



Supreme Court Holds That Securities Fraud Liability Extends Beyond “Maker” Of False Statements

Lorenzo v. SEC, No. 17-1077

Decided March 27, 2019

Today, the Supreme Court held 6-2 that an individual who knowingly disseminates false statements, even if the individual did not “make” the statements under SEC Rule 10b-5(b), can be held liable under other subdivisions of Rule 10b-5 and related securities laws.

Background:

Francis Lorenzo sent emails to prospective investors containing false statements about the sale of securities. He sent the emails at the direction of his boss, who wrote their content. Under *Janus Capital v. First Derivative Traders*, 564 U.S. 135 (2011), Lorenzo could not be held liable for making false statements under Rule 10b-5(b) because he was not the “maker” of the statements—his boss retained “ultimate authority” over their content. *Id.* at 142. The SEC nonetheless charged Lorenzo with violating other parts of Rule 10b-5 and related statutes. For example, the SEC alleged that Lorenzo had “employ[ed] any device, scheme, or artifice to defraud” under Rule 10b-5(a), and also had “engage[d] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person” under Rule 10b-5(c). The D.C. Circuit rejected Lorenzo’s contention that, because he was not the “maker” of the misstatements, he could not be held liable under Rule 10b-5(a) and (c) and related statutes.

Issue:

Whether someone who is not a “maker” of a misstatement under Rule 10b-5(b) can nevertheless be held liable for dissemination of misstatements under other subsections of Rule 10b-5 and related securities laws.

“[W]e conclude that . . . dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b-5 . . . even if the disseminator did not ‘make’ the statements and consequently falls outside subsection (b) of the Rule.”

Justice Breyer,
writing for the majority

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Court's Holding:

Yes. The prohibitions of fraudulent schemes and fraudulent practices in Rule 10b-5(a) and (c), as well as related prohibitions in securities laws, are broad enough to encompass the knowing dissemination of false or misleading statements directly to investors with the intent to defraud, even if the person who disseminates them did not “make” them under Rule 10b-5(b).



What It Means:

- The Court read the language of Rule 10b-5 broadly, relying on dictionary definitions to hold that an individual need not “make” false statements in order to be liable for “employ[ing]” a scheme to defraud under Rule 10b-5(a) or for “engag[ing]” in an act that operates as a fraud under Rule 10b-5(c) based on the individual’s knowing dissemination of false statements with intent to deceive.
- The Court declined to read the subdivisions of Rule 10b-5 as mutually exclusive, reasoning that their prohibitions involve “considerable overlap” to ensure coverage for multiple forms of fraud.
- The Court suggested some limits to its broad reading of Rule 10b-5, observing that “liability would typically be inappropriate” for individuals “tangentially involved” in disseminating false statements, such as “a mailroom clerk.”
- The Court reaffirmed its precedent holding that private suits are not permitted against secondary violators of Section 10(b), 15 U.S.C. § 78j(b). For example, private plaintiffs cannot sue defendants for undisclosed actions that investors could not have relied upon. Therefore, the Court’s ruling should be limited to claims involving the dissemination of false information directly to investors.
- The Court did not address what intent (scienter) is required to establish violations of Rule 10b-5 and related securities laws, as Lorenzo did not challenge the D.C. Circuit’s holding that he had the requisite scienter. The Court also reaffirmed that the SEC, “unlike private parties, need not show reliance in its enforcement actions.”
- The decision may result in the SEC and private plaintiffs increasingly relying on provisions other than Rule 10b-5(b) when alleging violations of the securities laws.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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