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Whether the Supreme Court's Decision in *Janus* Applies to Government Enforcement Actions Under Section 10(b) and Rule 10b-5(b)



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In June 2011, the Supreme Court held, in *Janus Capital Group, Inc. v. First Derivative Traders* ("*Janus*"), that the "maker" of a materially false statement subject to liability under Section 10(b) of the Securities Exchange Act, and Rule 10b-5(b) thereunder, is "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."[1] Put another way, the Supreme Court effectively ruled that the "maker" of a statement is the party whom you would more commonly refer to as the "speaker," as opposed to the "speechwriter."[2]

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Given the exceedingly narrow definition of the term "make" adopted by the Supreme Court in *Janus*, litigation since that decision has focused on whether it applies to other federal securities laws such as Section 17(a) of the Securities Act, the scope of "scheme liability" under the other two subsections of Rule 10b-5, and whether "secondary liability" for aiders and abettors in SEC enforcement actions extends to those not deemed "makers." It has generally been assumed that *Janus* would apply not only in private actions brought under Section 10(b), but also in government enforcement actions, be they civil or criminal, brought under that provision. That was, until last week.

In *Prousalis v. Moore* ("*Prousalis*"), the Fourth Circuit became the first federal appellate court to address the question of whether the Supreme Court's decision in *Janus* applies to criminal charges brought under Section 10(b) and Rule 10b-5(b).[3] In that case, the defendant was a securities lawyer who pled guilty to securi-

[1] 131 S.Ct. 2296, 2302 (2011).
[2] *Id.*
[3] In *Janus*, the Supreme Court reversed a decision of the Fourth Circuit.

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ties fraud based on his preparation of IPO registration materials that were signed by company management and filed with the SEC. The Fourth Circuit held that the *Janus* court's interpretation of the term ''make'' applies only in the context of a private action.[4] For the following reasons, we question the reasoning of the opinion and believe that the holding creates significant uncertainty as to the scope of liability under Section 10(b).

First, the decision in *Janus* was explicitly based on the language of Rule 10b-5.[5] In particular, the Court looked to the dictionary definition of the term ''make'' as used in that rule and determined that ''[t]he phrase at issue in Rule 10b-5, '[t]o make any. . .statement,' is thus the approximate equivalent of 'to state.' ''[6] While the Fourth Circuit noted that ''context'' must be considered when interpreting the language of a statute, the court offered no authority for the notion that ''context'' includes the identity of the plaintiff.[7] The notion that the same word in the same rule has different meanings in a criminal versus civil case is a novel proposition.

Second, while the Fourth Circuit held that the *Janus* court's interpretation of the term ''make'' does not apply in the criminal context, the court did not explain what ''make'' does mean in the criminal context. Prior to the *Janus* decision, there were several tests being used by the various courts to define the scope of liability under Rule 10b-5(b). The Fourth Circuit's failure to identify which of the approaches it will adopt in the criminal context can only lead to further confusion among courts and prosecutors, and quite possibly unnecessary Circuit splits.

Third, the *Janus* court held that it would not defer to the SEC's proposed interpretation of the term ''make'' to include the creator of a statement because it did not ''find the meaning of 'make' in Rule 10b-5 to be ambiguous.''[8] Significantly, the Court did not differentiate between the civil and criminal context in reaching this conclusion. If the term ''make'' is unambiguous, it is hard to understand how there can be a different interpretation of ''make'' in a government enforcement case than in a private action.

Fourth, the *Prousalis* court makes much of the fact that *Janus* was a private action case and that the Supreme Court noted that its holding was consistent with the scope of the private right.[9] But the fact that the Supreme Court believed its decision in *Janus* was consistent with the case law concerning the private right of action – which, of course, it should be – does not suggest that the holding is limited to that context. To the contrary, the Supreme Court implied that its decision would apply outside the context of a private right action when it noted the SEC's ability to bring enforcement actions under an aiding and abetting theory against ''entities that contribute 'substantial assistance' to the making of a statement but do not actually make it . . . , *see* 15 U.S.C.A. § 78t(e).''[10]

Fifth, the Fourth Circuit notes that no criminal case has ever applied *Janus*.[11] This is beside the point, because there are dozens of SEC enforcement cases applying *Janus*.[12] If the *Prousalis* court is right that *Janus* does not apply outside the private action context, then it shouldn't be that *Janus* applies to SEC enforcement cases either. But the SEC does not even argue that *Janus* does not apply to its cases.[13] Indeed, in *SEC v. Tourre*, an enforcement action brought in part under Rule 10b-5, the only claim on which the defendant was cleared was the Rule 10b-5(b) claim, where the jury was charged that ''make'' meant the defendant either ''personally made'' or had ''ultimate authority over'' a false statement, using the same terms and analogies as *Janus*.[14] The Fourth Circuit offered no explanation for why *Janus* applies in civil enforcement cases but not criminal ones.

In determining that *Janus* does not apply to criminal charges brought under Rule 10b-5, the Fourth Circuit has thrown the law into flux and in doing so raised many more questions than it has answered. Practically, will the Fourth Circuit's decision lead the SEC to change its position on prosecutions? How will judges instruct juries in the criminal context? Will other circuits follow the Fourth Circuit's lead in distinguishing private securities cases from government enforcement actions? These questions all remain to be answered. In the meantime, the uncertainty in the law created by this decision is significant. It is cold comfort to business executives to know that their conduct will not subject them to private securities actions, but could nonetheless expose them to federal criminal liability.

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[4] *Prousalis v. Moore*, —- F.3d —-; 2014 BL 127095, *3 (May 7, 2014).

[5] Rule 10b-5(b) provides that ''it shall be unlawful for any person. . .[t]o **make any untrue statement** of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. . . in connection with the purchase or sale of any security.'' (emphasis added)

[6] *Janus*, 131 S.Ct. at 2302.

[7] *Prousalis*, —- F.3d —-, 2014 BL 127095 at *4-5.

[8] *Janus*, 131 S.Ct. at 2304, n. 8.

[9] *Prousalis*, —- F.3d —-, 2014 BL 127095at *4.

[10] *Janus*, 131 S.Ct. at 2302.

[11] *Prousalis*, —- F.3d —-, 2014 BL 127095 at *7.

[12] *See, e.g., SEC v. Kelly*, 817 F. Supp.2d 340 (S.D.N.Y. 2011); *SEC v. Sentinel Mgmt. Group.*, 2012 BL 85573 (N.D. Ill. March 30, 2012).

[13] *See* Jury Charges, *SEC v. Tourre*, 2013 WL 5823080 (S.D.N.Y); No. 10-3229, docket no. 433-1 at 37-38.

[14] *Id*. Mr. Martens represented the SEC in *SEC v. Fabrice Tourre*.

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