The Effects of an Undefined Ultimate Authority Standard for Rule 10b-5 Claims: Janus Capital Group, Inc. v. First Derivative Trader

Bryan P. King

Follow this and additional works at: http://scholarship.law.unc.edu/ncbi

Part of the Banking and Finance Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncbi/vol16/iss1/15

This Notes is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Banking Institute by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
The Effects of an Undefined "Ultimate Authority" Standard for Rule 10b-5 Claims:

_Janus Capital Group, Inc. v. First Derivative Traders_

I. INTRODUCTION

In an episode of NBC's comedy series, _The Office_, Michael Scott and Jim Halpert both share the role of co-manager of the Scranton branch of Dunder Mifflin Paper Company, Inc., a fictional paper sales company.1 The two co-managers try to work together but the employees struggle to determine which manager has ultimate authority over the office.2 The confusion created by the blurred chain of command leads one employee to quip, "[l]ook, it doesn't take a genius to know that every organization thrives when it has two leaders. Go ahead; name a country that doesn't have two presidents. A boat that sets sail without two captains. Where would Catholicism be, without the popes[?]"3 The scenario causes laughter when presented in a sitcom, but the question of who has "ultimate authority" can have drastic effects in the real world, including a determination of whether a suit alleging fraud against a mutual fund advisor will go to trial or be dismissed.4

In _Janus Capital Group, Inc. v. First Derivative Traders_,5 the Supreme Court held that an investment management company that was "significantly involved in preparing prospectuses" was not liable under Rule10b-5 for making an untrue statement of material fact.6 As a result, the Supreme Court dismissed the suit.7 The Court determined that the

---

2. _Id._
3. _Id._
5. _Id._
6. _Id._ at 2305.
7. _Id._ (reversing the judgment of the United States Court of Appeals for the Fourth Circuit dismissing the suit against Janus Capital Management).
investment management company did not actually “make” the statements because it did not have “ultimate authority” over the statements. The Court explained that “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.” This holding “sharply limits private federal securities fraud suits” brought against individuals and entities that prepare disclosure documents such as prospectuses on behalf of other fund companies. Additionally, the holding has created ambiguity in determining who actually has “ultimate authority” and therefore is able to “make” a statement. Since the Supreme Court decision, several lower courts have cited to Janus Capital, and different courts have interpreted the limit on “ultimate authority” in different ways. While the Court’s decision in Janus Capital may be one of its “most significant” securities cases in recent years, the holding left many ambiguities, including the all important question of which persons or entities have “ultimate authority.”

This Note examines the Supreme Court’s decision in Janus Capital Group, Inc. v. First Derivative Traders, concluding that the

---

8. Id.
9. Id. at 2302.
14. Yin Wilczek, Negative Shareholder Say-on-Pay Votes Generate Lawsuits, Conflicting Decisions, 43 Sec. Reg. & L. Rep. (BNA) No. 1999 (Oct. 3, 2011) (“On another topic, [Jonathan] Youngwood observed that the U.S. Supreme Court has been very active on the securities front in the last two years. He predicted that of the three securities decisions issued during the court’s previous term . . . Janus will be the most significant.”).
15. Janus Capital Grp., Inc v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011) (setting forth the standard that the maker of the statement is the entity with “ultimate authority”).
Supreme Court correctly interpreted Rule 10b-5 in its decision; however, the Court left open the question of who has “ultimate authority” leaving the district courts and circuit courts to determine the answer. Part II of this Note provides a detailed background of Rule 10b-5. This section includes a glimpse into the history of the Rule, discussing both the statutory authority for the SEC to make such a rule as well as the limitations imposed on the Rule through various court decisions. Part III then addresses the Janus Capital case, discussing the procedural history, the Supreme Court’s holding, and the dissent. Part IV of this Note includes an analysis of the decision in Janus Capital and evaluates the outstanding question of “ultimate authority.” This section discusses three lower court holdings since Janus Capital and analyzes the differences in applying the “ultimate authority” test. This section also discusses both the effects and consequences of these varying holdings and also analyzes alternative actions that may be brought against investment advisors. Finally, Part V provides a summary of the findings and reiterates that the Court was correct in Janus Capital but did not go far enough in defining which persons and entities have “ultimate authority” to avoid ambiguity and discrepancies in future cases.

II. THE SECURITIES EXCHANGE ACT OF 1934 AND SEC RULE 10B-5

The gravamen of the complaint in Janus Capital is the Court’s interpretation of Rule 10b-5. This Rule is titled “Employment of Manipulative and Deceptive Devises” and states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device scheme, or artifice to defraud,

---

16. See infra Part II.
17. See infra Part III.
18. See infra Part IV.
19. See infra Part V.
20. Janus Capital Grp., Inc., 131 S. Ct. at 2301 (“We granted certiorari to address whether JCM can be held liable in a private action under Rule 10b-5 for false statements included in Janus Investment Fund’s prospectuses.”).
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.  

An analysis of the creation of the Rule as well as its limitations is imperative in understanding the Court's decision in Janus Capital.

A. The Creation of Rule 10b-5

Congress granted the SEC rulemaking authority to create Rule 10b-5 as part of the Securities Exchange Act of 1934. Although Congress granted the power to enact rules to prevent manipulative or deceptive devices, the creation of Rule 10b-5 was sparked by one individual's manipulation. The SEC was notified of "the president of some company in Boston who [was] going around buying up the stock of his company from his own shareholders at $4.00 a share, and he [had] been telling them that the company [was] doing very badly, whereas, in fact, the earnings [were] going to be quadrupled." As recounted by Milton Freeman, upon being notified of the manipulation, "I looked at Section 10(b) and I looked at Section 17, and I put them together, and the only discussion we had there was where 'in connection with the purchase or sale' should be . . . ." He gave the new rule to the Commission and there was no debate or comment other than one person

22. See 15 U.S.C. § 78w(a) (2006) ("The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 78c(a)(34) of this title shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter . . . ."); id. § 78j(a)-(b) (2006) ("[I]n contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.").
24. Id.
25. Id.
who asked a rhetorical, "[w]ell, we are against fraud, aren't we?" It was this quick turn of events that created Rule 10b-5.27

Although Rule 10b-5 is now the "primary private remedy for fraud available under the Securities Exchange Act,"28 Freeman commented that at the time he did not think the creation of the Rule would be the "biggest thing that had ever happened."29 This underestimation of the magnitude of the Rule, along with the swiftness of the creation of the Rule, may lead some to question exactly how much time and thought went into the precise language used, and therefore how much weight the courts should give the language.30

B. The Origins of the Language of Rule 10b-5

As noted in Freeman's account, the language used in Rule 10b-5 was created through the fusion of Section 10(b) of the Securities Exchange Act of 1934 and Section 17(a) of the Securities Act of 1933.31

Section 10(b) of the Act provided much broader language than is used in Rule 10b-5 by making it unlawful:

[t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.32

26. Id.
27. Id.
28. 3 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION, 518 (West Publ'g Co., 6th ed. 2009).
30. Conference on Codification, supra note 23, at 922 (discussing the rapid creation of the rule and the limited debate surrounding the language of the rule). Cf. Rulemaking, How it Works, U.S. SEC. AND EXCH. COMM'N, http://www.sec.gov/answers/rulemaking.htm (last visited Feb. 9, 2012) ("Rulemaking generally involves several steps that are designed to give members of the public an opportunity to provide their opinions on whether the agency should reject, approve, or approve with modifications a rule proposal.").
Section 17(a) uses more broad language as well providing, in part, that:

[i]t shall be unlawful for any person in the offer or sale of any securities . . . directly or indirectly (1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.\textsuperscript{33}

Quite possibly the biggest and most relevant difference between these two statutes and the language of Rule 10b-5 is that neither of the two statutes use the specific language “to make.”\textsuperscript{34} The language in the two sections passed by Congress use phrases such as “to use or employ”\textsuperscript{35} or “to employ”\textsuperscript{36} but when the two were merged by the SEC\textsuperscript{37} these more broad phrases dropped out and were replaced with the word “make.”\textsuperscript{38} Arguably, “to make” narrows the scope of the Rule from a more expansive 10(b) and 17(a).\textsuperscript{39} This may have been a conscious decision or may have been a seemingly harmless minor change in language used.\textsuperscript{40} However, if a court were to hold that the use of “make” was a harmless change that did not narrow the scope of the Rule, the court would need to overcome the canon of construction that a statute means what it says and says what it means.\textsuperscript{41}

---

33. Id. § 77q(a).
34. Compare id. § 78j, and id. § 77q, with 17 C.F.R. § 240.10b-5 (2011).
36. Id. § 77q(a).
38. 17 C.F.R. § 240.10b-5.
39. See, e.g., Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011) (limiting the entities that “make” a statement to those that have “ultimate authority”).
C. The Rule is Only as Broad as the Statute

Rule 10b-5 is also limited in its use in that it only is as broad as the statute that gives the SEC the authority to make rules in the area of fraud and misrepresentation. The Court has been faced with the issue of an expanding Rule 10b-5 before as in Ernst & Ernst v. Hochfelder when the Court ruled that negligence was not enough for a Rule 10b-5 claim because it went beyond the scope of the statute. In that case, the SEC argued that the purpose of Section 10(b) was to "protect investors against false and deceptive practices that might injure them" and that "the 'effect' upon investors of given conduct is the same regardless of whether the conduct is negligent or intentional." Refusing to expand the scope of the statute, the Court did not accept the argument and reiterated that "[t]o let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another." In analyzing other cases brought under Rule 10b-5, courts must remain cognizant of this guiding principle and not expand the use of the rule beyond the statute that it seeks to enforce.

D. The Private Right of Action

Despite no expressed private right of action, courts have found that Rule 10b-5 gives rise to an implied private remedy. Since the initial ruling providing this private right in 1946, the private remedy has expanded and is described as a "judicial oak which has grown from

---

42. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.' Thus, despite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted the Commission by Congress under § 10(b).") (quoting Dixon v. United States, 381 U.S. 68, 74 (1965)).


44. Id. at 197-99 (holding that allowing a claim of negligence under Section 10(b) would expand beyond the statute's limitations of "manipulative and deceptive" and "add a gloss to the operative language of the statute quite different from its commonly accepted meaning").

45. Id. at 197-98.

46. Id. (citing Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617-18 (1944)).

little more than a legislative acorn." While the reading and use of Rule 10b-5 has expanded over the years, the suits brought under it are still limited to ones of primary liability. As a result, suits brought against entities that contribute "substantial assistance" to making statements but do not go as far as actually making the statement can be brought by the SEC but not by private parties. This distinction between primary liability and aiding and abetting liability is one that is of great importance in determining which individual or entity has "ultimate authority" as required by the Janus Capital case.

III. AN OVERVIEW OF JANUS CAPITAL GROUP, INC. V. FIRST DERIVATIVE TRADERS

A. Factual Background Leading Up to the Supreme Court Case

The Janus mutual funds at issue in this case were created by Janus Capital Group, Inc. (JCG). The mutual funds are held in a business trust with the name Janus Investment Fund (JIF). Janus Capital Management LLC (JCM), a wholly owned subsidiary of JCG, was the investment adviser and the administrator of the JIF. The Court made note of the fact that the JIF is "a separate legal entity owned entirely by mutual fund investors," and despite being created by JCG, it must be treated as a separate entity. In addition to being organized as separate legal entities, these legal entities followed corporate formalities and acted as separate business entities.

48. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) (dismissing the case for failure to state a claim where the plaintiffs had not bought or sold the securities described in the misleading prospectus).


50. Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011); see also, 15 U.S.C. § 78t(e) ("For purposes of any action brought by the Commission under paragraph (1) or (3) of section 78u(d) of this title, any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.").


52. Id.

53. Id.

54. Id.

55. Id.

56. Id. at 2304 ("Although First Derivatives and its amici persuasively argue that
The Janus Capital case addressed issues related to language in the JIF prospectuses.\textsuperscript{57} A prospectus is a disclosure document that must be issued as required by the Securities Act of 1933 before a legal entity can offer and sell securities.\textsuperscript{58} The prospectuses were issued by JIF for their mutual funds and sought to provide investors with important information about the funds so that investors could make informed decisions.\textsuperscript{59} Included in the prospectuses were statements "that the funds were not suitable for market timing" and it was suggested that "JCM would implement policies to curb the practice" of marketing timing.\textsuperscript{60}

\begin{itemize}
  \item investment advisers exercise significant influence over their client funds it is undisputed that the corporate formalities were observed here.
  \item Janus Capital Grp., Inc., 131 S. Ct. at 2305 ("There is no allegation that JCM in fact filed the prospectuses and falsely attributed them to Janus Investment Fund. Nor did anything on the face of the prospectuses indicate that any statements therein came from JCM rather than Janus Investment Fund – a legally independent entity with its own board of trustees.").
  \item 15 U.S.C. § 77e(a) (2006) (prohibiting sales unless a registration statement is filed with the SEC); § 77e(c) (prohibiting offers prior to the filing of registration statements); § 77j (detailing information required in prospectus).
  \item Janus Capital Grp., Inc., 131 S. Ct. at 2299 ("As the securities laws require, Janus Investment Fund issued prospectuses describing the investment strategy and operations of its mutual funds to investors.").
  \item Id. ("The prospectuses for several funds represented that the funds were not suitable for market timing and can be read to suggest that JCM would implement policies to curb the practice."). "Market timing, as it occurred here, refers to the practice of rapidly trading in and out of a mutual fund to take advantage of inefficiencies in the way the fund values its shares. Some funds, including the Janus funds, use stale prices to calculate the value of the securities held in the fund’s portfolio (net asset values (NAVs)), which may not reflect the fair value of the securities as of the time the NAV is calculated. The use of stale prices to calculate the NAV makes a fund vulnerable to time zone arbitrage and other similar strategies; repeated use of such strategies is referred to as ‘timing’ the fund. Time zone arbitrage can occur when a fund is invested in foreign securities. As we explained in In re Mutual Funds Investment Litig.:
  \item Time zone differences allow market timers to purchase shares of [mutual] funds that invest in foreign securities based on events occurring after foreign market closing prices are established, but before the fund’s NAV calculation. Prior to the daily NAV calculation, which in the United States generally occurs at or near the closing time of the major U.S. securities markets, the fund price would not take into account any changes that have affected the value of the foreign security. Therefore, if the foreign security had increased in value, the NAV for the mutual fund would be artificially low. After purchasing the shares at the low price, the market timer would redeem the fund’s shares the next day when the fund’s share price would reflect the increased prices in foreign markets, for a quick profit at the expense of the long-term fund shareholders.

529 F.3d 207, 211 (4th Cir. 2008) (internal citations and quotations omitted). Market timing has the potential to harm other fund investors by diluting the value of shares, increasing transaction costs, reducing investment opportunities for the fund, and producing negative tax consequences.” Wiggins v. Janus Capital Grp., Inc. (In re Mut. Funds Inv. Litig.), 566 F.3d 111, 116 (4th Cir. 2009), rev’d, 131 S. Ct. 2296 (2011).
The New York Attorney General filed a complaint in September 2003 against JCG and JCM alleging that JCG “entered into secret arrangements to permit market timing in several funds run by JCM.” This complaint ultimately led to the withdrawal of “significant amounts of money from the [JIF] mutual funds,” which in turn decreased the value of both the funds and JCG’s stock price. Since JCG received a significant percentage of its income from the JCM’s management fees, and since JCM was compensated based on the total value of the JIF, a decrease in the assets under management in the JIF had a ripple effect, ultimately causing the stock price of JCG to decline.

Subsequent to the decrease in the JCG stock price and after the New York Attorney General’s complaint, First Derivative, representing a class of plaintiffs who owned JCG stock, filed a suit alleging that JCM and JCG violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. While First Derivative was not a party at the district court, they joined the suit and represented the class of plaintiffs. The claims stated that JCG and JCM “caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [JCG and JCM] would implement measures to curb market timing in the Janus [mutual funds].”

The specific issue that the Court addressed in this case was whether JCM, the investment adviser to the JIF, could be held liable in a private action under Rule 10b-5 for false statements included in the

62. Id.
63. Id. (“[B]ecause Janus Investment Fund compensated JCM based on the total value of the funds and JCM’s management fees comprised a significant percentage of JCG’s income, Janus Investment Fund’s loss of value affected JCG’s value as well.”).
64. The facts of this case are relatively unique as the suit is being brought by JCG stockholders, against JCM based on JCM’s role as an investment advisor for JIF mutual funds.
67. Janus Capital Grp., Inc., 131 S. Ct. at 2300 (citation omitted). First Derivative brought other claims including holding JCM liable as a “controlling person” under 15 U.S.C.A. § 78t(a); however, these claims were beyond the scope of the Supreme Court’s certiorari and therefore beyond the scope of this Note. Id. at 2301.
prospectus for the JIF.\textsuperscript{68} Prior to the Supreme Court addressing that question, the case worked its way through the lower courts.

\textbf{B. Prior History: District Court and Circuit Court Decisions}

The initial trial was held in the United States District Court for Maryland.\textsuperscript{69} The District Court addressed the plaintiffs' 10(b) claims against JCM by first noting that the alleged fraud must have “occurred in connection with the purchase or sale of a security.”\textsuperscript{70} The court cited to a previous case where it ruled that an investment adviser owed no duty to the parent company’s shareholders because the plaintiffs had not purchased or sold the securities.\textsuperscript{71} Following their previous holding, the court dismissed the action against JCM because the plaintiffs held JCG stock, and therefore JCM did not owe them a duty.\textsuperscript{72} In dismissing the action, the District Court did not need to decide whether JCM made the alleged misstatements upon which the plaintiffs relied.\textsuperscript{73}

The plaintiffs appealed to the Fourth Circuit where the District Court’s holding was ultimately reversed.\textsuperscript{74} The Circuit Court began by outlining the fraud-on-the-market doctrine on which the plaintiffs relied.\textsuperscript{75} This doctrine required the plaintiff to prove “(1) that the defendant made the public misrepresentations; (2) that the misrepresentations were material; (3) that the shares were traded on an efficient market; and (4) that the plaintiff purchased the shares after the misrepresentations but before the truth was revealed.”\textsuperscript{76} The defendants, JCG and JCM only disputed the first element: that they did not make the public misrepresentations.\textsuperscript{77} In doing so, they argued that

\begin{itemize}
  \item \textsuperscript{68} \textit{Id.} at 2299.
  \item \textsuperscript{70} \textit{Id.} at 622 (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341 (2005)).
  \item \textsuperscript{71} \textit{Id.} at 622-23.
  \item \textsuperscript{72} \textit{Id.} at 623.
  \item \textsuperscript{73} \textit{Id.} at 622, n.5 (“Because I find that my ruling in \textit{Fischbein} is dispositive of plaintiff’s claim against JCM, I need not decide whether JCM made the alleged misstatements upon which plaintiffs rely.”).
  \item \textsuperscript{74} Wiggins v. Janus Capital Grp., Inc. (\textit{In re} Mut. Funds Inv. Litig.), 566 F.3d 111, 115 (4th Cir. 2009), \textit{rev'd}, 131 S. Ct. 2296 (2011).
  \item \textsuperscript{75} \textit{Id.} at 120.
  \item \textsuperscript{76} \textit{Id.}
  \item \textsuperscript{77} \textit{Id.} at 120-21.
\end{itemize}
they did not make the statements in the prospectus and that the statements were not publicly attributable to them.\textsuperscript{78}

The Circuit Court determined that the complaint sufficiently alleged that both JCG and JCM had \textit{made} the misleading statements contained in the prospectuses to meet the pleading standards.\textsuperscript{79} After reaching that conclusion, the court ruled differently on the two defendants and held that investors would infer JCM either prepared or approved the language\textsuperscript{80} but that the same was not true for JCG.\textsuperscript{81} Based on these findings, the court concluded that the plaintiffs had sufficiently "pled a viable claim of primary §10(b) liability against JCM" and remanded to the district court for further proceedings.\textsuperscript{82}

\textsuperscript{78} Id. at 121 ("JCG and JCM press two distinct aspects of this pleading requirement, arguing that plaintiffs do not adequately allege either (1) that defendants made the statements in the prospectuses or (2) that the statements contained in the prospectuses were sufficiently publicly attributable to defendants to hold them responsible.").

\textsuperscript{79} Id. ("In this case, although the individual fund prospectuses are unattributed on their face, the clear essence of plaintiffs' complaint is that JCG and JCM helped draft the misleading prospectuses. Specifically, the complaint alleges that defendants 'wrote and represented [their] policy against market timers,' and 'publicly issued false and misleading statements.' The complaint also alleges that defendants 'represented that [their] mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored investment vehicles for retirement plans.' According to the complaint, defendants made these representations by 'caus[ing] mutual fund prospectuses to be issued for Janus mutual funds and ma[king] them available to the investing public,' through filings with the SEC and dissemination on a joint Janus website. These statements, taken together, allege that JCG and JCM, by participating in the writing and dissemination of the prospectuses, \textit{made} the misleading statements contained in the documents . . . . And the allegations are sufficiently clear as to the identity of the entities making the misleading statements to meet the pleading standards of Rule 9(b).") (citations omitted).

\textsuperscript{80} Wiggins v. Janus Capital Grp., Inc., 566 F.3d at 127 ("We conclude, at the Rule 12(b)(6) stage, that given the publicly disclosed responsibilities of JCM, interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses, particularly the content pertaining to the funds’ policies affecting the purchase or sale of shares. It was publicly known that JCM furnished advice and recommendations concerning the Janus funds’ investment decisions and even made NAV determinations, which in part enabled market timing. In light of the publicly available material, interested investors would have inferred that if JCM had not itself written the policies in the Janus fund prospectuses regarding market timing, it must at least have approved these statements. This circumstance is sufficient to support the adequacy of plaintiff’s pleading of fraud-on-the-market reliance as to JCM.").

\textsuperscript{81} Id. at 128 ("We cannot say, however, that it would be apparent to the investing public that the investment advisor’s parent company, which sponsors a family of funds, participates in the drafting or approving of prospectuses issued by the individual funds. Although JCG, like JCM, played a role in the dissemination of the fund prospectuses on the Janus website, this fact, taken by itself, is insufficient in this case for us to infer that interested investors would believe JCG had prepared or approved the Janus fund prospectuses.").

\textsuperscript{82} Id. at 131.
defendants petitioned for certiorari, and the Supreme Court granted it to determine if JCM could be liable “in a private action under Rule 10b-5 for false statements included in [JIF] prospectuses.”

C. The Supreme Court Decides Janus Capital Group Inc. v. First Derivative Traders

The Supreme Court began their review by recounting the facts of the case and providing a brief history of Rule 10b-5, which provides in part that “[i]t shall be unlawful for any person, directly or indirectly . . . [t]o make any untrue statement of material fact . . . in connection with the purchase or sale of any security.” The Court directed their focus to the crucial ambiguity at issue: the meaning of the word “make” as used in Rule 10b-5. The majority held that “[w]hen ‘make’ is paired with a noun expressing the action of a verb, the resulting phrase is ‘approximately equivalent in sense’ to that verb.” Thus, the phrase “to make a statement” has the same meaning as “to state.” The court then declared what is likely to be one of the most quoted passages of the case:

[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. Without control, a person or entity can merely suggest what to say, not ‘make’ a statement in its own right.

This is the statement that draws the line in the sand; courts hearing future cases will need to determine if the entity had the “ultimate authority” as described above, before holding the defendant liable for a cause of action under Rule 10b-5. In Janus Capital, the

84. Id.; 17 C.F.R. § 240.10b-5 (2011).
85. Janus Capital Grp., Inc., 131 S. Ct. at 2301-02 (discussing the meaning of the word “make” as used in different contexts).
86. Id. at 2302.
87. Id. (providing additional examples such as “to make a proclamation” is the same as “to proclaim” and “to make a promise” is the same as “to promise”).
88. Id.
89. Id.
Court held that it was the JIF that "made" the statements as they were the entity that had the duty to file the prospectus with the SEC and it was the JIF that filed the funds’ prospectuses with the SEC.  

In reaching this holding, the Court addressed numerous theories put forth by the plaintiffs. First Derivative suggested that JCM "made" the statements within the meaning of Rule 10b-5 "because JCM was significantly involved in preparing the prospectuses." The Court refuted this argument by likening the analysis of "ultimate authority" to that of a speechwriter and a speaker. In this case, JCM, acting like a speechwriter, may have assisted in the language used in the prospectuses, but "JCM itself did not 'make' those statements for purposes of Rule 10b-5." The Court also noted that JCM hosted the JIF prospectuses on its website, but that "[m]erely hosting a document on a Web site does not indicate that the hosting entity adopts the document as its own statement or exercises control over its content." Additionally the Court noted that nothing in the prospectus "indicate[d] that any statements therein came from JCM rather than rather than [the JIF]."

The Court also had the occasion to address the issue of primary and secondary liability as it relates to Rule 10b-5. The Court has consistently held that Rule 10b-5’s private right of action is limited to primary liability and does not include suits against aiders or abettors. In maintaining this distinction, the Court in Janus Capital stated that "[i]f persons or entities without control over the content of a statement could be considered primary violators who ‘made’ the statement, then

---

90. *Id.* at 2304.
91. *Janus Capital Grp., Inc.*, 131 S. Ct. at 2305 n.11 (addressing theories including that the word "indirectly" expands the meaning of “make” and that both JCM and Janus Investment Fund might have “made” the statement).
92. *Id.* at 2305.
93. *Id.* at 2302 (“This rule might best be exemplified by the relationship between a speechwriter and a speaker. Even when the speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit – or blame – for what is ultimately said.”).
94. *Id.* at 2305.
95. *Id.* at 2305 n.12 (citing cf. United States v. Ware, 577 F.3d 442, 448 (2d Cir. 2009)).
96. *Id.* at 2305.
aiders and abettors would be almost nonexistent.” After reviewing the relevant laws and dismissing the plaintiff’s arguments, the Court held that only the person or entity with “ultimate authority” could be liable under Rule 10b-5 and in this case, JCM did not have the requisite ultimate authority.

D. The Dissent

Considering that Janus Capital was a 5-4 decision, it is worth discussing the opinion of the dissent as well. The dissent’s main argument was that the majority misinterpreted the word “make.” Rather than be limited to the person with “ultimate authority,” the dissent argued that the language and case law shows that many other individuals and entities are able to “make” a statement contained in a prospectus.

The dissent claimed that it is possible for several different people to “make” a statement that each person has a hand in creating, and that nothing in the English language prevents this conclusion. In contrast to the majority’s analogy to a speechwriter and the person who ultimately makes the speech, the dissent argued that corporate officials always make statements that the board of directors actually has control over, and that cabinet officials, such as the Secretary of State, make statements that the President actually has ultimate authority over.

Additionally, the dissent argued that there is no support for the majority’s definition of “make” in any case law. The majority cited to Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., but the dissent claims that the majority misinterpreted the case and that while Central Bank discusses secondary liability, “the present

100. Id. at 2305.
101. Id. (5-4 decision) (Breyer, J., dissenting).
102. Id. at 2306.
103. Id. (“To the contrary, both language and case law indicate that, depending on the circumstances a management company, a board of trustees, individual company officers, or others, separately or together, might ‘make’ statements contained in a firm’s prospectus – even if a board of directors has ultimate content-related responsibility.”).
104. Id. at 2307.
106. Id.
case is actually about primary liability — about individuals who allegedly themselves “make” materially false statements, not about those who help others do so.”

The dissent also argued that Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc. did not provide any authority in support of the majority because the issue in that case was whether any deceptive statement had the proximate relation to the investors’ harm. After discussing the specific language of the Rule and the distinguishing the case at hand from the Court’s earlier cases, the dissent concluded that “as long as some managers, sometimes, can be held to have ‘ma[d]e’ a materially false statement” then the facts alleged by the plaintiffs should be sufficient and the claim should not have been dismissed.

IV. AN ANALYSIS OF JANUS CAPITAL INC. V. FIRST DERIVATIVE TRADERS AND THE APPLICATION OF THE CASE

A. Discussion of the Majority’s Holding

In Janus Capital the majority held that JCM could not be liable under Rule 10b-5 because it was not the “entity with ultimate authority over the statement” and therefore was not the “maker of [the] statement.” In doing so, the majority upheld two principles that are explicitly part of securities law: the difference between primary and secondary liability and the recognition that investment advisers are separate legal entities and need to be treated as such provided they follow corporate formalities.

The majority’s holding in Janus Capital is consistent with Central Bank which held that there is no private right of action against aiders and abettors under 10b-5. The majority came to the logical

111. Id. at 2312 (alteration in original).
112. Id. at 2302 (majority opinion).
conclusion that its definition of "made" was necessary to maintain some
distinction between primary liability and secondary liability and that
"[i]f persons or entities without control over the content of a statement
could be considered primary violators who 'made' the statement, then
aiders and abettors would be almost nonexistent." This decision
ensures that the distinction between primary and secondary continues to
be well defined and that primary liability does not expand past its limits
to affect secondary actors.\textsuperscript{117}

While maintaining the clean line between primary and
secondary liability, the majority also correctly refused to be influenced
by the plaintiff First Derivative's argument that the "well-recognized
and uniquely close relationship between a mutual fund and its adviser"
causes the advisor to be understood as the "maker."\textsuperscript{118} The majority
observed that JCM and the JIF are separate legal entities that followed
corporate formalities and are therefore distinguishable from their mutual
fund clients.\textsuperscript{119} This decision is seemingly backed by the SEC which
recognized that "the investment adviser is separate and distinct from the
fund it advises, with primary responsibility and loyalty to its own
shareholders."\textsuperscript{120} If there is a unique relationship in the context of
mutual funds and their advisers, the issues created by that relationship
can be — and to some extent have been — addressed by the SEC or
Congress.\textsuperscript{121} While there is ample room for discussions around the
unique structure of mutual funds, the Court correctly refused to address
it in this case.\textsuperscript{122}

\textsuperscript{116.} Id.
\textsuperscript{117.} Id. at 2302 n.6 ("We draw a clean line between the two – the maker is the person or
entity with ultimate authority over a statement and others are not. In contrast, the dissent's
only limit on primary liability is not much of a limit at all. It would allow for primary
liability whenever "[t]he specific relationships alleged . . . warranted [that] conclusion’ –
whatever that may mean.").
\textsuperscript{118.} Id. at 2304 (quoting Brief forRespondent at 21, Janus Capital Grp., Inc. v. First
Derivative Traders, 131 S. Ct. 2296 (2011) (No. 09-525)).
\textsuperscript{119.} Id. at 2304.
\textsuperscript{120.} Role of Independent Directors of Investment Companies, SEC Release No. 33-
\textsuperscript{121.} Janus Capital Grp., Inc., 131 S. Ct. at 2304 ("Congress also has established
liability in § 20(a) for '[e]very person who, directly or indirectly, controls any person liable'
for violations of the securities laws. First Derivative’s theory of liability based on a
relationship of influence resembles the liability imposed by Congress for control. To adopt
First Derivative’s theory would read into Rule 10b-5 a theory of liability similar to – but
broader in application than . . . – what Congress has already created elsewhere. We decline
to do so.") (citation omitted).
\textsuperscript{122.} See also Norman S. Poser, The Supreme Court's Janus Capital Case, 44 THE REV.
The Court drew a clear line between primary and secondary liability and between separate legal entities, however, the Court did not go far enough in defining "ultimate authority." The Court noted that the person or entity with "ultimate authority" is the person or entity that has control over the statement's "content and whether and how to communicate it." While the holding provided some guidance over who has "ultimate authority," there remains a lot of ambiguity, and lower courts have differed in their application of the "ultimate authority" standard, especially as it relates to corporate insiders.

B. Applications of the Holding to Corporate Insiders

Since the decision, courts have differed in their application of the Supreme Court's holding in Janus Capital; specifically, the issue of who has "ultimate authority." Within three months of the case, two courts were faced with the question of whether "the Supreme Court's 'ultimate authority' requirement for primary liability also applied to corporate insiders." The first case to apply Janus Capital to corporate insiders was In re Merck & Co. Securities, Derivative & "ERISA" Litigation. This case involved an executive vice president's statements that were made public and attributed to him in the company's public filings.

The executive's claim, relying on Janus Capital, was that "he cannot be liable for [the statement] because the Complaint does not allege that he has 'ultimate authority over the statement.'" However, the court found that this claim "takes the Janus holding out of context" in that...
"[h]e made statements pursuant to his responsibility and authority to act as an agent of Merck, not as in Janus, on behalf of some separate and independent entity."130 The court noted "the well-established rule that 'a corporation can act only through its employees and agents'" and concluded that "'[t]aken to its logical conclusion, [the executive's] position would absolve corporate officers of primary liability for all Rule 10b-5 claims, because ultimately, the statements are within the control of the corporation which employs them."131 This is a logical conclusion, but it is only one interpretation of the holding in Janus.132

Less than a month after In re Merck & Co. the U.S. District Court for the Northern District of Ohio found in Hawaii Ironworkers Annuity Trust Fund v. Cole133 that "nothing in the Court's decision in Janus limits the key holding . . . to legally separate entities."134 In this case, the complaint alleged that the defendants, who were officers at the company, "worked together to falsify financial information about the financial circumstances" of a specific business unit.135 The misinformation was then used by officials at the company who gave "overly optimistic public statements."136

The analysis of whether the officers in Hawaii Ironworkers had ultimate authority entailed examining "the degree of separation between entities," which will "inform the analysis of where ultimate authority lies."137 In Hawaii Ironworkers, the fact specific inquiry determined that the Chief Executive Officer (CEO) and Chief Financial Officer (CFO) of the company had put pressure on the defendants to provide forecasts that met certain benchmarks and even rejected previously submitted forecasts that did not meet the benchmark.138 As a result,

---

130. Id.
131. Id.
134. Id. at *9.
135. Id. at *1.
136. Id.
137. Id. at *9.
138. Id. at *13-15 ("Plaintiff adds, 'Burns and Richter knew that the edict was unobtainable' and that by requiring this arbitrary numbers defendants 'would have to manipulate the underlying data to generate reported profits.' 'This pressure was so severe that actual forecasts provided by plant personnel were not accepted by [the company's]
"[t]he defendants sent the results that they were commanded to send." The court determined that the plaintiff had failed to state a claim because "the defendants did not have ultimate authority over the content of the statement" despite being corporate insiders.

In addition to these two cases discussing corporate insiders, the District Court for Nebraska analyzed the impact of Janus Capital in suits brought by the SEC. In SEC v. Das, the defendants attempted to argue that they were not the "makers" of statements despite being CFOs of the company that filed the relevant forms. The court held that they were in fact the makers of such statements, citing Janus Capital, and stating that the defendants were "the persons with ultimate authority and control over the content of the statements and whether and how they were communicated." While the Court in Janus Capital sought to limit the private right of action under Rule 10b-5 by defining the word "maker" as the person with "ultimate authority," the District Court for Nebraska interpreted Janus Capital as also narrowing the SEC's ability to bring a 10b-5 action against people without the requisite ultimate authority. Under the District Court for Nebraska's application of Janus Capital any investment advisor, lawyer, or other party who assists in the creation of a statement but does not "make" the statement, is exempt from 10b-5 liability regardless of whether the suit is a private action or brought by the SEC — unless it is brought as an aiding or abetting suit which is a different form of liability.

finance department personnel if they did not meet the pre-established benchmark.' Thus 'the increased forecasts were not based on the plant's actual performance, but instead were determined from above before a plant's budget would be accepted and approved by finance department personnel.' (citations omitted).

140. Id. at *15-16.
142. Id.
143. Id. at *17-18.
144. Id. at *18.
145. See Janus Capital Grp., Inc. 131 S. Ct. at 2305.
146. SEC v. Das, 2011 U.S. Dist. LEXIS 106982, at *16-19 (applying the Janus Capital definition of "make" to a suit brought by the SEC against two company executives).
147. Cf. id. (discussing a suit brought by the SEC against two former CFOs of a company).
The issue of who has "ultimate authority" is one that the court left open in Janus Capital. The Court provided little guidance on the use of Janus Capital beyond the facts presented of a suit against a separate legal entity that acted as an advisor and left it to the lower courts to decide how to interpret the decision. Applying Janus Capital to various corporate insiders continues to be "an evolving area of law" and will likely involve a "very facts-and-circumstances" analysis. Courts will likely continue to differ on their application of the holding until the Supreme Court clarifies its holding, or until the SEC, under its broad rulemaking authority, implements a new rule that makes Janus Capital moot or explicates the Janus Capital holding. However, even if either of these solutions occurs, there is no guarantee the Supreme Court will answer every outstanding question, and if the SEC decides to change the rule, it will still be subject to judicial review to make sure it is operating within the confines of the statutory language.

148. See generally Janus Capital Grp., Inc., 131 S. Ct. 2296 (limiting the entities that can "make" a statement to those with "ultimate authority" but not providing any guidance on what individuals or entities do have "ultimate authority").

149. See id.

150. After Janus, Plaintiff Bar's Focus Will Shift to Other Liability Provisions, Lawyers Say, 43 Sec. Reg. & L. Rep. (BNA) 1946, (Sept. 26, 2011) ("The panelist also agreed that the application of Janus down the executive line -- for example, the company controller or individuals who help in the preparing of corporate statements -- is an evolving area of law.") [hereinafter After Janus].

151. Id. ("[D]own the foodchain, it becomes a very facts-and-circumstances' determination.").

152. See Satellite Broad. & Commc'ns Ass'n of Am. v. Oman, 17 F.3d 344, 348 (11th Cir. 1994) (discussing an agency's ability to adopt regulations that conflict with a court opinion by stating that "[a]though such an interpretation is not 'the only one it permissibly could have adopted ... or even the reading the court would have [and indeed has] reached ... in a judicial proceeding,' neither can it be said that the interpretation contradicts Congress's 'clear meaning.'") (citation omitted).

153. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.' Thus, despite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted the Commission by Congress under § 10(b)." (quoting Dixon v. United States, 381 U.S. 68, 74 (1965))).
C. Consequences of the Holding and Effect on Future Rule 10b-5 Cases

The paradox of creating a "bright line"\textsuperscript{154} rule that nevertheless has resulted in different applications in recent cases\textsuperscript{155} indicates that the issue of Rule 10b-5 liability is likely to continue taking shape for years to come. The most obvious effect of these cases is that there remains uncertainty in who can be held liable under Rule 10b-5.\textsuperscript{156} While the Court was clear that separate legal entities do not have "ultimate authority" over statements in the prospectuses of the funds that they advise, the Court did not provide clarity surrounding whether the "ultimate authority" standard is limited within the legal entity that issues the fund and files the prospectus.\textsuperscript{157}

The initial effect is a "major victory for outside advisors" in that there is now precedent and authority granting them de facto immunity from 10b-5 suits.\textsuperscript{158} However, as seen in the cases discussed above, there is not clear precedent for who can be liable within the organization that issues the mutual fund and files the prospectus.\textsuperscript{159} In a large organization, the "ultimate authority" over language may be diffused and seemingly shared between many parties. In such a situation, the court will find it difficult to determine which party actually has "ultimate authority" without extensive discovery and a trial.\textsuperscript{160}

\textsuperscript{154} Client Alert, Gregory E. Xethalis et al., Katten Muchin Rosenman LLP, United States: Supreme Court Limits Liability of Mutual Fund Advisor for Fund Prospectus Misstatements (July 21, 2011), http://www.kattenlaw.com/supreme-court-limits-private-lawsuit-primary-liability-of-mutual-fund-advisor-for-fund-prospectus-misstatements/ ("This is a bright line test that should limit mutual fund advisor liability in Rule 10b-5 private actions.").


\textsuperscript{157} Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2305 (2011).

\textsuperscript{158} Pecht, supra note 10.


\textsuperscript{160} In Janus, the court held that Janus Investment Fund had ultimate authority because they filed the prospectus, but in Hawaii Ironworkers, the court was forced to look at the internal operations of the company to determine which individuals had ultimate authority. A complex fact pattern where separate people are creating, editing, and reviewing the language, and where an officer is not specifically creating the language but providing guidance may create trouble for determining who should actually be held liable if some
One consequence of Janus Capital may include additional rule-making by the SEC to address any concerns it has with the Court’s decision. The SEC has broad rule-making authority under Section 10(b), and can create rules related to enforcing the section so long as the rules don’t exceed the scope of the statute.\textsuperscript{161} As noted above, the SEC seems to have intentionally narrowed the scope of Rule 10b-5 by using the word “make” rather than more broad words like “employ,”\textsuperscript{162} but at the same time the history of Rule 10b-5 may bring about questions as to how much time and debate were spent creating the wording of the rule and therefore question how much weight courts should give the word “make” in their rulings.\textsuperscript{163}

If the SEC is in disagreement with the Court’s ruling, it can propose a new rule or amend the existing one.\textsuperscript{164} The SEC could add the word “create” to Rule 10b-5.\textsuperscript{165} This would seemingly override Janus Capital, in that both the majority and dissent seem to agree that JCM created the language, despite not making any statements.\textsuperscript{166} This solution may just be kicking the can down the road in that courts would then need to define and limit “create” without stepping into the boundaries of the aiding and abetting laws. As the courts have attempted to limit the private right of action, and since the private right of action is not even stated in Rule 10b-5, it may be unlikely that the SEC will seek a rule change to expand a private right of action to any and all parties involved in the creation of language.\textsuperscript{167}

An alternative approach to determine who has ultimate authority

\textsuperscript{161} See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197-99 (1976) (holding that allowing a claim of negligence under Section 10(b) would expand beyond the statutes limitations of “manipulative and deceptive” and “add a gloss to the operative language of the statute quite different from its commonly accepted meaning”).


\textsuperscript{163} Conference on Codification, supra note 23, at 922 (noting that the only question asked about the rule was a rhetorical “well, we are against fraud, aren’t we?”).


\textsuperscript{165} The new rule would read in part: “It shall be unlawful for any person, directly or indirectly, . . . to make or create any untrue statement of material fact.”

\textsuperscript{166} See Janus Capital Grp., Inc., 131 S. Ct. 2296.

\textsuperscript{167} The SEC has not changed the language of the rule in response to other securities law cases that limit the private right of action. Cf. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) (holding that Rule 10b-5’s private right of action does not include suits against aiders and abettors).
may be one put forth by Columbia Law School Professor Jack Coffee.\(^{168}\)

"in which the investment advisor is required to join the fund on its filings, so that the advisor becomes a 'maker' of the funds statements."\(^{169}\) If the SEC required this joint filing, Rule 10b-5 and Janus Capital could remain good law, and yet JCM or another fund advisor could be found liable for "making" a statement.\(^{170}\) The issue here is that there would still be room for debate over who had "ultimate authority" over the prospectus.\(^{171}\) While in theory it sounds practical for both of these entities to place their names on the filing, courts, by analyzing different fact patterns, would still be able to determine that only one of the parties had "ultimate authority."\(^{172}\) To some degree, it is almost contradictory to say that two entities can both have "ultimate authority."\(^{173}\)

If the SEC does not take action, and lower courts continue to differ on their understanding of Janus, the Supreme Court will be faced with the decision of granting certiorari or allowing different jurisdictions to have different approaches. Two district courts in different circuits reached different conclusions about the breadth of "ultimate authority" and created a split in authority.\(^{174}\) This split could remain even as cases are appealed to the circuit courts because each circuit could reach a different conclusion. Such a split in authority would result in issues such as forum shopping where plaintiffs would seek to bring suits in courts with a broader understanding of "ultimate authority" in hopes that Rule 10b-5 would apply to all of the defendants.

---


170. Applying the holding in Janus Capital, the court may rule that an investment adviser who filed the prospectus with the SEC did have "ultimate authority" and therefore could be liable for "making" the statements.


173. Janus Capital Grp., Inc., 131 S. Ct. at 2302 (holding that 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" (emphasis added)).

Defendants, on the other hand, would then likely attempt procedures to claim a lack of personal jurisdiction or seek to transfer the case to a court with a more narrow application of "ultimate authority." If a split remains, eventually the Supreme Court will likely grant certiorari to a similar case in order to prevent the issues that come with different jurisdictions having different approaches. The Court will need to provide clarity and consistency surrounding who can "make" a statement and who has "ultimate authority." Ideally, the next case the Court rules on regarding this topic will have a more straightforward fact pattern where shareholders of a mutual fund are bringing suit against the mutual fund company, the outside advisor, or both.

D. Alternative Actions Against Investment Advisers

In general, the holding was seen as very favorable to investment advisers in that it continues the courts’ ongoing efforts to limit the

175. See, e.g., Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945) (outlining the requirement for personal jurisdiction and noting that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice').

176. 28 U.S.C. § 1404(a) (2006) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").


178. Braxton v. United States, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."); see also Sup. Ct. R. 10.1 ("A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the court considers: (1) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . .").

179. Gordon, supra note 169 (noting that "the actual litigation [in Janus Capital] is not a particularly appealing case for liability. The plaintiff was not a shareholder of the fund claiming damage from the fraud, but rather a shareholder in the investment advisor, asserting that as the fraud was uncovered, investors in the fund redeemed their shares, the pool of managed assets shrank, advisory fees declined, and thus the stock price of the investment advisor fell. The defendant had been given no opportunity to demonstrate other factors at work in the stock price. A Supreme Court concerned about the potential reach of an implied right of action could have disposed of the case on loss causation grounds long established in the Court's prior cases without creating the collateral damage entailed by Janus Capital Group v. First Derivative Traders").

private right of action under Rule 10b-5. The decision created a "bright line general principal" that there is no private action available under Rule 10b-5 to sue an entity that creates information or language that is then put into a statement made by a party with ultimate control. The holding may have other benefits to investment advisers including deterring strike suits where plaintiffs are seeking settlements by leveraging the complexities and expense of litigation.

Although outside advisors seem to benefit from this decision, it is important to note that there are other available remedies that both the SEC and private parties can bring against investment advisors. While the SEC has wider authority to bring suits under Rule 10b-5 than individuals in private actions, the Court did not provide one definition of the word "make" for private actions, and a separate definition for SEC actions. This results not only in investment advisers being sheltered from private action 10b-5 suits, but also from suits brought by the SEC. The most straightforward alternative then, is for the SEC to bring a suit under Rule 10b-5 either directly against the mutual fund or against an adviser through their authority to sue aiders and abettors.

---

181. Id.
182. Xethalis, supra note 154.
183. See generally Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975) (noting that courts have been hesitant to expand the scope of 10b-5 in part because the rule "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." These suits often have "a settlement value to the plaintiff out of any proportion to its prospect of success at trial" and therefore expanding the scope of Rule 10b-5 would open the door for more people to bring suit, which has many consequences. To the extent that the courts limit the scope of Rule 10b-5, they will continue to limit the possibility of these "blackmail" or "strike" suits).
184. Xethalis, supra note 154 (mentioning other forms of liability including that "fund shareholders may be able to seek redress against the advisor as the 'controlling person' of the fund under Section 20(a) of the Exchange Act").
185. *Janus Capital Grp., Inc.*, 131 S. Ct. at 2299 (defining the word "make" without providing an exception to the definition for SEC suits).
187. Xethalis, supra note 154 (outlining different causes of action).
One issue with limiting the liability of investment advisors to suits brought by the SEC is that it takes the prerogative to bring a suit out of the shareholders hands and limits it to the SEC. In one amicus brief, attorneys pointed out that:

[F]ederal and state governments are too overwhelmed and cash-strapped to effectively enforce laws; governments are generally strangers to the transactions that give rise to allegations of fraud; private actions have a broader reach, as the government is limited in its oversight – particularly so in the case of mutual funds; and, private enforcement actions are the only way to adequately compensate victims since government agencies can impose only limited fines.

The brief also argued that the ability to bring a private action serves as a deterrent to the financial industry and reminds the investment managers and advisers of their legal duties and responsibilities. It is also important that investors remain confident in the markets, and knowing they have the ability to hold the industry professionals accountable increases their confidence. These conflicting arguments represent the intricate legal and policy implications based on how Rule 10b-5 is interpreted by courts and enforced by both private and government action.

In Janus Capital, the Court limited the implied private right of action under Rule 10b-5, but courts have been less hostile to other statutory provisions. Shareholders have another remedy at their
disposal: a suit under Section 20(a) or 20(b) of the Exchange Act.\textsuperscript{194} A suit under section 20(a) or 20(b) of the Exchange Act would allow the shareholders to go after an advisor acting as a "controlling person" of the fund.\textsuperscript{195} While this method of bringing suit may be viable, commentators have also suggested it will open "the way to extensive litigation over the scope of 'control person' liability."\textsuperscript{196} Either way, securities attorneys seem to be in agreement that it is time to "dust off Sections 20(a) and 20(b)."\textsuperscript{197}

Additionally, some courts have declined to dismiss post-\textit{Janus Capital} Rule 10b-5 claims because there is more to Rule 10b-5 than just "to make" a statement.\textsuperscript{198} Even in light of \textit{Janus Capital} these courts have noted that Rule 10b-5 "also prohibits employing 'any device, scheme, or artifice to defraud' or engaging in 'any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person' in connection with a securities sale."\textsuperscript{199} These holdings may lessen the effect of \textit{Janus Capital} by focusing on other language of Rule 10b-5, however, a detailed discussion on the language of the Rule other than the "to make" addressed in \textit{Janus Capital} is beyond the scope of this Note.

V. CONCLUSION

In \textit{Janus Capital Group v. First Derivative Traders} the Supreme Court "sharply limit[ed] private federal securities fraud suits against

\begin{itemize}
\item 194. 15 U.S.C. § 78t(a) (2006) ("Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with an to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."); 15 U.S.C. § 78t(b) (2006) ("It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this title or any rule or regulation thereunder through or by means of any other person.").
\item 195. Xethalis, \textit{supra} note 154 (outlining different causes of action).
\item 196. Gordon, \textit{supra} note 169.
\item 197. \textit{After Janus, supra} note 150 ("I would advise you to dust off Sections 20(a) and 20(b). That is where the focus will shift.") (quoting Jonathan Cuneo, founding partner of Cuneo Gilbert & LaDuca LLP).
\item 199. \textit{Id.} at *12 (quoting 17 C.F.R. § 240.10b-5 (2011)).
\end{itemize}
person and entities who prepare disclosure on behalf of other companies. The court interpreted the language of Rule 10b-5 to apply only to those with “ultimate authority” over the statement. While this 5-4 decision has been somewhat controversial, the Court interpreted the language of Rule 10b-5 to provide a more narrow right of action than rule 10(b) by replacing the “to employ” language with “to make.”

Lower courts have also differed in their application of this holding to other cases, especially those involving corporate insiders, and they have applied the Janus definition of “make” to SEC suits as well. Based on the controversy of the holding and the lack of clarity in its application, there is likely to be more discussion and potential changes in the future. The SEC may act by changing the language of Rule 10b-5 to avoid the controversy over who can “make” statements, or the Supreme Court may grant certiorari over another case shedding further light on who has “ultimate authority.” Just as in The Office, having two authorities and no clear understanding of their duties is not a viable arrangement. The court proclaimed that only the person or entity with “ultimate authority” can be held primarily liable. Now we just need to know who has ultimate authority; a question that will be decided in time through the arguments of lawyers and analysis of judges.

BRYAN P. KING

205. The Office: The Manager and the Salesman (NBC television broadcast Feb. 11, 2010) (summary available at http://www.tv.com/shows/the-office/the-manager-and-the-salesman-1321716/) (the new CEO insists that one of the two managers step down claiming that “each of you is doing half a job”).