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Pleading Standards Writing a Blank Check: Revisiting the Second Circuit's Pleading Standards of Securities Exchange Act Section 20(a) in the Rise of SPAC Litigation*Melissa Perez*50 Rutgers L. Rec. 1 (2022) | WestLaw | LexisNexis

A board of directors of a promising music streaming corporation has decided they want to raise capital publicly quickly and without the regulatory nets of an initial public offering. Instead, the corporation acquires a publicly traded shell company and becomes listed on - secondary markets, including Nasdaq. This process is known as acquiring or merging with a Special Purpose Acquisition Company (SPAC).2 In doing so, investors continue pouring millions of dollars into the corporation with high hopes of positive returns.3 However, it turns out that the corporate officers have not been entirely honest about the music corporations' stability and success; they misrepresented financial results by falsifying its number of subscribers to the streaming market. Outraged, the investors decide to file suit against the corporation in the State of New York alleging, among other violations, that the corporate officers are responsible for securities fraud. Will these corporate officers be held liable for their misrepresentations? The answer: it depends.

This scenario is based on a SPAC litigation in one of the district courts in the Second Circuit, and is one of many that may determine the future of secondary liability in business combination cases.4 Section 20(a) of Securities Exchange Act of 1934 provides that a person, typically a corporate officer or director, who ?controls? another person who is found liable for securities fraud, is jointly and severally liable, ?unless the controlling person acted in good faith and did not directly or indirectly induce? the violation.5 When analyzing Section 20(a) cases, courts across the justice system implement one of two differing tests: the majority's ?potential control? test or the minority's ?culpable participant? test. Specifically, within the Second Circuit, courts utilize varying interpretations of the minority's culpable participant test, but most importantly, they apply differing pleading standards that may affect the liability of a corporate officer.6

The difference between the pleading standards of the culpable participant test within the Second Circuit, while minor, have varying degrees of clarification. Some district courts in the Second Circuit require pleading facts that support an individualized inference of the control person's scienter, whereas others have reasoned that such allegations require a pleading with particularized facts about the control person's actions.7 For instance, in this scenario with the music streaming corporation, one district court could find the fact that a corporate officer's discussion of false financial profitability is proof of scienter, but another district court may determine that such fact alone is insufficient to determine a ?controlling person's? conscious misbehavior to satisfy the scienter requirement.8 In essence, the competing standards of pleading could determine a corporate officer's freedom or imprisonment, depending on which court he or she sits in.

The pleading standards between the majority and minority tests disrupted uniformity not only across all Circuits, but explicitly, the Second Circuit's contradicting pleading standards resulted in inconsistent liability standards within itself as the Second Circuit battles its own precedent. Again, some district courts within the Second Circuit require pleading facts that support an individualized inference of the control person's scienter, but others reasoned that such allegations require a pleading with particularized facts about the control person's actions instead.9 Additionally, a minority of district courts in the Second Circuit removed the ?culpable participation? prong entirely from the pleading standard requirements, leaning towards the majority's potential control test instead.10 Thus, courts wrestled the idea of what level of control is required for a corporate officer to be found in violation of Section 20(a).11

This Note will analyze the evolution of the tug-of-war between district courts in the Second Circuit that inconsistently apply the varying pleading standards and competing tests to suggest the most effective standard. To illustrate the implications of the varying tests, this note will also address the potential influence of the Second Circuit's inconsistent rulings to secondary liability exposure under Section 20(a) of the Exchange Act relating to SPAC litigation. First, Part I describes the overall history of secondary liability, including the clarifications sought by courts and the SEC to define what constitutes ?control? under Section 20(a).

Next, Part II seeks to uncover the elements of a Section 20(a) claim by providing the distinction in Section 20(a) competing analyses between the test most circuit courts use, the potential control test, against that which a minority uses, the culpable participant test.

Furthermore, this part reveals the competing pleading standards faced by the Second Circuit in Section 20(a) allegations. Specifically, this section demonstrates how differing liability can result when some district courts in the Second Circuit continue to require scienter as a pleading requirement element of a culpable participant, and others continue to allow plaintiffs to produce scienter only when the defendant is attempting to show a good faith defense.

Then, Part III delves into the unprecedented rise of SPACs together with the increase in SPAC litigation and legal debates surrounding regulation. This section reflects on how the Second Circuit's split on Section 20(a) will affect the outcome of pending SPAC litigation, using examples to demonstrate varying outcomes based on the competing pleading standards.

Lastly, Part IV concludes the Second Circuit's need for uniformity for the sake of Section 20(a) claims, especially in the face of SPAC litigation, by formally adopting the potential control test. However, if the Second Circuit continues to follow the minority test of a culpable participant test, then this section argues how a pleading standard rejecting the heightened form of scienter would align most with the intent of Section 20(a) and the majority of circuit courts.

2 Note that a SPAC/de-SPAC process includes a more complex procedure before a final merger. ?SPACs exist before a deal; many are actively searching for companies they wish to acquire. When a SPAC identifies a potential match, they'll begin the acquisition process . . . [then,] the SPAC undertakes the due diligence to verify that the company is presenting itself accurately; there are also target valuation considerations from the NASDAQ and NYSE. The de-SPAC transition process officially begins once the formal merger is announced. Once a merger agreement is signed, the deal is announced publicly and investors are notified.? After such processes, the business files an S-4 statement with the SEC to trigger the next phases of the de-SPAC transition for the newly created entity. Craig Clay, What is a De-SPAC Transaction? DONNELLY FIN. SOLUTIONS (May 3, 2021), https://www.dfinsolutions.com/knowledge-hub/thought-leadership/knowledge-resources/what-de-spac-transaction.

3 Not all SPAC investors seek positive returns; rather, investors seek ?a variety of return and risk profiles and timelines? that they may benefit from a SPAC/de-SPAC transaction. Max H. Bazerman & Paresh Patel, SPACS: What You Need to Know, HARV. BUS. REV. (July-Aug. 2021), https://hbr.org/2021/07/spacs-what-you-need-to- know.

4 See In re Akazoo S.A. Securities Litigation, No. 20-cv-1900, Dkt. No. 15 (E.D.N.Y. 2020).

5 Section 20(a) describes joint and several liability as well as the good faith defense of a ?control? person. ?Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 78u(d) of this title), unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.? 15 U.S.C. § 78t(a) (1934).

6 In re Tronox, Inc., 2010 U.S. Dist. LEXIS 67664 *63 (S.D.N.Y. 2010); Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd., 33 F. Supp. 3d 401, 437 (S.D.N.Y. 2014).

7 Id.

8 In Re Tronox, Inc., supra note 6 at 63; Special Situations Fund III QP, L.P., supra note 6 at 437.

9 In Re Tronox, Inc., supra note 6 at 63; Special Situations Fund III QP, L.P., supra note 6 at 437.

10 In Re Tronox, Inc., supra note 6 at 63; Special Situations Fund III QP, L.P., supra note 6 at 437.

11 See Laura Greco, The Buck Stops Where?: Defining Controlling Person Liability, 73 S. CAL. L. REV. 169, 171-72 (1999) (?By

looking at the legislative history of [Section 15 and Section 20(a)], it becomes clear that Congress intentionally omitted fixed criteria for defining a ?controlling person.? It was thought that by keeping the concept of control flexible, the statute would be applicable to a variety of situations both seen and unforeseen. Absent a bright line rule, however, the courts have been forced to wade through a sea of uncertainty to uncover who qualifies as acontrolling person?.)

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Section 230 Section 230 in 2022: Increasing Responsibility of Online Platform Hosts to Address Human Trafficking and Child Exploitation*Jill Steinberg and Kelly McGlynn*50 Rutgers L. Rec. 31 (2022) | WestLaw | LexisNexis

Abstract

In 1996, before the widespread public use of the internet, Congress recognized the need to regulate improper content online while also encouraging the growth of the then-nascent industry. From these competing values emerged Section 230 of the Communications Decency Act. Now there is an increasing movement in Congress and among the judiciary to strike a different balance. Section 230 has been interpreted to protect entities that host platforms online from liability for the harms that are perpetrated on and allegedly facilitated by their platforms. Among those harms are human trafficking and child exploitation. Wrongdoers are known to use interactive platforms to identify, connect with, and exploit victims. Recent cases show that some courts are no longer inclined to allow Section 230 to fully shield platform hosts from liability. These cases have begun to shift responsibility onto hosts, suggesting that they have some obligation to protect their users from these harms. Section 230 has also been the subject of high-profile political discussion, with demonstrated bipartisan interest in legislative change. This article provides an overview of Section 230 as it stands today, and reviews the cases and legislative proposals that together demonstrate that the law's broad liability shield is already shrinking and may undergo dramatic change in the near future. We discuss the implications this has for entities operating online and conclude that while Section 230 still protects them in some instances as it relates to trafficking and child exploitation material, this may soon change and should spur proactive efforts to implement appropriate safeguards.

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Online Gambling Re-interpreting and Amending the Wire Act and the Unlawful Gambling Enforcement Act to Address Modern Forms of Online Gambling*Parita Patel*50 Rutgers L. Rec. 74 (2022) | WestLaw | LexisNexis

INTRODUCTION

Two current laws that address gambling activities are the Wire Act1 and the Unlawful Internet Gambling Enforcement Act2 (UIGEA). Both Acts are similar in that their history, application, and current overall strength are somewhat dim. For over a year now, the video streaming platform Twitch.com has developed a close relationship with online casino gambling sites. There is a large amount of business done between high earning Twitch streamers and online casino gambling sites.3 Many of these online casino sites are located offshore because the types of gaming practices they are engaged in are illegal in the U.S. However, they are still managing to make money from U.S. residents. Because of technological advancements, such as cryptocurrencies and virtual private networks (VPNs), these online practices have not been heavily regulated as of this point. The need to address these practices to protect U.S. residents, especially young people, is evident. This note will first provide background on two current laws that regulate gambling. Next, it will provide background on gambling and how gambling works on Twitch. Then, it will explain re-interpreting

the Wire Act, followed by an analysis of amending the Wire Act and the UIGEA.

1 Transmission of Wagering Information Act, 18 U.S.C. § 1084 (1961).

2 31 U.S.C. §§5361-5367 (2006).

3 Nicolas Perez, On Twitch, Online Casino Streamers Promote Gambling to Their Audience While Taking on Little Risk, PASTE MAGAZINE (Dec. 21, 2020), https://www.pastemagazine.com/games/twitch/twitch-online-casino- streamers/.

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Climate Disclosure Rule The SEC's Climate Disclosure Rule: Critiquing the Critics*George S. Georgiev*50 Rutgers L. Rec. 101 (2022) | WestLaw | LexisNexis

Climate change is an existential phenomenon, which entails a wide variety of physical risks as well as sizeable but underappreciated economic risks. In March 2022, the U.S. Securities and Exchange Commission (SEC) moved to address some of the information gaps related to the effects of climate change on firms by proposing a rule that requires public companies to report detailed and standardized information about important climate-related matters for the benefit of investors and markets. Though the rule proposal was welcomed by many market participants, it was also met with a level of opposition that was unusual in both its intensity and consistency. Instead of following standard practice and engaging with the specific policy judgments made by the SEC in an effort to improve the final rule through constructive notice-and-comment rulemaking, many critics chose to attack every aspect of the rule proposal and the SEC's very decision to pursue a climate disclosure rule. The critics disputed the SEC's statutory authority and motivations, questioned the materiality of information about the economic impacts of climate change, and advanced certain novel administrative and constitutional law theories that had gained traction in other, unrelated contexts. Unless the SEC yields to pressure and abandons the climate disclosure project, these same arguments will serve as the basis for the widely predicted litigation against the final rule.

This Article presents an original analysis of some of the principal challenges to the SEC's climate disclosure rule and, ultimately, finds them unpersuasive. A close review of the features of the traditional disclosure regime, many of them long forgotten, and of the features of the SEC's rule, many of them distorted by the critics, suggests that the rule is in keeping with longstanding regulatory practice. In short, the SEC has the statutory authority to act, its motivations are neither improper nor novel, materiality, when properly understood, does not present an obstacle, and theories pertaining to ?major questions? and ?compelled speech? are misplaced in this context.

The Article contributes to the debate on climate-related disclosure in two ways. First, it draws attention to the flawed legal and policy arguments against the SEC's climate disclosure initiative and the distracting rhetoric that has accompanied them. And, second, it highlights the rule's core function, which is to put in place an information-generating framework to help capital markets and capital market participants?the primary intended beneficiaries of SEC regulation?with the climate-related economic challenges that lie ahead.

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Election Interference Contempt of Congress and Election Interference*Joshua T. Carback*50 Rutgers L. Rec. 131 (2023) | WestLaw | LexisNexis **I.INTRODUCTION**

And because Elections ought to be free, the King commandeth upon great Forfeiture, that [no Man] by Force of Arms, nor by

Malice, or Menacing, shall disturb any to make free Election.

? Statute of Westminster the First of 1275, 3 Edw. 3, c. 5

Contempt of Congress and Election Interference

On July 11, 1958, the United States Congress passed Joint Resolution 175, a code of ethics binding every employee of the federal government:

Any person in Government service should:

1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.

***

9. Expose corruption wherever discovered.

10. Uphold these principles, ever conscious that public office is a public trust.1

Few things expose the weakness of a politician's commitment to these principles of public service like the heat of a contested election. The chaos of public uproar molds his mettle. The hammer of adversity pounds his principles. The friction between competing interests tempers his tenacity. The 2020 Presidential Election of the United States was such a contest.

By January 1, 2021, the outcome of the election was clear. President-elect Joseph R. Biden defeated incumbent President Donald A. Trump. But several members of Congress resisted the proven legitimacy of the Democratic victory. They propounded the idea that the election was stolen through voter fraud??the Great Lie.? These members shamelessly fed this conspiracy using their soapboxes and social media accounts. The hot air spewing from these members combined with the humidity of an acrimonious political environment to create a perfect storm.

On January 6, 2021, a joint session of Congress convened to certify the election in President-elect Biden's favor. President Trump and his personal lawyer, Rudolph W. Giuliani, preached vitriolic sermons decrying the election outcome just down the street at a ?Save America? rally. Their pugnacious tone created an electric field ripe for a discharge of violence. Some of the protestors attending the rally transformed into a mob and diverted to the United States Capitol. The rioters stormed the halls of Congress like a microburst. The disturbance was sudden and terrifying, temporarily suspending the certification proceedings, and in its wake, creating a deluge of controversy.

In the aftermath of the Trump Riot, Representative Zoe Lofgren (Democrat, California), Chair of the House Committee on Administration, produced a social media report documenting the efforts of fellow members to overturn the election. In her opening letter, Representative Lofgren noted that ?Congress has broad and express authority under Article I to ?punish its Members for disorderly Behaviour.' More research on this question is warranted.? This article fulfills that warrant.2

I contend that Congress can vindicate assaults on the integrity of federal elections through contempt proceedings. I provide an extensive survey of relevant legislative history in Part II: I highlight three English contempt precedents and three American contested election precedents. I then explain how Congress can synthesize these two bodies of precedent with its current rules and procedures to hold members of the public, members of Congress, and members of the executive accountable for contemptuous interference with federal elections in Part III. Part IV concludes. Although I am fully aware of how arcane and politically impractical contempt proceedings may seem, contempt power remains an important vehicle for Congress to vindicate itself when other options

are unavailing.

1 H.R. Con. Res. 175, 85th Cong. (July 11, 1958).

2 STAFF OF S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFF. & S. COMM. ON RULES AND ADMIN., 117TH CONG., EXAMINING THE U.S. CAPITOL ATTACK: A REVIEW OF THE SECURITY, PLANNING, AND RESPONSE FAILURES TO JANUARY 6, 1 (2021); ZOE LOFGREN, SOCIAL MEDIA REVIEW: MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES WHO VOTED TO OVERTURN THE 2020 PRESIDENTIAL ELECTION 2?3 (2021)[hereinafter, ?HOUSE 2020 PRESIDENTIAL ELECTION SOCIAL MEDIA REVIEW?].

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Administrative Law Corporatizing Administrative Law In Ghana: Lessons From US and UK*Rowland Atta-Kesson*50 Rutgers L. Rec. 187 (2022) | WestLaw | LexisNexis **Abstract**

This paper adopts a functionalist comparative law method to put forward a corporatized administrative law theory in comparative administrative law. It examines how different administrative law systems corporatize administrative law. It looks specifically at how English and American Administrative law systems, as comparators for Ghana, address corporatisation. Ghana's industrialization drive is the background to this study. This industrialization policy is intended to be private-sector-led. But the private sector is excluded from the policy making process in the country. Therefore, by corporatization, the paper makes a case for the formal recognition of industry in the policy making process. In hybridizing between the US and the UK, it argues for the establishment of a Public Business Tribunal, and adoption of an Administrative Procedure Act (APA) in Ghana.

View the Entire Article] **Child Welfare**Like Stealing Candy from a Baby: How the Government Easily and Legally Steals Millions from the Children in Their Care & Why it Needs to Stop*Brittany R. Glidewell*50 Rutgers L. Rec. 222 (2022) | WestLaw | LexisNexis

1. Introduction

As of September 2020, there were approximately 400,000 children in the foster care system; 10% of these children are entitled to some form of Social Security benefits that they do not receive despite it being considered their property.1 In an investigation by The Marshall Project and NPR, it was found that a majority of the states and Washington, D.C., not only reimburse themselves using the child's benefits but actively seek out youth in the system that may qualify for government benefits, all without letting the child or their legal representation know about these benefits.2 Each year, the foster care agencies take at least $250 million from foster children receiving Supplemental Security Insurance (SSI) and/or Old-Age, Survivors, and Disability Insurance (OASDI)?benefits that are the property of these children.3 The foster care agenciesdo this all legally under the Social Security Act as the child's representative payee, which was upheld as not in violation of the Social Security Act Anti-Attachment Provision, in the 2003 Supreme Court case Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler.4

This note explores the Keffeler decision itself, the questions that remain following Keffeler regarding the ethics and negative social consequences in continuing to allow child welfare agencies to act as the child's representative payee, and recent federal and state cases. Next, this note will examine the child welfare reform movement, the shift to the privatization of the state and local foster care agencies, and the devastating effects of the privatization on foster youth. Lastly, this note will consider Maryland's recent legislation limiting the amount of money the agencies can take from a child to reimburse themselves, what other states need to do in order to do what is actually in the best interest of the child, and how life changing saving and investing the benefit payments for the foster youth after they age out of the system.

1 U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE AFCARS REPORT: PRELIMINARY FY 2020 ESTIMATES AS OF OCT. 4, 2021 ? NO. 28 (2021).2 Eli Hager & Joseph Shapiro, State Foster Care Agencies Take Millions Of Dollars Owed to Children In Their Care, NPR (Apr. 22, 2021), https://www.npr.org/2021/04/22/988806806/state-foster-care-agencies-take-millions-of- dollars-owed-to-children-in-their-ca.3 DANIEL L. HATCHER, THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS 80 (2016).4 Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003).

View the Entire Article] **Employee Classification**New Data Needed: Improving New Jersey's Enforcement of Employee Misclassification Laws*Seamus O'Connor*50 Rutgers L. Rec. 248 (2022) | WestLaw | LexisNexis **Introduction**

In the United States, thousands of employees in the private sector are misclassified as independent contractors.1 Employers have used misclassification to withhold workers' benefits such as well-earned wages, benefits, and sick leave.2 This has a deleterious effect on working conditions and a cumulative effect on income inequality.3 The rise of employee misclassification has both federal and state governments scrambling to enforce employee misclassification statutes with mixed results.4 Although some states use a broader definition of what constitutes an employee to enforce employee misclassification, the number of misclassifications demonstrates effective enforcement is still an ongoing issue.5 Because of this lack of effective enforcement, employee misclassification persists in the workforce.6

1Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, National Employment Law Project (October 2020), https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Indep2 Kerri Keohane and David Schap, Employee Misclassification and Related Damages Claims, 27 J. LEGAL ECON. 63, 64 (July 2021).3 See Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries NATIONAL EMPLOYMENT LAW PROJECT, https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/; See Eric Posner, How Antitrust Failed Workers, BOSTON REVIEW (Nov. 23, 2021) https://bostonreview.net/articles/competition-is-not-the- cure/.4 Rebecca Rainey and Ian Kullgren U.S. Labor Agencies Strike Deal to Share Enforcement Information, BLOOMBERG LAW (Jan. 6, 2022), https://news.bloomberglaw.com/daily-labor-report/u-s-labor-agencies-strike-deal- to-share-enforcement-information; Sean Golonka, State task force sets sights on multimillion-dollar problem of employee misclassification, The Nevada Independent (Apr. 12, 2021), https://thenevadaindependent.com/article/state-task-force-sets-sights-on-multimillion-dollar-problem-of-employ; Francoise Carre, (In)dependant Contractor Misclassification, ECONOMIC POLICY INSTITUTE (June 8, 2015), https://www.epi.org/publication/independent-contractor-misclassification/.

5 See Carre, supra at note 1.6 See Louise Esola, N.J. calls for wider employee misclassification enforcement, BUSINESS INSURANCE, (July 11, 2019), https://www.businessinsurance.com/article/20190711/NEWS08/912329545/NJ-calls-for-wider-employee-misclassification-enforcement.

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Public Employee Speech Public Employee Speech and The Heckler's Veto: Is There a Way Around It?*Michael E. Rosman*50 Rutgers L. Rec. 278 (2022) | WestLaw | LexisNexis

The law that governs public employee speech has engendered some serious criticism. Public employers can impose adverse employment actions (suspensions, firings, denying raises or promotions) for much speech that would be protected by the First Amendment from any action the government might take as a sovereign (fines, jail, etc.). Most conspicuously, if an employer reasonably predicts ?disruption? as a result of the speech ? which, in this day and age, can be caused by the simple disagreement of an intended or entirely unintended audience ? it can impose an adverse employment consequence on its employee. This problem,

sometimes referred to as the ?heckler's veto? because it elevates the views of opponents of the speech, lurks over the area of public employee speech.1

1 Patrick Schmidt, Heckler's Veto, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/968/heckler-s-veto.

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