

Corporate & Financial Weekly Digest

Posted at 12:06 PM on August 6, 2010 by [Bruce M. Sabados](#)

Ninth Circuit Addresses "Reckless Scierter" Requirement

The U.S. Court of Appeals for the Ninth Circuit affirmed a district court's partial grant of summary judgment in favor of plaintiff, the Securities and Exchange Commission, finding that defendants violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 by issuing a fraudulent press release.

The SEC alleged that defendants' press release, which stated that a new technology system was being "unveiled," was false because at the time the press release was issued, the company had no prototypes for the system built, or even the money to build one. The district court granted summary judgment for the SEC on this claim.

On appeal, defendants contended that the statement was not issued with "reckless scierter" as required under Section 10(b). The Ninth Circuit held that scierter requires either "deliberate recklessness" or "conscious recklessness" that includes "a subjective inquiry" turning on "the defendant's actual state of mind," and that evidence showing that the defendants did not appreciate the gravity of the risk of misleading others is relevant. The court also found that a defendant ordinarily will not be able to defeat summary judgment by the mere denial of subjective knowledge of the risk that a statement could be misleading. Though summary judgment is generally inappropriate when mental state is an issue, a defendant with knowledge of the relevant facts cannot manufacture a genuine issue of material fact by denying what a reasonable person would have known.

Applying this standard, the court found that defendants knew that the company had not produced a complete, field-tested system, and the press release left the "unmistakable impression" that the new system existed. Because no reasonable juror could conclude that defendant was not conscious of the risk that the press release would be misinterpreted, the court held that there was no issue of material fact that the press release was materially misleading and issued with deliberate recklessness. (*Securities and Exchange Commission v. Platforms Wireless Int'l Corp.*, 2010 WL 2902393 (9th Cir. July 27, 2010))