



Securities Litigation ADVISORY ■

JUNE 2, 2014

The Potential Expansion of the “Innocent Instrumentality” Doctrine into the Realm of Civil Securities Litigation

Recently, Mary Jo White, Chair of the Securities and Exchange Commission (SEC), announced that the SEC will begin using a new approach to pursue violations of the federal securities laws. The approach calls for a renewed focus on an obscure section of the Securities Exchange Act of 1934 (the “’34 Act”) – Section 20(b). Section 20(b) makes it “unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of [the ’34 Act] or any rule or regulation thereunder through or by means of any other person.”¹ In criminal law, this is referred to as the “innocent instrumentality” doctrine under which a person can be held criminally responsible for causing an innocent person to commit a crime.

As explained by Ms. White, Section 20(b) potentially represents a powerful tool to ensnare individuals that use innocent intermediaries to commit securities law violations. As a result, the number of people subject to enforcement actions will likely expand. Additionally, Ms. White’s announcement begs the question of whether the plaintiffs’ bar will begin to invoke Section 20(b) to effect an end-run on the *Janus* limitation on primary ’34 Act liability.

Approximately three years ago, the U.S. Supreme Court ruled in *Janus Capital Grp., Inc. v. First Derivative Traders* that 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.”² The Court explained this rule by drawing an analogy to the relationship between a speechwriter and a speaker. “Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it.”³ Thus, under *Janus*, only the speaker and not the speechwriter could be liable under Section 10(b).

¹ 15 U.S.C. § 78t(b).

² 131 S. Ct. 2296, 2302 (2011).

³ *Id.*

Interestingly, the majority declined to address “whether Congress created liability for entities that act through innocent intermediaries in [Section 20(b)].”⁴ The dissent, however, seems to have suggested that Section 20(b) does create a private right of action. “If the majority believes, as its footnote hints, that § 20(b) could provide a basis for liability in this case . . . then it should remand the case for possible amendment of the complaint.”⁵

It is important to note that *Janus* involved claims brought by private investors. Whether Section 20(b) does in fact create a private right of action remains unclear. As the dissent noted, “[t]here is a dearth of authority construing Section 20(b).”⁶ Moreover, there is no clear consensus among the lower courts.

In *Fiero v. Fin. Indus. Regulatory Auth., Inc.*, the Second Circuit, without providing any analysis, held that private parties could bring actions for damages pursuant to Section 20(b).⁷ In contrast, in *SEC v. Stringer*, the United States District Court for the District of Oregon held that “[u]nlike Section 20(a), Section 20(b) is specifically geared toward government actions.”⁸ It should be noted, however, that Section 20(b) and Section 10(b) use similar language, to wit: “It shall be unlawful for any person, directly or indirectly”⁹ There is a private right of action under Section 10(b). Hence, despite the dearth of authority construing Section 20(b), courts could find that Section 20(b) is not only available to the SEC, but also to private litigants seeking damages in civil suits against public corporations.

Given that this development may increase the focus by regulators and plaintiffs’ lawyers on individual directors and officers, a company’s D&O insurance program is the best protection and defense in any ensuing regulatory or civil action. Ensuring that the program provides adequate limits and coverage to account for the defense of several individuals in such litigation is therefore essential.

This advisory was written by **Tod Sawicki** and **Jason Outlaw**.

⁴ *Id.* at 2304 n.10.

⁵ *Id.* at 2311.

⁶ *Id.*

⁷ 660 F.3d 569, 574 (2d. Cir. 2011).

⁸ 2003 WL 23538011, at *6 (D. Or. Sept. 3, 2003).

⁹ See 15 U.S.C. §§ 78j and 78t(b).

If you would like to receive future *Securities Litigation Advisories* electronically, please forward your contact information to securities.advisory@alston.com. Be sure to put "subscribe" in the subject line.

If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

Lisa R. Bugni
404.881.4959
lisa.bugni@alston.com

John P. Doherty
212.210.1282
john.doherty@alston.com

Darren L. McCarty
214.922.3414
darren.mccarty@alston.com

Gidon M. Caine
650.838.2060
gidon.caine@alston.com

Mary C. Gill
404.881.7276
mary.gill@alston.com

John D. Roesser
212.210.9479
john.roesser@alston.com

Craig Carpenito
212.210.9582
craig.carpenito@alston.com

Susan E. Hurd
404.881.7572
susan.hurd@alston.com

Theodore J. Sawicki
404.881.7639
tod.sawicki@alston.com

Steven M. Collins
404.881.7149
steve.collins@alston.com

Dennis O. Garris
202.239.3452
dennis.garris@alston.com

Jon G. Shepherd
214.922.3418
jon.shepherd@alston.com

Jessica Perry Corley
404.881.7374
jessica.corley@alston.com

John A. Jordak, Jr.
404.881.7868
john.jordak@alston.com

Brandon R. Williams
404.881.4942
brandon.williams@alston.com

Charles W. Cox
213.576.1048
charles.cox@alston.com

John L. Latham
404.881.7915
john.latham@alston.com

Dawn M. Wilson
212.210.9451
dawn.wilson@alston.com

Todd R. David
404.881.7357
todd.david@alston.com

Robert R. Long
404.881.4760
robert.long@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2014

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213-576-1100
NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333