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"To Make or to Mar: The Supreme Court Turns Away Another Securities Law Plaintiff"

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The United States Supreme Court, in Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011), once again denied a remedy to securities law plaintiffs and further restricted the implied private right of action under Securities Exchange Act Section 10(b) and SEC Rule 10b-5. In Janus, the Court held that one, and only one, person or entity can "make" a material misstatement under Rule 10b-5(b), namely that person or entity with "ultimate authority over the statement, including its content and whether and how to communicate it." 131 S. Ct. at 2302. As a result, an investment adviser to mutual funds that issued misleading statements in investor prospectuses could not be held liable as a "maker" of those misstatements, notwithstanding substantial evidence indicating that the adviser made almost all management decisions for the funds and controlled almost every aspect of their work.

This article takes issue with the restricted meaning given by the Court to the word "make" and argues that the Court's reading of the term was justified neither as a linguistic nor as a legal matter. Utilizing the dictionaries cited by the Court, the article plumbs the myriad meanings of "make" and reasons that the Court was not justified in substituting a "test" for a "definition." The article also questions the Court's holding that the funds and the adviser...
enjoyed separate corporate existences. Although such a “veil-piercing” analysis might be relevant had the plaintiffs proceeded on the theory that the defendants operated as a “single economic entity,” such an approach is inappropriate here, as the plaintiff’s claim sounds in fraud. Finally, the article suggests a “test” of its own for who is a “maker” and urges the Court to examine the benefit to the defendant from prospectus misstatements, rather than focusing on the artificial issue of who exercises “ultimate authority” over those misstatements.

"Disclosure of Information on Social Networking Websites"

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The digital age is upon us, and the explosion of electronically stored information on computers, gadgets that go by all sorts of odd names (cell phones, PDAs, smartphones), and social networking sites, can often constitute a treasure trove for plaintiffs and defendants alike. This article primarily discusses several recent decisions where parties have sought information contained on social networking sites, but similar principles will likely apply in instances where the information sought is contained on an electronic device, or where the information sought pertains to the use of a particular device.

"Two Informative Opinions on 'Forgiveness' Statute, Among Other Rulings from the New York Court of Appeals"

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This article discusses several important procedural decisions handed down by the New York Court of Appeals during its 2010-2011 term. The piece includes discussion of three cases addressing important provisions in the CPLR, including:

CPLR 2001 (Mistakes, omission defects and irregularities), which was at issue in Goldenberg v. Westchester, 16 N.Y.3d 323 (2011) (dismissing medical malpractice action for failing to purchase an index number prior to serving summons and complaint);

CPLR 321 (Attorneys), at issue in Moray v. Koven & Krause, Esqs., 15 N.Y.3d 384 (2010) (finding that an action is automatically stayed where plaintiff’s attorney is suspended from the practice of law and opposing party failed to serve notice to appoint new counsel); and

CPLR 3126 (Penalties for Failing to Disclose—Conditional Orders), at issue in Gibbs v. St. Barnabas Hosp., 16 N.Y.3d 74 (2010) (overturning Appellate Division’s ruling that bill of particulars served 75 days late in violation of a conditional order was not grounds for granting summary judgment for defendant).

"Paperless Governments: Moving Towards Sustainability"
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This chapter explores the exciting opportunities for local and state governments to continue to move in the trend towards paperless operations, which improve efficiencies, reduce long-term costs and promote greater sustainability. In addition to pointing to examples of how governments across the country are engaging in the quest to become less reliant on paper, the chapter demonstrates how governments can easily comply with record keeping laws, access to government requirements, privacy laws and e-signature and e-notarization laws in the process. Finally, this chapter shows how electronic records management for both record keeping and for communication is on the doorstep.

"Failing Failed States: A Response to John Yoo"
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In Fixing Failed States, 99 CALIF. L. REV. 95 (2011), John Yoo shows that intervening states seeking to transform
the social, economic, and political framework of failed states aim to do too much and ultimately fail. Yoo proposes that the role of intervening states should be minimal — enforcing power-sharing agreements between competing groups within failed states, rather than transforming them into parliamentary democracies. Stated another way, he argues that failed states are best stabilized by military guarantees from western countries. He argues that the rules prohibiting the use of force should be loosened to facilitate such military guarantees as a means of re-stabilizing failed states.

In my response to Yoo’s, I argue that his proposals overstate the benefits of loosening the prohibition against the use of force and the rule that occupied countries be restored to full sovereignty. By proceeding primarily from a security perspective, he offers a military solution that risks exacerbating rather than resolving the problem of failed states while failing to support his arguments with persuasive evidence and case studies to support the efficacy of his proposals. Ultimately, I disagree with the means Yoo proposes to fix failed states.

"Tax Court Appointments and Reappointments: Do They Strengthen the Tax Court?"

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During the Presidential administrations of William J. Clinton and George W. Bush changes in the political climate made politics increasingly visible in judicial appointments. This trend has continued into the first two years of President Barack Obama’s administration and his judicial appointments. Most of the public attention with regard to judicial appointments is focused on nominees to serve as judges on the Article III courts: the United States District Courts, United States Courts of Appeals, and the United States Supreme Court. However, other courts are affected by this trend, specifically, the courts created by legislative enactment pursuant to Article I of the Constitution, including the United States Tax Court.

As an Article I court, the Tax Court has a number of differences from Article III courts. The most important of which is likely the lack of life tenure afforded to the judges appointed to the Tax Court bench, Tax Court judges are appointed by the President, with the advice and consent of the Senate to serve 15 year terms, and judges may be reappointed.

As the only prepayment forum for tax controversies, the majority of all civil tax litigation goes through the Tax Court. As a result, the Tax Court’s decisions play an important role in the economic life and health of all taxpayers. As a consequence, the effectiveness of the mechanism by which quality appointments and reappointments to the Tax Court are made should be of great concern to all.

This Article explores the appointment of Tax Court judges and the reappointment of Tax Court judges. In exploring these issues, this Article focuses on the processes historically used to appoint and reappoint Tax Court judges. This Article also considers the impact that recent changes in the appointment and reappointment process have had on both the quality of judges and the court itself.

As this Article demonstrates, delays in the reappointment process have had a significant effect on the efficient and effective disposition of justice to taxpayers. This negative effect has been noted by many who are close the tax administration system, including the chairmen of the House Ways and Means Committee and the Senate Finance Committee, and the American Bar Association Committee, Taxation Section.

This Article concludes that politicizing the selection of Tax Court judges, or the conditions under which a Tax Court judge is reappointed, would weaken the legitimacy of the Tax Court. However, under recent circumstances, such politics have been only a symptom of underlying problems. In practice, appointments have worked well, but reappointments have proven problematic. Recent experiences demonstrate that the appointment process works well to ensure that Tax Court judges are well qualified, as demonstrated by the withdrawal of unqualified candidates during the Bush Administration. However, changes are needed to the reappointment process, as the political use of that process has weakened the Tax Court by reducing the availability of experienced, established, well qualified presidentially appointed Tax Court judges.

This Article explores options to prevent this weakening of the Tax Court. Short of permitting life tenure, which seems unlikely given the historic resistance to turning the Tax Court into an Article III court, the Tax Court’s statutes should be amended to allow judge’s who are serving as senior judges on recall because of the expiration of their first term to continue to exercise the power’s of a judge, including participation in court review of a case. This power should continue when a judge is qualified for and interested in reappointment. The power to act in this manner would be withdrawn in the event that the president indicated that he or she did not intend to fill the vacancy or intended to nominate another person to the position.

"Wave of Corruption: Corruption Laws and Water Access"
Wessex Institute of Technology Press, Forthcoming
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Water is essential for human life and functioning. At the international and domestic level, it is well known that water is not accessible to all. There are many societal, structural and legal reasons for this lack of access, to say nothing of the lack of access to clean water rather than simply water itself.

This paper will shift the focus of water-based discussions to examine the relationship between access to water and legal regimes regarding corruption. Using international, regional and domestic corruption and water laws, this paper will analyze which regimes are applicable to corruption involving water access and how applicable regimes might be used to prevent corruption involving water access. From this analysis will come suggestions as to ways that existing corruption and other legal regimes could be strengthened to provide for more specific penalties involving corruption and water resources.

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