

U.S. Supreme Court Insulates Advisers, Including Lawyers, From Rule 10b-5 Liability for Statements Made by Companies

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Janus Capital Group, Inc. v. First Derivative Traders, 524 U.S. ---- (June 13, 2011)

Brief Summary

U.S. Securities and Exchange Commission (SEC) Rule 10b-5 forbids “any person . . . [t]o make any untrue statement of a material fact” in connection with the purchase or sale of securities. The U.S. Supreme Court recently held that an adviser who did not finalize the decision to communicate the statements cannot be a “maker” under Rule 10b-5, absent authority over the content and when and where the content is communicated. Advisers, including lawyers and accountants, generally lack this ultimate authority and thus cannot be held liable under the rule for making such false statements.

Complete Summary

Defendants, a mutual fund investment company and its investment advisers, were sued by plaintiffs, the fund’s investors, for making false statements in violation of the Rule 10b-5. The investors asserted that both the investment company and its advisers materially misled the investing public and that the advisers should be liable as a “controlling person” under the Securities and Exchange Act.

The U.S. Supreme Court held that the advisers themselves did not “make” any statements to the public because only the investment company itself published the prospectuses, the advisers themselves did not attest to the accuracy of the published information, and there was no doubt that the investment company was a different legal entity than the advisers. An adviser cannot be a “maker” under Rule 10b-5, absent authority over the content and

when and where the content is communicated. The Court used the analogy of a speechwriter who prepares the vast majority of the message but does not deliver the speech herself; the speaker maintains the final control and authority to say part or all of what has been prepared.

Significance of Opinion

The Supreme Court's holding generally should protect advisers, including lawyers and accountants, from liability under Rule 10b-5 for the making of false statements by their client companies. The decision also is significant because it indicates that while *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) recognized an implied right to bring certain claims under Rule 10b-5, that right will be narrowly construed.

For more information, please contact your regular Hinshaw attorney.

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