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897 Credit Enhancement: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)
Robert D. Aicher, Deborah L. Cotton, and TK Khan
Billions of dollars of publicly issued debt securities are supported by financial instruments issued by third parties. The use of these instruments, letters of credit, guaranties, insurance and swaps, has carried with it a set of business assumptions concerning their performance. The first decision arising out of the Enron debacle, JPMorgan Chase Bank v. Liberty Mutual Ins. Co., 189 F. Supp. 2d 24 (S.D.N.Y. 2002), exposed the brutal fact that the legal principles underlying these instruments do not necessarily deliver the business results anticipated. This created a tremendous crisis of confidence in the public debt marketplace that remains unresolved. This Article is an attempt to compare these instruments side by side in the context of both their historical origins and their current use in the capital marketplace. The instruments' individual histories are used to explain why each instrument developed as it did, and that the legal principles that govern each instrument are entirely consistent with their respective historical roots. In addition, this Article makes specific recommendations regarding two relatively new instruments created by the insurance and investment banking industries: financial guaranty insurance and credit default swaps.

975 Misrepresentations of Secondary Actors in the Sale of Securities: Does In re Enron Square with Central Bank?
Aegis J. Frumento
When should a secondary actor to a securities fraud—like an accountant or a lawyer—be liable to the same degree as the primary culprit? Ever since the Supreme Court abolished aider and abettor liability for violations of section 10(b) of the Securities Exchange Act of 1934, courts have struggled to answer that question, and the struggle has led to competing standards. In the case of misrepresentations in connection with the purchase or sale of securities, the Courts of Appeal have split between those imposing liability on secondary actors who "substantially participate" in making a misrepresentation, and those who also require, as a "bright line" test, that the misrepresentation be publicly attributed to the secondary actor before the plaintiff makes his or her investment decision. The court hearing the cases arising from the Enron debacle adopted yet a third alternative, the so-called "creation" test, imposing liability on a secondary actor who, alone or with others, "creates" a misrepresentation. This Article explores the problem of misrepresentations by secondary actors in securities frauds, analyzes the competing standards of liability, traces the roots of the creation test, and argues ultimately that the crea-
tion test and the substantial participation test share deficiencies that the bright line test avoids.

1005  **Section 304 of the Sarbanes-Oxley Act of 2002: The Case for a Personal Culpability Requirement**

*John Patrick Kelsh*

Section 304 of the Sarbanes-Oxley Act imposes on chief executive officers and chief financial officers of public companies an obligation to disgorge certain compensation (i.e. trading profits, bonuses and equity-based compensation) that is earned in the twelve-month period following the first public issuance or filing of a financial document that the public company is subsequently required to restate due to its material noncompliance, as a result of misconduct, with any financial reporting requirement under the securities laws. On its face, section 304 provides no guidance on the question whether chief executive officers and chief financial officers are required to disgorge even if they have no personal culpability for the “misconduct” that gives rise to the need to restate. This Article considers that question. After estimating the frequency with which this question might arise in the post Sarbanes-Oxley era and reviewing the limited legislative history of section 304, the Article considers the normative question of how section 304 should be interpreted. Relying on statutory, constitutional and policy arguments, the author concludes that section 304 should be interpreted to require chief executive officers and chief financial officers to disgorge only when they have personal culpability for the misconduct that gives rise to the need to restate.

1043  **Windfall Awards Under PSLRA**

*Richard A. Booth*

Congress enacted the Private Securities Litigation Reform Act (PSLRA) to limit frivolous lawsuits under the federal securities laws. Among the many changes wrought by PSLRA was the imposition of a limit on damages in private securities fraud actions under the Exchange Act. Specifically, PSLRA limits damages in a case of bad news fraud to the difference between the purchase price and the average market price during the ninety-day period following corrective disclosure. As it turns out, this formula unduly encourages securities litigation in down markets by increasing the limitation on damage awards to the extent that the subject stock falls further after corrective disclosure either because of a general decline in the market or because of independent news about the company. Moreover, the PSLRA formula disproportionately enhances potential awards against growth companies whose stock prices tend to move by more than the market as a whole. In short, the PSLRA formula has increased the incentives for plaintiffs to sue particularly in down markets. Fortunately, because the Exchange Act also expressly limits awards to actual damages, the courts can avoid the ill effects of the PSLRA formula by adjusting the prices on which awards are calculated to filter out market events as well as independent company-specific news both before and after corrective disclosure.
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JUST WHO DO YOU THINK YOU'RE TALKING TO? THE MANDATE FOR EFFECTIVE NOTICE TO FOOD STAMP RECIPIENTS WITH MENTAL DISABILITIES

The Fourteenth Amendment's guarantee of due process of law demands that prior to depriving an individual of property, the state must provide notice that is reasonably calculated to apprise him or her of the pendency of the action. Title II of the federal Americans with Disabilities Act calls for reasonable modification of public services and programs to accommodate individuals with disabilities. This Note explores what these two legal mandates require of state practices for informing public benefit recipients of an impending reduction or termination of their benefits, in particular those recipients who have mental disabilities limiting their comprehension of written information. It addresses the problem of inadequate notice regarding changes in food stamp assistance levels, and looks at state and federal regulations as well as relevant case law on the subject, with a particular focus on New York State. It then examines a concrete example of a notice of change in food stamp benefits, and suggests modifications that might reasonably accommodate those with mental disabilities and increase the possibility that the notice actually apprises them of the impending action.

WE'LL ALWAYS HAVE PARISH: THE NINTH CIRCUIT DECISION AND ITS IMPLICATIONS FOR ENFORCEMENT OF THE FEDERAL SENTENCING GUIDELINES

In the recently decided United States v. Parish, the Ninth Circuit split from the holdings of the Fourth, Seventh, and Eighth Circuits and held that a district judge could consider the "nature of the offense" in deciding whether or not to depart from the Federal Sentencing Guidelines. Since Parish, Congress passed the Feeley Amendment, which significantly reshaped the landscape of sentencing within the federal system. This Note argues that the Ninth Circuit rendered the proper decision in Parish. By permitting consideration of the nature of the offense in combination with other factors, courts can better assess whether a prisoner's susceptibility to abuse renders him "outside the heartland." The Note then argues that despite the significant changes in the sentencing landscape since the adoption of the Feeley Amendment, courts should still consider the nature of the offense in combination with other factors. Lastly the Note considers possible ways for the Sentencing Commission to resolve the circuit split, given the limitations imposed by the Feeley Amendment.
THE RIGHT TO REPLY: A CONFLICT OF FUNDAMENTAL RIGHTS

A “right to reply” affords people who feel they have been unfairly criticized or defamed by a media outlet the right to respond and have published, in the same media outlet, their side of the issue. In an attempt to reconcile the pertinent and oftentimes contradictory American case law concerning such a right, this Note argues that the United States should provide, as a remedy available to plaintiffs in successful defamation suits, the right to reply to published or broadcast defamatory statements. Similar to such reply rights offered in several European nations, the publisher or broadcaster should be required to publish or air the victim’s reply free of charge, affording it the same prominence as the defamatory statements themselves, and within a reasonable amount of time. The Note argues that, contrary to what several American courts have held, such a right to reply is deeply rooted in the Constitution, and especially relevant in light of modern economic, cultural, and technological conditions. Though the freedom of the press may to some extent be compromised, the value derived from protecting the victim’s freedom of speech, the victim’s reputation, and the right of the listener/viewer to receive such information overrides this competing interest, and thus justifies the right to reply as a remedy in a defamation suit.

THE PARTY’S OVER: WHY THE ILLICIT DRUG ANTI-PROLIFERATION ACT ABRIDGES ECONOMIC LIBERTIES

Ecstasy has spread more rapidly than any other drug in history, especially within “rave” and nightclub culture, a culture of flashing lights and loud dance music. To curb the use of the drug, Congress passed the Illicit Drug Anti-Proliferation Act (2003), an amendment to the federal Crack House Statute. Armed with this amended statute, federal prosecutors have begun to target rave and nightclub owners. The hope is that as these music promoters fear prosecution, they will cease to hold rave events, limiting the availability of venues for ecstasy use. The problem with this approach is that it violates the economic liberties of legitimate rave and concert promoters. This argument is two-fold. First, the amendment does not circumvent prior case law limiting the statute’s application to actual crack houses, and not legitimate businesses. Second, insofar as Congress intended the amendment to supplant all of the limiting constructions, the amendment oversteps the Lopez formulation of Congress’ Commerce Clause power because it lacks formal congressional findings linking rave promotion to economic drug activities, such as interstate drug trafficking. Against this backdrop, this Note also illustrates the courts’ willingness to uphold questionable drug statutes, betraying an obvious policy force in government. Finally, this Note suggests that drug-related youth subcultures will always receive less constitutional protection than mainstream art and music movements.
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