



California Corporate & Securities Law

Supreme Court Weighs Opening The Janus Gate of Secondary Liability

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The Supreme Court heard oral arguments in *Janus Capital Group, Inc. v. First Derivatives Traders* on Tuesday. You can read the transcript [here](#). The [SCOTUSblog](#) posts transcripts of oral arguments. If you are not up to reading the entire transcript, Jim Hamilton's World of Securities Regulation posted this [summary](#).

[Mark Perry](#), on behalf of the petitioners, argued that the judgment below represented nothing less than a frontal assault on the Supreme Court's earlier rulings in *Central Bank of Denver, NA v. First Interstate Bank of Denver, NA*, 511 US 164 (1994) (holding a private plaintiff may not bring a suit for aiding and abetting under § 10(b) of the Securities Exchange Act of 1934) and *Stoneridge Inv. Partners v. Scientific-Atlanta*, 128 S. Ct. 761 (2008) (holding that there is no implied right of action under § 10(b) against customers/suppliers because investors did not rely on their statements).

I was pleased to see that Justice Scalia focused on the create/make (γεννηθέντα, οὐ ποιηθέντα) debate. Rule 10b-5(b) imposes liability on those who "make" statements. In the case of mutual funds, the fund adviser *creates* the statements, but the statements are *made* in the fund's prospectuses. The respondents argued that a fund adviser who *creates* statements for a fund is *making* statements for purposes of the liability. Justice Scalia observed:

If you're talking about making heaven and earth, yes, that means to create, but if you're talking about making a representation, that means presenting the representation to someone, not — not drafting it for someone else to make.

In contrast, the California Corporate Securities Law of 1968 imposes joint and several liability on persons who materially assist in violations of various statutes, including § 25401 which prohibits the sale or purchase of securities by means of a written or oral communications containing false statements or omissions. Cal. Corp. Code § 25504.1. However, the statute requires intent to deceive or defraud.

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