SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 45 | Issue 2 Article 9

1995

A Seville Standard for Aiders and Abettors: The Logic and Implications of the Supreme Court's Decision in *Central Bank v. First Interstate Bank*

James L. Fuchs

A SEVILLE STANDARD FOR AIDERS AND ABETTORS: THE LOGIC AND IMPLICATIONS OF THE SUPREME COURT'S DECISION IN *CENTRAL BANK V. FIRST INTERSTATE BANK*

I. INTRODUCTION

In one of Cervantes' *Exemplary Stories*, a thief finds the city of Seville so lax in safeguarding its citizens from criminals that even he is scandalized.[1] Upon observing the impunity with which the city has allowed an entire den of thieves to plunder, "he was shocked by the slackness of the law in that famous city . . . where such pernicious and perverted people could live almost openly."[2] He thereupon resolved to seek a more respectable location as quickly as possible.

In expressing indignance, albeit contrived, the thief was demonstrating a sensitivity to the role of law in society which, in a recent decision, appears to have completely eluded the United States Supreme Court. In *Central Bank v. First Interstate Bank*,[3] the Court held that aiders and abetters in private actions are now exempt from liability under section 10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934.[4] In so ruling, the Court has departed from precedent as thoroughly, and as sweepingly, as it has vitiated the Act's enforcement. This Comment will consider the language and legislative history of the 1934 Act, the precedent established by both initial and later judicial decisions, the rationale according to which the Supreme Court has departed from that

1. CERVANTES, EXEMPLARY STORIES 119 (C.A. Jones trans., Penguin Books 1972).

2. *Id.*

3. 114 S. Ct. 1439 (1994), *reversing* First Interstate Bank v. Pring, 969 F.2d 891 (10th Cir. 1992). The litigation in *Central Bank* stemmed from the default of $11 million in bonds for residential and commercial development.

4. *See* Securities and Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1983), 17 C.F.R. § 240.10b-5 (1993).

precedent, and the detrimental effects both of shielding aiders and abetters from prosecution and of overhauling precedent in order to do just that.

II. THE 1934 ACT'S LANGUAGE AND LEGISLATIVE HISTORY

Crafted at the beginning of the New Deal as a response to the wild speculation that had ultimately overturned Wall Street, the 1934 Act has at once transcended its origins and retained its initially broad scope. The 1934 Act's tenth section is characteristic of that scope. It defines conduct that "shall be unlawful for any person [to undertake] *directly or indirectly*, by the use of any means or instrumentality of interstate commerce, or the mails, or of any facility of any national securities exchange."[5] Section 10(b) stipulates that:

> It shall be unlawful [t]o use or employ, in connection with the purchase or sale of any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[6]

In introducing the bill that was ultimately to become the 1934 Act, Senator Fletcher, who chaired the Senate Committee on Banking and Currency, left no doubt concerning the broad powers that Congress was entrusting to the SEC. He declared that "[t]he Commission is . . . given power to forbid any other devices in connection with security transactions which it finds detrimental to the public interest or to the proper protection of investors."[7] One of the principal draftsmen of the House version of the bill similarly stressed his intention to make the language that was to become section 10(b) as broad as possible in order to prevent "other cunning devices."[8]

Nor did the SEC refuse to act upon its authority. In 1942, it fleshed out the 1934 Act with Rule 10b-5, according to which it is

> unlawful . . . to employ any device, scheme, or artifice to

---

5. Securities and Exchange Act § 10(b) (emphasis added).

6. *Id.*

7. 78 CONG. REC. S2272 (daily ed. Feb. 9, 1934) (statement of Sen. Fletcher).

8. *Hearing on H.R. 7852 and H.R. 8720 Before the Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 115 (1934) (statement of Rep. Corcoran).

> defraud . . . 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 . . . or . . . to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.[9]

III. JUDICIAL HISTORY OF AIDER AND ABETTOR LIABILITY PRIOR TO *CENTRAL BANK*

In view of the 1934 Act's broad language, circuit courts have universally held defendants liable for aiding and abetting under Rule 10b-5 in private actions.[10] In each of these decisions, three crucial elements have constituted the *sine qua non* for imposing liability upon aiders and abettors: 1) a breach of the securities law by a party other than the defendant;[11] 2) the aider and abettor's knowledge of having advanced an improper activity;[12] and 3) some degree of significance of the aider and abettor's action in advancing the primary activity.[13]

In elucidating the second and third elements, the circuit courts have imposed liability upon aiders and abettors according to two "patterns."[14] In *SEC v. Coffey*,[15] the court required a showing

---

9. *See* 17 C.F.R. § 240.10b-5 (1993).

10. Among the many decisions are Fine v. American Solar King Corp., 919 F.2d 290 (5th Cir. 1990), *cert. denied*, 500 U.S. 913 (1991); Metge v. Baehler, 762 F.2d 621, 624 (8th Cir. 1985); Woods v. Barnett Bank, 765 F.2d 1004 (11th Cir. 1985); Cleary v. Perfectune, Inc., 700 F.2d 774, 777 (1st Cir. 1983); Investors Research Group v. SEC, 628 F.2d 168, 178 (D.C. Cir.), *cert. denied*, 449 U.S. 919 (1980); IIT v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980); Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793, 799 (3d Cir.), *cert. denied*, 439 U.S. 930 (1978); Woodward v. Metro Bank, 522 F.2d 84 (5th Cir. 1975); and Landy v. FDIC, 486 F.2d 139, 162-63 (3d Cir. 1973) (holding that defendant's acquiescence through silence in another party's fraudulent conduct, when combined with affirmative acts, constituted sufficient grounds for aiding and abetting), *cert. denied*, 416 U.S. 960 (1974).

11. The court of appeals, in First Interstate Bank v. Pring, 969 F.2d 891, 898 (10th Cir. 1992), *rev'd*, 114 S. Ct. 1439 (1994), referred to this element as "the existence of a primary violation of the securities laws by another."

12. *Id.*

13. The *Pring* court employed the language: "substantial assistance by the alleged aider-and-abettor in achieving the primary violation." *Id.* In its analysis of the three criteria, the court also noted that the Seventh Circuit views the three criteria as added requirements beyond the plaintiff's demonstration "that the alleged aider-and-abettor committed a proscribed 'manipulative or deceptive' act with the same scienter as for primary liability." *Id.* at 899.

14. WILLIAM L. CARY & MELVIN A. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 885 (6th ed. 1988).

15. 493 F.2d 1304 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).

that "the accused party had general awareness that his role was part of an overall [improper] activity and . . . knowingly and substantially assist[ed] the violation."[16] Then, in language suggesting a difference of nuance between "knowledge" and "general awareness" rather than of substance, the *IIT v. Cornfeld*[17] court held that, to impose liability, a court must find "'knowledge' of [the primary] violation on the part of the aider and abettor; and . . . 'substantial assistance' by the aider and abettor in the achievement of the primary violation."[18]

Since mere "knowledge" or "general awareness" can be grounds for liability,[19] silence or inaction may in and of themselves constitute aiding and abetting, even though the grounds upon which liability may be imposed under such circumstances are somewhat nebulous.[20] Two commentators argue that "aiding and abetting liability based on inaction can be predicated on either a duty to act or a conscious intent to assist the wrongful act."[21] In-

16. *Id.* at 1308. The *Pring* court also referred to this "general awareness" standard. First Interstate Bank v. Pring, 969 F.2d 891, 899 (10th Cir. 1992), *rev'd*, 114 S. Ct. 1439 (1994).

17. 619 F.2d 909 (2d Cir. 1980).

18. *Id. See also* Armstrong v. McAlpin, 699 F.2d 79, 88 (2d Cir. 1983) (holding that by exercising reasonable diligence shareholders could have discovered alleged fraudulent conduct two years prior to complaint); Stokes v. Lokken, 644 F.2d 779, 784 (8th Cir. 1981) ("The scienter requirement scales upward when activity is more remote; therefore, the assistance rendered should be both substantial and knowing"). Judge Friendly's opinion in *Cornfeld*, 619 F.2d at 924, also suggests the possibility that the two tests in fact coalesce. According to that opinion:

> Although [the tripartite] list of prerequisites has become commonplace, the exact content of the rather vague phrases, especially 'knowledge' and 'substantial assistance,' is still being delineated by the courts . . . . After studying the many cases we might be inclined to wonder whether the elaborate discussions have added anything except unnecessary detail to Judge L. Hand's famous statement, made in a criminal context, that, in order to be held as an aider and abettor, a person must 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.'

Id.

19. The Eighth and Ninth Circuits recently imposed a recklessness standard instead. Levine v. Diamandthuset, Inc., 950 F.2d 1478, 1483 (9th Cir. 1990); FDIC v. First Interstate Bank, 885 F.2d 423, 433-34 (8th Cir. 1989). *See infra* notes 23-33 and accompanying text.

20. CARY & EISENBERG, *supra* note 14, at 886. *See also* Landy v. FDIC, 486 F.2d 139, 162-63 (3d Cir. 1973) (holding that defendant's acquiescence through silence in another party's fraudulent conduct, when combined with affirmative acts, constituted sufficient grounds for aiding and abetting liability), *cert. denied*, 416 U.S. 960 (1974).

21. CARY & EISENBERG, *supra* note 14, at 886.

deed, according to the Court of Appeals in *Pring*, "*[t]he weight of authority* is that even absent a duty to disclose, silence and inaction can be substantial assistance for aider and abettor liability provided the defendant consciously intended to assist the primary violation."[22]

The Sixth,[23] Eighth,[24] and Ninth Circuits[25] have added recklessness as a third basis for aider and abettor liability. The court in *Herm v. Stafford* conflated the concepts of "knowledge," "general awareness," and "recklessness"[26] in holding a fast food franchise operator and participant in investment scheme potentially liable for misleading prospective investors by reading a press release that contained materially false statements.[27] Other courts have also adopted this formulation. In the Eighth Circuit, *FDIC v. First Interstate Bank* court[28] held that "the evidence supports an inference that [the defendant bank], with potential profits in mind, recklessly chose to continue its relationship with the primary violator."[29] In the Ninth Circuit, the court in *Levine v. Diamanthuset, Inc.*[30] held a trust company liable for it "reckless disregard, if not actual knowledge, of both [the corporation's] Rule 10b-5 violations and the bank's role in the violations, together with the provisions of substantial assistance by the bank in the violations."[31]

In all these decisions, the only real division among the courts

---

22. First Interstate Bank v. Pring, 969 F.2d 891, 899 (10th Cir. 1992), *rev'd*, 114 S. Ct. 1439 (1994) (emphasis added) (citing Schneberger v. Wheeler, 859 F.2d 1477, 1480 (11th Cir. 1988); Moore v. Fenex, Inc., 809 F.2d 297, 303-304 (6th Cir. 1987); Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793, 800 (3d Cir. 1978); Woodward v. Metro Bank, 522 F.2d 84 (5th Cir. 1975)). *See also* Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) ("an aider-abettor case predicated on inaction of the secondary party must meet a high standard of intent"). As the *Pring* court noted, courts have evaluated actual intent by determining "whether the alleged aider-and-abettor benefitted from such silence." *Pring*, 969 F.2d at 899. *Cf.* DiLeo v. Ernst & Young, 901 F.2d 624, 629 (7th Cir. 1990) (the test is whether "the defendant has thrown in his lot with the primary violators").

23. Herm v. Stafford, 663 F.2d 669 (6th Cir. 1981).

24. FDIC v. First Interstate Bank, 885 F.2d 423, 433-34 (8th Cir. 1989).

25. Levine v. Diamandthuset, Inc., 950 F.2d 1478, 1483 (9th Cir. 1990).

26. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976) (holding that "the term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud in certain areas of the law" and that "[i]n certain areas of the law, recklessness is considered to be a form of intentional conduct for the purpose of imposing liability for some act").

27. *Herm*, 663 F.2d at 684.

28. 885 F.2d 423, 433-33 (8th Cir. 1989).

29. *Id.* at 424-28. The facts of this case show an intersting similarity to those in *Central Bank*. *See infra* notes 35-53 and accompanying text.

30. 950 F.2d 1478 (9th Cir. 1990).

31. *Id.* at 1483.

has concerned whether a finding of recklessness is sufficient to establish scienter. For none of these courts, however, has there been any question that aiders and abettors are liable in private actions under section 10(b) of the 1934 Act, and they have cited reasons of precedent and public policy alike.[32] The desire to deter securities fraud to the greatest possible extent is inextricable from adherence to the goals that had animated Congress in the 1930s and to which subsequent Congresses have adhered.[33]

IV. THE FACTS AND ANALYSIS UNDERLYING THE APPELLATE COURT'S DECISION IN *FIRST INTERSTATE BANK V. PRING*

In 1986 and 1988, the Colorado Springs-Stetson Hills Public Building Authority (the Authority) issued bonds for $15 million and $11 million to finance public improvements in a planned Colorado Springs residential and commercial development, Stetson Hills.[34] The purpose of both bonds was to reimburse the developer, AmWest Development I Limited Partnership (AmWest L.P.), for the improvement costs. The bondholders in turn were to be repaid from assessments that the developer was to receive from commercial builders or from a reserve fund.[35] The bonds were secured by "landowner assessment liens" covering approximately 250 acres and 272 acres for the 1986 and 1988 bond issues respectively. The bonds' covenants stipulated that at all times the land subject to the liens was to be worth at least 160% of the bonds' outstanding principal and interest (160% test).[36]

One of the original owners of the property under development, Roy I. Pring, sold some of the property to AmWest L.P., in which he and his wife each held 17.5% interest, and to which Pring had loaned five million dollars.[37] For some time, Pring served as a vice-president and director of AmWest Development Corporation (AmWest), which was the sole general partner of AmWest. L.P. Pring concurrently had an interest in AmWest and had loaned money to it.[38]

---

32. *See supra* notes 10-31 and accompanying text.

33. *See infra* notes 100-03 and accompanying text.

34. First Interstate Bank v. Pring, 969 F.2d 891, 893 (10th Cir. 1992), *rev'd*, 114 S. Ct. 1439 (1994).

35. *Id.*

36. *Id.* at 893.

37. *Id.* at 894.

38. *Id.* at 893-94.

Central Bank served as the indenture trustee for both bond issues, and in that capacity received an "updated" appraisal of the land securing the 1986 loan, along with an appraisal of the land that had been proposed to secure the 1986 bonds.[39] Although this theoretically "updated" appraisal suggested that the land values had remained essentially "unchanged,"[40] Central Bank soon "became aware of serious concerns about the adequacy of the security for the 1986 bonds and the accuracy of the [updated] appraisal."[41] That is, the 1986 bonds' senior underwriter conveyed his concern that "the 160% test was not being met,"[42] and that, given a decline in property values subsequent to the time that the now sixteen-month appraisal had been issued, "the Authority may have given 'false or misleading certifications' of compliance with the bond covenants."[43] The underwriter then wrote another letter expressing the same concerns, and Central Bank investigated.[44]

Since Central Bank received conflicting information, its own in-house appraiser reviewed the "updated" appraisal. Suggesting that the appraisal was both methodologically flawed and outdated, he urged Central Bank to conduct an independent review of the appraisal.[45] Worse still, a Central Bank trust officer calculated that even according to the "updated" appraisal, the 160% test was not being met.[46] In view of all these warnings, Central Bank ordered "that an independent review of the appraisal be conducted by a different appraiser."[47]

After a series of meetings in which AmWest's president exerted considerable pressure, Central Bank agreed to delay an independent review until approximately six months after the closing of the 1988 bond issue.[48] During this period, Pring, who knew both that

---

39. First Interstate Bank v. Pring, 960 F.2d 891, 894 (10th Cir. 1992), *rev'd*, 114 S. Ct. 1439 (1994).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. First Interstate Bank v. Pring, 960 F.2d 891, 894 (10th Cir. 1992), *rev'd*, 114 S. Ct. 1439 (1994).

45. *Id.*

46. *Id.*

47. *Id.* In a letter to AmWest's President, Central Bank cited as its three reasons for ordering an independent review: "(1) the comparable sales data was outdated; (2) the methodology did not consider a bulk sale in a forced liquidation context; and (3) considering the local real estate market, the value appeared 'unjustifiably optimistic.'" *Id.* at 895.

48. First Interstate Bank v. Pring, 960 F.2d 891, 895 (10th Cir. 1992), *rev'd*, 114 S.

the "updated" appraisal had been questioned and that AmWest seemed to be facing serious cash-flow difficulties, said nothing. He coincidentally received almost two million dollars from AmWest L.P. as "payment due" for land purchases and interest for Pring's loan to AmWest L.P.[49]

Less than a year later, after a new appraisal had begun, the Authority refused to complete the appraisal process.[50] The 1988 bond owners were thereupon notified that the Authority had technically defaulted.[51] The Authority then completely defaulted on payments on the 1988 bonds.[52] First Interstate Bank and Jack Naber, who had purchased 2.1 million dollars of the 1988 bonds, then proceeded to file a cause of action against Pring, the Authority, two underwriters, and Central Bank.[53] After the United States District Court for the District of Colorado granted the defendants' motion for summary judgment, the bondholders appealed.[54] The Tenth Circuit held that both Pring and Central Bank had aided and abetted the Authorty's Rule 10b-5 violation of concealing the property's true value and issuing bonds linked to the false and outdated land value.[55]

In judging whether Pring's "silence was accompanied by a conscious or actual intent to assist the primary violation,"[56] the court applied the "personal benefit" test.[57] It concluded that "[p]laintiffs' evidence establishes that Pring had a substantial personal stake in the 1988 bond issue."[58] As for the plaintiffs' aiding and abetting claim against Central Bank, the Court of Appeals, while "agree[ing] . . . that Central Bank owed plaintiffs no duty to disclose,"[59] found "the lack of duty . . . not dispositive in this case . . . [since] it is possible for an indenture trustee to be held

---

Ct. 1439 (1994).

49. *Id.* These payments were ostensibly, if not actually, for land purchases and for the repayment of interest. *Id.* at 893.

50. *Id.* at 895.

51. *Id.*

52. *Id.*

53. *See* Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994).

54. *Id.*

55. First Interstate Bank v. Pring, 960 F.2d 891, 899 (10th Cir. 1992), *rev'd*, 114 S. Ct. 1439 (1994).

56. *Id. See supra* notes 20-22 and accompanying text.

57. *Pring*, 960 F.2d at 899. *See supra* note 22 and accompanying text.

58. *Pring*, 960 F.2d at 899. As the court pointed out, Pring expected to receive payment from the proceeds of the bond sale. *See supra* note 49.

59. *Pring*, 969 F.2d at 900.

liable as an aider and abettor."[60] Rather, the court found that Central Bank's unprecedented decision to delay an independent appraisal after ordering one—even though it "knew that serious concerns had been raised about the accuracy of the . . . updated appraisal,"[61] and even though "it believed those concerns were credible"[62]—could support aiding and abetting liability on grounds of recklessness.[63] That is, "the bank's knowledge of the alleged inadequacies of the . . . updated appraisal could support a finding of extreme departure from the standards of ordinary care."[64] The court similarly held that the decision to delay an independent appraisal after ordering one "raised a genuine issue of material fact as to the element of substantial assistance," given that through just such an appraisal, "the depleted collateral would have been discovered and plaintiffs' losses avoided."[65]

V. REVISIONISM CAST AS ORIGINALISM: THE SUPREME COURT'S RATIONALE IN *CENTRAL BANK*

After acknowledging numerous federal court decisions establishing aiding and abetting liability in private actions under section 10(b) of the 1934 Act,[66] the Supreme Court argued that its "close attention to the statutory text in defining the scope of conduct prohibited by Section 10(b)"[67] had prompted "courts and commentators [alike] . . . to question whether aiding and abetting liability under Section 10(b) was still available."[68] Most of the doubts about the continued availability of aider and abettor liability under Rule 10b-5 have emanated from a perceived shift in the Court's

60. *Id.* at 901. Central Bank had argued that because it was an indenture trustee, it was liable, according to the terms of the Trust Indenture Act of 1939, only for failing to perform those duties set out in the indenture. *Id.* at 900.

61. *Id.* at 904.

62. *Id.* The court noted that precisely because Central Bank did give credence to these concerns, it demanded that $2 million worth of additional property be added to the Security for the 1986 bond issue. As a result, the bank was particularly culpable; since it was "preparing to be the indenture trustee for the 1988 bond issue," and since it knew, in that capacity, that the 1988 bonds were about to be sold on the basis of collateral that, in view of the "updated" appraisal's outdatedness, was entirely inadequate. *Id.*

63. *Id.*

64. First Interstate Bank v. Pring, 960 F.2d 891, 904 (10th Cir. 1992), *rev'd*, 114 S. Ct. 1439 (1994).

65. *Id.*

66. Central Bank v. First Interstate Bank, 114 S. Ct 1439, 1444 (1994).

67. *Id.*

68. *Id.*

position on just such liability in cases such as *Musick, Peller & Garrett v. Employers Insurance of Wausau.*[69] In that case, the Court declared that it could "only infer how the 1934 Congress would have addressed the issues [involving private liability] had the 10b-5 action been included as an express provision in the 1934 Act."[70]

In so arguing, the Court conveniently ignored a number of its own decisions in which it had accepted the notion of liability in private actions under section 10(b), including its decisions in *Affiliated Ute Citizens v. United States*[71] and *Superintendent of Insurance v. Bankers Life & Casualty Co.*[72] It concomitantly dismissed, since it could not ignore, Congress' express delegation of authority to the SEC to interpret section 10(b) by distinguishing between the SEC's right to "bring administrative and injunctive proceedings"[73] and the rights of private plaintiffs, as specified in the Act, to pursue claims.[74] The Court concurrently buried the evolution and interpretations of section 10(b) and Rule 10b-5 in an unnecessarily compendious, and not entirely germane, chronicle.[75]

The *Central Bank* Court listed the various requirements for a Rule 10b-5 violation, including manipulation and deception[76] and failure to speak when there is reliance,[77] but it begged the question in assuming that these requirements somehow preclude aiding and abetting liability in private actions. In mooring its holding to a "manipulation or deception" requirement,[78] the Court appeared to assume the possibility of aiding or abetting without also manipulating or deceiving.[79] In most cases, it would seem that aiding and abetting would indeed incorporate some element of manipulation or

69. 113 S. Ct. 2085 (1993) (holding that defendants in Rule 10b-5 action have right to seek contribution as a matter of federal law).

70. *Id.* at 2089-90.

71. 406 U.S. 128, 150-54 (1972).

72. 425 U.S. 185, 196 (1976).

73. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1445 (1994).

74. *Id.*

75. *See id.* at 1445-48. *See, e.g.*, the Court's reference to its consideration of "whether knowing participation in a breach of fiduciary duty is actionable under ERISA." *Id.* at 1447.

76. *Id.* at 1445-48.

77. *Id.* at 1449.

78. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1446 (1994) (citing Santa Fe Indus. v. Green, 430 U.S. 462, 473 (1977) (holding that the "language of § 10b gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception")).

79. *Id.* at 1448.

deception, but the Court here wrongly implied that no liability for aiding and abetting can be found in the absence of a primary violation consisting of manipulative or deceptive behavior. On the facts of *Central Bank*, the bank did order a review, but procrastinated and postponed the review under heavy pressure. To the extent that it ordered the review, the bank could argue that it was not deceiving anyone. However, because it knowingly delayed that review in the face of damaging evidence concerning the Authority's ability to meet its financial obligations, there is little question that the bank aided and abetted the fraud perpetrated upon the bondholders. Hence, on the facts of this case, the Court's distinction between "manipulation and deception" and "giving aid to a person who commits a manipulative or deceptive act"[80] is as tortuous linguistically as it is legally.

Moreover, referring to decisions concerning "reliance"[81] and "duty to speak,"[82] the *Central Bank* Court argued that "[w]ere we to allow the aiding and abetting action proposed in this case, the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions."[83] The Court failed to explain, however, in just what circumstances bondholders would not rely upon an indenture trustee, or in which an indenture trustee would not have a duty toward the bondholders.

Despite its professed adherence to statutory "language," however, the Court seems to contravene both the letter and the spirit of an Act that makes "unlawful for any person, directly or indirectly . . . [to employ] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may proscribe."[84] The Court expressly said that giving a degree of aid or comfort to parties directly or indirectly engaging in proscribed activities is not itself an "indirect action" giving rise to liability.[85] That is, the Court stated that "aiding and abetting

80. *Id.* According to the Court, "[t]he proscription does not include giving aid to a person who commits a manipulative or deceptive act. We cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive." *Id.*

81. Basic, Inc. v. Levinson, 485 U.S. 224, 243 (1988) (involving transaction in which trader relied upon corporation's materially misleading statement).

82. Chiarella v. United States, 445 U.S. 222, 232 (1980) (holding that printer's "mark-up man" trading on basis of inferences made from information available at job did not have a duty to disclose).

83. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1449 (1994).

84. 1934 Act § 10(b).

85. *Central Bank*, 114 S. Ct. at 1447.

liability [as previously interpreted] reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do."[86] Hence, according to the Court, aiding and abetting is not itself a violation of Rule 10b-5 in private actions. Arguably, however, such aid or comfort is itself an "indirect" violation when the word "indirect" is reasonably construed.

The implications of the Court's decision in fact belie its protestations about adhering to a "statutory" meaning of "indirect."[87] Without the "aider and abettor" language as a guide, other courts will find themselves in entirely uncharted territory as they attempt to determine what constitutes "indirect deception and manipulation."[88] In many instances, secondary participants, such as lawyers or accountants issuing opinion letters, will have communicated several times to the plaintiff. Other secondary participants will have chosen to remain silent despite a fiduciary duty to the plaintiff, and still others will have been in positions in which they might or might not have a duty. In *Gold v. DCL Inc.*[89] the plaintiff complained that an accounting firm, Price Waterhouse, had been obligated to disclose the financial difficulties of a company that it had audited, even though the firm had been "fired by [defendant] because of the parties' disagreement over the validity of the intended [certification of financial condition]."[90] The court rejected this attempt to impose liability based on the firm's failure to disclose financial information.[91] Yet, thanks entirely to the Supreme Court's insistence upon adhering to a formalistic interpretation of the language of the 1934 Act, such heretofore innocent individuals may now be found liable for a primary violation of Rule 10b-5. Alternatively, without the mooring of "aider and abettor" liability, courts will lack any frame of reference by which to classify such individuals and will be tempted to let both themselves and the defendants off the hook.

Moreover, in its highly selective legislative history of aiding and abetting liability, the Court ignored judicial and legislative assumptions alike. As Justice Stevens' dissent observed, "judges

86. *Id.*

87. *Id.* at 1448.

88. *See id.*

89. 399 F. Supp. 1123 (S.D.N.Y. 1973) (involving purchases by lawyer and investor of stock in company involved in short-term leasing of computers).

90. *Id.* at 1128.

91. *Id.* at 1127 (holding that "the situation is utterly lacking in the kind of special relationship which has heretofore imposed on auditors a duty of disclosure").

closer to the times and climate of the 73rd Congress . . . concluded that holding aiders and abettors liable was consonant with the 1934 Act's purpose to strengthen the antifraud remedies of the common law."[92] Indeed, the 1934 Act was precisely the type of "remedial" legislation that the Supreme Court had insisted should receive "a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress."[93] By the same token, "[w]hen §10(b) was enacted, aiding and abetting liability was widely, albeit not universally, recognized in the law of torts and in state legislation prohibiting misrepresentation in the marketing of securities."[94] Above all, as Justice Stevens noted in reference to previous decisions, including decisions of the Supreme Court, "[t]he courts' reliance on common law tort principles in defining the scope of liability under § 10(b) was by no means an anomaly."[95] The Court also, in a decision involving conspirators rather than aiders and abettors, "recognized a private right of action against secondary violators of a statutory duty despite the absence of a provision explicitly covering them."[96]

As a consequence of these legislative and judicial assumptions, "[i]n hundreds of judicial and administrative proceedings in every circuit in the federal system, the courts and the SEC have conclud-

---

92. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1455 (1994) (Stevens, J., dissenting).

93. *Id.* at 1457 (citing Piedmont & Northern Ry. v. ICC, 286 U.S. 299, 311 (1932) (holding that railroad with trackage outside of cities and with national freight business is not "inter-urban electric railway")).

94. *Id.* at 1456 (citing THOMAS M. COOLEY, LAW OF TORTS 244 (3d ed. 1906) ("All who actively participate in any manner in the commission of a tort, or who command, direct, advise, encourage, aid or abet its commission, are jointly and severally liable therefor.")).

95. *Id.* & n.2 (citing American Soc'y of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565-74 (1982) (holding the organization accountable for antitrust violations)).

96. *Id.* at 1459 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 394 (1982) (involving action by investor in commodities future contracts against his merchant and broker, and by speculators in futures contracts against New York Mercantile Exchange, in which plaintiffs alleged unlawful price manipulation that could have been prevented through the Exchange's enforcement of its own rules. The Court held that

> [h]aving concluded that exchanges can be held accountable for breaching their statutory duties to enforce their own rules prohibiting manipulation, it necessarily follows that those persons who are participants in a conspiracy to manipulate the market in violation of those rules are also subject to suit by futures traders who can prove injury from these violations.)).

ed that aiders and abettors are subject to liability under § 10(b) and Rule 10b-5."[97] Even in *Blue Chip Stamps v. Manor Drug Stores*,[98] to which the majority refers at several points, the Court held that the "longstanding acceptance by the courts" and "Congress' failure to reject" the *Birnbaum* rule, which had been announced in a landmark court of appeals decision,[99] mandated the Rule's retention.[100] More to the point, "[i]n its comprehensive revision of the Exchange Act in 1975, Congress left untouched the sizeable body of case law approving aider and abettor liability in private actions under Section 10 and Rule 10b-5."[101]

The Court did concede, but then explained away, recent Congressional committee interpretations of section 10(b) that suggest it encompasses aiding and abetting liability,[102] by stating that a later Congress' interpretation does not prove statutory meaning.[103] Yet, in so arguing, the Court overlooked the obvious conclusion that the only reason that Congress did not change the law is that it saw no need, in view of the statute's language, to do so. Indeed, these recent interpretations belie the Court's argument that "[i]t is 'impossible to assert . . . that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation.'"[104]

In order to overlook the vast legislative and judicial history concerning aiding and abetting liability, the *Central Bank* Court overlooked important unsettled issues in the case that had been

---

97. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1455 (1994) (citing ARNOLD S. JACOBS, LITIGATION AND PRACTICE UNDER RULE 10-B 5 § 40.02 (rev. ed. 1993)).

98. 421 U.S. 723 (1975).

99. Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1951).

100. *Central Bank*, 114 S. Ct. at 1457 (citing *Blue Chip Stamps*, 421 U.S. at 733).

101. *Id.* at 1458.

102. *Id.* at 1452 (citing H.R. Rep. 100-910, 100th Cong., 2d. Sess. 27-28 (1988), *reprinted in* 1988 U.S.S.C.A.N. 6043, 6064-65; H.R. Rep. 98-106, 98th Cong., 1st Sess. 10 (1983), *reprinted in* 1983 U.S.S.C.A.N. 592, 601).

103. *Id.*

104. *Id.* (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 175, & n.1, (1989) (quoting Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting)).

The Court was even-handed, however, in rejecting Central Bank's arguments concerning the failure to pass "aid-and-abet" legislation in 1957, 1959, and 1960; and by recognizing that "failed legislation proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Id.* (quoting Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)).

addressed by both parties[105] in its haste to overturn the long settled principles that both parties had taken for granted. In fact, the Court went so far as to redraft the questions presented for review, as neither side had questioned the availability of aider and abettor liability in private actions.[106] It has thus once again seized the occasion to don an originalist mask in order to play a revisionist role but in the process has forgotten who the players are.

The Court then threw out the specter of excessive and expensive litigation against companies and independent professionals should it fail to act. In so arguing, the Court appeared to fear the constraints on business advice by professionals apprehensive about potential liability.[107] However, the authority the Court cited was against section 10(b) in general, not against aiding and abetting liability in particular.[108] In any event, its projections concerning increased litigation are as chimerical as they are nonauthoritative.[109] Moreover, the comfort that the Court derived in having left open the possibility of causes of action against primary violators—whose violations are often difficult to prove, and against only some of whom, as it acknowledges, it has allowed a cause of action—is the comfort of having thrown out most of the baby with the bath.[110]

VI. CONCLUSION: IMPLICATIONS OF THE DECISION

Action against aiders and abettors has constituted fifteen percent of the SEC's civil enforcement proceedings, and "elimination of aiding liability would 'sharply diminish the effectiveness of Commission actions.'"[111] As Justice Stevens suggested, the majority holding will call into question even the SEC's ability to prosecute actions against aiders and abettors.[112] Indeed, now that aiders and abettors will no longer be liable in private actions, the tempta-

105. *See supra* notes 60-66 and accompanying text.

106. Central Bank v. Interstate Bank, 114 S. Ct. 1439, 1456-57 (1994).

107. *Id.* at 1454.

108. *Id.*

109. The *Central Bank* Court then briefly alluded to competing policy considerations, which it did not specify, and which it subsumed under its professed uncertainty concerning congressional intentions in 1934. *See id.*

110. *See id.* The Court's stated that "there are likely to be multiple violators," *id.*, but the implication was that some will be subject to a cause of action, while others will not.

111. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1459 (1994) (quoting brief for the SEC as amicus curiae 18).

112. *Id.*

tions to test the law will become, in many instances, almost inexorable.

The effects of *Central Bank* will be worse still when coupled with another recent Supreme Court decision, *Harper v. Virginia Department of Taxation.*[113] In *Harper*, Justice Thomas, in sweeping language, proclaimed that

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.[114]

Thus *Central Bank* will become a basis for exculpating not simply future aiders and abettors, whose conduct will take them to the very margins of the law, but also present aiders and abettors, who were willing to break the law even when their activity was considered cause for liability under section 10b(5) of the 1934 Act. Thanks to the *Central Bank* majority, the conduct of aiders and abettors, entirely illegal at the time, will not be excused but rather vindicated. The lesson that they will draw is not only that they were right to break the law, but that the judicial system has rewarded them for doing so. Indeed, they will be encouraged to break the law even under the *Central Bank* Court's expansive approach to participants in securities violations, since they have no reason to think that the laws against primary violators are any more stable than were the laws against aiders and abettors. At the very least, individuals who were willing to aid and abet when it was illegal will, *a fortiori,* be willing to do it when it is legal. How could it be otherwise when the Court has inexplicably chosen to depart as much from precedent as it has from the arguments that the litigators presented before it?[115]

To be sure, the decision's defenders can suggest the possibility that it will alleviate the confusion and injustices sometimes imposed upon accountants, lawyers, investment bankers, and various other professionals, whose involvement in transactions subject to section 10(b) liability was marginal at best, but who nonetheless

113. 113 S. Ct. 2510 (1993).
114. *Id.* at 2517.
115. *See supra* note 100 and accompanying text.

had been classified as aiders and abettors.[116] Yet, by the same token, courts had attempted to shield minor players from aider and abettor liability under section 10(b). Thus, the court in *In re Gas Reclaimer, Inc. Securities Litigation*[117] held that there was "no evidence that . . . [a party's] relatively minor role . . . viewed in isolation proximately caused plaintiffs' allegedly ill-advised investment"[118] and that "acts of procuring indemnity agreements, bond applications, and primary insurance do not constitute assistance."[119] Under the aiding and abetting standard, courts were interested in manipulation and deception,[120] not in tangential involvement, but the new standard has the paradoxical effect of encumbering the tangential[121] in order to exempt the manipulative.

Hence, unlike the residents of Cervantes's Seville, who—to the thief's disgust—wrongly believed that they would earn Heavenly rewards despite their dissolute lives by performing religious rituals, the securities violators of twentieth century America will correctly realize that they can earn earthly rewards, precisely because of their dissolute lives, by performing civil rituals. Their salvation will come by pretending to aid and abet, when they are in fact actively engaging in securities fraud.

JAMES L. FUCHS

116. *See* IIT v. Cornfeld, 619 F.2d 909, 924 (2d Cir. 1980) ("One may indeed doubt whether plaintiffs will be able to demonstrate actual knowledge on the part of . . . three minor underwriters at a trial, but in the absence of a sufficiently supported motion for summary judgment on this subject, a course still open to the underwriter defendants, they are entitled to an opportunity to do this.").

117. 659 F. Supp. 493 (S.D.N.Y. 1987) (finding that an accountant's preparation of a compilation report without issuing opinion did not create duty to disclose).

118. *Id.*

119. *Id.*

120. *See* SEC v. Senex Corp, 399 F. Supp. 497 (E.D. Ky. 1975) (holding that party's "taciturnity intended to convey a particular—and erroneous—impression of the project's financial outlook").

121. *See supra* notes 84-85 and accompanying text.