Cooley

Dissemination of One's Own Misstatements Does Not Create Scheme Liability, Says New York Court

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On July 16, 2025, the US District Court for the Eastern District of New York dismissed a scheme liability claim in an enforcement action brought by the US Securities and Exchange Commission (SEC) against a company's former chief financial officer (CFO). The SEC alleged that the CFO engaged in "deceptive conduct" by disseminating his own alleged misstatements to investors as part of a scheme to fundraise for the company. The court held that while the SEC's allegations supported misstatement claims, the act of "sending **one's own** false statements to others" cannot form "the sole basis for scheme liability."

In addressing this "unsettled securities-fraud question" regarding scheme liability, the court observed that some district courts have come out the other way (i.e., held defendants liable for a scheme claim for disseminating their own misstatements). It remains to be seen how courts will answer this question going forward.

Background

The defendants in this SEC enforcement action include the former CEO, CFO and a manager for Medly Health (which has since ceased operations). The company operated as a digital pharmacy, reporting "nine-figure revenues earned by selling prescription medications and receiving payments from patients or their insurance companies." According to the SEC's complaint, those revenue figures were deceptive because the manager entered hundreds of fictitious prescriptions into Medly's pharmacy-management system, often billing those prescriptions to nonexistent insurers. The SEC alleged that the manager "created at least $70 million in fake revenue" and that the CEO and CFO used the inflated figures in fundraising materials.

The CFO moved to dismiss the SEC's misstatement and scheme liability claims, and the manager moved to dismiss the SEC's scheme liability and aiding-and-abetting claims.

The court denied the motions to dismiss – with one exception

First, addressing the misstatement claim against the CFO, the court found that the SEC's complaint stated a claim because the CFO allegedly "provided financial statements to potential investors containing revenue numbers he, at the very least, strongly suspected were inaccurate." The court rejected the CFO's argument that because he did not know about the manager's conduct, he could not "recklessly make a false statement about an unknown fact." The court found that the complaint contained sufficient allegations indicating that the CFO "knew that Medly's revenue was misstated, even if he didn't know the cause or extent."

As to the scheme liability claims, the court held that, while the complaint "sets forth a textbook scheme-liability claim against " for entering fake prescriptions to inflate Medly's revenue, it failed to allege a scheme liability claim against the CFO for disseminating his own false statements. With respect to the latter, the court briefly examined scheme liability jurisprudence:

- In the 2005 case *Lentell v. Merrill Lynch*, the US Court of Appeals for the Second Circuit held that "alleged misrepresentations or omissions" cannot form the "sole basis" for scheme liability.
- Fourteen years later, in *Lorenzo v. SEC*, the US Supreme Court held that scheme liability could be based on disseminating a misstatement made by someone else – specifically, that it could be found where a defendant "email to a client a false statement made by his employer" – because dissemination "fell within the 'wide range of conduct' captured by the terms 'device,' 'scheme,' and 'artifice to defraud.'"
- Three years after that, the Second Circuit sought to harmonize *Lentell* and *Lorenzo* in *SEC v. Rio Tinto*, holding that "an actionable scheme liability claim … requires 'something **beyond**' misstatements and omissions, such as dissemination."

The Eastern District of New York noted that the Medly case raised a question "left unanswered" by *Rio Tinto*, namely, "can the act of sending **one's own** false statements to others form the sole basis for scheme liability?" The court recognized that two cases in the Southern District of New York had reached opposite conclusions on this issue. Relying

on the dictionary definition of “statement” and the Supreme Court’s definition of what it means to “make” a statement (from *Janus Capital Group v. First Derivative Traders*), the Eastern District found that “‘disseminating’ one’s own misstatement is equivalent to ‘making’ a misstatement” because “the disseminator communicates false information over which he has full control and authority.” As such, “relaying to investors own misstatement cannot be ‘something beyond’ the misstatement.”

The court also observed that scheme liability claims are not subject to the Private Securities Litigation Reform Act of 1995 (PSLRA), which sets heightened pleading standards for misstatement claims. Therefore, if dissemination of one’s own misstatements could form the basis of a scheme liability claim, private plaintiffs would be able to escape the PSLRA’s heightened pleading standards by focusing their complaint on the “dissemination” of misstatements rather than the misstatements themselves.

Lastly, the court found that the SEC had stated an aiding-and-abetting claim against the manager, reasoning that his false prescriptions “make him primarily liable for scheming to defraud investors and secondarily liable for the false statements made by .”

Key takeaways

- A viable scheme liability claim requires “something beyond” misstatements and omissions. Disseminating someone else’s misstatements could meet the “something beyond” standard, but disseminating one’s own misstatements should not.
- While this case is an SEC enforcement action, the court’s decision also has significant implications for securities actions brought by private plaintiffs. By rejecting scheme liability based solely on a defendant’s dissemination of their own misstatements, the decision closes a potential end-run around the PSLRA’s heightened pleading standards for misstatements.

SEC v. Amah, 2023 WL 6386956, at *14 (S.D.N.Y. Sept. 28, 2023) (holding a defendant liable under the scheme subsections for “directly disseminating” his own misstatements); *In re CarLotz, Inc. Securities Litigation*, 2024 WL 3924708, at *4 (S.D.N.Y. Aug. 23, 2024) (“issemination … does not include sending one’s own false statements to prospective investors.”).

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