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With Kavanaugh Recusal, Lorenzo Arguments Get Close Look

By **Rachel Graf**

Law360 (November 30, 2018, 9:17 PM EST) -- With Justice Brett Kavanaugh recusing himself from the Lorenzo case involving forwarded misstatements before the U.S. Supreme Court, attorneys say they'll be paying close attention to oral arguments on Monday for any unexpected leanings by the other eight justices.

The Supreme Court might be headed toward a 4-4 ruling in light of Kavanaugh's recusal following his **involvement** in the D.C. Circuit decision, which **affirmed** the U.S. Securities and Exchange Commission's finding that investment banker Francis V. Lorenzo was liable for fraud through so-called scheme liability for forwarding his boss' misstatements about an energy investment. Given the potential for a divided court, oral arguments will be especially telling.

"People who follow these things and who work in the industry [will be] listening closely and analyzing the questions that the justices ask to see if you can perceive a path forward for one side or the other," Alston & Bird LLP partner Susan Hurd said.

At issue is whether Lorenzo can be held liable for sending clients emails drafted by his boss that contained false statements.

The D.C. Circuit's majority opinion, from which Kavanaugh dissented, determined Lorenzo does not meet the definition of a "maker" of fraudulent statements as set forth in the Supreme Court's 2011 decision in Janus , which held that the "maker" of a statement is limited to whoever had ultimate authority over the statement.

But the majority said Lorenzo was nonetheless responsible under the concept of scheme liability since he "effectively vouched for the emails' contents and put his reputation on the line by listing his personal phone number and inviting the recipients to 'call with any questions,'" according to the majority opinion.

Lorenzo has argued the D.C. ruling allows plaintiffs to "sidestep Janus' carefully drawn elements of fraudulent statement claims merely by relabeling the claims — with nothing more — as fraudulent scheme claims."

But Janus was a 5-4 opinion, and the four dissenters remain on the Supreme Court today, which attorneys say could pose a problem for Lorenzo. Those dissenters were Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan.

"I would be surprised to see any of them — particularly in light of the facts at issue — change their minds," said Laura Posner, a partner at Cohen Milstein Sellers & Toll PLLC, which filed an amicus brief supporting the SEC on behalf of North American Securities Administrators Association Inc.

Of the Janus dissenters, Ulmer & Berne LLP partner Ken Berg will be paying close attention to Justice Kagan and Justice Breyer during Monday's oral arguments. The duo ruled with a 7-2 majority in the recent Lucia **decision** against the SEC. The Lucia case addressed the constitutionality of the SEC's process for appointing its in-house judges, which Berg conceded is different than the statutory question posed in Lorenzo. Still, he wouldn't be surprised if Justices Kagan or Breyer ruled against

the SEC in Lorenzo as well.

Justice Neil Gorsuch is also worth watching, as is Chief Justice John Roberts, said Holwell Shuster & Goldberg LLP partner Daniel Sullivan. Because Justice Gorsuch's tenure started after the Janus ruling, he will be addressing the issues raised by Lorenzo for the first time on the Supreme Court.

Sullivan added that Justice Roberts has issued opinions that indicate he could be sympathetic to both sides of the case. The chief justice wrote the 2014 **opinion** in Halliburton II , which upheld the landmark Basic v. Levinson decision and said a company's stock price reflects all material, public information about the company. The opinion allowed investors who purchased shares of a company to prove on a classwide basis they relied on alleged misstatements that would have been reflected in the stock price, and signaled Justice Roberts might be wary of drastic limits to liability, Sullivan said.

"He has been in some respects on board with insisting on the limits of Section 10(b) liability, but not on board with what he maybe perceives to be too-aggressive efforts to reduce the scope of that liability," Sullivan said.

To avoid a 4-4 opinion, the justices could also agree to a narrow ruling that wouldn't have many implications beyond this specific case.

If a majority of justices can't reach an agreement, the D.C. Circuit opinion would stand, as would a split among a number of the federal appellate courts. The Second, Eighth and Ninth circuits have found that misstatements alone can't support a fraudulent scheme claim, while the Eleventh and D.C. circuits have found they can, Lorenzo said in his brief.

Of course, the final ruling and its implications won't be clear until the Supreme Court decides the case, likely next year.

"If anybody says they know exactly what the Supreme Court is going to do, they're setting themselves up to be potentially wrong," Alston & Bird's Hurd said.

--Editing by Emily Kokoll and Michael Watanabe.
