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Applying *Stoneridge* to Restrict Secondary Actor Liability Under Rule 10b-5

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Although the U.S. Supreme Court's decision in Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., was widely viewed as a sweeping rebuke of the application of "scheme" liability to secondary actors, the Court's decision also raised some questions regarding the precise scope of secondary actor liability under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. There is an obvious tension between the Court's holding that the secondary actors in Stoneridge could not be held liable because their "deceptive acts, which were not disclosed to the investing public, [were] too remote to satisfy the element of reliance" and its pronouncement that "[c]onduct itself can be deceptive" and could therefore satisfy a Rule 10b-5 claim. In particular, the question of what type of conduct satisfies the element of reliance in a claim against a secondary actor who assists in the drafting of a company's public disclosures remains open to interpretation.

This Article first discusses the general standards of section 10(b) liability and the Supreme Court's decision in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A. The next part of the Article compares the judicial standards of secondary actor liability under Rule 10b-5(b)—the bright line, substantial participation, and creator standards—that emerged in the post-Central Bank era. It then discusses Stoneridge and the Court's recent rejection of secondary actor "scheme" liability under Rule 10b-5(a) and (c). Finally, it reviews recent applications of Stoneridge and analyzes the implications of these decisions going forward.

INTRODUCTION

Although the U.S. Supreme Court's decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*,[1] was widely viewed as a sweeping rebuke of the application of "scheme" liability to secondary actors,[2] the Court's decision also raised some questions regarding the precise scope of secondary actor liability under section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)")[3] and Rule

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1. 128 S. Ct. 761 (2008).

2. *See, e.g.*, Linda Greenhouse, *Supreme Court Limits Lawsuits by Shareholders*, N.Y. TIMES, Jan. 16, 2008, at C1 ("Ruling in its most important securities fraud case in years, the Supreme Court on Tuesday placed a towering obstacle in the path of shareholders looking for someone to sue when a stock purchase turns sour.").

3. Securities Exchange Act of 1934 ("Exchange Act") § 10(b), 15 U.S.C. § 78j(b) (2006).

10b-5.[4] There is an obvious tension between the Court's holding that the secondary actors in *Stoneridge* could not be held liable because their "deceptive acts, which were not disclosed to the investing public, [were] too remote to satisfy the element of reliance"[5] and its pronouncement that "[c]onduct itself can be deceptive" and could therefore satisfy a Rule 10b-5 claim.[6] In particular, the question of what type of conduct satisfies the element of reliance in a claim against a secondary actor who assists in the drafting of a company's public disclosures remains open to interpretation.

District courts have begun to address this issue. For example, in *In re DVI Inc. Securities Litigation*,[7] the district court broadly construed *Stoneridge* as precluding the application of the fraud-on-the-market presumption of reliance[8] against a law firm whose name never appeared in the allegedly fraudulent disclosure but which had been heavily involved in drafting and advising DVI Inc. on its public disclosures and which "initiated and masterminded a 'workaround' that allowed DVI to fraudulently misstate ... that its internal controls were adequate."[9] Another district court in *Lopes v. Vieira*[10] reached a different conclusion. It found that a law firm was subject to Rule 10b-5 liability, even if not publicly identified, as long as it had "'played a significant role in drafting and editing'" the allegedly fraudulent disclosure.[11] That court also noted that, unlike a counterparty in a business transaction, a law firm could have an implied duty to disclose the truth to investors based on its alleged role in drafting fraudulent statements in a disclosure.[12] Given these conflicting rulings, it is apparent that *Stoneridge* is creating some confusion among the lower courts and leading to the application of varying standards of secondary actor liability under Rule 10b-5(a), (b), and (c).

This article first discusses the general standards of section 10(b) liability and the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*[13] The next part of the Article compares the judicial standards of secondary actor liability under Rule 10b-5(b)—the bright line, substantial participation, and creator standards—that emerged in the post-*Central Bank* era. It then discusses *Stoneridge* and the Court's recent rejection of secondary actor "scheme" liability under Rule 10b-5(a) and (c). Finally, it reviews recent applications of *Stoneridge* and analyzes the implications of these decisions going forward.

4. 17 C.F.R. § 240.10b-5 (2008).
5. *Stoneridge Inv. Partners*, 128 S. Ct. at 770.
6. *Id.* at 769.
7. No. 2:03-CV-05336-LDD, 2008 WL 1900384 (E.D. Pa. Apr. 29, 2008).
8. *See infra* note 30.
9. *DVI Inc. Sec. Litig.*, 2008 WL 1900384, at *21 n.39.
10. 543 F. Supp. 2d 1149 (E.D. Cal. 2008).
11. *Id.* at 1176 (quoting *In re* Software Toolworks Inc. Sec. Litig., 50 F.3d 615, 628 n.3 (9th Cir. 1994), *cert. denied sub nom.* Montgomery Sec. v. Dannenberg, 516 U.S. 907 (1995)).
12. *Id.* at 1177–78.
13. 511 U.S. 164 (1994).

I. Section 10(b)

Section 10(b) prohibits fraud in connection with the sale or purchase of a security. Under section 10(b), it is unlawful for any person, directly or indirectly, to:

> use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [U.S. Securities and Exchange Commission] may prescribe as necessary or appropriate in the public interest or for the protection of investors.[14]

Rule 10b-5 states, in relevant part, that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[15]

If section 10(b) does not give rise to liability, then Rule 10b-5 does not either.[16]

Investors have an implied private right of action for securities fraud under Rule 10b-5.[17] To state a claim for relief, a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.[18]

As set forth above, an investor has a cause of action for the making of an untrue statement or the failure to disclose information (an omission) only if the untrue statement (or omission) is material.[19] The standard of materiality is whether "there is a substantial likelihood that a reasonable shareholder would consider [a fact or omission] important" when making an investment decision.[20] Courts

14. Exchange Act § 10(b), 15 U.S.C. § 78j(b) (2006).

15. 17 C.F.R. § 240.10b-5 (2008).

16. *See* Jeanne L. Schroeder, *Envy and Outsider Trading: The Case of Martha Stewart*, 26 Cardozo L. Rev. 2023, 2046 (2005) ("Although the language of Rule 10b-5 is broader than that of § 10(b), under the basic principles of administrative rulemaking, the rule should not be read more expansively than the statute under which it is promulgated.").

17. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976); *In re* Parmalat Sec. Litig., 376 F. Supp. 2d 472, 494 (S.D.N.Y. 2005) (noting that the implied private right of action under Rule 10b-5 has been recognized in the lower courts since 1946 and was acknowledged by the U.S. Supreme Court in 1971).

18. *See* Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005).

19. *See id.*

20. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (defining materiality in the context of proxy statements and Rule 14a-9); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) ("We now expressly adopt the *TSC Industries* standard of materiality for the § 10(b) and Rule 10b-5 context.").

have explained that the materiality standard is satisfied if the untrue statement (or omission) significantly alters the "total mix" of information made available to a reasonable investor.[21]

Scienter is defined as the "intent to deceive, manipulate, or defraud."[22] As a check against vexatious litigation in private securities fraud actions, Congress enacted the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), which includes, among other things, exacting pleading requirements for allegations of scienter.[23] As set forth in the PSLRA, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[24] Specifically, the PSLRA requires plaintiffs to state with particularity the facts constituting the alleged violation of Rule 10b-5, including each statement alleged to have been misleading and the reason or reasons why the statement is misleading.[25]

Plaintiffs in a securities fraud lawsuit must also establish that they *relied* on the information that the defendant provided to them in making an investment decision. In other words, plaintiffs must prove that "defendants' conduct caused [them] to engage in the transaction in question."[26] The element of reliance is usually a central determination for a court when it determines whether it should certify a securities class action. A securities class action generally fails if proof of individual reliance is required.[27] In two instances, however, there is a rebuttable presumption of classwide reliance, thus obviating the need for such individual proof. First, under the U.S. Supreme Court's decision in *Affiliated Ute Citizens v. United States*, plaintiffs are afforded a presumption of reliance where their claims are *primarily* ones of fraudulent "omissions" of information that a defendant had a duty to disclose.[28] Second, under the fraud-on-the-market doctrine (which was adopted by the Supreme Court in *Basic Inc. v.*

21. *TSC Indus., Inc.*, 426 U.S. at 449.

22. *Ernst & Ernst*, 425 U.S. at 193. The federal appellate courts have ruled that severe recklessness is sufficient to establish the necessary state of mind. *See id.* n.12. To prove that the defendant acted recklessly, the plaintiff must show that the defendant's disregard for the truth or falsity of a statement was "highly unreasonable" and "represent[ed] an extreme departure from the standards of ordinary care." SEC v. McNulty, 137 F.3d 732, 741 (2d Cir. 1998) (quoting Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978)), *cert. denied sub nom.* Shanklin v. SEC, 525 U.S. 931 (1998).

23. Pub. L. No. 104-67, § 101(b), 109 Stat. 737, 747 (codified as amended at 15 U.S.C. § 78u-4(b)(1), (2) (2006)) (adding section 21D(b) to the Exchange Act) [hereinafter "PSLRA"].

24. *Id.* (codified at 15 U.S.C. § 78u-4(b)(2) (2006)).

25. *Id.* (codified at 15 U.S.C. § 78u-4(b)(1) (2006)). If the complaint does not satisfy these requirements, the PSLRA provides that "the court shall, on the motion of any defendant, dismiss the complaint." *Id.* (codified at 15 U.S.C. § 78u-4(b)(3)(A) (2006)).

26. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 174 (3d Cir. 2001) (internal quotation marks omitted); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988). Often, the reliance element of a Rule 10b-5 claim is difficult to prove. It becomes even more difficult to prove in the context of secondary actor liability. Unlike issuers whose actions can be directly tied to the losses suffered by a plaintiff, secondary actors (non-issuer defendants), such as underwriters, accountants, and lawyers, are typically one step removed from the specific misrepresentation (or omission) on which the plaintiff relied and which caused the plaintiff's injury.

27. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996).

28. *See* 406 U.S. 128, 154 (1972).

Levinson[29]), reliance is presumed when the alleged false statement becomes public.[30]

In addition to proving reliance, plaintiffs must sustain the burden of showing loss causation. Consistent with the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, plaintiffs must prove that any losses resulted from the fraud itself and not from other market forces, such as investor expectations, market conditions, or developments within the company.[31] The Supreme Court has noted that although a misrepresentation may play a role in bringing about a future loss, "[t]o 'touch upon' a loss is not to *cause* a loss, and it is the latter that the law requires."[32]

II. *Central Bank*

In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,[33] the U.S. Supreme Court considered whether liability extends to those who do not directly make a material misstatement but who instead aid and abet a section 10(b) violation.[34] Based on a literal reading of the statutory text and an interpretation of congressional intent, the Supreme Court held that a private right of action for aiding and abetting is not cognizable under section 10(b).[35] The Court reasoned that the statutory text does not explicitly provide a cause of action against a secondary actor who assists another in violating section 10(b).[36] The Court also asserted that "the statutory silence cannot be interpreted as tantamount to an explicit congressional intent to impose § 10(b) aiding and abetting liability."[37]

In addition, the Court rejected the argument that the statute's prohibition on "direct or indirect" violations of the securities laws extends liability to those who aid and abet others.[38] The Court stated that reading the statute in such a manner would inappropriately impose liability on those secondary actors who "do not engage in the proscribed activities at all, but who give a degree of aid to those who do."[39] The Court concluded that "[a]s in earlier cases considering conduct prohibited by § 10(b), ... the statute prohibits only the *making* of a material misstatement (or omission) or the commission of a manipulative act. The proscription does not include giving aid to a person who commits a manipulative or

29. 485 U.S. at 241–43.

30. The "fraud-on-the-market" doctrine is based on the theory that "in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business [and that] [m]isleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." *Basic*, 485 U.S. at 241–42.

31. 544 U.S. 336, 343 (2005).

32. *Id.*

33. 511 U.S. 164 (1994).

34. *Id.* at 167.

35. *Id.* at 169.

36. *Id.* at 174.

37. *Id.*

38. *Id.* at 175–76.

39. *Id.* at 176.

deceptive act."[40] After analyzing other sections of the securities laws, the Court also noted that the absence of a private right of action for aiding and abetting suggests a specific congressional intent not to provide such a right.[41] Because Congress had included aiding and abetting liability for other causes of action under the securities laws, the Court inferred that Congress intended not to allow for aiding and abetting liability under section 10(b).[42]

Furthermore, the Court maintained that a theory of liability based on aiding and abetting under which a defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions would impermissibly remove one of the required elements of a section 10(b) cause of action (i.e., reliance).[43] In the absence of attribution to the aider and abettor as the author or co-author of a specific misrepresentation, the Court in *Central Bank* seemed to indicate that the plaintiffs would not be able to establish reliance.[44]

Last, the Court reasoned that the U.S. Securities and Exchange Commission ("SEC") has the power to bring administrative actions and injunctive proceedings against aiders and abettors of federal securities law violations.[45] Thus, the abolition of a private right of action did not completely eviscerate the enforceability of aiding and abetting liability.[46] The Court envisioned that the SEC—rather than private plaintiffs—would enforce the statutory prohibition against aiding and abetting.[47]

Following its seemingly definitive pronouncement of the absence of a private right of action for aiding and abetting, the Court then cautioned that its decision did not immunize secondary actors from liability under the securities laws.[48] To the contrary:

> Any person or entity, including a *lawyer, accountant, or bank*, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met. In any complex securities fraud, moreover, there are likely to be multiple violators.[49]

40. *Id.* at 177 (emphasis added) (internal citations omitted).

41. *Id.* at 180 (stating that it would be "anomalous to impute to Congress an intention in effect to expand the defendant class for 10b-5 actions beyond the bounds delineated for comparable express causes of action").

42. *Id.* at 170 (rejecting an "expansive reading of the statutes and instead prescrib[ing] a strict statutory construction approach to determining liability").

43. *Id.* at 180 (arguing that "[a]llowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b-5 recovery mandated by our earlier cases").

44. *See* Wright v. Ernst & Young LLP, 152 F.3d 169, 173 (2d Cir. 1998) (interpreting *Central Bank* to require that a misrepresentation "be attributed to that specific actor at the time of public dissemination, that is, in advance of the investment decision"), *cert. denied*, 525 U.S. 1104 (1999).

45. *See Central Bank*, 511 U.S. at 183 (noting that "various provisions of the securities laws prohibit aiding and abetting, although violations are remediable only in actions brought by the SEC").

46. *See id.*

47. *See id.*

48. *Id.* at 191.

49. *Id.* (emphasis in first line added) (internal citation omitted).

III. Fallout from *Central Bank*

The above cautionary words prompted more than a decade's worth of ambiguity regarding the exact contours of secondary actor liability under section 10(b) and Rule 10b-5.[50] Without providing any guidance on what it means to "make" a material misstatement in violation of section 10(b), the Supreme Court's decision—in some commentators' view—muddied more than clarified the landscape of secondary actor liability.[51] In the vague borders between primary and secondary liability following *Central Bank*, courts attempted to follow the Supreme Court's prohibition on aiding and abetting liability while still ascribing liability to secondary actors as circumstances warranted.[52] The balancing act, in part, produced vastly different judicial standards of secondary actor liability under Rule 10b-5(b), including the "bright line" test, the "substantial participation" test, and the "creator" test.

A. The Bright Line Standard

With the demise of aiding and abetting liability, courts struggled with the question of what constitutes the "making" of a material misrepresentation under Rule 10b-5(b).[53] The Second, Tenth, and Eleventh Circuits began to apply a "bright line" test when determining whether the actions of a secondary actor rise to the level of a primary violation of section 10(b) and Rule 10b-5(b).[54] Under the bright line test, the secondary actor must actually publish a material misstatement that is attributed to it, rather than merely participating in its creation.[55] In other words, a secondary actor can be primarily liable for a misrepresentation *only* if it is named in the document containing the misrepresentation, has signed such document, or is otherwise identified to investors at the time of the misrepresentation's dissemination to the public.[56] Only in those limited circumstances, some

50. *See* Cecil C. Kuhne, III, *Expanding the Scope of Securities Fraud? The Shifting Sands of* Central Bank, 52 Drake L. Rev. 25, 27–28 (2003) ("This small linguistic concession has emboldened some courts and commentators to promote a more liberal interpretation of the act—one that allows a secondary actor to be held liable as a primary violator for 'participation' in the making of a material misstatement—even though that individual was never identified in any way to the public.").

51. *See, e.g.*, Taavi Annus, Note, *Scheme Liability Under Section 10(b) of the Securities Exchange Act of 1934*, 72 Mo. L. Rev. 855, 859–60 (2007).

52. *See id.* at 859 (commenting that in the Rule 10b-5(b) context, "courts have adopted three theories in order to delineate when the decisions have been 'made' by the secondary actors and when the secondary actors only assist in making the statements, thus being at most aiders and abettors"). The lower courts have "come to different conclusions regarding the scope of scheme liability" under Rule 10b-5(a) and (c). *See id.* at 877.

53. *See* Kathy Patrick, *The Liability of Lawyers for Fraud Under the Federal and State Securities Laws*, 34 St. Mary's L.J. 915, 922 (2003).

54. *See* Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999); Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1226–27 (10th Cir. 1996); Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1205 (11th Cir. 2001).

55. *See, e.g.*, *Wright*, 152 F.3d at 175; *Anixter*, 77 F.3d at 1126–27; *Ziemba*, 256 F.3d at 1205.

56. *See, e.g.*, Shapiro v. Cantor, 123 F.3d 717, 720 (2d Cir. 1997) ("[I]f *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable

courts have noted, can a plaintiff establish the requisite reliance on the defendant's misrepresentation.[57]

B. Substantial Participation Test

The Ninth Circuit adopted a more nuanced theory of secondary actor liability than the bright line standard. Under the Ninth Circuit's approach, any secondary actor who substantially participated in the preparation of materially false or misleading statements may be primarily liable under Rule 10b-5(b).[58] Unlike the bright line rule, the "substantial participation" standard does not require that the secondary actor (a) sign the document containing the misrepresentation, (b) distribute the misrepresentation to investors, or (c) otherwise be identified to investors.[59] The substantial participation standard is a theory of liability based not on the identified authors or "makers" of deceptive statements but on the secondary actor's knowing participation in the preparation of material misrepresentations for inclusion in its client's public disclosures.[60]

For example, in *In re ZZZZ Best Securities Litigation*, the U.S. District Court for the Central District of California rejected the argument that liability attaches for material misrepresentations only if those misrepresentations are attributed to the defendant.[61] The court held that if the secondary actor's participation in preparing the misstatements is substantial enough that the statements rightfully could be attributed to it, then the secondary actor could be liable under section 10(b) and Rule 10b-5(b).[62] The court added that even if investors could not reasonably attribute a misstatement to a particular secondary actor, "the securities market still relied on those public statements and anyone intricately involved in their creation and the resulting deception should be liable under Section 10(b)/Rule 10b-5."[63] What mattered, according to the court, was that investors relied on misinformation transmitted to the market—not that they knew who actually made the statements.[64] The court concluded that all of the requirements for a primary violation

under Section 10(b)." (internal quotation marks omitted) (alteration in original)); *see also Wright*, 152 F.3d at 175 ("[A] secondary actor cannot incur primary liability under the Act for a statement not attributed to the actor . . . .").

57. *See, e.g.*, *Wright*, 152 F.3d at 175; *see also* Mary M. Wynne, *Primary Liability Amongst Secondary Actors: Why the Second Circuit's "Bright Line" Standard Should Prevail*, 44 St. Louis U. L.J. 1607, 1628 (2000) ("[U]nder the Second Circuit's "bright line" standard, reliance on the part of the plaintiff, an essential element of primary liability, remains intact.").

58. *See* Kuhne, *supra* note 50, at 37 (noting that "[t]he Ninth Circuit has been the most vocal proponent of expanding liability to secondary actors under the guise of a substantial participation test").

59. *See id.*

60. *See In re* Software Toolworks Inc. Sec. Litig., 50 F.3d 615, 628 n.3 (9th Cir. 1994) (finding accounting firm liable for "significant role in drafting and editing" letter that misled the plaintiffs), *cert. denied sub nom.* Montgomery Sec. v. Dannenberg, 516 U.S. 907 (1995).

61. 864 F. Supp. 960, 970 (C.D. Cal. 1994).

62. *Id.*

63. *Id.*

64. *See id.*

of Rule 10b-5(b), including reliance, had been satisfied against the defendant, which was an accounting firm.[65]

The contrasting positions taken by courts following the bright line standard and courts applying the substantial participation test demonstrate how differently courts view the element of reliance for a Rule 10b-5(b) claim. On the one hand, the Second, Tenth, and Eleventh Circuits (the bright line circuits) require that the plaintiff knew the identity of the speaker; on the other hand, the Ninth Circuit (the substantial participation circuit) requires that the plaintiff prove only that he or she relied on the misrepresentation, irrespective of whether there is attribution to a specific speaker.

C. The Creator Standard

In an effort to impose liability on secondary actors without casting too broad a net, the SEC proposed its own standard of liability for secondary actors under Rule 10b-5(b) called the "creator" test.[66] The SEC's creator standard attempted to chart a middle ground between the bright line standard's arguably limited attribution rule and the specter of unlimited liability arguably inherent in the application of the substantial participation standard.[67]

Under the SEC's creator standard, a secondary actor is primarily liable to a third-party investor when it, acting alone or with others, *creates* a misrepresentation even if the misrepresentation is not publicly attributed to it.[68] Pursuant to this standard, a plaintiff must prove that (1) the secondary actor knew (or was reckless in not knowing) that the statement would be relied on by investors, (2) the secondary actor was aware (or was reckless in not being aware) of the material misstatement, (3) the secondary actor played such a significant role in the creation of the misrepresentation that he or she could fairly be characterized as the author or co-author of the misrepresentation, and (4) the other requirements for primary liability have been satisfied.[69]

The Third Circuit adopted the SEC's proposed liability standard in *Klein v. Boyd*.[70] In that case, the Third Circuit held that the law firm Drinker Biddle & Reath ("Drinker") could be primarily liable under the securities laws for allegedly

65. *See id.* Several courts have followed the rationale set forth in *ZZZZ Best*. *See, e.g.*, Cashman v. Coopers & Lybrand, 877 F. Supp. 425, 432 (N.D. Ill. 1995) (ruling that primary liability may be established against accountants "centrally involved" in preparing allegedly false information for inclusion in prospectuses and promotional material distributed to investors); McNamara v. Bre-X Minerals Ltd., 57 F. Supp. 2d 396, 429 (E.D. Tex. 1996) (holding that "if a defendant played a 'significant role' in preparing a false statement actually uttered by another, primary liability will lie").

66. Brief of the Securities and Exchange Commission, Amicus Curiae at 14–16, Klein v. Boyd, Nos. 97-1143, 97-1261, 1998 Fed. Sec. L. Rep. (CCH) ¶ 90,136 (3d Cir.), *vacated for reh'g en banc*, 1998 Fed. Sec. L. Rep. ¶ 90,165 (3d Cir. 1998), *available at* http://www.sec.gov/litigation/briefs/klein.txt.

67. *See id.*

68. *See id.* at 13–15.

69. *See id.*

70. Klein v. Boyd, Nos. 97-1143, 97-1261, 1998 Fed. Sec. L. Rep. (CCH) ¶ 90,136 (3d Cir.), *vacated for reh'g en banc*, 1998 Fed. Sec. L. Rep. ¶ 90,165 (3d Cir. 1998). The case settled before the court

misleading statements contained in its client's offering documents despite the fact that the investment community was unaware of Drinker's participation in the drafting of those public disclosure documents.[71] In *Klein*, the court stated:

> A lawyer who can fairly be characterized as an author or a co-author of a client's fraudulent document may be held primarily liable to a third-party investor under the federal securities laws for the material misstatements or omissions contained in the document, even when the lawyer did not sign or endorse the document and the investor is therefore unaware of the lawyer's role in the fraud.[72]

The Third Circuit also opined that a lawyer preparing a document with the knowledge that it will be given to investors "has elected to speak to the investors, even though the document may not be facially attributed to the lawyer."[73]

The creator standard regained momentum with the decision issued by the U.S. District Court for the Southern District of Texas in *In re Enron Corp. Securities, Derivative & ERISA Litigation*.[74] There, the district court found that the allegations made against Enron's primary outside counsel, Vinson & Elkins ("V&E"), were sufficient to state a Rule 10b-5(b) claim against it.[75] The plaintiffs alleged that V&E knew there were side deals to a number of transactions between Enron and related third parties and subsequently drafted false and misleading language in disclosures concerning those transactions that were included in Enron's 10-Ks, 10-Qs, and proxy statements.[76] Relying on these claims, the court found that "'when a person, acting alone or with others, creates a misrepresentation [on which the investor-plaintiffs relied], the person can be liable as a primary violator . . . if . . . he acts with the requisite scienter.'"[77] The court's invocation of the creator test in the high-profile Enron securities class action highlighted the viability of the creator test as a standard of secondary actor liability.

IV. *Stoneridge*

A. Factual and Procedural Background

Shareholders who purchased Charter Communications, Inc. ("Charter"), stock between November 8, 1999, and August 16, 2002, initiated a class action lawsuit

heard the case en banc. *See* Nicholas Fortune Schanbaum, *Scheme Liability: Rule 10b-5(a) and Secondary Actor Liability After* Central Bank, 26 Rev. Litig. 183, 203 (2007).

71. *Klein*, 1998 Fed. Sec. L. Rep. at 90,324.

72. *Id.*

73. *Id.* at 90,318.

74. 235 F. Supp. 2d 549 (S.D. Tex. 2002).

75. *Id.* at 588 ("Because § 10(b) expressly delegated rule-making authority to the agency, which it exercised *inter alia* in promulgating Rule 10b-5, this Court accords considerable weight to the SEC's construction of the statute since the Court finds that construction is not arbitrary, capricious or manifestly contrary to the statute." (footnote omitted)); *id.* at 590 ("This Court finds that the SEC's approach to liability under § 10(b) and Rule 10b-5 is well reasoned and reasonable, balanced in its concern for protection for victimized investors as well as for meritlessly harassed defendants . . . .").

76. *See id.* at 663–64.

77. *Id.* at 588 (quoting "the SEC's test for primary liability for a material misrepresentation or omission under § 10(b) and the second prong of Rule 10b-5").

in the Eastern District of Missouri against Charter (a cable television provider), its executives and auditor, and Scientific Atlanta, Inc., and Motorola, Inc.—two equipment vendors that had done business with Charter (the "Vendors").[78] The plaintiffs alleged that Charter arranged to overpay the Vendors for purchased equipment with the understanding that the Vendors would return the overpayment by purchasing advertising from Charter.[79] The plaintiffs contended that these were sham transactions with no economic substance and that the Vendors entered into them knowing that the transactions were contrived to inflate Charter's operating cash flows to meet the revenue and operating cash flow expectations of Wall Street analysts.[80] Rather than alleging a Rule 10b-5(b) violation for the making of false or materially misleading statements, the plaintiffs characterized the Vendors' conduct as participation in a "pervasive and continuous fraudulent scheme intended to artificially boost [Charter's] reported financial results" in violation of Rule 10b-5(a) and (c).[81] By framing the Vendors' conduct in terms of a "scheme to defraud," the plaintiffs attempted to circumvent *Central Bank's* prohibition on aiding and abetting liability.[82] The Vendors moved to dismiss the section 10(b) and Rule 10b-5 claims brought against them on the ground that their actions constituted at worst aiding and abetting, which was not actionable after the Supreme Court's decision in *Central Bank*, and not a primary violation of section 10(b).[83] The district court granted the Vendors' motion.[84]

After the district court entered a final judgment as to the plaintiffs' claims against the Vendors, the plaintiffs appealed the judgment to the Eighth Circuit.[85] Like the district court, the Eighth Circuit found that the allegations against the Vendors were merely claims of aiding and abetting disguised as scheme liability not cognizable after *Central Bank*.[86] The Eight Circuit was reluctant to expand section 10(b) and Rule 10b-5 liability to include an arms-length transaction involving the Vendors and Charter.[87] The court noted:

> We are aware of no case imposing § 10(b) or Rule 10b-5 liability on a business that entered into an arm's length non-securities transaction with an entity that then used the transaction to publish false and misleading statements to its investors and analysts. The point is significant. To impose liability for securities fraud on one party to an arm's length business transaction in goods or services other than securities because

78. *See In re* Charter Commc'ns, Inc., Sec. Litig., 443 F.3d 987, 989–90 (8th Cir. 2006), *aff'd*, Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008).

79. *Id.*

80. *See id.* at 990.

81. *See id.* at 989–90 (internal quotation marks omitted).

82. *See id.* at 992.

83. *Stoneridge Inv. Partners*, 127 S. Ct. at 767.

84. *See id.*

85. *See id.*

86. *See Charter Communc'ns, Inc., Sec. Litig.*, 443 F.3d at 992 ("[A]ny defendant who does not make or affirmatively cause to be made a fraudulent misstatement or omission, or who does not directly engage in manipulative securities trading practices, is at most guilty of aiding and abetting and cannot be held liable under § 10(b) or any subpart of Rule 10b-5.").

87. *See id.* at 992–93.

> that party knew or should have known that the other party would use the transaction to mislead investors in its stock would introduce potentially far-reaching duties and uncertainties for those engaged in day-to-day business dealings.[88]

According to the Eighth Circuit, the decision to impose liability in these circumstances should be made only by Congress, which had not created an express cause of action for aiding and abetting.[89]

B. U.S. Supreme Court's Decision

On appeal, the Supreme Court observed that there was a conflict among the circuit courts as to whether under section 10(b) an investor could recover from a party that "neither makes a public misstatement nor violates a duty to disclose but does participate in a scheme to violate § 10(b)."[90]

In its decision, the Court closely followed its ruling in *Central Bank* and found that the Vendors were not liable to Charter's investors.[91] The Court explained that "[r]eliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action."[92] The Court focused, however, not on whether the Vendors had committed deceptive acts or on whether the Vendors had made a false or materially misleading statement. Instead, the Court analyzed whether the Vendors' deceptive acts or conduct had "the requisite proximate relation to the investors' harm"[93] and whether their acts or conduct took place in the "investment sphere."[94] The Court reasoned that this analysis was consistent with its view that before Rule 10b-5 liability could be imposed, investors had to demonstrate reliance on the Vendors' acts or conduct.[95]

In its analysis, the Court expressly rejected the applicability of either the *Affiliated Ute* or the *Basic* presumption of reliance to the facts of the case.[96] First, the Court held that the *Affiliated Ute* presumption was inapplicable to the claims brought against the Vendors because the Vendors "had no duty to disclose" the allegedly fraudulent transactions to investors.[97] The Court next considered the investors' argument that they were entitled to the fraud-on-the-market presumption because the Vendors had intentionally engaged in conduct that resulted in the falsification of Charter's financial statements—all as part of a larger scheme to misrepresent Charter's revenue.[98] Rejecting the notion that the reliance element could be satisfied as to the Vendors' conduct because in an efficient market investors rely upon the veracity of the transactions underlying the statements

88. *See id.*
89. *See id.* at 993 ("Decisions of this magnitude should be made by Congress.").
90. *Stoneridge Inv. Partners*, 128 S. Ct. at 767–68.
91. *See id.* at 774.
92. *Id.* at 769.
93. *See id.*
94. *See id.* at 774.
95. *See id.* at 769.
96. *See id.*
97. *See id.*
98. *See id.* at 770.

contained in a company's public disclosures, the court stated that "[w]ere this concept of reliance to be adopted, the implied cause of action would reach the whole marketplace in which the issuing company does business; and there is no authority for this rule."[99] The Court also noted that the Vendors' deceptive acts were not communicated to the public: "No member of the investing public had knowledge, either actual or presumed, of [the Vendors'] deceptive acts during the relevant times."[100] As a result, investors could not show any reliance upon any of the Vendors' actions "except in an indirect chain" that the Court found "too remote for liability."[101]

Although the broad language of its decision could be read as eliminating (or at least severely restricting) secondary actor liability under section 10(b), the Court noted that "[c]onduct itself can be deceptive" and can provide the basis for liability.[102] According to the Court, the key inquiry is whether the secondary actors' actions or conduct "were immediate or remote to the injury."[103] The Court added that it would be "erroneous" to conclude that the Eighth Circuit's decision should be "read to suggest there must be a specific oral or written statement before there could be liability under § 10(b) or Rule 10b-5."[104] In explaining why the Vendors' conduct did not have the "requisite proximate relation to investor harm," the Court asserted that although Charter's arrangement with the Vendors was "unconventional," "it took place in the marketplace for goods and services, *not* in the "investment sphere."[105] Apparently attempting to discern which actions occur within the "investment sphere," the Court stated that the Vendors played no role in preparing Charter's "books," conferring with its auditor, or preparing and then issuing its financial statements.[106] In such circumstances, investors "cannot be said to have relied upon any [of the Vendors'] deceptive acts in the decision to purchase or sell securities."[107] The Court emphasized, as it did in *Central Bank*, that secondary actors are not immune from private suit, and section 10(b) "continues to cover secondary actors who commit primary violations."[108]

The Court's language perpetuates the doctrinal ambiguity that emerged in the post-*Central Bank* era concerning the exact contours of Rule 10b-5(b) liability.[109]

99. *Id.*
100. *Id.* at 769.
101. *Id.*
102. *Id.*
103. *Id.* at 770.
104. *Id.* at 769.
105. *Id.* at 769, 774 (emphasis added).
106. *Id.* at 774.
107. *Id.*
108. *Id.* at 773–74. The Court also noted that after *Central Bank*, Congress had considered creating an express private cause of action for aiding and abetting but elected not to do so. *See id.* at 769. Instead, in section 104 of the PSLRA, Congress authorized only the SEC to prosecute aiders and abettors. *See id.* In the Court's view, imposing "scheme" liability on the Vendors would have been inconsistent with the will of Congress. *See id.* at 773.
109. *Stoneridge* could also be read to permit a claim for "scheme liability" against financial and legal professionals who operate within the "investment sphere." But the Fifth Circuit did not allow such a claim, and the Supreme Court decided not to clarify whether such a claim was permitted when it denied

Significantly, although *Stoneridge* assists in framing the analysis for secondary actor "scheme liability" (pursuant to Rule 10b-5(a) and (c)), it also casts doubt on the notion that there must be a specific oral or written statement attributable to the defendant for the imposition of Rule 10b-5(b) liability. In particular, there remains uncertainty as to when secondary actors—such as lawyers and accountants who assist in preparing disclosures for publication to investors and fall within the "investment sphere" as defined by *Stoneridge*—would be liable for statements or conduct under Rule 10b-5(b).[110]

V. Recent District Court Decisions

A. *In re DVI Inc. Securities Litigation*

1. Allegations Against Clifford Chance

One of the first cases in which a court considered the implications of *Stoneridge* for the actions and conduct of a secondary actor was the U.S. District Court for the Eastern District of Pennsylvania's decision on class certification regarding claims brought against Clifford Chance LLP and Clifford Chance U.S. LLP (collectively, "Clifford Chance") in *In re DVI Inc. Securities Litigation*.[111]

Following the decision of DVI Inc. ("DVI") to file for chapter 11 bankruptcy protection, DVI investors initiated a securities fraud class action lawsuit against the officers and directors of DVI, its independent auditor, its largest shareholder, and its outside law firm, Clifford Chance.[112] The plaintiffs alleged that these defendants were part of a "massive multiparty scheme designed to artificially inflate the price of DVI securities."[113] The plaintiffs contended that "in furtherance of this scheme, Defendants concealed cash shortages, double-pledged collateral and pledged ineligible collateral, refused to report impaired assets and loans, refused to implement adequate accounting controls, and overstated assets and revenues while understating liabilities."[114]

In support of its class certification motion, the plaintiffs argued that Clifford Chance should be held liable under section 10(b) and Rule 10b-5 because of its

the certiorari petition of the plaintiffs in the Enron securities litigation on January 22, 2008—one week after issuing its decision in *Stoneridge*. *See* Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 385–92 (5th Cir. 2007), *cert. denied sub nom.* Regents of the Univ. of Cal. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 128 S. Ct. 1120 (2008). The plaintiffs had argued that the Eighth Circuit's rejection of scheme liability for the Vendors in *Charter Communications* did not extend to the conduct of financial professionals accused of facilitating securities fraud. *See* Petition for Writ of Certiorari at 28–30, Regents of the Univ. of Cal. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 128 S. Ct. 1120 (2008) (No. 06-1341).

110. It is also worth pointing out that under *Stoneridge*, it is possible that participating in a "scheme to defraud" may be sufficient deception as long as actions of the secondary actor are disclosed to investors. For example, if the transactions of the Vendors had been disclosed to Charter's investors because they were significant drivers of the issuer's cash flow, the reliance element of a Rule 10b-5 claim might have been satisfied under the holding of *Stoneridge*.

111. No. 2:03-CV-05336-LDD, 2008 WL 1900384 (E.D. Pa. Apr. 29, 2008).

112. *See id.* at *1–2.

113. *Id.* at *2.

114. *Id.*

substantial participation in the scheme to defraud investors in DVI.[115] Specifically, the plaintiffs claimed that Clifford Chance had knowledge of DVI's financial condition and substantially assisted in all elements of its fraudulent scheme, including "drafting fraudulent public financial reports, making fraudulent disclosures related to DVI's internal controls, and deflecting inquiries from the Securities and Exchange Commission."[116]

Although the plaintiffs recognized that *Stoneridge* limited "scheme liability" under section 10(b), they contended that Clifford Chance's "unique role" in drafting public disclosures and creating and "masterminding" certain aspects of the fraudulent scheme was intimately related to the injury suffered by DVI's investors.[117] Thus, investors argued that they were entitled to a classwide presumption of reliance under the fraud-on-the-market doctrine for their section 10(b) and Rule 10b-5 claims against Clifford Chance.[118] In support of their argument, the plaintiffs noted *Stoneridge's* express language that conduct itself could be "deceptive," even if a secondary actor (like Clifford Chance) was not specifically identified in the allegedly fraudulent public disclosures.[119] Attempting to follow the reasoning in *Stoneridge*, the plaintiffs contended that because "reliance is tied to causation," the district court had to determine whether Clifford Chance's acts were so immediate to the injury suffered by DVI's investors that they established the requisite reliance.[120]

2. District Court's Decision

In its decision on class certification, the court recognized that *Stoneridge* acknowledged the relationship between causality and reliance in determining the applicability of scheme liability under section 10(b), but that the Supreme Court ultimately rejected "an expansion of liability under Section 10(b) premised on a broad conception of scheme liability."[121] The court noted that the investors' argument in *Stoneridge* was rejected because they "did not in fact rely upon [the Vendors'] own deceptive conduct."[122]

The court then attempted to apply *Stoneridge* to the allegations made against Clifford Chance. Although the plaintiffs alleged that Clifford Chance knew of the fraudulent scheme, assisted in the drafting of misleading public disclosures, and took an active part in implementing the scheme, the court concluded that "the fact remains that *none* of [Clifford Chance's] alleged conduct was publicly disclosed such that it affected the market for DVI's securities."[123] The court further noted that because "the misleading 10-Q was issued solely by DVI and contains no indication that any statement therein is attributable to Clifford Chance," the plaintiffs "have not over-

115. *Id.*
116. *Id.*
117. *See id.* at *21.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* (internal quotation marks omitted).
122. *Id.*
123. *Id.* (emphasis added).

come the objection that investors in DVI did not rely upon the allegedly deceptive conduct of Clifford Chance."[124] Accordingly, the court held that the plaintiffs were not entitled to the fraud-on-the-market presumption of reliance with respect to the class's section 10(b) and Rule 10b-5 claims against Clifford Chance.[125]

In reaching its decision, the court did not conduct an analysis of the extensive role that Clifford Chance had played in drafting and assisting with DVI's allegedly false disclosures or whether such conduct fell within the "investment sphere" as defined by *Stoneridge*. Further, the court failed to differentiate between "scheme liability" under Rule 10b-5(a) and (c) and liability under Rule 10b-5(b) for the making of false statements.[126] Instead, the court appeared to conclude that *Stoneridge* applies beyond the "scheme" context and to all claims under Rule 10b-5—including situations in which a non-publicly identified secondary actor is alleged to have "created" or "substantially participated" in a public misstatement.[127] Last, the court did not address whether, regardless of the fact that none of the alleged misleading statements had been publicly attributed to Clifford Chance, the law firm had an independent duty to disclose the truth to DVI's investors based on its role in the drafting of the public statements.

B. *Lopes v. Vieira*

1. Allegations Against Downey Brand

In *Lopes v. Vieira*,[128] another recent decision in which the court applied *Stoneridge*, the U.S. District Court for the Eastern District of California reached a different conclusion on whether a law firm, Downey Brand LLP ("Downey"), was liable under section 10(b) and Rule 10b-5. The plaintiffs had invested in Valley Gold, LLC ("Valley Gold"), a company whose primary asset was a cheese manufacturing plant.[129] Valley Gold was allegedly created for the sole purpose of perpetuating a fraudulent scheme created by its promoter, George Vieira ("Vieira").[130] Downey had prepared a business plan and offering memorandum to market and sell shares of Valley Gold, including detailed financial forecasts, a detailed business plan, and disclosures required by federal securities law.[131] Although Downey allegedly knew that Vieira was under criminal investigation for his fraudulent schemes, Downey failed to disclose that fact in the public disclosures it had drafted and on which Valley Gold's investors relied.[132]

124. *Id.* at *21 n.39.
125. *Id.* at *21.
126. *See* 17 C.F.R. § 240.10b-5 (2008).
127. The plaintiffs have requested that the court reconsider its class certification ruling as to Clifford Chance. That motion is now pending.
128. 543 F. Supp. 2d 1149 (E.D. Cal. 2008).
129. *See id.* at 1155–56.
130. *See id.*
131. *See id.* at 1156.
132. *See id.*

After Vieira pled guilty for his criminal conduct and there had been foreclosure upon the cheese manufacturing plant held by Valley Gold, the plaintiffs lost their entire investment and sued, among others, Downey.[133] The plaintiffs claimed that they had invested in Valley Gold "at a time when it should have been clear" to Downey that Viera's plans for Valley Gold "were destined to fail."[134] Relying on *Stoneridge* and the fact that it was at most an "aider and abetter," Downey moved to dismiss the securities fraud claims on the basis that none of the alleged false statements in the offering memorandum were publicly attributed to the firm.[135]

2. The District Court's Decision

Although it acknowledged the *Stoneridge* decision, the district court distinguished the facts before it, noting that *Stoneridge* involved a corporation's "vendors and suppliers, who are secondary actors or aiders and abettors."[136] The court noted that Downey was not being sued as an aider and abettor "but as a direct participant in the preparation and drafting of the misleading offering memorandum."[137] Citing the Ninth Circuit's decision in *In re Software Toolworks Inc. Securities Litigation*,[138] the court invoked the substantial participation test and found that a law firm (like other secondary actors) could face liability under Rule 10b-5(b), even if not publicly identified, as long as it had "'played a significant role in drafting and editing'" the allegedly fraudulent disclosure.[139]

Without conducting a stringent analysis as to whether Downey's conduct was "immediate or remote to the injury" and within the "investment sphere" so as to satisfy the element of reliance, the court then summarily reviewed Downey's role in the scheme. In distinguishing its ruling from *Stoneridge*, the court suggested that an attorney or law firm, unlike a counterparty in a business transaction, could—depending on the circumstances—have an implied duty to investors.[140] However, at the pleading stage, the court concluded that it could not make such a determination as to Downey's conduct.[141] The court thus denied Downey's motion to dismiss plaintiffs' Rule 10b-5 claim and held that the existence of the implied duty to disclose for a law firm "will depend upon the facts."[142]

133. *See id.*

134. *Id.* at 1157 (internal quotation marks omitted).

135. *Id.* at 1175–76.

136. *Id.* at 1178 (citing Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008)).

137. *See id.* at 1176.

138. 50 F.3d 615, 628 n.3 (9th Cir. 1994), *cert. denied sub nom.* Montgomery Sec. v. Dannenberg, 516 U.S. 907 (1995).

139. *Lopes*, 543 F. Supp. 2d at 1176 (citing *Software Toolworks*, 50 F.3d at 628 n.3).

140. *See id.* at 1177–78.

141. *Id.*

142. *Id.*

C. Implications Going Forward

The decisions in *In re DVI Inc. Securities Litigation* and *Lopes v. Vieira* illustrate the problems that district courts will now face in applying *Stoneridge* to the conduct of secondary actors. On one end of the spectrum, the court in *In re DVI Inc. Securities Litigation* made a sweeping application and interpretation of *Stoneridge* to limit secondary actors' liability under section 10(b) and Rule 10b-5. Instead of conducting the detailed analysis that was suggested in *Stoneridge* and determining whether Clifford Chance's conduct was "immediate or remote to the injury" and within the "investment sphere" so as to satisfy the element of reliance, the court focused solely on whether Clifford Chance was publicly identified in the alleged fraudulent disclosures. The court also failed to distinguish between the claims brought against Clifford Chance for its role in drafting and assisting in DVI's public disclosures—which could arguably fall sufficiently within the investment sphere to satisfy the element of reliance—and the conduct of the Vendors in *Stoneridge*.

On the other end of the spectrum, *Lopes v. Viera* demonstrates that a secondary actor may still face liability regardless of whether it was publicly identified in the disclosure. If the secondary actor (like an auditing or law firm) has an implied duty to disclose the truth to investors, the holding in *Lopes* illustrates that it still faces liability under Rule 10b-5 after *Stoneridge*.

The most important difference between the two cases is how the court applied *Stoneridge* to Rule 10b-5(b) claims. In *Lopes*, the court found that the substantial participation test remains intact post-*Stoneridge* and that a secondary actor could face liability under Rule 10b-5(b), even if not publicly identified, as long as it had played a "significant role" in preparation of the allegedly fraudulent disclosure. In contrast, the court in *In re DVI Inc. Securities Litigation* failed to differentiate between Clifford Chance's potential liability under Rule 10b-5(a) and (c) (for participation in the "scheme") and Rule 10b-5(b) (for making false statements). As a result, the court did not make a determination as to which of the standards for Rule 10b-5(b) liability (bright line, substantial participation, or creator) was most in accord with the rationale of *Stoneridge*.

The debate on the extent of Rule 10b-5(b) liability post-*Stoneridge* will have significant implications for securities class actions. Given that Clifford Chance allegedly knew of the deficiencies in DVI's internal controls, created a scheme to circumvent DVI's disclosure obligations, and assisted with the drafting of materially misleading disclosures, the holding in *In re DVI Inc. Securities Litigation*—if followed by other courts—would alter the landscape of Rule 10b-5(b) liability. In particular, the fraud-on-the-market presumption of reliance would no longer apply to secondary actors (including auditing and law firms) whose names do not appear in the alleged fraudulent disclosure. As a result, regardless of how involved the secondary actor is in creating and assisting with fraudulent disclosures, it would not be subject to Rule 10b-5(b) liability if it was not publicly identified or did not make the public misrepresentation.

It will be interesting to see if other district courts follow the interpretation of *Stoneridge* employed in *Lopes* or *In re DVI Inc. Securities Litigation* or whether courts will undertake a more stringent analysis of the secondary actors' conduct—as seemingly mandated by *Stoneridge*—going forward. Regardless, these district court decisions indicate that *Stoneridge*, like *Central Bank* before it, will likely lead to confusion among the lower courts and varying standards of secondary actor liability under Rule 10b-5(a), (b), and (c).

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