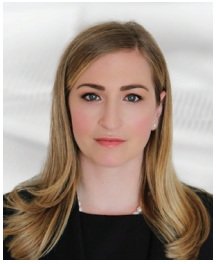
SUPREME COURT WILL REVISIT 'SCHEME LIABILITY' IN *LORENZO V. SEC*

BY LAURA H. POSNER
212.220.2925
lposner@cohenmilstein.com
V-CARD



ERIC S. BERELOVICH
202.408.3666
eberelovich@cohenmilstein.com
V-CARD

In June 2018, the Supreme Court agreed to hear *Lorenzo v. SEC*, a case in which the Securities and Exchange Commission ("SEC") found Francis Lorenzo liable for emailing false and misleading statements to investors that were originally drafted by his boss. The SEC asserted claims under the scheme liability provisions of Rule 10b-5(a) and (c), as well as the false-and-misleading statements provision of Rule 10b-5(b). A divided panel of the U.S. Circuit Court of Appeals for the District of Columbia held that, under the Supreme Court's precedent in *Janus Capital Group, Inc. v. First Derivative Traders*, Lorenzo did not "make" a false and misleading statement as required for liability under Rule 10b-5(b), because he did not have "ultimate authority" over the statements. The D.C. Circuit held, however, that Lorenzo was liable under the scheme liability provisions. Before his confirmation to the Supreme Court, Judge—now Justice—Kavanaugh wrote a dissenting opinion arguing Lorenzo is not liable under any provision of the federal securities laws. Lorenzo appealed the D.C. Circuit's decision, arguing that an individual cannot be liable for false and misleading statements under the scheme liability provisions where the same individual did not "make" the statements under Rule10b-5(b). Lorenzo's appeal raises complicated issues regarding, among other things, the line between Rule 10b-5(b) and the scheme liability provisions, the line between primary and secondary liability in SEC enforcement actions, and the scope of the scheme liability provisions.

In an *amicus curiae* (*i.e.*, friend of the court) brief filed in the Supreme Court, Cohen Milstein recently argued that the Court need not decide these thorny issues. It can uphold the D.C. Circuit's ruling simply by applying *Janus* to find that Lorenzo was a "maker" of the statements at issue, and thus find he is liable under Rule10b-5(b).

Janus held that "[o]ne 'makes' a statement by stating it." *Janus*, 564 U.S. at 142. "For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* Similar to Lorenzo's argument here, after *Janus*, corporate officers who signed documents containing untrue statements attempted to avoid liability by arguing that their company or board of directors had "ultimate authority" over the statements. *See, e.g.*, *In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 163-64 (S.D.N.Y 2012). But this strategy was roundly rejected. *See id.*

IN AN *AMICUS CURIAE* BRIEF FILED IN THE SUPREME COURT, COHEN MILSTEIN RECENTLY ARGUED THAT THE COURT CAN UPHOLD THE D.C. CIRCUIT'S RULING SIMPLY BY APPLYING *JANUS* TO FIND THAT LORENZO WAS A "MAKER" OF THE STATEMENTS AT ISSUE, AND THUS FIND HE IS LIABLE UNDER RULE10B-5(B).

Thus, in our amicus curiae brief, we argue that the fact that Lorenzo signed the emails is decisive. Just like a corporate officer who puts her signature on a corporate statement written by others, Lorenzo adopted the emails as his own by signing them.

In dismissing the import of Lorenzo's signature, the D.C. Circuit reasoned only that this "sort of signature line … can often exist when one person sends an email that 'publishes a statement on behalf of another,' with the latter person retaining 'ultimate authority over the statement.'" *Lorenzo*, 872 F.3d at 588. We argue that this reasoning is flawed for three reasons. First, there is no evidence in the record upon which the D.C. Circuit based its observation regarding the nature of Lorenzo's signature line, or what the signature line signifies. Second, the D.C. Circuit's reasoning relies on language from *Janus* divorced from its context. The Court's decision in *Janus* was based on the fact that the defendant was a "legally independent entity." 564 U.S. at 146-47. Here, by contrast, there is no legally independent entity at issue; Lorenzo was a registered broker with his own independent duties to his company and its investors, and the power to make statements that legally bound his company. And finally, the D.C. Circuit's reasoning also appears to assume that only one individual within an organization can "make" a statement. But both SEC enforcement actions and private suits under Rule 10b-5(b) routinely seek to hold accountable multiple senior executives who, for instance, all sign a statement. Unlike in *Janus*, which dealt with a separate corporate entity, "*within an organization*, more than one person will have ultimate authority over a statement … ." *In re Barrick Gold Sec. Litig.*, 2015 WL 3486045, at *2 (S.D.N.Y. June 2, 2015).

In sum, Cohen Milstein argues that, just as a corporate executive is a "maker" of an untrue statement in a filing she signs, Lorenzo is a "maker" of the email he chose to sign and send from his email account. It is thus appropriate to hold him liable under Rule 10b-5(b).

The Supreme Court is scheduled to hear oral arguments December 3 and should issue its opinion in the first quarter of next year. ■

Laura H. Posner is a partner and Eric S. Berelovich is an associate in the firm's Securities Litigation & Investor Protection practice group.