The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION MAY 2023

Editor's Note: The Rules Are Getting Tighter and Tighter
Victoria Prussen Spears

A New "Operation Choke Point"? The Quickly Constricting Rules on Crypto Activities for Banks
Douglas Landy, Glen R. Cuccinello, Leel Sinai and Chante Eliaszadeh

Federal Deposit Insurance Corporation Continues Rulemakings Related to Misrepresentation in Advertising: Digital Asset Businesses Still in the Crosshairs
Hugh C. Conroy Jr., Brandon Hammer, Megan Lindgren and Richard Bae Gong

Financial Crimes Enforcement Network Proposes Rule on Access to Beneficial Ownership Information
Richard M. Alexander, Marcus A. Asner, James W. Cooper, David F. Freeman, Jr., Michael A. Mancusi, Kevin M. Toomey, Christopher L. Allen, Erik Walsh and Rebecca A. Caruso

New Legislation to Expand Privacy Obligations of Financial Institutions Introduced in Congress
Kirk J. Nahra, Peter G. Machtiger and Ali A. Jessani

Core Considerations for Out-of-Network Buy Now, Pay Later Payments
Evan R. Minsberg and Maria B. Earley

Foreclosure Abuse Prevention Act – Due Process Considerations
Morgan R. McCord

How the U.S. Supreme Court's Upcoming Decision in *Slack v. Pirani* May Tilt the Legal Playing Field Between Investors and Issuers
Douglas Baumstein, John Condon, Patrick McDonough and Aaron Megar

THE BANKING LAW JOURNAL

VOLUME 140 **NUMBER 5** **May 2023**

Editor's Note: The Rules Are Getting Tighter and Tighter
Victoria Prussen Spears 219

A New "Operation Choke Point"? The Quickly Constricting Rules on Crypto Activities for Banks
Douglas Landy, Glen R. Cuccinello, Leel Sinai and Chante Eliaszadeh 222

Federal Deposit Insurance Corporation Continues Rulemakings Related to Misrepresentation in Advertising: Digital Asset Businesses Still in the Crosshairs
Hugh C. Conroy Jr., Brandon Hammer, Megan Lindgren and Richard Bae Gong 236

Financial Crimes Enforcement Network Proposes Rule on Access to Beneficial Ownership Information
Richard M. Alexander, Marcus A. Asner, James W. Cooper, David F. Freeman, Jr., Michael A. Mancusi, Kevin M. Toomey, Christopher L. Allen, Erik Walsh and Rebecca A. Caruso 245

New Legislation to Expand Privacy Obligations of Financial Institutions Introduced in Congress
Kirk J. Nahra, Peter G. Machtiger and Ali A. Jessani 250

Core Considerations for Out-of-Network Buy Now, Pay Later Payments
Evan R. Minsberg and Maria B. Earley 255

Foreclosure Abuse Prevention Act – Due Process Considerations
Morgan R. McCord 259

How the U.S. Supreme Court's Upcoming Decision in *Slack v. Pirani* May Tilt the Legal Playing Field Between Investors and Issuers
Douglas Baumstein, John Condon, Patrick McDonough and Aaron Megar 263

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Matthew T. Burke at .... (800) 252-9257
Email: .... matthew.t.burke@lexisnexis.com

Outside the United States and Canada, please call .... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at .... (800) 833-9844
Outside the United States and Canada, please call .... (518) 487-3385
Fax Number .... (800) 828-8341

Customer Service Website .... http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call
Your account manager or .... (800) 223-1940
Outside the United States and Canada, please call .... (937) 247-0293

ISBN: 978-0-7698-7878-2 (print)
ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2023 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

(2023–Pub.4815)

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF
STEVEN A. MEYEROWITZ
President, Meyerowitz Communications Inc.

EDITOR
VICTORIA PRUSSEN SPEARS
Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS
BARKLEY CLARK
Partner, Stinson Leonard Street LLP

CARLETON GOSS
Partner, Hunton Andrews Kurth LLP

MICHAEL J. HELLER
Partner, Rivkin Radler LLP

SATISH M. KINI
Partner, Debevoise & Plimpton LLP

DOUGLAS LANDY
Partner, White & Case LLP

PAUL L. LEE
Of Counsel, Debevoise & Plimpton LLP

TIMOTHY D. NAEGELE
Partner, Timothy D. Naegele & Associates

STEPHEN J. NEWMAN
Partner, Stroock & Stroock & Lavan LLP

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2023 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

How the U.S. Supreme Court's Upcoming Decision in *Slack v. Pirani* May Tilt the Legal Playing Field Between Investors and Issuers

By Douglas Baumstein, John Condon, Patrick McDonough and Aaron Megar*

In this article, the authors review in detail Slack Technologies, LLC v. Pirani – a case currently before the U.S. Supreme Court with potentially far-reaching consequences.

For individual investors purchasing corporate securities on the public markets, Section 11 of the Securities Act of 1933 (the Securities Act) and Section 10(b) of the Securities & Exchange Act of 1934 (the Exchange Act)(and Rule 10b-5 promulgated thereunder) are the primary bases to seek redress for misstatements in connection with the purchase or sale of a security. Those statutes, however, operate under differing frameworks that reflect the fundamental economic differences between the underlying transactions they cover.

Section 11 focuses on company stock offerings and holds issuers strictly liable for making "an untrue statement of a material fact or omitt[ing] to state a material fact required . . . to make the statements therein not misleading"[1] in a registration statement provided that the investor can trace its purchase back to the offering.

On the other hand, Section 10(b) focuses on exchange transactions made on secondary markets and holds issuers and officers liable for making material misstatements or omissions only if those misstatements or omissions were made with an intent to deceive, manipulate or defraud (that is, with scienter) in connection with the purchase or sale of a security, upon which the plaintiff relied and pursuant to which the plaintiff suffered a loss caused by the material misrepresentation or omission.

The separate liability standards reflect the differing purposes of the two statutes and the economic realities of the transactions they are designed to cover. Applying strict liability under Section 11 makes sense in the context of public offerings because the issuer receives a direct economic benefit in the form of capital raised from the offering that relates directly to the contents of its registration statement. Plainly, where an issuer receives a direct economic

* The authors, attorneys with Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., may be contacted at dbaumstein@mintz.com, jcondon@mintz.com, pemcdonough@mintz.com and armegar@mintz.com, respectively.

[1] 15 U.S.C. § 77k.

benefit as a result of a misrepresentation, even if innocent or negligent, it should not be enriched at the expense of an investor that is ignorant of such misstatement.

By contrast, Section 10(b) and Rule 10b-5 are antifraud provisions, designed to penalize fraud that may affect transactions on impersonal markets, but where the speaker does not (or is extremely unlikely to) receive proceeds directly from the underlying transaction. Rather, in a typical Section 10(b)/Rule 10b-5 claim, an unknown seller of securities is likely to be the unwitting beneficiary of a transaction where the value of shares is inflated by a material misrepresentation. The lack of direct economic benefit in an exchange transaction helps explain why Section 10(b) and Rule 10b-5 require a showing of fraudulent intent and issuers are not strictly liable for misstatements or omissions.

In *Slack Technologies, LLC et al. v. Pirani*,[2] the U.S. Supreme Court granted certiorari to defendants in a case that, unless overturned, has the potential to upend the economic theory and congressional intent that underlie the strict liability regime in place for Section 11 claims.

Slack addresses whether the requirement under Section 11 that a plaintiff trace its purchase in an offering to the misleading registration statement should apply to direct listings. In a direct listing, the registration statement often applies only to some, but not all, of the company's shares offered to investors. Unlike in initial public offerings (IPOs), where all shares sold into the market are traceable to the offering because unregistered shares are contractually prohibited from trading during the IPO and immediately thereafter because of customary lock-up periods, direct listings pose an obstacle for shareholders seeking to trace the securities they purchased in the market. In a direct listing, unregistered shares are often sold into the market pursuant to Rule 144 of the Securities Act, thereby co-mingling registered and unregistered shares in the market at the same time, rendering tracing nearly impossible.

In light of the differences between a direct listing and an IPO and the policy decisions that animate the different legal frameworks provided under Section 11 of the Securities Act and Section 10 of the Exchange Act, strict liability should not apply to direct listings where the plaintiff cannot trace its purchase to a materially misleading registration statement.

Rather, if investors cannot trace their shares to the offending registration statement, they should be required to show scienter under Section 10 to recover for any misstatements.

[2] Slack Technologies, LLC et al. v. Pirani, No. 22-200.

SLACK TECHNOLOGIES, LLC V. PIRANI

In a case with potentially far-reaching consequences, the Supreme Court is set to address the applicability of the tracing requirement under Section 11 to direct stock listings. In *Slack*, an investor, Pirani, brought Section 11 claims in the U.S. District Court for the Northern District of California challenging statements Slack made in a registration statement in advance of its direct listing. Slack had gone public on June 20, 2019, opting to do so by a direct listing rather than the more common IPO. For the direct listing, over 290 million shares became available for sale to the public, but only 118,429,640 were offered pursuant to the registration statement that Slack filed. By way of an SEC-authorized exemption, the remaining shares were unregistered and could lawfully be sold without registration.

Direct listings, like the one pursued by Slack, are more similar to a typical market exchange of shares than they are to an IPO. In a typical direct listing, a previously private company allows its private shareholders to sell their shares on the public market.[3] Among these private shareholders are affiliates of the issuer, defined by SEC Rule 144 as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer."[4] Generally, in order for these affiliate shareholders to be able to sell their shares, the sale must be registered. Non-affiliates, on the other hand, may sell their shares in a private or newly public company without registration if they have held them for one year. Therefore, as happened in *Slack*, companies in direct listings register at least some of their shares in order to allow their affiliate shareholders to sell shares on the public market, creating a mix of registered and unregistered shares entering the market at the same time. In effect, the issuer takes itself public without necessarily selling shares directly to the public in exchange for capital. This is distinct from an IPO for many reasons, including that the issuer does not receive the benefit of any (or at least all) of the capital proceeds from the transactions. In that way, direct listings are similar to the typical transaction on an open-market exchange where unknown buyers and sellers buy and sell securities at a market-clearing price.

---

[3] A New York Stock Exchange rule, proposed in April 2022 and approved by the Securities and Exchange Commission on December 15, 2022, permits a company to issue primary shares directly at the same time (though to date, no company appears to have taken advantage of this option). https://www.sec.gov/rules/sro/nyse/2022/34-96514.pdf.

[4] 17 C.F.R. § 230.144. The SEC typically defines "control" as "the power to direct the management and policies of the company in question, whether through the ownership of voting securities, by contract, or otherwise." Off. Of Inv. Educ. & Advoc., U.S. Sec. & Exch. Comm'n, Rule 144: Selling Restricted and Control Securities (2013).

Three months after Slack's direct listing, Pirani commenced a class action lawsuit under, inter alia, Section 11 of the Securities Act, claiming that he and similarly situated investors had suffered financial losses after purchasing shares of Slack that were issued pursuant to a materially misleading registration statement. Specifically, Pirani alleged that Slack's registration statement was misleading because it did not disclose that Slack was obligated to pay all customers service credits whenever Slack's service was disrupted and failed to disclose the frequency of these disruptions. Pirani also alleged that the registration statement downplayed the competition that Slack was facing from Microsoft Teams.[5]

On a motion to dismiss, Slack argued that Pirani could not establish standing because he purchased shares in the open market subsequent to a direct listing in which both registered and unregistered shares were being sold at the same time, so there was no way for Pirani to distinguish whether he bought from the pool of registered or unregistered shares. Accordingly, Slack argued that Pirani had no ability to trace those shares back to the purportedly false registration statement as required under Section 11 and the claim should be dismissed.

The district court denied Slack's motion to dismiss and rejected Slack's argument, finding that the plaintiff could sufficiently trace his shares to the allegedly misleading registration statement, notwithstanding the existence of market-exchanged unregistered shares that were also sold at the time of the direct listing. The district court reasoned that in the context of a direct listing where all shares purchased were "of the same nature," regardless of whether they were registered, they were all purchased "pursuant to" i.e., traceable to the registration statement.[6] On a motion from Slack, the district court certified its order for interlocutory appeal to the U.S. Court of Appeals for the Ninth Circuit.

THE NINTH CIRCUIT'S DECISION

The Ninth Circuit, over Judge Miller's dissent, affirmed the district court on different grounds, holding that because all Slack shares could only be offered and acquired once the registration statement was made effective, even the unregistered shares could not have entered the market prior to registration. The court stated: "Slack's unregistered shares sold in a direct listing are 'such securities' within the meaning of Section 11 because their public sale cannot occur without the only operative registration in existence."[7] The Ninth Circuit

[5] Pirani v. Slack Techs., Inc., 13 F. 4th 940, 944 (9th Cir. 2021).

[6] Pirani v. Slack Techs., Inc., 445 F. Supp. 3d 369, 381 (N.D. Cal. 2020).

[7] Pirani v. Slack Techs., Inc., 13 F. 4th 940, 947 (9th Cir. 2021).

determined that this was sufficient to demonstrate that purchasers of all shares in the direct listing could trace their shares back to the registration statement.

The Ninth Circuit offered a policy-based justification for its ruling, reasoning that applying the rigid tracing requirement for which Slack advocated would allow issuers to avoid all potential Section 11 liability by going public through a direct listing instead of an IPO.

According to the majority, because registered shares and unregistered shares in a direct listing "are released to the public at once" without a lock-up period, "interpreting Section 11 to apply only to registered shares in a direct listing context would essentially eliminate Section 11 liability for misleading or false statements made in a registration statement in a direct listing for both registered and unregistered shares."[8] The court went on to suggest that such a ruling would incentivize companies to use direct listings instead of IPOs: "from a liability standpoint it is unclear why any company, even one acting in good faith, would choose to go public through a traditional IPO if it could avoid any risk of Section 11 liability by choosing a direct listing."[9]

After an unsuccessful petition for en banc review, Slack petitioned for a writ of certiorari to the Supreme Court, on the question of "[w]hether Sections 11 and 12(a)(2) of the Securities Act of 1933 require plaintiffs to plead and prove that they bought shares registered under the registration statement they claim is misleading."[10] The U.S. Supreme Court granted certiorari.

THE DIFFERING LIABILITY REGIMES UNDER SECTION 11 AND SECTION 10(b)

In order to understand the stakes at issue in *Slack*, it is important to examine the various securities regulation regimes that protect investors. Section 11 of the Securities Act imposes strict liability upon any issuer that makes a material misstatement or omission within a registration statement (i.e., there is no requirement to prove that a misleading statement or omission was made with intent, recklessness, or negligence).[11] The strict liability created by Section 11 reflects its congressional focus as a disclosure statute. The Preamble to the Securities Act describes the law's intent as "[t]o provide full and fair disclosure

---

[8] Id. at 948.

[9] Id.

[10] Petition for a Writ of Certiorari at i, Slack Techs., Inc. v. Pirani, 143 S. Ct. 542 (No. 22-200).

[11] Plaintiffs can bring claims against underwriters and directors under Section 11 as well, but the statute holds these defendants to a negligence standard and allows them to raise an affirmative defense that they acted with due diligence with respect to any misstatement or omission.

of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof."[12] The Securities Act thus has the dual purpose of encouraging disclosure and weeding out fraud.

However, as the structure of the statute makes clear, only Section 17 of the Securities Act explicitly addresses fraud, with the rest of the statute focusing on "full and fair disclosure." With its focus on disclosure, the intent of Section 11 was to ensure that required disclosures are accurate when made and can be relied upon by the investing public, not to penalize the issuer for wrongdoing. As the Supreme Court observed, Section 11 "was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering."[13] Thus, Section 11 requires no showing of an issuer's culpability for a misstatement or omission; its focus is on ensuring certain information is disclosed to the marketplace.

In contrast, Section 10 of the Exchange Act makes clear in its title, the "Regulation Of The Use Of Manipulative And Deceptive Devices," that it is focused on misconduct and culpable fraudulent behavior. The Exchange Act's scope is broader than the Securities Act, as it addresses all purchases and sales of securities, not merely those in offerings. Under Section 10(b) and Rule 10b-5, Congress (and the SEC promulgating Rule 10b-5) focused on defining and penalizing fraudulent misconduct. As a result, Section 10 is indifferent to whether an investor purchased in an offering or in the secondary market and if the misstatement is in the registration statement or any other public statement. However, in light of the punitive and conduct-regulating nature of Section 10, the statute requires a showing that a misstatement or omission was made with scienter in the form of an intent to deceive or some form of elevated recklessness.[14]

---

[12] Securities Act of 1933, 15 U.S.C. §§ 77a-77mm.

[13] Herman & MacLean v. Huddleston, 459 U.S. 375, 381-82 (1983).

[14] Although the Supreme Court "ha[s] not [yet] decided whether recklessness suffices to fulfill the scienter requirement," Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 48 (2011), it has assumed it does. The appellate courts have, for example, variously described the necessary state of mind as including "a high degree of recklessness," ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 58 (1st Cir. 2008), "severe recklessness," Edward J. Goodman Life Income Tr. v. Jabil Cir., Inc., 594 F.3d 783, 790 (11th Cir. 2010); "conscious recklessness," S. Cherry St., LLC v. Hennessee Grp., 573 F.3d 98, 109 (2d Cir. 2009), and "deliberate recklessness." S. Ferry LP v. Killinger, 542 F.3d 776, 782 (9th Cir. 2008).

SECTION 11'S TRACING REQUIREMENT SOFTENS ITS STRICT LIABILITY REGIME

Strict liability regimes of the type established by Section 11 are harsh and have potentially far-reaching consequences. One way in which the statute has softened the harshness of strict liability under Section 11 is by imposing a "tracing" requirement for plaintiffs to establish standing. Pursuant to Section 11, if "any part of the registration statement . . . contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein . . . , any person acquiring *such security* [may] . . . sue."[15]

Based on the language limiting Section 11 to "such security" subject to a registration statement, since at least Judge Friendly's 1967 decision in *Barnes v. Osofsky,* federal courts have required that a Section 11 plaintiff show that the shares it purchased were among those registered under the purportedly false registration statement and not unregistered or previously registered shares.[16]

Judge Friendly found further support for this interpretation when viewing Section 11 as part of the greater statutory scheme created under the Securities Act and Exchange Act. As Judge Friendly wrote, because "only individual shares are registered, it seems unlikely that the section developed to insure proper disclosure in the registration statement was meant to provide a remedy for other than the particular shares."[17] Moreover, the statute's legislative history limits Section 11 recovery to "*the buyer of securities sold upon a registration statement*."[18]

Additionally, when comparing the "such security" language in Section 11 to the language used in the antifraud provisions in the Securities Act (Section 17) and the observation that Section 10(b) of the Exchange Act "would not simply duplicate a remedy already given by §11 of the 1933 [Securities] Act," the intent to limit the scope of Section 11 to shares directly traceable to a particular registration statement becomes more apparent. For example, whereas Section 11 limits claims to owners of "such security," Section 17 of the Securities Act prohibits fraud "in the offer or sale of *any securities*," and Section 10(b) of the Exchange Act similarly addresses misstatements and omissions "in connection with the purchase or sale of *any security*."[19] Following this reasoning, "every

---

[15] 15 U.S.C. § 77k (emphasis added).

[16] *E.g.*, Barnes v. Osofsky, 373 F.2d 269 (2d Cir. 1967); In re ARIAD Pharms. Sec. Litig., 842 F.3d 744 (1st Cir. 2016); Cal. Pub. Emps.' Ret. Sys. V. Chubb Corp., 394 F.3d 126 (3d Cir. 2004).

[17] Barnes v. Osofsky, 373 F.2d 269. 272 (2d Cir. 1967).

[18] Id. at 273.

[19] 15 U.S.C. § 77q; 15 U.S.C. § 78j (emphasis added).

court of appeals to consider the issue" prior to *Slack* has agreed that the language regarding "such security" requires that a plaintiff trace its purchase to the offending registration statement.[20]

Tracing, of course, can be successfully demonstrated in certain circumstances. In a traditional IPO, proving tracing is relatively easy, as unregistered shares issued prior to the IPO are typically subject to a "lock-up" period that prevents private shareholders from selling their unregistered shares right after the IPO. Because in a traditional IPO only registered shares issued by the company pursuant to the registration statement are traded in the public market for a period following the offering, all shares purchased in the open market are readily traceable to the IPO registration statement.

By contrast, it is very difficult to trace shares bought in a secondary or follow-on offering because, unless the investor can show it purchased shares from the underwriter, issuer or selling shareholder on the day of the offering, it is functionally impossible to know if the investor purchased newly issued or pre-existing shares.[21] The tracing requirement is a high burden for plaintiffs to establish, and meaningfully so, because expanding Section 11 liability for purchases of shares not registered in a purportedly false registration statement would create potentially crippling liability for a company for even innocent mistakes as well as broaden the potential class of plaintiffs that could sue under Section 11.

Courts have acknowledged the harsh nature of strict liability under Section 11 and how the statute compensates for it by requiring tracing. As the dissenting judge in the *Slack* opinion in the Ninth Circuit noted: "Strict liability is strong medicine, so the statute tempers it by limiting the class of plaintiffs who can sue."[22] Other federal courts have noted the reason for the application of the tracing requirement:

> [R]igid application of the tracing requirement is a product of Congress' decision to balance the low-burden substantive proof [with a] high-burden standing requirement, and courts should not abrogate the congressional intent by expanding the 'virtually absolute' liability to

---

[20] Pirani v. Slack Techs., Inc., 13 F. 4th 940, 952 (9th Cir. 2021) (Miller, J., dissenting).

[21] In re Initial Pub. Offering Sec. Litig., 227 F.R.D. 65, 118 (S.D.N.Y. 2004) ("The modern practice of electronic delivery and clearing of securities trades, in which all deposited shares of the same issue are held together in fungible bulk, makes it virtually impossible to trace shares to a registration statement once additional unregistered shares have entered the market. Even where the open market is predominantly or overwhelmingly composed of registered shares, plaintiffs are not entitled to a presumption of traceability.")

[22] Pirani v. Slack Techs., Inc., 13 F. 4th 940, 952 (9th Cir. 2021) (Miller, J., dissenting).

> claims of purchasers whose securities cannot be traced.[23]

Courts have also rejected attempts to mitigate the tracing requirement, including by rejecting attempts to use statistical analysis to show the likelihood that shares are traceable to the registration statement.[24]

THE CONCEPT OF UNJUST ENRICHMENT ELUCIDATES SECTION 11'S STRICT LIABILITY REGIME

The rationale for Section 11's strict liability regime coupled with a tracing requirement is perhaps best understood through the lens of unjust enrichment. Unjust enrichment is often defined as "the receiving and retention of property, money, or benefits which in justice and equity belong to another."[25] In a typical IPO, the share price received by the company is directly dependent upon the disclosures in the registration statement. Accordingly, regardless of fault, if an offering is made upon a misleading registration statement, the issuer would receive an unwarranted benefit and windfall from a misstatement in the form of the capital raised directly from investors. Thus, when applied to an IPO with only traceable securities on the market, it is easy to see why strict liability makes sense for a Section 11 claim.

A hypothetical example helps illustrate this point. Let us assume Company XYZ (Company) intends to issue 10 million shares at $30 per share in its upcoming IPO. In its registration statement, as required, XYZ discloses its historical revenue. The IPO is successful so, excluding underwriter commissions, the Company raises $300 million. Now, let us assume that because of a technical accounting error, XYZ innocently overstated its annual revenue and that, had the Company correctly stated its revenue, XYZ's value would have been calculated lower and its shares would have been sold at $18 per share instead of $30. In that case, the Company has received $120 million more ($12 per share times 10 million shares) than it should have from the investing public because of a misstatement it made. As between the Company and the investing public, there can be little doubt that it would be unjust for the Company to benefit from an additional $120 million in IPO proceeds from investors that it

---

[23] In re FleetBoston Fin. Corp. Sec. Litig., 253 F.R.D. 315, 347 (D.N.J. 2008).

[24] Krim v. pcOrder.com, Inc., 402 F.3d 489, 494 (5th Cir. 2005) (rejecting claim that plaintiffs can demonstrate Section 11 standing "by proffering nothing more than statistics indicating a high mathematical probability . . . that at least some of their shares were issued pursuant to the challenged registration statement.").

[25] Unjust enrichment, Ballentine's Law Dictionary (3d ed. 2010).

would not have received but for its incorrectly reported revenue, regardless of any intent to mislead.[26]

If we take the same scenario and apply it to a direct listing, however, the illustration demonstrates why preservation of the tracing requirement is critical. Assume the same scenario above, but instead of issuing 10 million shares in an IPO priced at $30 per share, XYZ instead pursues a direct listing whereby it registers 3 million of its affiliate-owned shares pursuant to the same false registration statement and another 7 million unregistered shares (previously issued to other prior investors and employees) become available for sale. Although direct listings do not have a specific public offering price and all shares are unlikely to be traded immediately, for illustrative purposes, let us assume that the price of XYZ stock remains stable at $30 per share and the registered shares being offered by the selling shareholders are eventually sold. The sale of the 3 million registered shares by the affiliate-shareholders resulted in only $90 million of proceeds for the Company's affiliates; the Company received no direct economic benefit from the sale of the 7 million unregistered shares, for which the proceeds were received by non-affiliate shareholders, not the Company. Because the Company's affiliates should have received only $54 million (at $18 per share price) from the sale of the registered shares if it had correctly reported its revenue, XYZ's affiliates were unjustly enriched by $36 million as a result of the innocent misstatement and, if the shares could be traced and the purchasers identified (which may be impossible), there is little doubt that as between XYZ and its affiliates on the one hand, and the investors, on the other hand, fairness would prevent XYZ and its affiliates from retaining that $36 million benefit.

Under the Ninth Circuit's *Slack* ruling, however, in the absence of fraud, XYZ could potentially face $120 million in liability – far more money than its affiliates received in the direct listing. Moreover, such amounts would be owing to many shareholders who purchased from market participants other than Company or its affiliates and therefore did not provide the Company or its affiliates any direct benefit to which they, as an investor, have a superior claim.

Section 11's damages provisions further demonstrate that strict liability was not intended to create liability to the extent implied by the Ninth Circuit's *Slack* ruling. Section 11 limits an investor's recovery to:

> the difference between the amount paid for the security (not exceeding

[26] For anyone purchasing after the IPO but before the financial restatement, $12 of artificial inflation would have been embedded in the stock price, so the seller of shares would not be hurt by the company misstatement, but the new purchaser would be.

> the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought.[27]

The damages provision also limits the amount recoverable to the size of the offering: "In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public."[28] The result is that even if share-value plummets to $0, damages cannot exceed the amount of capital the issuer has raised through the offering.[29] In other words, Section 11 was structured in such a way as to consider the ill-gotten economic benefit to the issuer and not merely the injury suffered by investors.

Section 10(b) of the Exchange Act, because of its anti-fraud focus, works differently. If we take the same scenario for XYZ as before, the potential liability to the Company and its officers for misstating revenue cannot exceed $120 million, but the ultimate liability, assuming scienter can be proven, would be limited to those shareholders that purchased between the time of the misstatement and the corrective disclosure. While XYZ's inaccurately reported revenue caused the Company's stock price to be artificially inflated, it does not receive any direct enrichment in the terms of raised capital as a result. Rather, the Company's misstatement has affected transactions in an impersonal marketplace. In recognition, the Exchange Act contemplates that an aggrieved investor proceeding under Section 10(b) or Rule 10b-5 must prove scienter and cannot rely merely on a strict liability showing that there was a misstatement. The harsh damages under the Exchange Act fit its statutory purpose, which is to stamp out fraud in the securities marketplace. By contrast, the disclosure focus of Section 11 seeks to allocate the costs of incorrect disclosure to the party that benefitted from the disclosure, but only to the extent of such benefit.

---

[27] 15 U.S.C. § 77k(e).

[28] 15 U.S.C. § 77k(g). Section 11 also allows defendants to limit damages by proving "that any portion or all of such damages" was caused by something other than the misstatement made in the registration statement. 15 U.S.C. § 77k(e).

[29] Brief for Amicus Curiae The Honorable Jay Clayton & The Honorable Joseph A. Grundfest in Support of Petitioners at 11, Slack Techs., LLC v. Pirani, 143 S. Ct. 542 (No. 22-200).

THE STAKES AT ISSUE IN THE SUPREME COURT'S CONSIDERATION OF *SLACK*

The Supreme Court's upcoming decision in *Slack* has important ramifications to the primary statutory regimes that protect investors from misstatements made concerning securities purchases in the various markets. By eliminating the tracing requirement and expanding strict liability for direct offerings, the Ninth Circuit has implemented a scheme where the economic risks associated with strict liability are shifted to the company, even where it receives no direct benefit.

If *Slack* is affirmed, the Supreme Court will, at least for direct listings, upend the balance that has been struck between the investor-friendly strict liability showing under Section 11 and the requirement that an investor trace the purchased security to the offending registration statement in order to invoke strict liability. That balance results from the prevailing interpretation of the statutory language in Section 11, but also reflects fundamental issues of fairness that have long been recognized through the concept of unjust enrichment.

Conversely, a decision reversing the Ninth Circuit's *Slack* decision would be congruent with how the benefits and risks of Section 11 liability have been allocated between issuers and investors for nearly a century.

Moreover, a decision requiring that investors in a direct listing trace their securities to an offering does not leave investors unprotected against misstatements in registration statements. Rather, it merely places them in the same position as all investors that make purchases in the secondary markets of shares that cannot be traced to a particular registration statement. That is, Section 10(b)'s anti-fraud provisions will continue to protect investors that are the victims of fraud. For the orderly and consistent application of rules governing disclosures and fraud with respect to securities, this would be the better result.