Two Faces of Janus in the District Courts: Is Liability for Securities Fraud under Section 17(a) Limited to Actors with Ultimate Authority over Untrue Statements

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Two Faces of Janus in the District Courts: Is Liability for Securities Fraud Under Section 17(a) Limited to Actors with "Ultimate Authority" over Untrue Statements?*

INTRODUCTION

The Supreme Court's recent decision in Janus Capital Group, Inc. v. First Derivative Traders1 has been derided by some commentators as a way for perpetrators of securities fraud to avoid liability.2 Others have embraced the decision as a much-needed limitation on plaintiffs' attorneys' ability to extract settlements from companies for meritless litigation.3 In Janus, the Court created a new restriction on who may be held liable under SEC Rule 10b-54 for making materially misleading statements.5 Rule 10b-5, promulgated under the authority of section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"),6 is a general anti-fraud provision that bans the use of certain "manipulative and deceptive devices" in connection with the purchase or sale of securities.7

It has long been established that parties who knowingly assist primary violators but do not themselves employ a manipulative device or make a material misstatement cannot be held liable as primary violators under Rule 10b-5.8 The distinction between primary and secondary liability is significant; while the SEC may bring Rule 10b-5 claims against aiders and abettors, the private right of action is

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2. See, e.g., Elizabeth Cosenza, Is the Third Time the Charm? Janus and the Proper Balance Between Primary and Secondary Actor Liability Under Section 10(b), 33 CARDOZO L. REV. 1019, 1073 (2012) (arguing that the Court's theory "would provide a blueprint for widespread immunity from securities violations").
3. A Thwarted Liability Scheme, WALL ST. J., June 14, 2011, at A14 ("The Supremes dismiss another plaintiffs bar money raid—barely.").
5. Janus, 131 S. Ct. at 2302-03 (holding that "[the Court] will not expand liability beyond the person or entity that ultimately has authority over a false statement").
limited to primary violators. In practice, the line between primary and secondary actors is often unclear.

In Janus, decided in June 2011, the Court announced a new standard for distinguishing between primary and secondary liability for misstatements in Rule 10b-5 actions. The Court held that parties may be held primarily liable only where they have “ultimate authority over the [allegedly untrue] statement, including its content and whether and how to communicate it.” This narrow construction of Rule 10b-5 immunizes lawyers, accountants, investment bankers, and others who knowingly assist in the creation of materially false statements, but who do not have ultimate authority over the statements. Janus thus restricts the cast of characters against whom a Rule 10b-5 lawsuit can be maintained.

Following Janus, several district courts have been asked to decide whether the “ultimate authority” standard also applies to claims brought under section 17(a) of the Securities Act of 1933 (“Securities Act”), a similar anti-fraud provision that applies to the offer and sale of securities. Section 17(a) claims have previously been held to have “essentially the same elements” as Rule 10b-5 claims, although there is no private right of action under section 17(a). While some courts have smiled on extending the rule in Janus in this way, others have frowned upon the idea. For example, in SEC v. Daifotis, a district court in the Northern District of California held that Janus did not apply to section 17(a). But, in SEC v. Kelly, a district court in the Northern District of New York

9. Id. (“Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).”).
10. Cosenza, supra note 2, at 1022.
11. See id. at 1066.
13. See id.
15. SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1467 (2d Cir. 1996).
19. Id. at *5–6.
held that *Janus* injected the “ultimate authority” requirement into 17(a).\(^{21}\)

This Recent Development argues that limiting section 17(a) liability for untrue statements to individuals with “ultimate authority” over those statements is not supported by the Supreme Court’s reasoning in *Janus*. The Court provided three justifications for imposing an ultimate authority requirement. First, the Court pointed to the use of the word “make” in the text of Rule 10b-5, but this word “is absent from the operative language of Section 17(a).”\(^{22}\) Second, the *Janus* Court cited the need to interpret the private remedy narrowly to protect business from vexatious, private litigation, but section 17(a) lacks a private remedy. Finally, the Court cited the need to preserve the distinction between primary and secondary actors to provide certainty as to who might be held liable under Rule 10b-5; however, section 17(a) liability is not limited to primary actors.

Analysis proceeds in three parts. Part I begins with an introduction to Rule 10b-5, followed by a description of the facts and holding in *Janus*, as well as a discussion of the case’s impact on the scope of the rule. Part II introduces section 17(a) of the Securities Act and describes the disagreement in the district courts over the applicability of *Janus* to claims made under that statute. Last, Part III applies the Supreme Court’s analysis in *Janus* to section 17(a), including a textual interpretation of the statute and the Court’s policy interests in limiting the reach of Rule 10b-5.

I. BACKGROUND

A. *Rule 10b-5*

Section 10(b) of the Exchange Act\(^{23}\) gives the SEC rulemaking authority to proscribe the use of “any manipulative or deceptive

\(^{21}\). *Id.* at 345.

\(^{22}\). *Daifotis*, 2011 WL 3295139, at *5.

\(^{23}\). The full text of Rule 10b-5 is as follows:

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,

(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
device or contrivance” when “in connection with the purchase or sale of any security.”24 By enacting the Exchange Act, Congress sought to “promote investor confidence” in the securities markets by mandating full disclosure by companies rather than having the government judge the merits of individual investments.25 Rule 10b-5, promulgated under the authority of section 10(b), makes it illegal to “employ any device, scheme, or artifice to defraud” under subpart (a), “make any untrue statement of a material fact or to omit to state a material fact” under subpart (b), or “engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person” under subpart (c).26 The SEC may bring suit against primary violators of Rule 10b-5 and against those who knowingly or recklessly provide substantial assistance to primary violators.27 Courts have also recognized an implied right of action for private plaintiffs under Rule 10b-5.28 However, the implied private right of action only reaches primary violators, so a private plaintiff may not bring suit against a defendant who merely assists a violation.29

The requirements for proving a violation of Rule 10b-5 vary depending on whether the suit is brought by a private plaintiff or the SEC. A private plaintiff generally must establish: “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation

(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.

27. 15 U.S.C. § 78t(e) (2006 & Supp. V 2011) (“[A]ny person that knowingly or recklessly 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.”).
28. Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (“It is now established that a private right of action is implied under § 10(b).”).
29. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994) (“Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).”).
or omission; (5) economic loss; and (6) loss causation." In contrast, the SEC need only establish the first three elements. To be held liable for an untrue statement or material omission under subpart (b) of Rule 10b-5, a defendant must also have "made" the allegedly misleading statement. Prior to the Supreme Court's decision in Janus, the circuits developed conflicting standards for determining whether a defendant was a "maker" of a statement, so the scope of subpart (b) was often unclear. Defendants may also be held liable under subparts (a) and (c), often referred to as "scheme liability." Neither of these provisions requires the defendant to have made a statement. However, their use has been circumscribed by the courts to prevent plaintiffs bypassing the "make" requirement. This Recent

31. For this reason, outcomes under Rule 10b-5 may vary depending on the identity of the plaintiff. See Donald C. Langevoort, Reading Stoneridge Carefully: A Duty-Based Approach to Reliance and Third-Party Liability Under Rule 10b-5, 158 U. PA. L. REV. 2125, 2127–28 (2010) ("The [Stoneridge] Court's choice of reliance as the crucial element indicates the Court's comfort with having different liability outcomes in Rule 10b-5 cases depending on whether the action is an SEC enforcement or criminal prosecution (where reliance is not required) or private litigation (where it is.").
32. See Chiarella v. United States, 445 U.S. 222, 225 n.5 (1980) ("Only Rules 10b-5(a) and (c) are at issue here. ... The portion of the indictment based on [(b)] was dismissed because the petitioner made no statements at all in connection with the purchase of stock." (emphasis added)).
33. See, e.g., In re Mut. Funds Inv. Litig., 566 F.3d 111, 121 (4th Cir. 2009) (concluding that plaintiffs sufficiently alleged that "defendants made the statements in question by participating in the preparation of the prospectuses"), rev'd sub nom. Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011); Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1205 (11th Cir. 2001) (holding that statements are not actionable unless they were "publicly attributable to the defendant at the time"); In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 588–91 (S.D. Tex. 2002) (adopting the rule that a defendant can be held liable where he "creates a misrepresentation"); see also Robert John Grubb II, Attorneys, Accountants, and Bankers, Oh My! Primary Liability for Secondary Actors in the Wake of Stoneridge, 62 VAND. L. REV. 275, 287–91 (2009) (describing tests used by the various circuits).
35. United States v. O'Hagan, 521 U.S. 642, 664–66 (1997) (reversing a holding that "§ 10(b) covers only deceptive statements or omissions"); see also Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 152–53 (1972) (noting that while "the second subparagraph of the rule specifies the making of an untrue statement of a material fact and the omission to state a material fact[.][t]he first and third subparagraphs are not so restricted").
36. Nicholas Fortune Schanbaum, Scheme Liability: Rule 10b-5(a) and Secondary Actor Liability After Central Bank, 26 REV. LITIG. 183, 205–22 (2007). But see SEC v. Sells, No. C 11-4941 CW, 2012 WL 3242551, at *6–7 (N.D. Cal. Aug. 10, 2012) (rejecting defendants' argument that SEC must allege that defendants "made" misleading statements where defendants were "architects of a fraudulent scheme" that was "communicated to the public"); SEC v. Geswein, No. 5:10CV1235, 2011 WL 4541308, at *17 n.3 (N.D. Ohio Aug. 2, 2011) (allowing Rule 10b-5 claim to proceed under (a) and (c)
Development primarily addresses Rule 10b-5 liability under subpart (b). The next section discusses the Supreme Court’s decision in Janus, in which it enunciated a new standard for determining who is a “maker” of a statement in a claim brought under subpart (b).

B. Janus Capital Group, Inc. v. First Derivative Traders

The defendant, Janus Capital Group, Inc. (“JCG”), was a publicly traded financial services company that created the Janus Investment Fund, a special purpose vehicle organized as a Massachusetts business trust, to hold a family of mutual funds. Janus Investment Fund was owned exclusively by investors in the mutual funds and had a legal existence apart from JCG. JCG was solely responsible for managing the mutual funds through a wholly-owned subsidiary, and all of Janus Investment Fund’s seventeen officers were vice presidents of JCG.

In 2003, the Attorney General for the State of New York filed a lawsuit against JCG, alleging that it had allowed market timing trading in its mutual funds. Market timing enables traders to profit from price movements in some of a fund’s stocks outside of regular market hours—for example, foreign stocks traded on markets that open and close at different times. Market timing harms existing mutual fund investors by depriving them of profits.

Soon after the announcement of the Attorney General’s lawsuit, the market price of JCG’s common stock declined significantly, and owners of the stock brought a Rule 10b-5 claim against the company and its wholly owned subsidiary, Janus Capital Management LLC (“JCM”). The plaintiff-shareholders alleged that JCG and JCM made false statements of material fact, that they bought Janus common stock in reliance on these statements, and that they sustained significant losses as a result of the false statements. The statements in question appeared in the prospectuses of several Janus
Investment Fund mutual funds and represented that the funds’ investment advisor, JCM, would act to prevent market timing in the funds. The prospectuses were written in large part by JCM’s employees and distributed via JCG’s website. The district court dismissed the complaint for failure to state a claim on the grounds that the companies did not “make” the allegedly misleading statements since the statements appeared in prospectuses issued by a separate legal entity, Janus Investment Fund.

On appeal, the Fourth Circuit reinstated the Rule 10b-5 claim and held that the defendants could be held liable if “interested investors would have inferred that [defendants] played a substantial role in drafting or approving the allegedly misleading prospectuses.” Under this standard, any person a plaintiff reasonably believes substantially participated in creating or approving a statement would be considered to have “made” the statement even if it cannot be directly attributed to the person. Thus, the expectations and understandings of investors control the scope of primary liability for Rule 10b-5(b). Applying this standard to the facts of the case, the Fourth Circuit held that since “an investment advisor is well known to be intimately involved in the day-to-day operations of the mutual funds it manages,” JCM could be held liable as a maker of the statements in the prospectuses issued by the Janus Investment Fund.

On the other hand, the Court found that JCG could not be held primarily liable since “it would [not] be apparent to the investing public that the investment advisor’s parent company . . . participates in the drafting or approving of prospectuses.”

The Supreme Court, in an opinion authored by Justice Thomas, reversed the Fourth Circuit and again dismissed the 10b-5 claim. The Court rejected a standard based on the expectations and understandings of investors and instead held 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

46. Id. Plaintiffs alleged that these statements, not the market timing itself, violated Rule 10b-5. Id.
47. Id. at 2312.
50. See id. at 123–34.
51. Id. at 127–28.
52. Id. at 128. The Court did find that the parent company might be held liable as a “control person” under section 20(a) of the Exchange Act. Id. at 131.
53. Janus, 131 S. Ct. at 2299.
communicate it."\textsuperscript{54} The Court argued that this requirement was necessary to preserve its decision in \textit{Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.},\textsuperscript{55} in which the Court held that private parties may not bring 10b-5 suits against aiders and abettors.\textsuperscript{56} The \textit{Janus} Court reasoned that allowing suits against persons without ultimate authority over a statement would eviscerate the line between principal and secondary actors, rendering meaningless the limitation imposed by \textit{Central Bank}.\textsuperscript{57} Citing its decision in \textit{Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc},\textsuperscript{58} the Court also reasoned that the plaintiff could not have relied on JCM's "undisclosed deceptive acts" since its participation did not make it "necessary or inevitable" that the alleged misstatements would appear in prospectuses over whose content Janus Investment Fund had ultimate authority.\textsuperscript{59}

C. Scope of Rule 10b-5(b) Liability After Janus

1. Creators of Statements

In \textit{Janus}, the Supreme Court held that only defendants with "ultimate authority" over statements may be found liable under subpart (b) of Rule 10b-5.\textsuperscript{60} Thus, liability in a private suit does not attach to persons who aid in the preparation of statements, such as accountants, lawyers, investment bankers, and others who provide professional services, but who do not exercise ultimate authority over the content of statements released to the public.\textsuperscript{61} The Court explicitly rejected the plaintiff's argument that the word "make" should be treated as synonymous with "create," so that any person who authored a statement could be held liable for its content under

\begin{thebibliography}{99}
\footnotesize
\item 54. \textit{Id.} at 2302 (emphasis added).
\item 55. 511 U.S. 164 (1994).
\item 56. \textit{Janus}, 131 S. Ct. at 2302; \textit{Cent. Bank}, 511 U.S. at 180.
\item 57. \textit{See Janus}, 131 S. Ct. at 2302.
\item 58. 552 U.S. 148 (2008).
\item 59. \textit{Janus}, 131 S. Ct. at 2303 (observing that "dismissal of [a] complaint [is] proper [where] the public could not have relied on the entities' undisclosed deceptive acts" (citing \textit{Stoneridge}, 552 U.S. at 166–67)). This reasoning may have surprised some commentators who had forcefully argued that \textit{Stoneridge} did not eliminate Rule 10b-5 secondary liability for attorneys, accountants, investment bankers, and others who toil in obscurity. \textit{See, e.g.}, Ronald J. Colombo, \textit{Cooperation with Securities Fraud}, 61 \textit{ALA. L. REV.} 61, 119 (2009) ("\textit{Stoneridge} did not foreclose liability on the part of secondary actors who manage to remain anonymous participants in securities fraud.").
\item 60. \textit{Janus}, 131 S. Ct. at 2302.
\item 61. \textit{See id.}
\end{thebibliography}
10b-5. Instead, a person who "creates" a statement, such as a speechwriter who writes a speech, would not be liable under the standard enunciated by the Court because the "content is entirely within the control of the person who delivers the speech." Nor is authorship a prerequisite for liability, so a speaker might be held liable for misstatements where he did not create the statements, yet had ultimate authority over their content.

2. Corporate Insiders

The Court in Janus noted that, as a legally separate entity, JCG was an outsider. Yet the Court did not distinguish between outsiders and insiders when formulating its new rule. Accordingly, district courts have consistently interpreted the ultimate authority standard to apply to corporate insiders, potentially shielding them from liability for misrepresentations they took part in creating or approving where they lacked "ultimate authority." Thus, Janus

62. Id. at 2303-04.
63. Id. at 2302 (emphasis added).
64. See, e.g., SEC v. Carter, No. 10 C 6145, 2011 WL 5980966, at *2 (N.D. Ill. Nov. 28, 2011) (finding that a defendant CEO who approved false press releases "had ultimate authority for the statements and 'made' them for purposes of Janus" although he did not write them).
65. Janus, 131 S. Ct. at 2304 ("We decline this invitation to disregard the corporate form."). But cf. id. at 2312 (Breyer, J., dissenting) (arguing that the "particular circumstances" of Janus's very close relationship with Janus Investment Fund called for liability).
66. Id. at 2303 (majority opinion) ("[W]e will not expand liability beyond the person or entity that ultimately has authority over a false statement." (emphasis added)); id. at 2302 n.6 ("[T]he maker of a statement is the person or entity with ultimately authority over the statement." (emphasis added)). Note that, despite the Janus Court's strong rhetoric and its use of the singular, more than one entity or person may still be liable for a materially misleading statement or omission under 10b-5. Where multiple parties have "ultimate authority over the [allegedly untrue] statement, including its content and whether and how to communicate it," multiple parties can be liable under Rule 10b-5 so long as they meet the other requirements for liability under that rule. Id. at 2306; cf. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994) ("In any complex securities fraud ... there are likely to be multiple violators ... "). Otherwise, corporate officers could avoid Rule 10b-5 liability by distributing decision-making. Such a rule would be a radical modification of the private action under Rule 10b-5, rather than a refusal to "expand" the private right of action. Janus, 131 S. Ct. at 2303.
entrenches broad Rule 10b-5 immunity for corporate officers who lack the requisite level of control.

3. Liability in SEC Actions

Finally, although the decision in Janus was premised in part on the need to limit the private right of action, it is apparent from the plain language of the opinion that the ultimate authority requirement also applies to claims brought by the SEC.68 This would not seem to be a significant limitation for the SEC since, unlike private parties, the Commission may bring 10b-5 actions on an accessory or control person theory.69 For example, where A purposely creates false statements and passes them on to B who then "makes" the statements (in the sense meant by Janus) by approving their content and releasing them to the public, the SEC could not hold A primarily liable since he did not "make" the statement. But the SEC could nevertheless hold A (the creator) liable as an accessory where A does not legally control B (the maker), and liable as a control person where A does legally control B.

However, the dissent in Janus identified a "loophole" in the ultimate authority rule in which no party would be liable under 10b-5 for a fraudulent statement.70 If A used B as an innocent conduit for a fraudulent statement created by A, then B could not be primarily liable for fraud since he would be unaware of the false nature of the statement and, therefore, would lack the requisite scienter. Since there would be no primary violation to which secondary liability could attach, A could not be held liable as an aider and abettor.71 Finally, unless A controlled B, there could be no control person liability either. In this way, A might avoid liability for a fraudulent statement. In fact, this was arguably the situation in Janus, where JCM allegedly created false statements and caused them to be placed in the prospectuses of the mutual funds, while the directors of Janus Investment Fund were likely unaware that the statements were false.72 Applying the ultimate authority standard, JCM was liable

68. Janus, 131 S. Ct. at 2302 ("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.").
70. Janus, 131 S. Ct. at 2311 (Breyer, J., dissenting) (arguing that the majority's rule may introduce a "loophole" in the securities laws).
71. Id. at 2312 (criticizing the majority for creating a rule in which perpetrators of fraud might escape liability by "us[ing] innocent persons as conduits through which . . . false statements reach the public").
72. Id.
under Rule 10b-5 neither as a primary violator, a secondary violator, nor a control person.  

A final question is the effect of the Janus ruling on claims brought by the SEC under section 17(a) of the Securities Act, a similar general anti-fraud provision. This question is important since applying Janus to section 17(a) would limit the scope of 17(a) in the same ways it has limited the scope of 10b-5. Part II introduces section 17(a) and briefly discusses the disagreement among district courts over Janus's applicability to claims brought under that section.

II. DISAGREEMENT OVER THE APPLICABILITY OF JANUS TO SECTION 17(A)

A. Section 17(a) of the Securities Act

Section 17(a) is a general anti-fraud provision that applies to the offer and sale of securities. Section 17(a) claims have previously been held to have "essentially the same elements" as Rule 10b-5 claims—a function of their shared foundation in common law fraud and similar text. In fact, the SEC adapted the text of Rule 10b-5 from the text of section 17(a). Like Rule 10b-5, the text of section

73. Id. at 2304-05 (majority opinion).
74. The full text of section 17(a) is as follows:

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act) by use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, 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.

75. SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1467 (2d Cir. 1996).
76. See infra notes 126-28 and accompanying text.
77. Remarks of Milton Freedman on Administrative Procedures (Nov. 18-19, 1966), in Conference on Codification of the Federal Securities Laws, 22 BUS. LAW. 793, 922 (1967) [hereinafter Freedman Remarks]. An SEC attorney recounted the creation of Rule 10b-5 in 1943: "I looked at Section 10(b) and I looked at Section 17, and I put them together . . . ." Id.; see also Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952) (recounting the history of the adoption of Rule 10b-5).
17(a) is organized into three subparts, but the subparts are identified by numbers rather than letters. Subpart (2) is analogous to subpart (b) of Rule 10b-5 and makes it "unlawful for any person in the offer or sale of any securities . . . to obtain money or property by means of any untrue statement of a material fact." Therefore, unlike Rule 10b-5, section 17(a) applies to offers and sales of securities, rather than to sales and purchases of securities. Thus, 17(a) is both narrower than 10b-5, in that it applies to purchases, and broader than 10b-5, in that it applies to fraudulent offers to sell that are never consummated. Finally, courts have not granted an implied private right of action under 17(a).

B. District Court Decisions Since Janus

Since the Supreme Court's decision in Janus, several district courts have ruled on the applicability of that decision to section 17(a) anti-fraud claims. This Recent Development focuses on SEC v. Daifotis and SEC v. Kelly as representative of these district court decisions. Both Daifotis and Kelly followed soon after the Supreme Court's decision in Janus and together include the major arguments for whether Janus should or should not limit the scope of section 17(a). The facts and holdings of Daifotis and Kelly are summarized in the next two subsections.

1. SEC v. Daifotis

In Daifotis, decided in August 2011, the SEC sued a portfolio manager (Daifotis) and an executive (Merk) of subsidiaries of the Charles Schwab Corporation, for allegedly making misleading statements related to an ultra-short bond fund to "portray [it] as a safe 'cash-alternative' or 'cash-equivalent' investment," as well as other misstatements about the way the fund was run and large

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78. § 77q(a).
79. Id.
80. Although section 17(a) is a part of the 1933 Securities Act, its reach is not limited to public offerings; like Rule 10b-5, it extends to aftermarket transactions. See United States v. Naftalin, 441 U.S. 768, 777–78 (1979).
82. See sources cited supra notes 16–17 (noting relevant district court cases).
84. 765 F. Supp. 2d 301 (S.D.N.Y. 2011).
declines in the fund's value. The District Court for the Northern District of California dismissed the 17(a) claim against defendant Merk because it relied on subpart (2), yet failed to allege that Merk had "obtained money or property" as the text of the statute requires. Following the Supreme Court's decision in Janus, the district court granted defendants' motion for reconsideration. On rehearing, defendant Daifotis argued that the 17(a) claim against him should also be dismissed because, although he helped draft statements, he lacked ultimate authority over their content and thus was not a "maker" of any statement.

The court denied Daifotis's motion to dismiss the 17(a) claim, finding the Janus decision inapplicable to that statute. The court based its decision, first, on a textual construction of section 17(a). Since the "operative language" was different from Rule 10b-5, the court reasoned that the same textual construction could not be used. Second, the court pointed out that the Supreme Court's "stringent reading of the word 'make'" was based on precedent limiting the reach of the private right of action. Since section 17(a) lacks a private right of action, the court reasoned that the "same rationale does not apply" to that statute.

2. SEC v. Kelly

In Kelly, decided in September 2011, the SEC sued three former executives of America Online ("AOL"), alleging that between 2000 and 2003 they caused AOL to enter into fraudulent "round trip" or "concurrent" transactions with several counterparties, which "improperly inflated [AOL's] advertising revenue by directly or indirectly funding another company's purchase of online advertising." For example, the SEC alleged that two of the executives were involved in the negotiation of a plan by which AOL would make a $39.2 million payment to WorldCom with the understanding that $34.2 million would be used to purchase

86. Id. at *10.
87. Notice of Motion and Defendant Kimon P. Daifotis's Motion for Reconsideration of Certain Portions of the Court's June 6, 2011 Order Denying His Motion to Dismiss at 1, 3, Daifotis, 2011 WL 3295139.
89. Id.
90. Id. at *5.
91. Id. at *6.
92. Id.
advertising from AOL. The SEC then recognized the funds from these round trip transactions as revenue, causing AOL’s financial statements to overstate revenue.

The SEC alleged violations of Rule 10b-5 and section 17(a) of the Exchange Act by each of the executives. The district court in the Southern District of New York dismissed the 10b-5 claim, finding that the executives could not be liable under subpart (b) of Rule 10b-5 since they did not have ultimate authority over the misstatements and thus were not the makers of the fraudulent statements pursuant to Janus. The court also found that the executives could not be liable under subparts (a) or (c) of Rule 10b-5 since “the primary purpose and effect of [their] purported scheme [was] to make a public misrepresentation or omission.” Next, the court dismissed the 17(a) claim, holding that the executives could not be held liable under section 17(a) either since they were not makers of the misstatements. The court argued that Janus’s ultimate authority standard applies equally to 17(a) because section 17(a) and Rule 10b-5 have the same “functional meaning when it comes to creating primary liability.”

III. APPLYING THE COURT’S REASONING IN JANUS TO SECTION 17(A)

In Janus, the Supreme Court used a four-part analysis to decide that liability under Rule 10b-5(b) required “ultimate authority” over a misstatement. First, the Court looked at the text of the statute to see what behavior it proscribes on its face. Second, the Court considered the need to distinguish between primary and secondary violators in order to preserve its decision in Central Bank, in which it held that there is no Rule 10b-5 private right of action against aiders.

94. Id. at 313–14.
95. Id.
96. Id. at 318.
98. Id. at 343; see also sources cited supra note 36.
100. Id.
101. Id.
and abettors. Third, the Court considered the effect of its recent decision in Stoneridge, in which it held that Rule 10b-5’s reliance element was not satisfied where plaintiff was not privy to defendants’ deceptive acts. Finally, the Court considered the need to limit the scope of the Rule 10b-5 private right of action. The Court’s methodology offers a blueprint for analyzing whether liability under section 17(a) also requires “ultimate authority.” This Part considers each of the Supreme Court’s arguments in turn and concludes that they do not apply with the same force to claims made under section 17(a).

A. Textual Interpretation of Section 17(a)

The Court began its analysis by construing the text of subsection (b) of the rule, which makes it unlawful to “make any untrue statement of a material fact.” Initially, the Court concluded that the meaning of the phrase “to make a statement” was the same as “to state.” For this construction, the Court relied on one of the definitions of “make” in an edition of the Oxford English Dictionary (“OED”) dating from the time of the passage of the Securities Act. The Court reasoned that the maker of a statement is the “person or entity with ultimate authority” because “[w]ithout control, a person or entity can merely suggest what to say, not ‘make’ a statement in its own right.” The question then is whether the Court’s reasoning here applies equally to section 17(a).

The text of subsection 17(a)(2) is analogous to the text of subsection (b) of Rule 10b-5; however, the wording differs somewhat. Notably, subsection 17(a)(2) does not make it unlawful

103. Id.
104. Id. at 2303.
105. Id.
106. 17 C.F.R. § 240.10b-5(b) (2012).
107. Janus, 131 S. Ct. at 2302 (“To make any... statement, is thus the approximate equivalent of ‘to state.’”).
108. Id. (“When ‘make’ is paired with a noun expressing the action of a verb, the resulting phrase is ‘approximately equivalent in sense’ to that verb.” (quoting 6 OXFORD ENGLISH DICTIONARY 66 (1st ed. 1933))).
109. Id. The dissent in Janus casts doubt on the majority’s construction of the word “make”: “The English language does not impose upon the word ‘make’ boundaries of the kind the majority finds determinative.” Id. at 2307 (Breyer, J., dissenting). This discussion fully accepts the majority’s construction as a matter of settled law.
110. See supra note 74.
111. See supra Part II.A.
to "make any untrue statement of material fact." Instead, subsection 17(a)(2) makes it unlawful to "obtain money or property by means of any untrue statement of a material fact." The text focuses on the action of "obtain[ing] money or property" rather than the action of "mak[ing] a statement." The phrase used to refer to the "untrue statement" is "by means of," which does not have the same meaning as "make." According to the OED, which the Supreme Court relied on in Janus, "by means of" is equivalent to "[b]y the agency or instrumentality of." The OED gives the following example usage from Encyclopedia Britannica: "The connexion is not made directly, but translation is secured by means of an induction coil." In other words, "by means of" is equivalent to "by the use of." The phrase "by means of" does not denote that the statement must have been "made" by the person who uses it to "obtain money or property" since one need not make an instrument in order to use it.

The court in Kelly held that a requirement that the defendant "made" an allegedly misleading statement should be read into subsection (2) of section 17(a). The court based this conclusion on judicial precedent and the SEC's intention in creating Rule 10b-5. First, the court noted that "numerous courts have held that the elements of a claim under section 17(a) are 'essentially the same' as those for claims under Rule 10b-5." Yet this argument is not very persuasive, as the courts have treated Rule 10b-5 and section 17(a) differently where appropriate. For example, the Supreme Court has held that the SEC need not establish scienter under subsections (a)(2) or (a)(3) of section 17. The Court grounded this decision in the

114. Id.
116. Id. (citing ENCYCLOPEDIA BRITANNICA XXXIII 236/1 (1902)).
117. SEC v. Kelly, 817 F. Supp. 2d 340, 345 (S.D.N.Y. 2011) ("Because subsection (2) of Section 17(a) and subsection (b) of Rule 10b-5 are treated similarly, it would be inconsistent for Janus to require that a defendant have made the misleading statement to be liable under subsection (b) of Rule10b-5, [sic] but not under subsection (2) of Section 17(a).")
118. Id.
119. Id.
120. See supra Part II.A.
121. SEC v. Monarch Funding Corp., 192 F.3d 295, 308 (2d Cir. 1999) ("[N]o showing of scienter is required for the SEC to obtain an injunction under subsections (a)(2) or (a)(3).") Scienter is required under (a)(1) because the use of the word "defraud" in the
function of section 17(a). Also, the courts have granted an implied private right of action under Rule 10b-5, but not under section 17(a), though perhaps largely by historical happenstance. Finally, an offer to sell is sufficient to create a violation of section 17(a), whereas a private Rule 10b-5 action requires a consummated sale (or purchase). This last difference is also grounded in the text of section 17(a). Thus, the fact that the elements of section 17(a) and Rule 10b-5 have often been treated similarly by the courts is not dispositive of whether Janus should apply to the former.

Further, the precedents cited in Kelly for the proposition that the elements of a section 17(a) claim and a Rule 10b-5 claim are "essentially the same" all ultimately ground this proposition in the similarities between the texts, or their shared basis in common law fraud. For example, the court in SEC v. First Jersey Securities Inc. writes that "given the similarity of the text of § 17(a) of the Securities Act to that of Rule 10b-5, we conclude that if a private right of action exists under § 17(a), [plaintiff] has stated a claim upon which relief statute imports the elements of common law fraud. Aaron v. SEC, 446 U.S. 680, 695–96 (1980)."

122. Aaron, 446 U.S. at 718 n.9 ("Because an SEC enforcement action is designed to protect the public against the recurrence of violative conduct, and not to punish a state of mind, this Committee intends that scienter is not an element of any Commission enforcement proceeding." (quoting H.R. REP. No. 95-640, at 10 (1977))).

123. See sources cited supra note 81.

124. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) ("[Section 17(a), the antifraud provision of the 1933 Act, 15 U.S.C. § 77q(a), expressly includes 'offer(s)' of securities within its terms while § 10(b) of the 1934 Act and Rule 10b-5 do not.").


127. See, e.g., Monarch Funding Corp., 192 F.3d at 308 (citing First Jersey Sec., Inc., 101 F.3d at 1467); Tex. Gulf Sulphur Co., 401 F.2d at 855 n.22 (observing that the "provisions of Sections 17(a) (2) and (3) of the Securities Act of 1933...are virtually identical to the provisions of Rule 10b-5(2) and (3) and were, in fact, the model therefor" but not addressing the question of whether the elements are the same); Power, 525 F. Supp. 2d at 419 ("In general, to prove a claim under [Rule 10b-5 and Section 17(a)], the SEC must show that the defendant: (1) committed a deceptive or manipulative act, or made a material misrepresentation (or a material omission if the defendant had a duty to speak) or used a fraudulent device; (2) with scienter; (3) which affected the market for securities or was otherwise in connection with their offer, sale or purchase.").

128. First Jersey Sec., Inc., 101 F.3d at 1467 ("Since Section 17(a), like Section 10(b), sounds in fraud, similar allegations are required to state a claim under that section.") (quoting Savino v. E.F. Hutton & Co., 507 F. Supp. 1225, 1231 (S.D.N.Y. 1981))).

129. 101 F.3d 1450 (2d Cir. 1996).
may be granted against [defendant] under that section as well." The similar treatment of section 17(a) and Rule 10b-5 is not an unbending rule, but rather, a product of textual similarities. Relying on the methodology used by the Supreme Court in Janus, the causes of action may be treated differently to the extent that the texts differ.

Second, the Kelly court based its conclusion in part on the fact that "the SEC's 'only purpose' in adopting Rule 10b-5 was to make the same prohibitions contained in Section 17(a)—which applies in connection with the 'offer and sale' of a security—applicable to 'purchasers' of securities as well." The authority the court cites to support this assertion, Birnbaum v. Newport Steel Corp., based its conclusion on the claim that to create Rule 10b-5 "the Commission simply copied Section 17(a), adding the words 'any person' in place of 'the purchaser' and a final clause 'in connection with the purchase or sale of any security.' " However, this description misrepresents the textual differences between the two provisions. Among other differences, section 17(a) lacks the word "make" that the Supreme Court construed in Janus.

To the extent that the SEC modified the text of 17(a) to adapt it for Rule 10b-5, it did not perfectly copy the meaning of the statute. Section 17(a) proscribes "obtain[ing] money or property," not making misleading statements. The Supreme Court has held that where the scope of the 10b-5 action is unclear, courts must "attempt to infer 'how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision in the [Exchange] Act.' " The Court continued:

For that inquiry, we use the express causes of action in the securities Acts as the primary model for the § 10(b) right of action. The reason is evident: Had the 73d Congress enacted a private § 10(b) action, it likely would have designed it in a

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130. Id. (alterations in original) (citing Zerman v. Ball, 735 F.2d 15, 23 (2d Cir. 1984)). Some courts previously recognized a private right of action under section 17(a), although this view has since been rejected. See supra note 81 and accompanying text.

131. Kelly, 817 F. Supp. 2d at 345 (citing Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952)).

132. 193 F.2d 461 (2d Cir. 1952).

133. Id. at 463.

134. See supra note 74.


manner similar to the other private rights of action in the securities Acts.\textsuperscript{137}

Therefore, to determine the scope of the judicially granted Rule 10b-5 private right of action, courts should look to the scope of statutorily granted rights of action. The \textit{Kelly} court reverses this relationship by looking to the scope of the judicially granted right of action under an agency rule (Rule 10b-5) to determine the scope of a self-executing statute enacted by Congress (section 17(a)).\textsuperscript{138}

Construing a statute enacted by Congress based on the text of a rule subsequently promulgated by the SEC also leads to an absurd conclusion: Had the SEC chosen to preserve the “to obtain” language from section 17(a) when it created Rule 10b-5, the meaning of section 17(a) would now be different. After all, “to obtain” cannot plausibly be interpreted to require ultimate authority.\textsuperscript{139} In \textit{Janus}, the plaintiff argued that “making” statements meant “creating” the statements.\textsuperscript{140} The court’s reasoning in \textit{Kelly} suggests that, had the SEC used the phrase “to create statements” in place of “to make statements” in Rule 10b-5, a creation requirement would have to be read into section 17(a) from the SEC rule. The \textit{Kelly} court justified its interpretation on the need to avoid “inconsisten[cy],”\textsuperscript{141} yet relying on a textual construction of an agency rule to construe a statute that predates it does not serve the purported goal of consistency. Even if it were appropriate to construe 17(a) to look at the SEC’s intent in drafting Rule 10b-5, it cannot be said that the SEC’s intent, much less its authority, encompassed modifying the meaning of section 17(a), which was enacted by Congress and had already been in effect for a decade when Rule 10b-5 was promulgated.\textsuperscript{142}

\textbf{B. Interpreting the Private Remedy Narrowly}

The Supreme Court prefaced its argument in \textit{Janus} with a precaution concerning the need to interpret the 10b-5 private right of action narrowly.\textsuperscript{143} After laying out its full argument, the Court

\textsuperscript{137} Id.

\textsuperscript{138} SEC v. Kelly, 817 F. Supp. 2d 340, 345 (S.D.N.Y. 2011) (reasoning that because “the SEC’s ‘only purpose’ in adopting Rule 10b-5 was to make the same prohibitions contained in Section 17(a) . . . applicable to ‘purchasers’ of securities,” section 17(a) has the “same functional meaning [when] it comes to creating primary liability”).

\textsuperscript{139} See supra notes 110–16 and accompanying text.

\textsuperscript{140} See supra notes 60–63 and accompanying text.

\textsuperscript{141} See supra note 117.

\textsuperscript{142} See Freedman Remarks, supra note 77, at 922.

\textsuperscript{143} Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011) (“[I]n analyzing whether [Janus] ‘made’ the statements for the purposes of Rule 10b-5, we
reiterated that its ultimate authority requirement “accords with the narrow scope that we must give the implied private right of action.” 144 This unwillingness to expand the private right of action seems to be the Court’s main rationale for imposing an ultimate authority requirement. 145 The Court’s precedents rely on two arguments to justify a narrow interpretation of Rule 10b-5. First, the Rule 10b-5 private right of action is vulnerable to abuse by plaintiff lawyers who would use it to extort settlements from defendants for non-meritorious claims. 146 Thus, the private right of action creates the potential for vexatious litigation. In contrast, there is no section 17(a) private right of action and, therefore, this justification for imposing an ultimate authority requirement does not apply to that statute. 147 Second, the Court argued that the Rule 10b-5 private right of action must be interpreted narrowly because “Congress did not authorize [the private right of action] when it first enacted the statute and did not expand it when it revisited the law.” 148 In contrast, the SEC’s authority to bring actions under section 17(a) is not implied by the judiciary but rather expressly granted by Congress in the text of the statute. 149 Thus, this second justification for limiting the scope of Rule 10b-5 is not applicable to section 17(a).

144. Id. at 2303.
145. As the dissent points out, while the majority grounds its decision in the text of Rule 10b-5, the use of the word “make” in the rule does not compel the requirement that liability be limited to parties with “ultimate authority” over a statement. Id. at 2307 (Breyer, J., dissenting) (“The English language does not impose upon the word ‘make’ boundaries of the kind the majority finds determinative.”). Likewise, the Court’s insistence that precedent compelled its decision is questionable. Id. at 2307-08. One commentator has argued that decisions on issues of securities law by the Roberts Court have been driven more by a preoccupation with “maintaining the status quo” than by a consistent methodology. A.C. Pritchard, Securities Law in the Roberts Court: Agenda or Indifference?, 37 J. CORP. L. 105, 145 (2011).
148. Janus, 131 S. Ct. at 2302 (quoting Stoneridge, 552 U.S. at 165 (2008)).
C. Preserving the Distinction Between Primary and Secondary Liability

The third justification that the Supreme Court gave for imposing the ultimate authority requirement was that it was necessary to preserve the distinction between primary and secondary liability in Rule 10b-5 actions. In Central Bank, the Court ruled that there was no aider and abettor liability under Rule 10b-5. The Janus Court reasoned that recognizing liability for parties that do not have ultimate authority for statements would allow plaintiffs' lawyers to perform an end run around Central Bank's prohibition on secondary liability. Hence, if the test were made any less stringent, then "aiders and abettors would be almost nonexistent," and Central Bank's purpose to limit the reach of the private cause of action would be defeated.

Yet, as discussed in the previous section, the judicial imperative to limit a right of action that Congress never explicitly granted does not apply to section 17(a) since there is no implied private right of action under that statute. The SEC can hold both primary and secondary actors liable under section 17(a)—so distinguishing between the two serves no useful purpose here—while allowing culpable parties who act through an innocent intermediary to avoid liability.

The other reason that the Court in Central Bank gives for declining to recognize secondary liability under Rule 10b-5 is that "the rules for determining aiding and abetting liability are unclear, in an area that demands certainty and predictability" because of the potentially high costs to business. In making its decision, the Court was concerned with the likelihood that legal uncertainty would multiply future litigation since parties are more likely to litigate

150. Janus, 131 S. Ct. at 2303.
152. Janus, 131 S. Ct. at 2302.
153. Id.
154. See supra Part III.B.
155. See supra notes 70–72 and accompanying text.
uncertainties.\textsuperscript{157} This phenomenon has certainly been at play in Rule 10b-5 claims since \textit{Central Bank} was decided, as plaintiffs' attorneys have tested various theories for broadening the scope of primary liability under that rule.\textsuperscript{158}

In contrast, in the context of section 17(a), the danger of uncertainty for business is much less acute because all litigation is coordinated through the SEC and the Department of Justice.\textsuperscript{159} Nor does rejecting an ultimate authority standard for section 17(a) foreclose the possibility that the courts might articulate a different rule for distinguishing between primary and secondary actors in that context. A different rule for 17(a) claims could create consistency without hampering the SEC's enforcement activities by exempting some culpable actors from liability.\textsuperscript{160}

\textbf{D. The Reliance Element}

The final support the Supreme Court offered for imposing an ultimate authority requirement on Rule 10b-5 claims was its decision in \textit{Stoneridge}.\textsuperscript{161} In \textit{Stoneridge}, investors sued outside suppliers who entered into fraudulent sales and purchases with the defendant company, which allowed the company to mislead its auditor and overstate its revenue.\textsuperscript{162} The Court dismissed the case, reasoning that the investors could not have relied on the fraudulent acts of the suppliers since those acts had not been disclosed to the public.\textsuperscript{163} The Court noted "nothing [the outside suppliers] did made it necessary or inevitable for [the company] to record the transactions as it did."\textsuperscript{164} However, as the dissent in \textit{Janus} notes, \textit{Stoneridge} is a case about the reliance element of a 10b-5 claim.\textsuperscript{165} Reliance is not an element of a

\begin{footnotes}
\textsuperscript{157} \textit{Cent. Bank}, 511 U.S. at 189 ("The issues would be hazy, their litigation protracted, and their resolution unreliable. Given a choice, we would reject any theory . . . that raised such prospects." (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 755 (1975))).
\textsuperscript{158} \textit{See}, e.g., Robert A. Prentice, \textit{Scheme Liability: Does It Have a Future After Stoneridge?}, 2009 Wis. L. REV. 351, 352–53 (2009) (describing plaintiff's shift from section (b) to sections (a) and (c) of 10b-5).
\textsuperscript{159} \textit{See Blue Chip Stamps}, 421 U.S. at 739–41 (reasoning that there is a special danger of vexatious litigation for the private right of action under Rule 10b-5).
\textsuperscript{160} \textit{See infra} CONCLUSION.
\textsuperscript{161} \textit{Janus Capital Grp., Inc. v. First Derivative Traders}, 131 S. Ct. 2296, 2303–04 (2011).
\textsuperscript{163} \textit{Id.} at 152–53, 159.
\textsuperscript{164} \textit{Janus}, 131 S. Ct. at 2303 (quoting \textit{Stoneridge}, 552 U.S. at 161).
\textsuperscript{165} \textit{Id.} at 2309 (Breyer, J., dissenting).
\end{footnotes}
17(a) claim, so it is immaterial for purposes of section 17(a) whether an investor relied on, or was even harmed by, a misrepresentation.\textsuperscript{166} The SEC need not prove reliance because the purpose of the securities Acts and the agency’s enforcement power under section 17(a) encompass not only investor protection but also “achie[ving] a high standard of business ethics” to protect “honest business” and promote a healthy economy.\textsuperscript{167} Consequently, Stoneridge’s holding that plaintiffs could not have relied on defendants’ misrepresentations where it was not “necessary or inevitable” for the company to act as it did is irrelevant to section 17(a) and does not justify imposing an ultimate authority standard.

CONCLUSION

In its recent decision in Janus, the Supreme Court held that to be found liable for securities fraud under Rule 10b-5(b) defendants must have had ultimate authority over allegedly false statements. Despite the similarities between Rule 10b-5 and section 17(a), the Court’s analysis in Janus does not support extending the ultimate authority standard to claims brought under section 17(a)(2). Most importantly, there are significant textual differences between the two provisions. Further, other considerations also do not weigh in favor of imposing an ultimate authority standard on section 17(a)(2) claims. While requiring ultimate authority for Rule 10b-5(b) claims arguably reduces vexatious litigation and legal uncertainty, this benefit does not accrue equally to section 17(a) since it lacks a private right of action.\textsuperscript{168} The need to distinguish between primary and secondary actors in the context of 17(a) is less acute because the SEC may bring claims under both theories of liability.\textsuperscript{169} Meanwhile, the innocent conduit of fraud loophole identified by the dissent in Janus applies equally to section 17(a) defendants.\textsuperscript{170} Finally, limiting the SEC’s ability to pursue anti-fraud actions may be contrary to the remedial role Congress envisioned for the legislation.\textsuperscript{171} For these reasons, in

\begin{itemize}
\item \textsuperscript{166} See Stoneridge, 552 U.S. at 158-59 (dismissing 10b-5 claim since plaintiffs could not have relied on “deceptive acts . . . not communicated to the public”); Langevoort, \textit{supra} note 31, at 2127.
\item \textsuperscript{167} United States v. Naftalin, 441 U.S. 768, 775 (1979) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963)).
\item \textsuperscript{168} See \textit{supra} Part III.B.
\item \textsuperscript{169} See \textit{supra} Part III.C.
\item \textsuperscript{170} See \textit{supra} notes 68–72 and accompanying text.
\item \textsuperscript{171} See Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151 (1972) (“Congress intended securities legislation enacted for the purpose of avoiding frauds to be
the absence of clear evidence that the Supreme Court intended its decision in Janus to apply more broadly, the holding in that case should be limited to Rule 10b-5 and not injected into other provisions in the securities Acts. The textual analysis used by the Court in Janus suggests that where section 17(a)(2) is concerned, courts should focus on whether the defendant used a false statement "to obtain money or property," rather than whether he made the statement.

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172. See Pritchard, supra note 145, at 145 (arguing that the concern of the Roberts Court in securities law is "maintaining the status quo").
