

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Securities and Exchange Commission v. Tambone

573 F.3d 54 (1st Cir. 2009) · No. No. 07-1384 · Decided July 22, 2009

SUMMARY

The First Circuit granted rehearing en banc on the Rule 10b-5(b) issues in the SEC's case against James Tambone and Robert Hussey, while denying review of the Section 17(a)(2) issue. The court withdrew its prior opinion, vacated the judgment, and established deadlines for supplemental and amicus briefs before the scheduled en banc hearing.

CASE DETAILS

COURT	United States Court of Appeals for the First Circuit
WRITING FOR THE COURT	Lynch, Chief Judge; Torruella, Circuit Judge; Boudin, Circuit Judge; Lipez, Circuit Judge; Howard, Circuit Judge
JURISDICTION	Federal
DECIDED	July 22, 2009
DOCKET	No. 07-1384
DISPOSITION	vacated
PROCEDURAL POSTURE	Defendants petitioned for rehearing en banc of the panel's decision concerning primary liability under Rule 10b-5(b), aiding-and-abetting liability, and the Section 17(a)(2) claim.
PRECEDENTIAL VALUE	Published procedural order; the prior panel opinion and judgment were withdrawn and vacated in the specified respects.
PARTIES	Securities and Exchange Commission v. James Tambone, Robert Hussey

TOPICS

- appellate procedure
- commercial litigation

PRACTICE AREAS

- securities law
- appellate procedure
- en banc rehearing

QUESTIONS PRESENTED

1. Whether rehearing en banc should be granted on the panel's Rule 10b-5(b) primary-liability issues.
2. Whether rehearing en banc should be granted on the panel's Section 17(a)(2) ruling.
3. What effect granting rehearing en banc would have on the previously issued opinion and judgment.

HOLDINGS

1. Rehearing en banc was granted on the Rule 10b-5(b) issues challenged by the defendants.
2. The petitions for rehearing en banc were denied as to the panel's Section 17(a)(2) ruling.
3. The December 3, 2008 panel opinion was withdrawn and the judgment entered on that date was vacated.

KEY QUOTATIONS

“A majority of the active judges of this court have voted to grant rehearing en banc on the Rule 10b-5(b) issues.” (55)

“In accordance with customary practice, the opinion released on December 3, 2008 is withdrawn, and the judgment entered on the same date is vacated.” (55)

FACTUAL BACKGROUND

The supplied opinion addresses only the procedural status of defendants' petitions for rehearing en banc. The petitions challenged the panel's implied-statement theory of primary liability under Rule 10b-5(b), the Section 17(a)(2) ruling, and, as to Tambone, the aiding-and-abetting ruling.

PROCEDURAL HISTORY

The panel issued an opinion and entered judgment on December 3, 2008. Defendants sought en banc review. A majority of the active judges voted to grant rehearing en banc on the Rule 10b-5(b) issues, while the petitions were denied as to the panel's Section 17(a)(2) ruling. The court withdrew the prior opinion and vacated the prior judgment, authorized limited supplemental briefing, and scheduled the case for en banc hearing.

DISPOSITION

vacated

REMAND INSTRUCTIONS

No remand was ordered. The court authorized simultaneous supplemental briefs limited to the Rule 10b-5(b) issues, solicited limited amicus briefing, and scheduled en banc argument for October 6, 2009.

OPINION

PER CURIAM.

573 F.3d 54 (2009) SECURITIES AND EXCHANGE COMMISSION, Plaintiff, Appellant, v. James TAMBONE; Robert Hussey, Defendants, Appellees. No. 07-1384. United States Court of

Appeals, First Circuit. July 22, 2009. Luke T. Cadigan, David H. London, Celia Delano Moore, U.S. Securities & Exchange *55 Commission, Boston, MA, John W. Avery, U.S. Securities & Exchange Commission, Washington, DC, for Plaintiff, Appellant.

Paula J. Degiacomo, Jennifer Martin Foster, A. John Pappalardo, Esq., John A. Sten, David G. Thomas, Greenberg Traurig, LLP, Boston, MA, Elliot H. Scherker, Miami, FL, John J. Commisso, Frank Albert Libby, Kelly, Libby & Hoopes, PC, Boston, MA, Warren L. Feldman, Skadden Arps Slate Meagher & Flom LLP, New York, NY, Christopher M. Joralemon, Clifford Chance U.S. LLP, New York, NY, for Defendants, Appellees.

Before LYNCH, Chief Judge, TORRUELLA, BOUDIN, LIPEZ and HOWARD, Circuit Judges. ORDER OF COURT Defendants James Tambone and Robert Hussey filed petitions for en banc review. The petitions challenged the panel's ruling on the issue of primary liability under Rule 10b-5(b), which was based on an implied statement theory; they also challenged the panel's ruling on the Section 17(a)(2) claim.

Tambone further argued that the panel's decision on the issue of aiding and abetting liability was erroneous because it depended on the panel's Rule 10b-5(b) primary liability holding. A majority of the active judges of this court have voted to grant rehearing en banc on the Rule 10b-5(b) issues. Judges Lipez and Torruella dissent from the grant of en banc review.

The petitions are denied as to review of the panel's Section 17(a)(2) ruling. In accordance with customary practice, the opinion released on December 3, 2008 is withdrawn, and the judgment entered on the same date is vacated. See 1st Cir. I.O.P. X(D).

The parties are permitted, if they wish, to file simultaneous supplemental briefs limited to the Rule 10b-5(b) issues. The court will not accept further briefing or argument on any other issues. Any supplemental briefs shall not exceed 30 pages, shall be in the form required by this court's local rules, and shall be filed on or before September 4, 2009.

The court also solicits amicus briefs limited to the Rule 10b-5(b) issues. Motions for leave to file amicus briefs from those who have not already filed briefs must be filed with attached brief, limited to 15 pages, by September 4, 2009. Fourteen copies of any supplemental brief or original amicus brief should be provided, including one copy in PDF format on a disk.

Existing amici may also file supplemental briefs by the same deadline, limited to 15 pages. Copies of briefs already filed are already available to all of the judges. The case will be heard on Tuesday, October 6, 2009 at 11:30 a.m., En Banc Courtroom, 7th Floor, John Joseph Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts.