Blogs
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The U.S. Supreme Court recently handed down a win for the SEC and private securities litigants, significantly broadening the scope of *primary* liability under Rule 10b-(5).

In *Lorenzo v. SEC*, the Court held that liability under Rules 10b-5(a) and (c)—which make it unlawful to employ a scheme to defraud or engage in any practice that operates as a fraud—is not limited only to those who *make* false or misleading statements as contemplated under sister-section Rule 10b-(5)(b), but may also extend to those who *disseminate* such statements made by others knowing they are false or misleading. **Background** This case arose from an SEC enforcement action brought against Francis Lorenzo, Director of Investment Banking for a New York broker-dealer. The SEC alleged that, in connection with a $15 million debt offering, Lorenzo sent emails to prospective investors that significantly overstated the value of the investment. It was undisputed that the emails were sent at the direction of Lorenzo's boss, who supplied all the content and "approved" the messages. It was also undisputed that Lorenzo knew that statements regarding the value of the investment were false or misleading. The SEC concluded that, by knowingly sending false statements from his email account, Lorenzo directly violated SEC Rule 10b–5 and related provisions of the securities law, including Sections 10(b) of the Exchange Act of 1934 and Section 17(a)(1) of the Securities Act of 1933. Rule 10b-5 makes it unlawful to: (a) employ a device, scheme, or artifice to defraud, (b) make an untrue statement of a material fact, or (c) engage in an act, practice, or course of business which does or would operate as a fraud or deceit in connection with the purchase or sale of securities. Lorenzo appealed, contending he had no liability under Rule 10b–5 because under the Supreme Court's ruling in *Janus Capital Group, Inc. v. First Derivative Traders*, liability for false statements was limited only to the "makers" of those statements as contemplated by Rule 10b–5(b), defined only as those with "ultimate authority" over the statements' content and communication. One who simply prepares or publishes a statement on behalf of another, as Lorenzo saw his role, fell outside of the scope of primary liability under *Janus*. The D.C. Circuit agreed that since Lorenzo's boss directed him to send the emails, supplied their content, and approved them for distribution, Lorenzo did not "make" the statements, and thus could not be held primarily liable for a Rule 10b-5(b) violation. But, the D.C. Circuit sustained the SEC's finding of primary liability under Rules 10b-5(a) and (c) for knowingly disseminating statements he knew to be false, even though he did not "make" the statements himself. **The Supreme Court's Ruling** On appeal to the Supreme Court, Lorenzo advanced two main theories, both of which the Supreme Court flatly rejected. ***Argument 1: The three subsections of Rule 10b-5 are mutually exclusive.*** Lorenzo argued that Rule 10b-5 limited primary liability *for false statements* only to "makers" of false statements under Rule 10b-5(b), so Rules 10b-5(a) and (c) could only be implicated when conduct other false statements was at issue. Holding to the contrary, he argued, would render subsection (b) "superfluous," and by extension, would relegate *Janus* to "dead letter" law. The Court noted that *Janus* was limited to whether Rule 10b-5(b) "maker" liability could extend to an investment advisor who helped draft false statements issued by someone else with ultimate authority, and said absolutely nothing about dissemination of false statements. The Court assumed *Janus* would remain "relevant (and preclude liability) where an individual *neither made nor disseminated* false statements and rejected Lorenzo's premise that Rule 10b-5's subsections were intended to operate with mutual exclusivity because the Court and SEC had long recognized "considerable overlap" among the Rule's subsections and related securities laws. Thus, the Court concluded, dissemination of false or misleading statements could constitute employment of a "device," "scheme," or "artifice to defraud" under Rule 10b-5(a) and "a[n] act, practice, or course of business" that "operates . . . as a fraud or deceit" under Rule 10b-5(c), even if the disseminator did not "make" the statements and falls outside operation of Rule 10b-5(b), if the disseminator knows the statements to be false or has intent to defraud recipients. Because it was undisputed that Lorenzo knew the emails overvalued the investment, the Court found it "difficult to see how his actions could escape the reach" of Rules 10b-5(a) and (c). ***Argument 2. Blurring the Lines Between Primary and Secondary Liability*** Lorenzo also argued that ascribing primary liability to him under Rule 10b-5, even though he did not "make" the false statements at issue would essentially "eviscerate" the distinction between primary and secondary liability inherent in the existence of the statue's "aiding and abetting" provision. Noting that it was "hardly unusual for the same conduct to be a primary violation with respect to one offense and aiding and abetting with respect to another," the Court found that Lorenzo could fairly be considered to have aided and abetted the making of a false statement (under Rule 10b-5(b) – secondary liability) by engaging in a "scheme," "practice," or "course of business" to defraud (under Rule 10b-5(a) or (c) – primary liability). **Implications** This case marks a clear expansion of the universe of

individuals who may be subject to Rule 10b-5 *primary* liability for false or misleading statements, and the circumstances under which that liability may attach. Indeed, *Lorenzo* opens the door for claims against individuals simply for disseminating statements of others that they know to be false or misleading, and by elevating dissemination to conduct that may give rise to primary (as opposed to secondary, or aiding and abetting) liability, invites private plaintiffs, in addition to the government, to seek to enforce the rules. Although the Court did place some parameters on its holding, noting that liability would typically be inappropriate for those only "tangentially involved in dissemination" (e.g., a mailroom clerk), the Court stopped short of defining the amount of control over a fraudulent statement or its dissemination required for liability to attach. Because the Court's opinion was heavily influenced by Lorenzo's undisputed intent to defraud, it will be up to the defense bar to distinguish the facts of each case on the element of intent to narrow the effect of this opinion.

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