[J-9-2023] [MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MIMI INVESTORS, LLC,	:	No. 57 MAP 2022
	:	
Appellee	:	Appeal from the Order of Superior Court at No. 1168 EDA 2020 dated November 5, 2021 Affirming the
v.	:	Order of the Bucks County Court of Common Pleas, Civil Division, at No. 2016-00834 dated January 8,
PAUL K. TUFANO, DAVID CROCKER, DENNIS CRONIN, AND NEIL MATHESON,	:	2020.
	:	
	:	ARGUED: March 8, 2023
Appellants	:	

CONCURRING OPINION

JUSTICE MUNDY **DECIDED: July 19, 2023**

I join the majority opinion subject to modest reservations as discussed below.

First, I am in alignment with the majority's analysis of subsection 401(b) of the Pennsylvania Securities Act of 1972 ("PSA"), 70 P.S. §1-401(b), in which it contrasts that provision with subsection 401(a)'s use of terms suggesting scienter – *e.g.*, "device," "scheme," "artifice," and "defraud." *See* 70 P.S. §1-401(a), *quoted in* Majority Op. at 22. I agree with its ultimate conclusion that 401(b) does not include a scienter predicate – *i.e.*, that the defendant knew the challenged statement was false or misleading.

My only reservation is with the extent to which some of the majority's discussion can be read to suggest a plain-text interpretation screens out external factors such as what others have said about the same text. *See id*. at 21; *see also id*. at 23 (appearing to negate the value of any "non-precedential sources"). While I agree that resorting to the rules of statutory *construction* is only warranted where there is an ambiguity or when

the statutory language is otherwise "not explicit," *see McGrath v. Bureau of Prof'l & Occupational Affairs, State Bd. of Nursing*, 173 A.3d 656, 662 n.8 (Pa. 2017) (quoting 1 Pa.C.S. §1921(c)), it seems to me that any textual *interpretation*, which I understand as ascertaining what the text under review means or was intended to convey, *cf*. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100 (2010) (positing that interpreting involves "discover[ing] the linguistic meaning of an authoritative legal text"), can take into account such factors as the context in which the words appear, historical considerations, dictionary definitions (of which there may be many for a single English word), and the reasoning of other courts and commentators who have dealt with the same or similar text, considered these same types of sources, and supplied a persuasive accounting of their conclusions and how they were reached.

Notably, the Statutory Construction Act recognizes both exercises, statutory construction and statutory interpretation, and it indicates the objective of each is to determine the General Assembly's intent. *See* 1 Pa.C.S. §1921(a). Even absent an ambiguity, statutory interpretation is not always cut and dried, and, as suggested above, it uses context fairly extensively. This is illustrated by the present case in which the majority contrasts the language of 401(b) with that in 401(a), and additionally points out that the statutory provision creating a private right of action, *see* 70 P.S. §501(a), which places the burden on the defendant to prove the absence of negligence in making the false or misleading statement, would make little sense in a context where the plaintiff has already been required to plead and prove scienter, thereby precluding the possibility of innocence. *See* Majority Op. at 28. The majority also refers to interpretive precepts such as "*expressio unius*" and attending to what the statute does not say, *see* Majority Op. at 24 n.21, again suggesting that some interpretive concepts are necessary or helpful even in a plain-text analysis.

My point here is that other courts may have used these types of precepts in ways that, if logically sound, can assist this Court's interpretive exercise. I therefore do not believe this Court should blind itself to any such judicial expressions on the sole basis that they do not bind us. *See, e.g.*, *Commonwealth v. Smith*, 186 A.3d 397, 402-05 (Pa. 2018) (undertaking an extensive interpretive analysis of a sentencing statute informed by non-binding authorities such as the Superior Court and the highest court of a sister State). And this is particularly so in light of the PSA's express command that it be read to "make uniform the law of those states which enact the Uniform Securities Act and coordinate the interpretation and administration of this act with related Federal regulation." 70 P.S. §1-702(a) (internal quotation marks omitted).

As I view the extrinsic judicial decisions referenced by Appellants in this matter, either their analysis is cursory, *see, e.g.*, *Michael S. Rulle Family Dynasty Trust v. AGL Life Assurance Co.*, 459 Fed. Appx. 79, 82 (3d Cir. 2011) (stating in generalized terms that the Pennsylvania Securities Act has "similar scienter requirements as the Federal Securities Laws," and negating liability under the PSA on that basis), *cited in* Brief for Appellants at 24, or their reasoning, in my view, is flawed. Thus, in *Goodman v. Moyer*, 523 F. Supp. 35 (E.D. Pa. 1981), which Appellants quote, *see* Brief at 24-25, the court rejected the plaintiff's argument that because Section 17(a) of the federal Securities Act of 1933 is congruent with Section 401 of the PSA, and because actions under Section 17(a)(2) and (3) have been held not to require scienter as an element of proof, *see Aaron v. SEC*, 446 U.S. 680, 696-97 (1980), Pennsylvania state courts would similarly not require a showing of scienter under Section 401. The court discounted this argument on the purported basis that Section 17 only addressed fraud by a purchaser, whereas Section 401, like federal securities Rule 10b-5, *see* 17 C.F.R. § 240.10b-5, controls both purchases and sales, and Rule 10b-5 requires scienter. *See Goodman*, 523 F. Supp. At

38-39. In fact, Section 17 governs "the offer or sale" of securities in interstate commerce. 15 U.S.C. § 77q(a); *see Aaron*, 446 U.S. at 687 (quoting Section 17(a)).

Moreover, I find salience in the *Goodman* plaintiff's reliance upon the congruence between Section 17(a) of the 1933 federal enactment and Section 401 of the PSA because, as *amicus* the Pennsylvania Department of Banking and Securities points out, a perusal of Section 17(a)(1), (2), and (3) reveals that those provisions are substantively identical to PSA subsections 401(a), (b), and (c). *See* Brief for *Amicus* at 12-13. The fact the Supreme Court in *Aaron* found subsection 17(a)(2) not to require proof of scienter, particularly when contrasted with subsection 17(a)(1), buttresses the majority's plain text reading of subsection 401(b), and I would not be reluctant to rely on *Aaron* for this type of support. Due to the similarity between Section 17(a) and Section 401 of the PSA, *Aaron*'s reasoning seems applicable here as applied to subsections 401(a), (b), and (c):

> The language of § 17(a) strongly suggests that Congress contemplated a scienter requirement under § 17(a)(1), but not under § 17(a)(2) or § 17(a)(3). The language of § 17(a)(1), which makes it unlawful "to employ any device, scheme, or artifice to defraud," plainly evinces an intent on the part of Congress to proscribe only knowing or intentional misconduct. Even if it be assumed that the term "defraud" is ambiguous, given its varied meanings at law and in equity, the terms "device," "scheme," and "artifice" all connote knowing or intentional practices. Indeed, the term "device," which also appears in § 10(b) [of the Securities Exchange Act of 1934] figured prominently in the Court's conclusion in [*Ernst & Ernst v. Hochfelder*, 425 U.S. 185, (1976)] that the plain meaning of § 10(b) embraces a scienter requirement.
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> By contrast, the language of § 17(a)(2), which prohibits any person from obtaining money or property "by means of any untrue statement of a material fact or any omission to state a material fact," is devoid of any suggestion whatsoever of a scienter requirement.

Aaron, 446 U.S. at 696 (citation and footnotes omitted).

The above reference to Section 10(b) of the 1934 enactment is also illuminating. That provision makes it unlawful for any person, in interstate commerce, to "use or employ

. . . any manipulative or deceptive device or contrivance in contravention of" the federal regulations. 15 U.S.C. § 78j(b). The terms such as "device" and "contrivance" mirror the language of Section 17(a)(1) of the 1933 statute, and are absent from Section 401(b) of the PSA.

Still, Appellants point to Rule 10b-5, in particular subsection (b) of that regulation, which, like subsection 17(a)(2) of the 1933 act, is quite similar to subsection 401(b) of the PSA. Plaintiffs argue the Supreme Court in *Hochfelder* interpreted Rule 10b-5(b) to require scienter, and that the lower federal courts have accordingly viewed liability under subsection 401(b) as coterminous with Rule 10b-5(b). *See* Brief at 17-18, 23-24. The argument, however, ultimately fails as it overlooks that *Hochfelder* dealt with the language of Section 10(b) of the 1934 federal *legislation*, of which Rule 10b-5 is a regulatory offshoot. It is the manipulative-or-deceptive-device-or-contrivance phraseology in Section 10(b) that *Hochfelder* focused on as reflecting scienter. *See Hochfelder*, 425 U.S. at 197 ("The words 'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that § 10(b) was intended to proscribe knowing or intentional misconduct."); *see also id*. at 199 (rejecting the SEC's argument to the contrary as it ignored those terms, which "make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence").

To the extent Rule 10b-5(b) might otherwise purport to predicate liability more broadly upon negligent behavior, the Court emphasized that the regulation could not widen liability beyond the scope of its enabling statutory provision. *See Hochfelder*, 425 U.S. at 212-14. Thus, Appellants are presently attempting to take observations about the breadth of an administrative regulation, *i.e.*, Rule 10b-5, made in light of the restrictions contained in its enabling legislation, and overlay those observations onto subsection 401(b) of the PSA which is not similarly restricted. Indeed, the *Aaron* Court specifically

referred to Rule 10b-5(b) and stressed that, viewed without its statute-based limitations, it "could be read as proscribing . . . any type of material misstatement or omission . . . that has the effect of defrauding investors, whether the wrongdoing was intentional or not." *Aaron*, 446 U.S. at 696 (ellipses in original) (quoting *Hochfelder*, 425 U.S. at 212).

In light of the above, the decisional law of the United States Supreme Court fully supports the conclusion reached by the majority in this case, and I would expressly disagree with any expressions to the contrary made by the Third Circuit, such as in *Rulle Family Dynasty Trust*, or by any other federal court which has ruled that the PSA always requires proof of scienter as a predicate to liability.