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'Janus' Decision Notes Behind-the-Scenes Participants Do Not 'Make' Statements For Securities Laws Purposes

BY SUSAN E. HURD

On June 13, 2011, the U.S. Supreme Court issued its opinion in *Janus Capital Group, Inc. v. First Derivative Traders*.¹ In a five to four decision,² the Supreme Court ruled that the investor advisor and administrator for certain mutual funds, Janus Capital Management or "JCM," could not be held liable under Section 10(b) of the Securities Exchange Act of 1934 for allegedly false and misleading statements in prospectuses issued by the Janus family of mutual funds.³

The Fourth Circuit had previously ruled that private investors could bring Section 10(b) claims against JCM because it had participated in the writing and dissemination of the fund prospectuses and, thus, investors would have likely viewed JCM as being responsible

for the allegedly false and misleading statements.⁴ The Supreme Court reversed, holding that, as a matter of law, no such claims were possible under Section 10(b).

The Court's Opinion

Rule 10b-5 prohibits the "mak[ing] [of] any untrue statement of material fact" in connection with the purchase or sale of securities.⁵ Thus, the Court's decision in *Janus* turned on whether JCM could be said to have "made" the alleged misstatements at issue. No statements in the fund prospectuses were directly attributed to JCM and the funds were considered to be legally separate from JCM.

The Court started its analysis by recognizing that Section 10(b) does not provide an express private cause of action for investors, although the Court has previously ruled that such a cause of action may be implied.⁶ In the Court's view, the fact that the cause of ac-

tion had been implied by courts, and not expressly granted by Congress, counseled against its further expansion and required the Court to give such claims "narrow dimensions."⁷

For purposes of Section 10(b) liability, "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."

The Court next held that "[o]ne 'makes' a statement by stating it."⁸ Thus, for purposes of Section 10(b) liability, "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."⁹ Without such control, an entity may suggest what to say, but it does "not 'make'

¹ No. 09-525, slip op. (June 13, 2011).

² Justice Thomas wrote the majority opinion in which Justices Roberts, Scalia, Kennedy, and Alito joined. Justices Breyer, Ginsburg, Sotomayor and Kagan dissented.

³ *Janus*, slip op. at 12.

⁴ *Id.* at 4.

⁵ *Id.* at 5.

⁶ *Id.* at 5-6.

⁷ *Id.* at 6.

⁸ *Id.*

⁹ *Id.*

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a statement in its own right.”¹⁰ The Court explained that this rule is best exemplified by the relationship between a speechwriter and a speaker. A speech writer may draft a speech, “but the content is still entirely within the control of the speaker, the person who delivers it.”¹¹ As a result, it is the speaker who takes the credit or the blame for what is ultimately said.¹²

The Court also concluded that this rule was consistent with its prior decisions in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*¹³ and *Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.*¹⁴ In *Central Bank*, the Court held that there was no private liability under Section 10(b) for “aiding and abetting” another party’s violation of the federal securities laws. A broader reading of “make” would have substantially undermined *Central Bank* by allowing claims against persons who were accused of providing “substantial assistance” to the making of a public statement.¹⁵ In *Stoneridge*, the Court had also previously ruled that certain product suppliers could not be liable for statements their customer made to its investors where the only conduct that could possibly be attributed to the suppliers was never communicated to investors. Like *Stoneridge*, the Court reasoned that the rule articulated in *Janus* properly focused on “the entity with the authority over the content of the statement and whether and how to communicate it.”¹⁶ Without such authority, it is not “‘necessary or in-

evitable’ that any falsehood will be contained in the statement.”¹⁷

The Court specifically rejected the Government’s request to define “make” more broadly to reach one who could be said to have “created” the statement.¹⁸ The Court explained that adopting this expansive definition would lead to results inconsistent with the prior precedent discussed above and would allow a plaintiff to sue any person who allegedly provided false information that another person chose to put into a statement.¹⁹

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The Court similarly refused to accept Plaintiff’s suggestion that the uniquely close relationship between a mutual fund and its advisor required a different result.²⁰ The Court held that “the corporate formalities were observed here” and any possible reapportionment of liability based on the unique circumstances of this particular industry would be the responsibility of Congress and not the courts.²¹

Analysis and Conclusions

The Court’s decision in *Janus* is entirely consistent with the bright line rule on the scope of primary liability previously articulated in *Stoneridge*.

The similarity between the two opinions is hardly surprisingly, given that the same five members of the Court were in the majority for both cases. Throughout the briefing and oral argument, counsel for Plaintiffs and the Government were never able to articulate a principled basis on which to distinguish the claims against JCM from those previously rejected in *Stoneridge* and *Central Bank*. The Supreme Court recognized that embracing the proposed claims in *Janus* had the potential to erode certain long-standing protections against abusive lawsuits established by its prior decisions.

In this respect, *Janus* covered familiar ground in the context of private securities litigation. The unique wrinkle that *Janus* presents is what effect the decision may have on enforcement actions brought by the Securities and Exchange Commission (“SEC”).

Janus dealt with claims by private investors as opposed to an enforcement action undertaken by the SEC. Congress expressly gave the SEC the authority to bring aiding and abetting claims, which means that *Central Bank* does not apply to the SEC. Also, much of the analysis in *Stoneridge* turned on the reliance requirement, which is an essential element of private liability, but does not apply to the SEC.

In contrast, the SEC, just like private litigants, must prove that the defendant “made” an allegedly false or misleading statement. There is a greater likelihood, therefore, that *Janus* will have an effect on the type of defendants who can be pursued in enforcement actions. The SEC will have difficulty arguing that this opinion should be read to apply only to private claims.

¹⁰ *Id.*

¹¹ *Id.* at 6-7.

¹² *Id.*

¹³ 511 U.S. 164 (1994).

¹⁴ 522 U.S. 148 (2008).

¹⁵ *Janus*, slip op. at 7.

¹⁶ *Id.* at 8.

¹⁷ *Id.* (citing *Stoneridge*, 552 U.S. at 161).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 9-10.

²¹ *Id.* at 10.