

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

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 In accordance with customary practice, the opinion released on December 3, 2008 is withdrawn, and the judgment entered on the same date is vacated.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