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Supreme Court Narrowly Defines Those Who "Make" Actionable Statements under Rule 10b-5

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In *Janus Capital Group, Inc. et al. v. First Derivative Traders*, 564 U.S. __ (2011), a divided Supreme Court has limited Rule 10b-5 liability solely to "the maker" of a statement, that is, "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." The ruling insulates from private Rule 10b-5 suits a broad spectrum of individuals and entities who participate in the preparation of filings with the Securities and Exchange Commission, private placement memoranda, press releases and other forms of commercial communication, but who do not have the ultimate authority for the content and logistics of the statements made in those communications. Although arguments will be made in subsequent cases over who possesses that "ultimate authority" and can be found to have made an allegedly false statement, *Janus* is a powerful precedent that will circumscribe the roster of those who may be characterized as primary violators in both private federal securities actions and SEC enforcement proceedings.

Justice Thomas, writing for the majority (which included Chief Justice Roberts and Justices Scalia, Kennedy and Alito), observed that since a private right of action under Section 10(b) is implied, rather than stated explicitly by Congress, the courts "must give 'narrow dimensions … to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'" Thus, in construing Rule 10b-5's language, the majority drew sharp lines to underscore the significance of who had "control" to "make" the challenged statement, stating:

> "Without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right."
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> "One who prepares or publishes a statement on behalf of another is not its maker."

> "And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by – and only by – the party to whom it is attributed."

Relying upon a grammatical analysis of the verb "to make" ("'[t]o make any . . . statement,' is . . . thus the approximate equivalent of 'to state'") and concerns about undermining the Court's decisions in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (holding there is no private right of action under Rule 10b-5 for aiding and abetting) and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (holding that there was no private liability under Rule 10b-5 for deceptive acts or statements not disclosed to and relied upon by the public), the majority rejected the more flexible approach adopted in Justice Breyer's dissent (joined by Justices Ginsberg, Sotomayor and Kagan), that "[p]ractical matters related to context, including control, participation, and relevant audience, help determine who 'makes' a statement and to whom that statement may properly be 'attributed.'"

Following the restrictive reading of Rule 10b-5 liability adopted by the Court in *Central Bank*, the majority in *Janus* determined to "draw a clean line" between those who may be primarily liable (and may be sued privately) and those who are secondarily liable (and may not be sued privately). Thus, the "mak[er] of a statement" could only be "the person or entity with ultimate authority over a statement." Anyone lacking that authority is now not subject to a Rule 10b-5 claim, despite having had substantial involvement in preparing the statement, but short of being in "control." The dissent rejected the need to make a crisp distinction, pointing out that *Janus* presented direct liability issues while *Central Bank* addressed the issue of secondary liability, and argued that the majority was extending *Central Bank*'s holding of no liability into "new territory that *Central Bank* explicitly placed outside that holding."

The majority found further support for its holding in *Stoneridge*, where the Court, concluding that the public could not have relied on undisclosed deceptive acts by a third party, emphasized that "nothing [the defendants] did make it necessary or inevitable for [the company] to record the transactions as it did." 552 U.S. at 161. The *Janus* majority applied this reasoning to support its conclusion that a "mak[er]" of a statement is limited to the entity with "authority" over its content and whether and how it communicates it for, without such authority, it is neither 'necessary or inevitable' that any falsehood will be contained in the statement. In contrast, the dissent argued that there was no denial in *Stoneridge* that the defendants had made false statements but, rather, the issue was that the deceptive statements were not actionable without reliance and thus without the requisite proximate relation to the investors' harm.

Justice Thomas' tight grammatical analysis and application of *Central Bank* and *Stoneridge* supported his fundamental view that the Court must act in accord "with the narrow scope that we must give the implied right of action." Thus, the majority concluded, "we will not expand liability beyond the person or entity that ultimately has authority over a false statement." The dissent expressed concerns that application of the majority's virtual bright-line rule would permit some who were "guilty" but who acted through "innocents" to escape any liability and that it would inhibit SEC prosecutions of aiders and abettors due to the difficulty in establishing that a primary violation occurred.

The aftereffects of *Janus* will rival those of *Central Bank* and the Supreme Court's more recent decision in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010) (limiting federal securities claims in private actions to those involving only domestic transactions in securities). We do anticipate, however, that plaintiffs' attorneys will be creative in alleging the requisite degree of control over allegedly false statements in seeking to overcome the seemingly bright-line restriction established in *Janus*.