

**SECOND CIRCUIT CURTAILS 10B-5 MARKET MANIPULATION CLAIMS**

On May 7, 2013, in *Fezzani et al. v. Bear Stearns & Co et al.*, No. 09-cv-4414, the U.S. Court of Appeals for the Second Circuit, following the U.S. Supreme Court’s directive in *Janus Capital Group Inc. v. First Derivative Traders* and *Stoneridge Investment Partners v. Scientific-Atlanta* to give a narrow scope to the 10b-5 implied right of action, affirmed the dismissal of a Section 10(b) claim against Isaac R. Dweck, an individual who was alleged to have “parked” securities as part of a “pump and dump” market manipulation scheme, because he did not directly communicate a misrepresentation to investors. The *Fezzani* decision is noteworthy in that it clearly holds that the limitations on secondary actor liability established by *Stoneridge* and *Janus* apply not merely to 10b-5 claims based on the dissemination of allegedly false and misleading statements but also to pure market manipulation claims.

**The Second Circuit’s Decision**

Plaintiffs alleged that Dweck, a founding investor and principal owner of the broker-dealer A.R. Baron, engaged in market manipulation in violation of Section 10(b) and Rule 10b-5. Dweck agreed to “park” penny stock securities in his account in order to assist A.R. Baron in creating the false appearance of an active market for the securities. Although Dweck’s alleged conduct facilitated the fraud, Dweck never communicated to investors, and his participation in the scheme was not disclosed to the securities markets (other than through the appearance of trading activity in the stocks). Plaintiffs alleged that A.R. Baron’s salespeople and Bear Stearns as clearing agent, not Dweck, misrepresented the stock volume and price to investors.

Holding that “[u]nder *Stoneridge* and *Janus*, only the person who communicates the misrepresentation is liable in private actions under Section 10(b),” the 2-1 majority found that “an allegation of acts facilitating or even indispensable to a fraud is not sufficient to state a claim if those acts were not the particular misrepresentations that deceived the investor.” While, in the majority’s view, plaintiffs had adequately alleged that Dweck facilitated A.R. Baron’s fraud, they failed to state a Section 10(b) claim against him insofar as Dweck’s participation was not alleged to have been disclosed to investors.

**Conclusion**

The Second Circuit’s decision in *Fezzani* is significant because it makes clear that the bright-line rule limiting liability under 10b-5 to those who communicate to the market applies to pure market manipulation cases.

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