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A Fatal Flaw: The Ninth Circuit Further Restricts Liability in 10b-5 Private Security Fraud Cases in *Reese v. BP*

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A FATAL FLAW: THE NINTH CIRCUIT FURTHER RESTRICTS LIABILITY IN 10B-5 PRIVATE SECURITY FRAUD CASES IN *REESE v. BP*

Abstract: On June 28, 2011, in *Reese v. BP Explorations (Alaska) Inc.*, the U.S. Court of Appeals for the Ninth Circuit held that plaintiffs could not bring certain securities fraud claims relating to a burst in an Alaskan oil pipeline, because the plaintiffs failed to show that the defendant had the “ultimate authority” for the allegedly fraudulent SEC filings. In so doing, the court continued a recent trend in securities fraud cases of making it more difficult for plaintiffs to bring claims. This Comment argues that although the Ninth Circuit’s ruling was consistent with Supreme Court precedent, it may allow otherwise liable parties to escape liability, and the decision expands the growing trend of reducing the scope of private actions under SEC Rule 10b-5.

INTRODUCTION

In the wake of the Great Depression, Congress enacted statutory safeguards to protect securities investors from buying overvalued securities.¹ The primary way in which Congress sought to achieve this goal was by implementing a system of periodic disclosure.² Under this system, pertinent information about each security is made public, thus allowing the free market to synthesize the information and price securities properly, and preventing the need to ban bad securities.³ Accordingly, Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934, which established standards for disclosure and

¹ See Securities Act of 1933, ch. 38, 48 Stat. 74 (codified at 15 U.S.C. §§ 77a–77b); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a–78pp (2006)).

² See Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 409 (1990); see also Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 601 (1984) (discussing the efficiencies of placing the burden of disclosure on the issuers of securities).

³ See Thel, *supra* note 2, at 409; see also Gilson & Kraakman, *supra* note 2, at 601 (discussing the effects of mandatory disclosure on the costs of gathering and distributing information).

created the Securities and Exchange Commission (SEC) to enforce and regulate the process.⁴

Yet it is not always clear whether and to what extent private parties can recover for losses suffered as a result of another party's failure to comply with SEC regulations.⁵ Clarifying this confusion somewhat, the Supreme Court has held that SEC Rule 10b-5, promulgated under section 10(b) of the Securities Exchange Act of 1934, creates a private right of action, thereby allowing injured parties to seek damages from a party who uses deceptive practices in the sale of a security.⁶ The Supreme Court has construed this private right of action narrowly and has since further clarified those subject to liability under Rule 10b-5.⁷

In *Reese v. BP Exploration (Alaska) Inc.*, the U.S. Court of Appeals for the Ninth Circuit dismissed certain securities fraud claims brought under Rule 10b-5.⁸ Although the Ninth Circuit could have dismissed the claim under various theories, it reasoned that recent Supreme Court jurisprudence, which further defined those who can be liable for making a false statement under Rule 10b-5, was sufficient to dismiss the claims.⁹ According to the Ninth Circuit, the fact that the defendant, BP Explorations (Alaska) ("BPXA"), had a *contractual* duty to complete the SEC filing, rather than a *statutory* duty, was "fatal" to the plaintiff's claim that BPXA's misrepresentations caused the stock in a royalty trust to be overvalued, thereby harming investors.¹⁰

Part I of this Comment outlines the pertinent factual and procedural background of *Reese*.¹¹ Then, Part II explains the recent history of third-party liability under Rule 10b-5, focusing on the Supreme Court's evolving jurisprudence and how the Ninth Circuit applied that reasoning.¹² Finally, Part III argues that the Ninth Circuit has made it more

⁴ See 15 U.S.C. § 78d.

⁵ Compare *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994) (concluding that lawyers or accountants may be liable in private securities fraud suits), with *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304-05 (2011) (concluding that an investment advisor was not liable in a private securities fraud suit).

⁶ 17 C.F.R. § 240.10b-5 (2011); *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971).

⁷ 17 C.F.R. § 240.10b-5; see *Janus Capital Grp.*, 131 S. Ct. at 2302; *Cent. Bank*, 511 U.S. at 191.

⁸ *Reese v. BP Exploration (Ala.) Inc.*, 643 F.3d 681, 694 (9th Cir. 2011).

⁹ *Id.* at 693 n.8.

¹⁰ *Id.*

¹¹ See *infra* notes 14-38 and accompanying text.

¹² See *infra* notes 39-55 and accompanying text.

difficult for plaintiffs to prevail against parties that may previously have been considered liable in private securities fraud cases.¹³

I. BP DID NOT “MAKE” THE STATEMENT

In 1989, BPXA established a royalty trust, BP Prudhoe Bay Royalty Trust (the “Trust”), to distribute the profits from BPXA’s oil production in Alaska’s Prudhoe Bay region.¹⁴ The agreement establishing the Trust provided that BPXA and the trustee were “authorized to make and [would] be responsible” for all legally required filings with the SEC.¹⁵ Shares of the Trust were publicly traded on the New York Stock Exchange.¹⁶ In its quarterly SEC filings, the Trust included a copy of the Overriding Royalty Conveyance agreement (the “ORC Agreement”), which BPXA and the trustees had entered into at the creation of the Trust.¹⁷ In the ORC Agreement, BPXA promised to “conduct and carry on the development, exploration, production, maintenance and operation of [Prudhoe Bay] with reasonable and prudent business judgment, in accordance with . . . good oil and gas field practices, as a reasonable and prudent operator” (the “Prudent Operator Promise”).¹⁸

On August 6, 2006, BPXA discovered a leak in an Alaskan oil pipeline under its operation.¹⁹ Allegedly, the leak was due to internal corrosion, and might have been preventable if BPXA had taken standard oil industry precautions.²⁰ After noticing the leak, BPXA shut down a number of pipelines and related oil production until the leak was corrected.²¹ In response to this leak and an earlier leak in the same region of Alaska, BPXA pled guilty to one violation of the Clean Water Act.²²

Claude Reese and a class of similarly situated investors (the “plaintiffs”) had purchased shares of BP’s common stock (*not* stock in the Trust) during the class period.²³ The plaintiffs alleged that the pipeline leak and related shutdown cost billions in BP’s market capitalization.²⁴

¹³ See *infra* notes 56–74 and accompanying text.

¹⁴ *Reese*, 643 F.3d at 685.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 686.

¹⁸ *Id.*

¹⁹ *Id.* at 684

²⁰ See *Reese*, 643 F.3d at 684. Specifically, the plaintiffs alleged BPXA should have used so-called “pigs,” or pipeline inspection gauges. *Id.* at 684 n.1.

²¹ *Id.* at 684.

²² 33 U.S.C. §§ 1319(c)(1), 1321(b)(3) (2006); *Reese*, 643 F.3d at 684.

²³ *Reese*, 643 F.3d at 684.

²⁴ *Id.* at 685–86.

Further, they noted that the Trust had included with its SEC filings the ORC Agreement, which contained the Prudent Operator Promise.²⁵ Accordingly, by allowing the leaks to occur and failing to follow prudent operator procedures, BPXA made a knowing and material misrepresentation, constituting securities fraud under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, according to the plaintiffs.²⁶

The claims against BPXA survived a motion to dismiss before the U.S. District Court for the Western District of Washington.²⁷ Then, the trial judge certified two questions to the Ninth Circuit for interlocutory appeal: (1) whether a party could be liable for securities fraud when the only statement attributable to that party was in a contract filed with the SEC by a different party; and (2) whether admission of guilt to a misdemeanor could be used as evidence of scienter when the standard demands reckless or intentional misconduct.²⁸ For the first question, a panel of the Ninth Circuit held in favor of BPXA, dismissing the securities fraud charges that were based on the ORC Agreement's Prudent Operator Promise.²⁹ Yet, the panel left the second question unresolved; because it dismissed the case by reasoning that the alleged misstatement was not attributable to BPXA, it did not need to address the question of scienter.³⁰

A plaintiff, to state a claim for a private securities fraud, must show a "material misrepresentation (or omission)."³¹ Under the Ninth Circuit's jurisprudence, the representation must "affirmatively create[] an impression of a state of affairs that differs in a material way from the one that actually exists."³²

Under this interpretation, the plaintiffs faced two hurdles when asserting that the Prudent Operator Promise was a material misrepresentation for the purposes of a security frauds action: the plaintiffs had to show both that the misrepresentation concerned *present* affairs, and

²⁵ *Reese*, 643 F.3d at 685–86.

²⁶ *Id.* at 685; see 15 U.S.C. § 78j (2006); 17 C.F.R. § 240.10b-5 (2011). The plaintiffs raised a number of claims against BP, its subsidiaries, and its officials; only the claims relating to the Trust's SEC filings were disposed of by the Ninth Circuit in this decision. *Reese*, 643 F.3d at 685–86.

²⁷ *Reese*, 643 F.3d at 687.

²⁸ *Id.*

²⁹ *Id.* at 687, 694.

³⁰ *Id.* at 694.

³¹ *Id.* at 685; see 17 C.F.R. § 240.10b-5.

³² *Reese*, 643 F.3d at 687 (quoting *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002)).

that BPXA had made it.³³ First, the court held that the Prudent Operator Promise did not describe a state of affairs in the *present*, but rather described how BPXA would act in the *future*.³⁴ Second, because the SEC disclosures containing the Prudent Operator Promise were filed by the Trust, and not BPXA, the court held that BPXA could not have “made” the statements as required by the Rule 10b-5.³⁵

The first deficiency, by itself, was enough to dismiss the claims.³⁶ In addition, the second problem, that the Trust, and not BPXA, was the party to “make” the statements, was fatal.³⁷ Yet although the question fundamental to the outcome of a case, it is still unclear who can “make” a fraudulent statement.³⁸

II. WHO CAN “MAKE” A STATEMENT UNDER RULE 10B-5

Prior to 1994, to state a cause of action, a plaintiff was not required to show that the opposing party had “made” the misrepresentation; it was sufficient if the party had aided and abetted the maker by providing substantial assistance.³⁹ This doctrine met its end in 1994, in *Central Bank of Denver v. First Interstate Bank of Denver*, when the U.S. Supreme Court interpreted Rule 10b-5 as attaching liability in private suits only to the party who actually made a statement, thereby ending liability for aiding and abetting fraudulent misrepresentations.⁴⁰ Yet the Court in *Central Bank* did not rule out potentially broad interpretations of making a statement under Rule 10b-5.⁴¹ For example, under broader interpretations, auditors or lawyers who helped prepare the misleading filings might find themselves on the hook to investors, according to dicta from *Central Bank*.⁴² Thus, *Central Bank*’s gutting of aiding and abetting

³³ See *id.* at 691, 693 n.8.

³⁴ *Id.* at 691.

³⁵ *Id.* at 693 n.8.

³⁶ *Id.* (citing *Brody*, 280 F.3d at 1006).

³⁷ *Id.* at 693 n.8.

³⁸ *Reese*, 643 F.3d at 693 n.8; see also *Janus Capital Grp.*, 131 S. Ct. at 2303 (defining the maker of a statement as the “person or entity with ultimate authority over the statement, including its content and whether and how to communicate it”).

³⁹ See, e.g., *Levine v. Diamantheset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991); *Roberts v. Peat, Marwick, Mitchell & Co.*, 857 F.2d 646, 652 (9th Cir. 1989).

⁴⁰ *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177 (1994).

⁴¹ *Id.* at 191; see Louis E. Ebinger, Note, *Sarbanes-Oxley Section 501(a): No Implied Private Right of Action, and a Call to Congress for an Express Private Right of Action to Enhance Analyst Disclosure*, 93 IOWA L. REV. 1919, 1939–40 (2008) (discussing the importance of *Central Bank*).

⁴² *Cent. Bank*, 511 U.S. at 191; see Ebinger, *supra* note 41, at 1939–40.

liability caused a good deal of confusion as to who could be liable for making a misrepresentation.⁴³

Then, in 2011, in *Janus Capital Group v. First Derivative Traders*, the Supreme Court further restricted those who could be held liable in a private securities fraud action by defining the word “make” very narrowly, thereby shrinking the sphere of potentially liable parties.⁴⁴ Specifically, the Supreme Court wrestled with whether a mutual fund investment advisor could be held liable for misleading statements prepared by the advisor but filed by a related yet independent mutual fund.⁴⁵ In a five-to-four decision, against a vigorous dissent, the Supreme Court held that a misleading statement can only be made by an “entity with ultimate authority over the statement, including its content and whether and how to communicate it.”⁴⁶

In addition to announcing this stringent definition of who can “make” a statement under Rule 10b-5, the *Janus Capital Group* Court pressed the policy goal of protecting the “narrow scope that we must give the implied private right of action.”⁴⁷ Although it is uncertain whether the Ninth Circuit would have decided *Reese* differently absent the Supreme Court’s policy articulation, the Ninth Circuit’s decision furthered that policy.⁴⁸

The Ninth Circuit’s decision in *Reese*, which prevented the plaintiffs from attributing statements in the ORC Agreement to BPXA, provides a window into possible applications and effects of the *Janus Capital Group* Court’s new doctrine for 10b-5 liability.⁴⁹ In *Janus Capital Group*, the composition of Janus Investment Fund’s board of directors was “more independent than the statute requires.”⁵⁰ Because of this independence, the Supreme Court held that the mutual fund advisor could

⁴³ See Elizabeth Cosenza, *Rethinking Attorney Liability Under Rule 10b-5 in Light of the Supreme Court’s Decisions in Tellabs and Stoneridge*, 16 GEO. MASON L. REV. 1, 2 (2008).

⁴⁴ See *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302–03 (2011).

⁴⁵ *Id.* at 2299.

⁴⁶ *Id.* at 2302.

⁴⁷ *Janus Capital Grp.*, 131 S. Ct. at 2303.

⁴⁸ See *id.*; *Reese v. BP Exploration (Ala.) Inc.*, 643 F.3d 681, 693 n.8 (9th Cir. 2011). This policy goal is not new in Supreme Court securities fraud jurisprudence. See, e.g., Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107, 114 (discussing the trend of cases making it more difficult to bring securities fraud claims).

⁴⁹ *Janus Capital Grp.*, 131 S. Ct. at 2303; see *Reese*, 643 F.3d at 693 n.8.

⁵⁰ *Janus Capital Grp.*, 131 S. Ct. at 2304; see 15 U.S.C. § 80a–10 (2006) (setting minimum standards for representation by independent directors of investment companies).

not be the party with ultimate authority over the statements.⁵¹ Likewise, if the trust agreement did not give BPXA ultimate authority over the filings made by the Trust, which included the ORC Agreement, then under the principle of *Janus Capital Group*, BPXA should also rightly escape liability.⁵² Furthermore, the Ninth Circuit read the plaintiff's pleadings as not alleging any facts that would show BPXA had ultimate authority over the pertinent filings.⁵³ The promise by BPXA to be "responsible for" the Trust's SEC filings, the strongest indicator of BPXA's control over the statements, was not an assertion of "ultimate authority" over the filings.⁵⁴ Just as it had been in *Janus Capital Group*, in *Reese*, the absence of a statutory obligation to file disclosures was fatal.⁵⁵

III. IMPLICATIONS OF A REQUIREMENT OF STATUTORY OBLIGATION

The Ninth Circuit's conclusion, and its use of the strong word "fatal," substantiates fears raised in Justice Stephen Breyer's dissent in the U.S. Supreme Court's 2011 decision, *Janus Capital Group v. First Derivative Traders*: the ultimate authority standard unduly limits liability for securities fraud.⁵⁶ Specifically, Justice Breyer expressed concern that in many cases the party with ultimate authority may not have scienter for the misstatement, and those with scienter may not have ultimate authority—leaving no party liable to an investor harmed by a misstatement.⁵⁷ Furthermore, although *Janus Capital Group* mentioned the requirement of a statutory obligation in passing, the Ninth Circuit found such an obligation to be dispositive.⁵⁸ In addition, the Supreme Court brought up the idea of statutory obligation not when articulating the ultimate authority standard, but as part of a recitation of important facts while applying the standard.⁵⁹

Under this reasoning, although BPXA was responsible for the Trust's SEC filings, it may not be liable because it lacks a statutory obli-

⁵¹ *Janus Capital Grp.*, 131 S. Ct at 2303–04.

⁵² *See id.*; *Reese*, 643 F.3d at 693 n.8.

⁵³ *Reese*, 643 F.3d at 693 n.8.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2307–08 (2011) (Breyer, J., dissenting).

⁵⁷ *See id.* at 2310.

⁵⁸ *See id.* at 2304. The reference to a "statutory obligation" is found in part 2.B of the opinion, which is the application of the rule rather than the articulation, and even begins "[u]nder this rule." *Id.*

⁵⁹ *See id.*

gation.⁶⁰ Taking this reasoning further, if the BPXA is not liable, then arguably neither would a lawyer or accountant who helped prepare the statements, although these actors were named in the Supreme Court's 1994 decision, *Central Bank of Denver v. First Interstate Bank of Denver*, as potentially sharing liability.⁶¹ Accordingly, *Reese's* added emphasis on statutory obligation signals a shift away from the proposition that "[a]ny person or entity, including a lawyer, accountant, or bank, who . . . makes a material misstatement . . . may be liable as a primary violator under 10b-5."⁶² If liability is limited to those individuals who have statutory obligations to file SEC disclosures, scant few will be liable under Rule 10b-5.⁶³

If the lack of a statutory obligation is truly fatal, it may present troubling loopholes in securities law.⁶⁴ Assume, for the sake of argument, that BPXA knew at the time of the execution of the ORC Agreement that it never intended to fulfill its promise to operate under a prudent standard of care, but the Trust was ignorant of that fact.⁶⁵ BPXA can escape all liability under Rule 10b-5 because it was not the ultimate authority that made the filings.⁶⁶ Likewise, the Trust could escape liability because it lacked scienter about BPXA's lack of care.⁶⁷ A material and knowing misrepresentation would have been made to the

⁶⁰ See *id.* at 2307–08; *Reese*, 643 F.3d at 693 n.8.

⁶¹ See *Janus Capital Grp.*, 131 S. Ct. at 2307–08; *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177 (1994); *Reese*, 643 F.3d at 693 n.8.

⁶² *Cent. Bank*, 511 U.S. at 191. Compare *Reese*, 643 F.3d at 693 n.8 (noting the lack of a statutory obligation to file disclosures with the SEC was "fatal" in a 10b-5 claim), with *Cent. Bank*, 511 U.S. 164, 191 (noting that any party, including lawyers and accountants, may be held liable in future 10b-5 claims). Scholarship after *Central Bank* yet before *Janus Capital Group* largely decried the ambiguous nature of *Central Bank's* holding, even going so far as to call the circuits' resulting attempt to define who can exactly be liable for what "schizophrenic jurisprudence." See Cosenza, *supra* note 43, at 2; see also Patricia Blanchini, Note, *The Statement Someone Else Makes May Be Your Own: Primary Liability Under Section 10(b) After Central Bank*, 71 ST. JOHN'S L. REV. 767, 768 (1997) ("Ultimately, the fundamental question left unanswered by *Central Bank* is what actions of secondary actors in Rule 10b-5 violations constitute primary violations.").

⁶³ See *Reese*, 643 F.3d at 693 n.8.

⁶⁴ See *id.*; see also *Janus Capital Grp.*, 131 S. Ct. at 2310 (Breyer, J., dissenting) (discussing the potential for investors harmed by deceptive practices to be unable to find a liable party from which to recover).

⁶⁵ See *Reese*, 643 F.3d at 693 n.8.

⁶⁶ See *Janus Capital Grp.*, 131 S. Ct. at 2310 (Breyer, J., dissenting).

⁶⁷ See *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (holding scienter to be a required element of a private securities fraud action under Rule 10b-5).

public, but under *Janus Capital Group*, no one could be held accountable.⁶⁸

The above example assumes facts not in the pleadings, for example that BPXA knew at the time it signed the contract that it would not honor it.⁶⁹ But the more salient issue for future litigation is what level of control a defendant needs over a statement to be subject to liability under Rule 10b-5.⁷⁰ In *Reese*, merely agreeing to be “responsible” for the statements did not meet the ultimate authority standard.⁷¹ In part, this is a result of the Ninth Circuit’s understanding of *Janus Capital Group*, as placing great weight on a statutory obligation to disclose.⁷² Nonetheless, it remains an open question what level of control, if any, a court will require before a party is held liable for the statements of another, absent that statutory obligation.⁷³ This ambiguity opens the door to further loopholes in an already shrinking scheme of private liability.⁷⁴

CONCLUSION

The litigation in the Ninth Circuit now has to contend with the *Reese* court’s interpretation of *Janus Capital Group*. The danger from the loophole that Justice Breyer predicted, already an issue that could derail otherwise meritorious litigation, will be enlarged even further as the Ninth Circuit continues to regard a lack of a statutory obligation to file as fatal to 10b-5 actions. And, perhaps just as importantly, the Ninth Circuit is following in the spirit of the *Janus Capital Group*’s announcement that third party liability in securities fraud actions should be con-

⁶⁸ See *Janus Capital Grp.*, 131 S. Ct. at 2310 (Breyer, J., dissenting); *Reese*, 643 F.3d at 693 n.8.

⁶⁹ See *Reese*, 643 F.3d at 686. Although the plaintiffs allege BPXA “had actual knowledge of the misrepresentations and omissions of material fact,” there was no mention in the opinion that the promise was known to be a misrepresentation when made (that is, when BPXA executed the ORC Agreement). See *Reese*, 643 F.3d at 686, 693.

⁷⁰ See *id.* at 693 n.8.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *Janus Capital Crp.*, 131 S. Ct. at 2310 (Breyer, J., dissenting); *Reese*, 643 F.3d at 693 n.8.

⁷⁴ See *Reese*, 643 F.3d at 693 n.8; see also *Janus Capital Crp.*, 131 S. Ct. at 2310 (Breyer, J., dissenting) (discussing the increased likelihood of a party who knowingly deceived investors escaping liability). Commentators have discussed how other recent Supreme Court cases have limited the private right of action under 10b-5 in other contexts. See Elizabeth Cosenza, *Paradise Lost: § 10(b)-5 After Morrison v. National Australia Bank*, 11 CHI. J. INT’L L. 343, 395–96 (2011); Vincent Chiapinni, Note, *How American Are American Depository Receipts? ADRs, Rule 10b-5 Suits, and Morrison v. National Australia Bank*, 52 B.C. L. REV. 1795, 1802–03 (2011).

strued all the more narrowly. This case is just one application of that policy goal, and it will be important to watch how each circuit does or does not continue to narrow the breadth of private securities fraud cases.

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