

Supreme Court Casts a Wide Net with Rule 10b-5

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The U.S. Supreme Court recently held that someone doesn't need to have "made" a false or misleading statement to have primary liability under the securities fraud rules.

Although the outer limits of that liability are not yet defined, this decision should cause persons with ancillary roles in securities transactions to be even more attentive to the accuracy of disclosures. Affected people could include:

- Broker-dealer firms whose representatives provide customers with disclosures about mutual funds and securities-based insurance products sold through the firm; and
- In some circumstances, legal, accounting, or business personnel who prepare, but do not have ultimate authority over, those disclosures.

Historically, most securities fraud actions have been brought under SEC Rule 10b-5(b), which governs those who "make" false or misleading statements. And the Supreme Court held in 2011 that one does not "make" a statement without ultimate authority over the contents of the statement and whether and how to issue it. But in its March 2019 opinion in *Lorenzo v. SEC*, the Supreme Court interpreted subsections (a) and (c) of the Rule (and the relevant statutory sections), and made clear that primary liability under those sections is not limited to persons with ultimate authority over statements.

Francis Lorenzo was an employee at an SEC-registered brokerage firm. He was helping to sell debentures in a company, and he sent emails to prospective investors that he knew contained materially false statements about the value of the company's assets. The content of the emails was written by Lorenzo's boss and Lorenzo sent them at his boss's direction, but the Supreme Court held that Lorenzo can be primarily liable under 10b-5(a) or (c).

As then-Judge Kavanaugh wrote in his dissent in the opinion below when he was on the D.C. Circuit, "the distinction between primary and secondary liability matters, particularly for private securities

lawsuits.” The Supreme Court has held that private litigants cannot bring 10b-5 claims against people who merely aid and abet primary actors. The majority opinion in Lorenzo therefore allows for more private lawsuits than would have been possible under the dissent’s preferred holding.

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