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Securities

After Janus, Plaintiff Bar's Focus Will Shift To Other Liability Provisions, Lawyers Say

Following the U.S. Supreme Court's narrow reading in *Janus* of the scope of 1934 Securities Exchange Act Rule 10b-5 liability, plaintiffs' attorneys will turn their attention to other securities law provisions, lawyers suggested Sept. 21.

Jonathan Cuneo, founding partner of plaintiffs' firm Cuneo Gilbert & LaDuca LLP, Washington, observed that the high court made clear in *Janus Capital Group Inc. v. First Derivative Traders*, U.S., No. 09-525, 6/13/11, that the "implied" private right of action under Rule 10b-5 must be construed narrowly.

However, the court has been "less unfriendly or antagonistic" to private actions that have a clear statutory basis, he said. "I would advise you to dust off Sections 20(a) and 20(b)" of the 1934 Act, Cuneo said. "That is where the focus will shift."

Bruce Cormier, associate general counsel at Ernst & Young LLP, agreed. The *Janus* decision is likely to "open up a lot of Section 20 litigation," he said.

The attorneys spoke on a panel hosted by the D.C. Bar. Section 20 provides for the liability of controlling persons and those who aid and abet securities violations.

Scope of Liability

On June 13, the Supreme Court concluded in *Janus Capital Group Inc. v. First Derivative Traders* that an investment adviser that was a legally separate entity from the mutual fund that filed an allegedly misleading prospectus could not be held primarily liable in a private action under Rule 10b-5 for "making" a false statement, even if the adviser took part in drafting the statement (12 CLASS 554, 6/24/11). The court also set out a bright-line distinction between primary and secondary liability under the antifraud rule.

The holding comes at a critical time, when federal securities litigation is on the rise, said co-panelist Jason Mendro, an associate at Gibson Dunn & Crutcher LLP, Washington. Mendro cited statistics compiled by NERA Economic Consulting finding that federal securities class actions for the first half of 2011 were filed at the second highest semi-annual rate in eight years. Even though *Janus* was decided only in June, the ruling has been cited in at least 13 federal court decisions, he said.

Mendro added that *Janus* involved only the (b) prong of Rule 10b-5 on the "making" of a false statement. It remains to be litigated as to "what teeth" the (a) and (c) prongs still have, he said.

The panelists also agreed that the application of *Janus* down the executive line—for example, the company controller or individuals who help in the preparing of corporate statements—is an evolving area of law.

"It's one of the next frontiers" of litigation, Mendro suggested. Panel moderator Michael Scanlon, a partner at Gibson Dunn, Washington, also observed that "down the foodchain, it becomes a very facts-and-circumstances" determination.

Section 17, '33 Act

As to another antifraud provision, Section 17 of the 1933 Securities Act, Scanlon said it still is "early days" as to deciding whether *Janus* applies to the provision. However, Mendro observed that the provision does not expressly create a private cause of action. "I do not think this court will infer that

plaintiffs can assert a private right of action under Section 17(a)," he said.

In other comments, Cormier said *Janus* has provided clarity for the accounting and auditing profession. For such professionals, "there is something worse than expansive liability, and that is unclear liability," he said. Cormier added that if the liability rules are not clear, "professionals involved in the dissemination of information really are in a no man's land."

The "envelope" of creative actions pursued by plaintiffs to hold auditing and accounting firms liable for securities violations "has been pushed as far as it can be pushed," Cormier continued. "I think the ground rules for us are fairly clear."

Janus and other high court decisions further reinforce that those who still want a private cause of action against aiders and abettors of securities violations should go to Congress rather than litigate, Cormier said. "There is not the proverbial snowball's chance in hell" that the high court would infer a private right of action under Section 10(b) if it were presented the issue today, he said.

Legislation

The panelists also told the audience that they do not anticipate any bill introduction in the near future to allow for private actions against aiders and abettors. "I don't sense anything afoot right now," Cormier said.

Mendro noted that the issue recently was rejected in the writing of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Although Senate Judiciary Committee Chairman Sen. Patrick Leahy (D-Vt.) criticized *Janus*—chairing a hearing in June to examine it and other high court decisions—that probably is "a lot of saber rattling that isn't going anywhere," he said.

However, Cuneo observed that the economic landscape now is dominated by complex entities that rely on a large number of professionals to help them make disclosures and in other matters. "So it is not out of the question that Congress" would address the issue of private lawsuits against aiders and abettors down the road, he said.

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