Supreme Court Set To Decide Arian Controversy In Janus

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The U.S. Supreme Court has scheduled oral arguments in *Janus Capital Group, Inc.v. First Derivative Traders* for December 7, 2010. The case concerns whether: (1) a service provider can be held primarily liable for participating in an issuer's misstatements; and (2) whether a service provide can be held primarily liable for statements not directly and contemporaneously attributed to that service provider. The Supreme Court will be reviewing a holding by the Fourth Circuit Court of Appeals that found that a mutual fund adviser could be held liable in a private action because it participated in the writing and distribution of fund prospectuses.

At a general level, the Fourth Circuit's decision can be viewed as an end-run on the Supreme Court's rejection of aiding and abetting liability in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver,* 511 U.S. 164 (1994) and secondary actors in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,* 552 U.S. 148 (2008). However, the *Janus* case involves the rather unique circumstances of an investment adviser to a registered investment company.

Rule 10b-5 under the Securities Exchange Act of 1934 imposes liability on persons who "make" untrue statements of material facts. The U.S. government filed an amicus curiae brief arguing that a person "makes" a statement if that person "creates" a statement. If the Court accepts this reasoning, accountants, lawyers and consultants who participate in reviewing securities disclosures could face liability as primary actors. The petitioners, represented by Mark Perry at Gibson, Dunn & Crutcher LLP, argue that equating "create" with "make" is just aiding and abetting by another name.

The debate reminds of the battle waged by early Christian theologians (most notably, the Bishops Arius and Athanasius) over the how to express the relationship of the Father and Son in the trinity. Ultimately, the First Council of Nicaea in 381 settled on the expression "γεννηθέντα, οὐ ποιηθέντα" (begotten, not made). Perhaps the Supreme Court will follow this example by settling on a formulation that requires "made, not created".

California's anti-fraud statute, Corporations Code § 25401, avoids the problem entirely by not expressly proscribing the "making" of untrue statements. Rather, the statute makes in unlawful for any person to offer or sell a security by means of an untrue statement of a material fact. Moreover, Corporations Code § 25501 imposes a strict privity requirement. Finally, California has a statute, Corp. Code § 25504.1, imposing liability

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on persons who "materially assist" in a violation of § 25401. Thus, the same debate should not arise under the Corporate Securities Law of 1968.

Copies of the briefs filed in *Janus* are available here on the SCOTUSblog.

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