



California Corporate & Securities Law

Supreme Court Resolves Janus Controversy But The Gates of War Are Not Entirely Closed

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Yesterday, the U.S. Supreme Court issued its decision in *Janus Capital Group, Inc. v. First Derivative Traders*. In a 5-4 decision, the Court found that to be liable under Rule 10b-5, a person must “make” the material misstatement. According to Justice Thomas writing for the majority, a person is a “maker” of a statement when that person “is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.” The majority rejected the government’s amicus argument that “make” should be defined as “create”.

The argument over “make” versus “create” is reminiscent of the great Arian controversy that divided the Christian church over whether Christ was begotten, not made (γεννηθέντα οὐ ποιηθέντα). In an interesting inversion, five of the six Roman Catholic justices favored an interpretation that limits liability to persons who “make” rather than “create” a statement.

I’m not suggesting that religious beliefs had any influence on the decision whatsoever. Indeed, the case presented no theological questions. However, someone who has been trained in the [Roman Catholic Catechism](#) would undoubtedly be familiar with, and perhaps attuned to, arguments about making versus creating.

Some will undoubtedly claim that the majority’s holding will limit aiding and abetting claims. However, the next few years may actually see an increase in actions against alleged aiders and abettors. As a result of the Dodd-Frank Act’s whistleblower bounty provision, the number of complaints to the SEC is likely to increase. Some of these complaints are will undoubtedly involve aiders and abettors. Congress restored the SEC’s authority to bring aiding and abetting actions in 1995 with the enactment of Section 104 of the Private Securities Litigation Reform Act. More recently, Section 929O the Dodd-Frank Act empowers the SEC to bring aiding and abetting actions based on a recklessness standard. Section 929P of the Dodd-Frank Act also authorized the SEC to obtain monetary penalties in administrative proceedings. Taken together, these changes should mean that the heads of aiders and abettors are not likely to be resting easy on their pillows, the *Janus* decision notwithstanding.

Janus is the Roman god with two faces for which the month of January is named (the month looks back to the old year and forward to the new year). In ancient Rome, Janus’ temple had double doors which were only closed in time of peace, which is to say that they were almost always open (“ἔστι δὲ αὐτοῦ καὶ νεῶς ἐν Ῥώμῃ διθυροσ, ὃν πολέμου πύλην καλοῦσι”).

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