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U.S. Supreme Court Invites Solicitor General's Views on Whether to Grant Review of Important Securities Fraud Case

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Today, the Supreme Court took an important step in a case that should be of interest to investment advisors, accountants, and others who provide services to issuers of securities. The Supreme Court issued an order inviting the Solicitor General of the United States ("SG") to file a brief expressing the views of the United States on whether the Court should review a recent ruling by the Fourth Circuit in *Janus Capital Group v. First Derivative Traders*, 566 F.3d 111 (4th Cir. May 7, 2009), a securities fraud case in which plaintiffs are testing the boundary between primary and secondary actors in the securities markets. Both the importance of the issue in *Janus* and the Supreme Court's desire to hear from the Solicitor General make this a case worth watching.

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Janus is another in a long line of cases in which plaintiffs seek to overcome the Supreme Court's holding in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). In *Central Bank*, the Supreme Court rejected a private action for aiding and abetting liability under the federal securities laws. Ever since, plaintiffs have struggled to hold secondary actors in the securities markets — such as banks, financial advisors, accountants, and lawyers — liable for securities fraud.

In *Janus*, plaintiffs sought to assert securities fraud claims against a group of mutual funds' investment advisor, Janus Capital Management LLC ("JCM"), and its parent company, Janus Capital Group Inc. (collectively, "Janus"). They alleged that Janus made misrepresentations about the mutual funds' rules prohibiting market timing. Recognizing that they could not establish liability by claiming that Janus aided and abetted the mutual funds' representations, plaintiffs alleged that Janus actually "made" the representations at issue, even though the prospectuses containing the alleged misrepresentations were not attributed to Janus.

Janus is not the first time securities-fraud plaintiffs have sought to hold defendants liable for making misrepresentations based on statements that were not explicitly attributed to them. Unlike the Fourth Circuit in *Janus*, however, most courts have refused to extend liability for securities fraud that far. The

Second Circuit, for example, has held that “a defendant must actually make a false or misleading statement in order to be held liable under § 10(b),” rejecting the theory that liability could be established even if investors understandably inferred that a defendant had made the statement at issue. The Tenth and Eleventh Circuits have also adopted this view.

The Fourth Circuit in *Janus*, however, declined to follow this circuit precedent, and held instead that “[a]t the complaint stage a plaintiff can plead fraud-on-the-market reliance by alleging facts from which a court could plausibly infer that interested investors would have known that the defendant was responsible for the statement at the time it was made, even if the statement on its face is not directly attributed to the defendant.” Considering the complaint in *Janus*, the Fourth Circuit held that plaintiffs adequately alleged that investors would have inferred that JCM was responsible for the alleged misrepresentations in the mutual funds’ prospectuses.

On October 30, 2009, Janus filed a petition for a writ of *certiorari*, asking the Supreme Court to review the Fourth Circuit’s decision. The petition asks the Court to consider two questions: first, whether the Fourth Circuit “err[ed] in concluding — in direct conflict with decisions of the Fifth, Sixth, and Eighth Circuits — that a service provider can be held primarily liable in a private securities fraud action for ‘help[ing]’ or ‘participating in’ another company’s misstatements?” and second, whether “the Fourth Circuit err[ed] in concluding — in direct conflict with decisions of the Second, Tenth, and Eleventh Circuits — that a service provider can be held primarily liable in a private securities fraud action for statements that were not directly and contemporaneously attributed to the service provider?”

When the Justices reviewed the *certiorari* petition and the other briefs, they did not issue the typical order either granting or denying review. Instead, the Court issued an “Invitation” to the SG to file a brief on whether the Court should grant review. When issued such an Invitation, also known as a “CVSG” because it Calls for the Views of the Solicitor General, the SG always files a brief in response with a recommendation as to whether the Court should grant review.

The Supreme Court issues an Invitation to the SG only a dozen or so times each year. The Court does so in cases where it wants to be informed by the expertise of the United States in a case in which the federal government is not a party. Generally, Invitations are issued in cases in which the federal government has a significant interest in the underlying federal law because of related federal programs or federal enforcement efforts. In this case, for example, as the SG formulates her position, she will likely solicit the views of the Securities and Exchange Commission, as well as those of other interested agencies in the United States government. The Court’s Invitation indicates the Court’s interest in hearing whether the United States thinks that *Janus* presents an important enough question of securities law to warrant review.

An Invitation by the Supreme Court to the SG cannot be read as a determination that the Court ultimately will grant review. More often than not, the SG recommends that the Court deny the petition, and the Court usually follows that recommendation. But an Invitation does indicate that the odds of *certiorari* being granted in the case are significantly higher than for a typical *certiorari* petition. It takes four Justices to issue an Invitation, just as it takes four Justices to grant a *certiorari* petition. The Court grants *certiorari* in only about 4% of petitions on the Court’s “paid” docket, which consists of petitions where the filing fee is paid and excludes those petitions filed by a prisoner or other indigent individual. For paid petitions on which the Court issues an Invitation for the SG’s views, that percentage jumps to approximately 33%.

The Supreme Court’s practice does not impose a specific deadline by when an Invitation brief must be filed. The Solicitor General usually takes at least 90 days to file an Invitation brief and sometimes takes significantly longer than that. While the SG often takes an average of 4 months to file an Invitation brief, when the Invitation order occurs affects the timing. For Invitations such as this one, issued in winter, the SG typically tries to file the Invitation briefs by May, to allow the Supreme Court enough time to decide to grant or deny review before it recesses for the summer.

Assuming the SG follows its past practice, we can expect the SG to file the Invitation brief in *Janus* by the end of May 2010. The parties in *Janus* will all then have an opportunity to file a supplemental brief, and the Court will be expected to decide whether to take the case before the end of this June. If the Court grants *certiorari*, the briefing on the merits will take place during the summer, and oral argument would be scheduled sometime in the late fall, in the Court’s October 2010 Term.

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