



## **The Continued Erosion of Rule 10b-5**

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## **Private Party Liability for Statements Under 10b-5 Following Janus Capital**

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**P.S. Truth is an absolute defense.**

To: Alain M. Baudry  
From: Edd M. Schillay  
Date: June 20, 2013

If you could send us your second draft set of materials by Wednesday, July 3, we would appreciate it. Final versions would be due in early September. We are looking forward to working with you. Thank you.

PS -- I have deleted the hilarious joke about the pope. It might offend someone. Ultimately, it is not my decision, but I think it would spice things up if you added something to insult our audience.

Edd M. Schillay | Manager of Operations  
The Network of Trial Law Firms, Inc.

To: Alain M. Baudry  
From: S. Lawrence Polk  
Date: June 19, 2013

I'm working on the titles for the various presentations. Does this edit work for you?

PS -- Regarding your materials: It is completely unacceptable to insult every member of the audience. If I wanted to, I could insist that The Network not permit this kind of outrageous slander and have you removed from the list of speakers. Instead, I will rely on your good judgment to do the right think.

S. Lawrence Polk | Partner  
Sutherland Asbill & Brennan, LLP

**TO: Attendees of the Financial Services CLE  
Super Course:**

It is a beautiful Friday afternoon  
in September in New York City.

The Network of Trial Law Firms believes that  
the fact that you are sitting inside  
listening to a CLE means only one thing --

**YOU ARE COMPLETE LOSERS! GET A LIFE!**

## Who made that statement under 10b-5?

### I. The Janus Decision

- In Janus Capital group Inc. v. First Derivative Traders, 131 S.Ct. 2296, 2302 (2011) the United States Supreme Court held that the “maker” of statement for 10b-5 liability must be someone with “ultimate authority” over the statement, including its content and whether and how to communicate it.”
- Further, “one who prepares/publishes a statement on behalf of another is not a maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by - and only by - the person to whom it is attributed. Id. at 2305.

## II. Key Issues After Janus

### A. Effect of Signature On “Maker” Status

- In virtually all circuits, a signature on the document containing the false statement is sufficient to impose liability on the party who signed the document.

*In re Am. Apparel, Inc. Shareholder Litig.*,  
2013 U.S. Dist. Lexis 6977, at \*90-91 (C.D. Cal. Jan. 16, 2013)

- An individual has sufficient ultimate authority to be liable for a statement he signed even if the individual was acting as an agent of his or her employer in supplying his signature.

*In re Smith Barney Transfer Agent Litig.*,  
884 F. Supp. 2d 152, 164 (S.D.N.Y. 2012)

- *Liability attaches* even if there is no proof that the signer otherwise assisted in preparing, reviewing, or approving the document.

*N. Port Firefighters' Pension v. Temple-Inland, Inc.*,  
2013 U.S. Dist. LEXIS 44280, at \*35-40 (N.D. Tex. Mar. 28, 2013).

#### **B. Liability for Corporate Officers Who Approve the Statements**

- Corporate executives may also be held liable for “making” a false statement when the executive approves the statement, because approval is seen as adopting the statement as the executive’s own.

*In re Pfizer Secs. Litig.*,  
2012 U.S. Dist. Lexis 39454, at \*20-21 (S.D.N.Y. Mar. 22, 2012).

### C. Effect of Direct Attribution

- When a false statement is directly attributed to a corporate officer, such as through quoting the individual in a corporate document, courts have been virtually unanimous in holding the individual liable for the statement.

*City of St. Clair Shores Gen. Emps. Ret. Sys. v. Lender Processing Servs., Inc.*,  
2012 U.S. Dist. LEXIS 44474, at \*8-9 (M.D. Fla. Mar. 30, 2012)  
*Comprehensive Inv. Servs. v. Mudd*,  
891 F. Supp. 2d 458, 473 (S.D.N.Y. 2012)

- Courts have split over whether an individual is liable for a misstatement if there was a suggested or implicit, but not direct, attribution of the misstatement to the individual.

*Compare:*

*SEC v. Landberg*, 836 F. Supp. 2d 148, 154 (S.D.N.Y. 2011)  
("surrounding circumstances" that imply attribution of statement to individual  
imposes liability on individual)

*~with~*

*City of Roseville Emp. Ret. Sys. v. Energy Solutions, Inc.*,  
814 F. Supp. 2d 395, 417 (S.D.N.Y. 2011)  
(no implicit attribution for director-nominees of corporation whose names  
were listed on publication containing misstatement)

## D. Liability of Senior Corporate Officers

- Courts have split on whether a corporate officer exercised sufficient “ultimate authority” to be liable for a statement when the officer did not directly make the statement in question, but when s/he maintained control over the company during the period of time when the statement was made.

*Compare*

*IBEW Local 90 Pension Fund v. Deutsche Bank AG*,  
2013 U.S. Dist. LEXIS 43774, at \*30 (S.D.N.Y. Mar. 27, 2013)  
(insufficient authority)

~with~

*In re Pfizer Inc. Sec. Litig.*,  
2013 U.S. Dist. LEXIS 49333, at \*37-39 (S.D.N.Y. Mar. 28, 2013)  
(sufficient authority).

- The Southern District of New York has drawn fine distinctions based on control over the specific portion of the company in which the false statement was made.

*IBEW Local 90 Pension Fund v. Deutsche Bank AG*,  
2013 U.S. Dist. LEXIS 43774, at \*30 (S.D.N.Y. Mar. 27, 2013)  
(Chairman of the Supervisory Board of a company not liable for statements made by other corporate officers during his tenure as Chairman when there was no allegation that he supervised them or participated in making any of the statements.)

*City of Pontiac Gen. Emp. Ret. Sys. v. Lockheed Martin Corp.*,  
875 F.Supp.2d 359, 374 (S.D.N.Y. 2012)  
(corporate officer was found liable because he was identified publicly as part of the corporation’s leadership and was in charge of the division of the company whose false statements led to the 10b-5 claim.)



## **E. Liability of Parent Corporations**

- Courts have found no liability for a parent company when there was not sufficient control over a wholly-owned subsidiary, such as when a subsidiary retained the right to amend its financial documents without consulting or gaining the approval of its shareholders or parent company.

*In re Optimal U.S. Litig.*,  
No. 10 Civ. 4095, 2011 U.S. Dist. LEXIS 119141,  
at \*16-17 (S.D.N.Y. Oct. 14, 2011).

## **F. Affiliates**

- The Southern District of New York has held that *Janus* does not foreclose liability for parent companies for the actions of their affiliate agents.

*Elbit Sys. v. Credit Suisse Grp.*,  
2013 U.S. Dist. LEXIS 2201, at \*20-21 (S.D.N.Y. Jan. 7, 2013).

- Parent company liability may be possible if the parent company exercises ultimate authority over the affiliate's statement via the ability to approve a statement or the authority to prevent the affiliate from releasing the statement.

*McIntire v. China Mediaexpress Holdings, Inc.*,  
2013 U.S. Dist. LEXIS 28592, at \*79-82 (S.D.N.Y. Feb. 28, 2013)  
(signs of control over affiliate existed, but insufficient showing of ultimate authority over whether and how affiliate would communicate statements at issue);

## **G. Underwriters**

- Courts have been willing to impose liability on underwriters for misrepresentations in Official Statements if the document is sufficiently attributed to the underwriter to suggest the underwriter had “ultimate authority” over the document.

*In re Allstate Life Ins. Co. Litig.*,  
No. CV-09-8174-PCT-GMS, 2012 U.S. Dist. LEXIS 7678,  
at \*18-19 (D. Ariz. Jan. 23, 2012)  
(*prima facie* case of liability for underwriter whose name was placed “prominently and in bold type on the first page” to suggest sufficient attribution).

New Issue Book Entry Only

Rating: Fitch Ratings: "A-"  
See "RATING" herein

In the opinion of Ernst & Young LLP, Bond Counsel, payments on the Bonds are not excluded from gross income for federal income tax purposes under Section 103 of the Code. This opinion is based upon existing law as of the date of issuance and delivery of the Bonds and we express no opinion as to any future changes in the law. Purchasers of the Bonds should consult their own advisors as to the tax consequences of purchasing or selling the Bonds. Bond Counsel is also of the opinion that interest on the Bonds is exempt from Arizona personal income taxation. For a more complete discussion, see "TAX MATTERS" herein.

#### SUMMARY

The Industrial Development Authority of the County of Yavapai  
Convention Center Facilities Tax Revenue Bonds,  
Series 2005 (Taxable)

Dated: Date of Delivery

Due: October 1, as shown  
on inside cover



The Convention Center Facilities Tax Revenue Bonds, Series 2005 (Taxable) (the "Bonds") are being issued by The Industrial Development Authority of the County of Yavapai (the "Issuer") pursuant to an Indenture of Trust, dated as of November 1, 2005 (the "Indenture"), between the Issuer and Wells Fargo Bank, National Association, as trustee (the "Trustee"). The proceeds therefrom will be used to construct, equip and operate a multipurpose convention and events center located within the Town of Prescott Valley (the "Project"), as more fully described under "THE PROJECT" herein, (i) pay capitalized interest on the Bonds through April 1, 2007, (ii) to fund a debt service reserve fund, and (iii) pay costs associated with the issuance of the Bonds. The Issuer will enter into a Lease Agreement with the Borrower (the "Lease Agreement"), dated as of November 1, 2005. Upon completion of construction, the Project will be conveyed to a Community Facilities District to be created by the Town of Prescott Valley, Arizona (the "Town").

The Bonds are special, limited obligations of the Issuer payable only from certain amounts paid by the Borrower pursuant to the Lease Agreement and other amounts held in certain funds and accounts established under the Indenture and pledged thereto. Pursuant to the Lease Agreement, the Borrower is obligated to make payments in amounts sufficient to pay the principal of and interest and premium, if any, on the Bonds and certain other fees and expenses.

The Bonds are issuable as fully registered obligations without coupons, in the principal amount of \$1,000 or any integral multiple thereof. Principal of, premium, if any, and interest on the Bonds will be payable at the principal corporate trust office of Wells Fargo Bank, National Association, Phoenix, Arizona, as Trustee and Paying Agent (the "Trustee" and "Paying Agent") for the Bonds, which payments will be made to the registered owners of the Bonds upon presentation and surrender to the Trustee. Interest on the Bonds is payable on April 1 and October 1 of each year, commencing April 1, 2006 (each an "Interest Payment Date").

The Bonds are secured by net revenues generated by the Project, amounts on deposit in the funds and accounts created for the benefit of the Bonds pursuant to the Indenture, and certain transaction privilege tax revenues ("TPV Revenues") paid by the Town to the Trustee (the "Pledged Revenues"). The Pledged Revenues will be applied to pay the principal of, premium, if any, and interest on the Bonds. See "SECURITY FOR THE BONDS" herein.

Pursuant to the Indenture, the Bonds are subject to optional and extraordinary mandatory redemption prior to maturity at the time, in the amount and at the redemption price as more fully described herein under the caption "DESCRIPTION OF THE BONDS - Redemption Provisions" herein.

THE BONDS AND THE INTEREST AND PREMIUM, IF ANY, THEREON ARE SPECIAL, LIMITED OBLIGATIONS OF THE ISSUER PAYABLE EXCLUSIVELY FROM THE PLEDGED REVENUES. THE BONDS DO NOT CONSTITUTE A DEBT OR A LOAN OF CREDIT OR A PLEDGE OF THE FULL FAITH AND CREDIT OR TAXING POWER OF THE COUNTY OF YAVAPAI, OR OF THE STATE OF ARIZONA, OR OF ANY POLITICAL SUBDIVISION THEREOF, WITHIN THE MEANING OF ANY STATE CONSTITUTIONAL PROVISION OR STATUTORY LIMITATION AND SHALL NEVER CONSTITUTE NOR GIVE RISE TO A PECUNIARY LIABILITY OF THE STATE OF ARIZONA OR THE COUNTY OF YAVAPAI. THE BONDS SHALL NOT CONSTITUTE, DIRECTLY OR INDIRECTLY, OR CONTINGENTLY OBLIGATE OR OTHERWISE CONSTITUTE A GENERAL OBLIGATION OR A CHARGE AGAINST THE GENERAL CREDIT OF THE ISSUER, BUT SHALL BE SPECIAL, LIMITED OBLIGATIONS OF THE ISSUER PAYABLE SOLELY FROM THE SOURCES DESCRIBED IN THE INDENTURE, BUT NOT OTHERWISE. THE ISSUER HAS NO TAXING POWER.

The purchase of the Bonds involves certain risks. In making an investment decision, investors must rely on their own examination of the offering, including the merits and the risks involved. This Official Statement has been prepared in connection with the offer and sale of the Bonds to the purchasers on the date hereof and is not intended for use in connection with any subsequent sale, offering or restructuring of the Bonds. See "CERTAIN BONDOWNERS' RISKS" herein.

The Bonds are offered, when and if issued by the Issuer, subject to the approval of legal counsel by Ernst & Young LLP, Scottsdale, Arizona, Bond Counsel. Certain legal matters will be passed upon for the Underwriter by Simon, Morrison, Heller, LLP, Omaha, Nebraska, for the Issuer by Boyle, Penick, Cline & Washington, P.L.L.C., Prescott, Arizona, and for the Borrower by Christopher Law Group LLP, Phoenix, Arizona. It is expected that the Bonds will be available for delivery through the facilities of DTC in New York, New York, on or about November 22, 2005.

Dated: November 18, 2005

ROBERT W. BAIRD & CO.

M.L. STERN & CO., LLC

EDWARD JONES

## Who made that statement: "YOU ARE COMPLETE LOSERS"?

- **Alain M. Baudry**  
Maslon Edelman Borman & Brand LLP
- **Edd M. Schillay**  
The Network of Trial Law Firms, Inc.
- **S. Lawrence Polk**  
Sutherland Asbill & Brennan LLP

## **About Alain Baudry**

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<http://www.maslon.com/Bio/AlainBaudry.asp>

Alain is a partner and chair of Maslon's Litigation Group and maintains a robust practice in federal and state courts in unfair competition (including trade secret misappropriation and non-compete disputes), securities laws, franchise and distribution law and valuation disputes.

### **Areas of Practice**

- Litigation
- Business Litigation
- Competitive Practices/Unfair Competition
- Construction Litigation
- Construction Claims
- Employment Litigation
- Intellectual Property Litigation

### **Articles and Presentations**

- "The Best Seminar You Will Ever Attend: What You Need to Know About False Advertising Law," Maslon Speaker Series, 2007
- "Trading Talent Without Trading Secrets. How to Manage the Risks Involved in Hiring While Protecting Intellectual Property Rights," Maslon Speaker Series, 2006
- "Business Torts," William Mitchell School of Law, 2002
- Don't Sign that Contract!, ON Litigation, Vol. 2, Fall 2009
- Thank you for not smoking or you're fired?, ON Litigation, Vol. 1, Spring 2009

### **Honors and Awards**

- North Star Lawyer, Minnesota State Bar Association, 2012 (North Star Lawyer is a designation that recognizes members who provide 50 hours or more of pro bono legal services in a calendar year.)
- Hennepin County Bar Association's Pro Bono Publico Private Sector Award, 2000
- AV Preeminent, Martindale-Hubbell® (AV Preeminent and BV Distinguished are certification marks of Reed Elsevier Properties, Inc., used in accordance with the Martindale-Hubbell® certification procedures, standards and policies.)

### **Education**

- J.D. - University of Minnesota Law School, Minneapolis, Minnesota, 1987 - Honors: magna cum laude; Honors: Order of the Coif; Law Review: Minnesota Law Review, Member, 1985 - 1987
- B.A. - Haverford College, Haverford, Pennsylvania, 1984