The Thirteenth Stroke:
An Approach to “Ultimate Authority” After Janus

“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.”

I. INTRODUCTION

In Janus Capital Group, Inc. v. First Derivative Traders, the Supreme Court produced a decision worthy of Janus, the two-faced Roman god whose image appears on Janus Capital’s corporate logo. The five-to-four opinion by Justice Thomas, while paying lip service to the private right of action under Rule 10b-5, effectively cut off that right for many plaintiffs. The Court in Janus addressed the question of whether a mutual fund’s management could be liable to investors in the fund’s parent company for losses tied to misstatements in the fund’s prospectuses. Answering in the negative, the Court held only a third group—the fund’s independent board of trustees—could have “made” those misstatements under Rule 10b-5. Significantly, the Court concluded only those with “ultimate authority” over a statement are liable for making it—a new Rule 10b-5 standard apparently not limited to the unique structures of mutual fund families.

And so, in its zeal to extend the limitations of Central Bank of Denver v. First Interstate Bank of Denver, eliminating secondary liability for private

2. Id.
4. See Janus, 131 S. Ct. at 2302 (mandating “narrow dimensions” for Rule 10b-5 private right). Chief Justice Roberts joined in the majority, along with Justices Scalia, Kennedy, and Alito. Justice Breyer filed a dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan. Id. at 2299.
5. See id. at 2301 (addressing Janus Capital Management’s liability for misstatements in Janus Investment Fund prospectuses).
6. See id. at 2305 (holding statement in prospectuses made by Janus Investment Fund, not by Janus Capital Management).
7. See Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011) (“For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement . . . .”).
plaintiffs under Rule 10b-5, the Janus majority provided a roadmap for avoiding primary liability, regardless of culpability.\(^9\) Indeed, the dissent predicted “guilty” management may now be able to launder a false statement through an “innocent” board while avoiding liability for lack of the ultimate authority to make that statement.\(^{10}\) Janus may have interpreted Rule 10b-5 so narrowly that conceivably no one could be primarily liable for “making” a demonstrably false statement—neither those who wrote it without the necessary authority nor those who approved it without the necessary intent.\(^{11}\)

Assuming the Court intended, as it said, to retain Rule 10b-5’s private right of action—and assuming Congress, in enacting antifraud legislation, intended someone be held liable for material misstatements in securities filings—this Note recommends interpreting the phrase “ultimate authority,” which is inadequately defined in Janus, to mean “ultimate control,” a phrase appearing synonymously in the majority opinion.\(^{12}\) As Justice Thomas reasoned, “[w]ithout control, a person or entity can merely suggest what to say, not ‘make’ a statement in its own right.”\(^{13}\) While the concept of ultimate authority leaves open the question of who is really responsible for a statement, the concept of ultimate control does not.\(^{14}\) Ultimately, the legislative intent and policies behind Rule 10b-5 will be served best by a precise definition of its contours.\(^{15}\)

II. A BRIEF HISTORY OF RULE 10B-5

Rule 10b-5 is the leading antifraud provision available to investors in

---


\(^{10}\) \textit{See Janus}, 131 S. Ct. at 2310 (Breyer, J., dissenting) (referring to scenario as “the 13th stroke of the new rule’s clock”). Justice Breyer was apparently referring to the “thirteenth stroke of a crazy clock, which not only is itself discredited but casts a shade of doubt over all previous assertions.” A.P. HERBERT, UNCOMMON LAW 28 (6th ed. 1948).

\(^{11}\) \textit{See Janus}, 131 S. Ct. at 2310 (Breyer, J., dissenting).

\(^{12}\) \textit{See id.} at 2302 (rejecting “[a] broader reading of ‘make,’ including persons or entities without ultimate control over the content of a statement” (emphasis added)); \textit{see also} id. at 2305 (noting assistance of one entity in drafting prospectuses “subject to the ultimate control” of another entity “does not mean that [the former entity] ‘made’ any statements in the prospectuses” (emphasis added)).

\(^{13}\) Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011).

\(^{14}\) \textit{See id.} (noting ability to “make” statement requires control over content).

\(^{15}\) \textit{See infra} notes 185-186 and accompanying text (suggesting authority to “make” statements requires ultimate control).
securities. The rule states, in relevant part: “It shall be unlawful for any person . . . [t]o make any untrue statement of a material fact . . . in connection with the purchase or sale of any security.” The rule applies to “any person,” and one of its prohibited acts is “[t]o make any untrue statement of a material fact.” And yet, federal courts have long struggled to develop a consistent definition of what it means to “make” an untrue statement of a material fact under Rule 10b-5.

Rule 10b-5 was promulgated under section 10(b) of the Securities Exchange Act of 1934. The rule gives the Securities and Exchange Commission (SEC)
broad latitude to police fraud in connection with the purchase or sale of securities.21 Judicially implied in the rule is the right of individuals to enforce its provisions, a private right of action the Supreme Court has deemed essential to the SEC’s fraud-fighting mission.22 The following sections will briefly recount the “peculiar blend of legislative, administrative, and judicial history which now surrounds Rule 10b-5.”23

A. Statutory Roots

Rule 10b-5 originated from the Securities Act of 1933 and the Exchange Act of 1934, which together embody a philosophy of full disclosure and high ethical standards adopted by Congress in response to the 1929 stock market crash and the Great Depression that followed.24 The Securities Act of 1933 required complete disclosure of material information in the issuance of securities, and created penalties to fight fraud and promote fair dealing.25 Section 17(a) of the Act, the “grandfather” of all federal antifraud provisions, was a primary source for the language in Rule 10b-5.26 Section 17(a) makes it

in the public interest or for the protection of investors.


23. Blue Chip Stamps, 421 U.S. at 749.

24. See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186-87 (1963) (linking disclosure philosophy and ethical standards to crises of 1920s and 1930s). Justice Goldberg wrote, “‘[i]t requires but little appreciation . . . of what happened in this country during the 1920’s and 1930’s to realize how essential it is that the highest ethical standards prevail in every facet of the securities industry.” Id. (quoting Silver v. N.Y. Stock Exch., 373 U.S. 341, 366 (1963)).

25. Ernst & Ernst, 425 U.S. at 195 (analyzing intent of Congress in enacting Securities Act). The 1933 Act provided for filing a registration statement and using a prospectus in connection with offering securities to the public. See LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 36 (5th ed. 2004). Material misstatements or omissions in those documents would subject the issuer and others connected with the offering to civil and criminal liability. Id.

26. LOSS & SELIGMAN, supra note 25, at 901-02 (enumerating “weapons” in SEC’s antifraud arsenal). While much of the Securities Act concerns the regulation of new offerings, Section 17(a) extends liability for fraud, deception, or misrepresentation to cover the sale of old or new securities. See United States v. Naftalin, 441 U.S. 768, 777-78 (1979) (construing congressional intent in enacting § 17(a)). The drafters of Rule 10b-5 combined section 17(a) of the 1933 Act with section 10(b) of the 1934 Act to create a rule that would apply to fraud in both the purchase and sale of securities. See Milton V. Freeman, Administrative Procedures, 22 B.U. LAW. 891, 922 (1967) [hereinafter Administrative Procedures] (recounting drafting of Rule 10b-5).
unlawful for any seller of securities to employ a scheme to defraud, make
materially false statements or omissions, or engage in any fraudulent
practices.  

With the Securities Exchange Act of 1934, Congress intended to deter the
manipulation of stock prices through regulation and reporting requirements; to
that end, Congress created the Securities and Exchange Commission (SEC) and
endowed it with flexible enforcement powers. In support of its disclosure and
market-regulation mechanisms, the 1934 Act included provisions to combat
securities fraud and manipulation. Among the Act’s antifraud provisions,
section 10(b) makes it unlawful for a person to use a manipulative or deceptive
device in connection with the purchase or sale of a security in contravention of
SEC rules. Thomas G. Corcoran, one of its principal drafters, described the
subsection as “a catch-all clause to prevent manipulative devices.” Corcoran
summed up the intent of section 10(b)’s drafters as follows: “Thou shalt not
devise any other cunning devices.”

27. 15 U.S.C. § 77q(a) (2006). Section 17(a) states:

It shall be unlawful for any person in the offer or sale of any securities . . . by the 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.

Id.

1933 Act’s static disclosure regime, which focused on the distribution of securities, gave way to a new,
continuous disclosure regime focused on securities trading; numerous periodic filing requirements subject to
the rulemaking authority of the SEC were added to the 1933 Act’s registration and prospectus filing
requirements. See LOSS & SELIGMAN, supra note 25, at 45-46 (providing overview of 1934 Act and
comparison to 1933 Act).

29. See LOSS & SELIGMAN, supra note 25, at 46 (listing “themes” of 1934 Act). “It is going to be
dangerous for a man to engage in window dressing, fraudulent and deceptive methods for the purpose of
defrauding investors. This bill proposes to punish persons guilty of fraudulent statements in reference to stock
listed on these national exchanges where damage results.” 78 CONG. REC. 7862 (1934) (statement of
Representative Lea of California).


31. Hearings on H.R. 7852 and H.R. 8720 Before the H. Comm. on Interstate and Foreign Commerce,
73d Cong., 2d Sess. 115 (1934) [hereinafter Hearings] (statement of Thomas G. Corcoran). Corcoran, a
member of President Franklin Delano Roosevelt’s New Deal “brain trust,” also had a significant role in drafting
the Securities Act of 1933. See James M. Landis, The Legislative History of the Securities Act of 1933, 28
GEO. WASH. L. REV. 29, 33-34 (1959) (recounting first encounter with Corcoran). The Supreme Court
subsequently embraced the term “catch-all” to describe section 10(b). See Ernst & Ernst, 425 U.S. at 203
(recounting, analyzing, and approving of Corcoran’s use of the term).

32. Hearings, supra note 31, at 115 (statement of Thomas G. Corcoran).
B. Writing the Rule

Rule 10b-5 itself had “modest aims and origins.” It was drafted by two SEC attorneys on Monday, May 18, 1942. That morning, Mayer Newfield met his colleague, Milton Freeman, at SEC headquarters in Philadelphia. Newfield had been reviewing monthly reports from the SEC’s regional offices and noticed a pattern of apparently fraudulent practices by corporate insiders in the purchase of securities. The SEC’s preferred tool for antifraud enforcement, section 17(a) of the 1933 Act, did not work in these cases, because its use was limited to fraud in the sale, not the purchase, of securities. Freeman suggested combining section 17(a) of the 1933 Act with section 10(b) of the 1934 Act to create a new rule that would apply to fraud in both the purchase and sale of securities.

The Commission met at three o’clock that afternoon, and the proposed Rule X-10B-5 was on the agenda. The presentation lasted about fifteen minutes. Freeman and Newfield appeared before the Commission and “passed a piece of
paper around to all the commissioners. All the commissioners read the rule and they tossed it on the table, indicating approval. Nobody said anything except Sumner Pike who said, ‘Well,’ he said, ‘we are against fraud, aren’t we?’41 The rule took effect on Thursday, May 21, 1942.42 Based on Freeman’s account, the Supreme Court later concluded Rule 10b-5 was “a hastily drafted response to a situation clearly involving intentional misconduct.”43

C. The Private Right of Action

In 1946, a district court judge in Philadelphia implied a private right of action in Rule 10b-5.44 The decision transformed the rule into something far greater than its drafters intended.45 In Kardon v. National Gypsum Co., Judge Kirkpatrick gave individuals the right to bring civil suits to enforce Rule 10b-5 under the “deeply ingrained” canon that violation of a statute creates civil liability.46 For twenty-five years after Kardon, federal courts implied a private right of action into Rule 10b-5, until the Supreme Court confirmed the right in a footnote.47 Justice Rehnquist famously characterized the expansion of Rule

---

41. Administrative Procedures, supra note 26, at 922; see also DuBois, supra note 34 (listing names of those present).
43. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212 n.32 (1976) (holding rule intended to apply only to activities involving scienter).
45. See Milton V. Freeman, Foreword: Happy Birthday 10b-5: 50 Years of Antifraud Regulation, 61 FORDHAM L. REV. S1, S2 (1993) (stating Freeman “innocent” of rule’s potential applications). “Obviously neither I, nor the Commission that promulgated the Rule, had any such idea when the Rule was adopted,” Freeman said of the private right. Id.
46. Kardon, 69 F. Supp. at 513-14. The defendants in the case had allegedly made materially misleading statements and omissions in order to buy plaintiffs’ stock for cheap. See id. at 513. The court held, under tort law, that defendants could incur civil liability for violating a legislative enactment—section 10(b)—the intent of which was to protect the individual plaintiff’s interest that served as the basis of the claim. See id. Section 286 of the First Restatement of Torts, a subsection on “Agencies by Which Negligence is Determined,” states:

The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if: (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect; and, (c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and, (d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action.

RESTATEMENT (FIRST) OF TORTS § 286 (1934). Comment b adds that when an enactment prohibits a particular act or requires a particular act to be done—but makes no provision for criminal punishment or civil liability—the enactment “establishes a standard of obligatory behaviour.” See id. at cmt. b.
47. See Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (“It is now
10b-5 via the private right of action as “a judicial oak which has grown from little more than a legislative acorn.” Even Freeman observed, “you have very little to do about what happens to your children when they grow up.”

In the 1960s, the Court applied the rule “not technically and restrictively, but flexibly to effectuate its remedial purposes.” By the 1970s, after a period of expansive construction, the pendulum began to swing the other way: The Court expressed concern that the rule was becoming a tool of “vexatious litigation” in the hands of unscrupulous practitioners out to squeeze lucrative settlements from meritless claims. The Court paid particular attention to the private right’s potential for nuisance suits, in which companies seeking to avoid discovery or business disruption would pay out disproportionate settlements. In construing Rule 10b-5, the Court began to place greater emphasis on the textual limitations of section 10(b). As a result, the rule’s impact in private actions has been limited substantially over the past three decades. Those

established that a private right of action is implied under s 10(b).”


49. See Discussion, An Examination of the Tensions Between Federal and State Law Dealing with Corporate Management: Discussion from the Floor, 31 BUS. LAW. 973, 982 n.4 (1976) (responding to introduction identifying Freeman as author of Rule 10b-5).


51. Blue Chip Stamps, 421 U.S. at 739-40 (suggesting problems could arise from widely expanded class of plaintiffs). The Court stated:

There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general. . . .

. . .

We believe that the concern expressed for the danger of vexatious litigation . . . is founded in something more substantial than the common complaint of the many defendants who would prefer avoiding lawsuits entirely to either settling them or trying them.

Id.

52. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007) (“Private securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.”); see also Blue Chip Stamps, 421 U.S. at 740-43 (reviewing congressional debate over deterring “strike” or nuisance suits in 1933 and 1934 Acts).

53. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197-201 (1976) (emphasizing adherence to statutory language remains important with judicially implied liability).

limitations became even more explicit following \textit{Central Bank}.55

III. \textit{Central Bank and Stoneridge: All Abets Are Off}

The importance of distinguishing primary from secondary liability in Rule 10b-5 claims originated in 1994 with \textit{Central Bank}, which involved a section 10(b) aiding-and-abetting claim.56 It was to be the last such claim, because the Court, in a five-to-four decision, foreclosed aiding-and-abetting liability in private actions under section 10(b).57 The Court offered three reasons for its decision.58 First, the text of section 10(b) does not specifically prohibit aiding and abetting.59 Second, allowing aiding-and-abetting liability would circumvent the element of reliance required for Rule 10b-5 claims.60 Third, the Court could find no evidence of congressional intent to impose aiding-and-abetting liability in private actions under section 10(b).61

The Court’s 2008 decision in \textit{Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.} reaffirmed that secondary-liability claims are no longer available to private litigants under Rule 10b-5.62


56. \textit{See} Cent. Bank, 511 U.S. at 168 (stating facts of case). In \textit{Central Bank}, bondholders sued a public building authority and others following the authority’s default on a bond issue to finance improvements at a planned residential/commercial development in Colorado. \textit{See id.} at 167-68. The bondholders alleged the building authority had committed fraud in the appraisal of the landowner assessment liens securing the bonds. \textit{See id.} The bondholders also alleged that \textit{Central Bank}, the indenture trustee, aided and abetted the fraud by delaying an independent review of the appraisal. \textit{See id.} Both claims were based on section 10(b). \textit{See id.} at 168. The claim was hardly novel: Courts had been reading aiding-and-abetting liability into section 10(b) since 1966. \textit{Id.} at 186. Indeed, hundreds of judicial and administrative proceedings in every federal circuit had found defendants liable for aiding and abetting under section 10(b). \textit{See id.} at 192 (Stevens, J., dissenting).

57. \textit{See id.} at 191 (basing holding on lack of aiding-and-abetting prohibition in section 10(b)). Justice Kennedy delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas. \textit{Id.} at 166. Justice Stevens filed a dissenting opinion joined by Justices Blackmun, Souter, and Ginsburg. \textit{Id.}

58. \textit{See id.} at 178-91.

59. \textit{See id.} at 191 (emphasizing statutory language).

60. \textit{See} Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 178 (reaffirming plaintiff in 10b-5 action must show reliance on defendant’s misrepresentation to recover damages). The Court reasoned an aider and abettor could be found liable without evidence of reliance on the aider and abettor’s misstatement (although a plaintiff would presumably still have to show reliance on the primary violator’s misstatement). \textit{Id.} at 180.

61. \textit{See id.} at 185 (maintaining congressional silence not tantamount to authorization of aiding-and-abetting liability).

after *Central Bank*, *Stoneridge* showed the Court indulging in a measure of self-congratulation that Congress acknowledged *Central Bank*’s elimination of private-right, aiding-and-abetting claims. Neither case purported to absolve secondary actors—including lawyers, accountants, and banks—from primary liability, provided all of the elements could be established. Indeed, Justice Kennedy emphasized “[a]ny person or entity” who makes a material misstatement or omission “may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met.” Still, the practical effect of the two decisions provided defendants with ample cause for optimism.

Where *Central Bank* initially represented an end to years of precedent—using textualist reasoning to eliminate areas of common-law liability—it also began a new era of progressively restrictive line-drawing. *Stoneridge*, once viewed as “the *Roe v. Wade* of securities law” and the “securities fraud case of the decade,” evolved into an extension of *Central Bank*, solidifying the latter’s position as a watershed in the history of Rule 10b-5. Both cases, however,

---

63. See *Stoneridge*, 552 U.S. at 158. The Court recounted how its decision in *Central Bank* “led to calls for Congress to create an express cause of action for aiding and abetting,” including Senate testimony from the SEC chairman. *Id.* But, Congress did not re-establish aiding-and-abetting liability for private plaintiffs, although it did so for the SEC. *Id.*

64. See *id.* (holding conduct of secondary actor must satisfy each element for liability).

65. See *Stoneridge*, 552 U.S. at 158.

66. 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, 2126-27 (2010). Professor Langevoort writes that in *Stoneridge*: Justice Kennedy’s opinion makes something of a doctrinal mishmash. The dish is tasty enough to those who dislike strong securities class actions, with abundant probusiness dicta adding ample spice. But the recipe has few serious academic defenders, even among those who like its outcome, and has been the object of disgust for those who do not. The standard account is that the Court was, yet again, showing its reflexive antipathy toward private securities class actions, throwing whatever was at hand into the pot in order to achieve a business-friendly result. . . . [M]ost lower courts have read *Stoneridge* as doing little more than truncating third-party liability via an especially strict reliance requirement.


have been roundly criticized for operating to defeat the legislative intent behind section 10(b).

Following the foreclosure of secondary liability in Central Bank, circuit courts developed various tests to separate the primary sheep from the secondary goats. Primary liability was viewed differently among the circuits between 1994 and 2011: the Ninth Circuit, for example, applied the more expansive “substantial participation” test, while the Second Circuit applied the more restrictive “bright-line test.” The substantial-participation test first appeared in a case decided soon after Central Bank: In re Software Toolworks.

In Software Toolworks, the Ninth Circuit, with secondary liability no longer available, determined that allegations of an accounting firm’s “significant role in drafting and editing” misleading letters to the SEC were sufficient to establish primary liability. Six years later, in Howard v. Everex Systems, Inc., the Ninth Circuit refined and restated the substantial-participation standard as follows: “[S]ubstantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability.” The question before the court was whether a corporate official who knowingly signed an SEC filing containing misrepresentations actually made a statement in violation...
of section 10(b). In answering yes, the Ninth Circuit reasoned that to protect investors from misleading information, a corporate officer who knowingly or recklessly signs a document on behalf of a corporation should be held responsible for the statements in that document.

The Tenth Circuit rejected the Ninth Circuit’s substantial-participation standard as incompatible with the holding in *Central Bank*. Instead, the Tenth Circuit produced an early version of the bright-line test in *Anixter v. Home-Stake Production Co.* The court based its test on two policy rationales enumerated in *Central Bank*. First, securities businesses demand predictability and clear rules about liability. Second, reliance on representations made by persons other than the defendant cannot by itself create liability.

75. See id. at 1061 (recalling distinction between primary and secondary violations in *Central Bank*). An investor brought suit against the CEO of a company and others, alleging they made material misrepresentations to the public about the company’s profitability. See id. at 1059-60. The district court dismissed the section 10(b) claim, finding that the CEO did not make the allegedly false statements because he did not participate in drafting them. See id. at 1060-61. The Ninth Circuit reversed. See id. at 1069.

76. See id. at 1061-62 (asserting signature on document meaningless unless officer stood behind statements within). The court concluded that high-ranking officials should not escape primary liability by avoiding involvement in the preparation of potentially misleading statements they then sign with the requisite level of scienter. See id. at 1062 (adding such result would substantially weaken securities laws). The court distinguished between “mere participation in a scheme to misrepresent,” which would be aiding and abetting, and “directly attesting to the truth of a statement,” which would amount to “making (in the ordinary sense) that very statement” in the eyes of the investing public. Id. at 1061 (basing distinctions on holding in *Central Bank*).

77. See *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 n.10 (10th Cir. 1996) (accusing Ninth Circuit of reformulating element of aiding-and-abetting liability into primary liability). For primary liability to attach, the court held that secondary actors:

> must themselves make a false or misleading statement (or omission) that they know or should know will reach potential investors. In addition to being consistent with the language of the statute, this rule, *though far from a bright line*, provides more guidance to litigants than a rule allowing liability to attach to an accountant or other outside professional who provided “significant” or “substantial” assistance to the representations of others.

Id. at 1226-27 (emphasis added).

78. See id. Investors, in what appeared to be a Ponzi scheme tied to a purported oil- and gas-drilling venture, sued the outside auditor after the venture collapsed. See id. at 1218. Investors brought primary and secondary claims against the auditor, alleging his knowing participation in preparing and filing fraudulent documents and issuing opinions and certification letters containing material misstatements created liability under section 10(b). See id. at 1225.

79. See id. at 1225, 1227 (emphasizing importance of certainty and predictability, and reliance as element distinguishing primary from secondary liability).


81. See id. at 178-80 (citing reliance requirement notably absent from aiding-and-abetting liability). In the end, the Tenth Circuit concluded that, even under its stricter standard, the auditor’s statements could support a finding of primary liability. See *Anixter*, 77 F.3d at 1227. The auditor issued opinions on the program’s balance sheets and certified its financial statements. Id. Despite the appearance of those opinions and certification letters in prospectuses, annual reports, promotional materials, and registration statements
The Second Circuit cited the Anixter holding approvingly and adopted a similar method of analysis in Shapiro v. Cantor. Investors in Shapiro alleged that an accounting firm had participated in the fraudulent schemes of certain limited partnerships by helping to prepare the partnerships’ offering memoranda. The Second Circuit, however, rejected the investors’ claims, holding allegations of “assisting,” “participating in,” “complicity in,” and similar words denote secondary liability within the framework of Central Bank. The Second Circuit further developed its paradigm in Wright v. Ernst & Young LLP. The court in Wright officially delineated the “bright line” and “substantial participation” tests as competing standards of primary liability, adopting the former and rejecting the latter. The court refined the bright-line standard by adding an attribution requirement. The court employed the rationale, stated in Central Bank and used in Anixter, that reliance on the representations of persons other than the defendant cannot by itself form the basis of primary liability.

In Ziemba v. Cascade International, Inc., the Eleventh Circuit joined the Second Circuit in applying the bright-line test to statements involving distributed to potential investors, the court held that the auditor’s statements were sufficient. Id. 82 123 F.3d 717 (2d Cir. 1997). The court’s approval carries added weight: The Supreme Court once described the Second Circuit as the “Court of Appeals regarded as the ‘Mother Court’ in this area of the law.” Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).

83. Shapiro, 123 F.3d at 719 (detailing allegations against accounting firm in amended complaint). The district court found that the accounting firm’s alleged misrepresentations contained sufficient cautionary language to prevent plaintiffs from reasonably relying on them. Id. The district court characterized other claims as aiding and abetting. Id.

84. Id. at 720-21 (maintaining claim must allege defendant made misstatement or omission).

85. 152 F.3d 169 (2d Cir. 1998). In Wright, an investor filed a class action suit against an accounting firm, alleging the firm had approved a company’s press release setting forth misleading financial results. Id. at 172. The Second Circuit held that the accounting firm did not make a material misstatement, because the company’s press release did not attribute any information to the firm, and the firm therefore did not communicate any misrepresentations to investors directly or indirectly. Id. at 175. Any other conclusion, the court surmised, would “run afoul” of the Supreme Court’s prohibition on aiding-and-abetting liability in private actions under section 10(b). Id. at 172-73.

86. See id. at 175-76 (contrasting Second, Ninth, and Tenth Circuit standards); see also Shapiro, 123 F.3d at 720 (articulating bright-line test); In re Software Toolworks Inc., 50 F.3d 615, 628 n.3 (9th Cir. 1994) (articulating substantial-participation test).

87. See Wright, 152 F.3d at 175 (restricting scope of liability). The court held that while a defendant need not directly communicate misrepresentations to investors:

a secondary actor cannot incur primary liability under the Act for a statement not attributed to that actor at the time of its dissemination. . . . [T]he misrepresentation must be attributed to that specific actor at the time of public dissemination, that is, in advance of the investment decision.

Id.

88. See id.; see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 178-80 (1994) (stating secondary liability allows plaintiffs to circumvent reliance requirement); Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1226 (10th Cir. 1996) (holding plaintiff must show secondary actor “knew or should have known that his representation would be communicated to investors”).
secondary actors. The Eleventh Circuit held secondary actors’ “significant role in drafting, creating, reviewing or editing allegedly fraudulent letters or press releases” constituted nonactionable secondary liability under Central Bank, because of the lack of attribution to those actors.90

The First Circuit applied neither the bright-line nor the substantial-participation tests, but instead developed a textualist approach in SEC v. Tambone.91 This mutual fund-related case involved a civil complaint against two former senior executives of a mutual fund broker-dealer.92 The SEC alleged the executives either knew of or “recklessly ignored” language in certain mutual fund prospectuses curbing an investment technique that favored customers were allowed to employ freely.93 The SEC said that the executives made misrepresentations to prospective clients by using the misleading prospectuses in sales efforts.94 The First Circuit, however, held that the SEC’s arguments were not consistent with accepted meanings of the word “make.”95 The court distinguished the verb “use,” found in section 10(b), from the verb “make,” found in Rule 10b-5(b), and opined, “the SEC’s asseveration that one can ‘make’ a statement when he merely uses a statement created entirely by others cannot follow.”96 Of the circuit court tests, the Tambone approach

89. Ziemba v. Cascade Int’l, Inc., 256 F.3d 1194, 1205 (11th Cir. 2001) (following Second Circuit in requiring public attribution). In Ziemba, investors filed a class action suit after a bankrupt company’s interim chairman publicly announced the company had misrepresented its assets, profits, and revenues. See id. at 1198. The complaint named an accounting firm and a law firm as defendants, in addition to the company’s officers and directors. See id. at 1197.

90. Id. at 1205-06 (applying Central Bank principles to allegations). Affirming the district court’s dismissal of claims against the two firms, the Eleventh Circuit held that the complaints lacked the element of reliance because the attorneys’ and accountants’ alleged assistance was not attributed to their firms. See id. at 1206-07 (holding plaintiffs failed to state Rule 10b-5 claim against either defendant).

91. 597 F.3d 436 (1st Cir. 2010).

92. See id. at 439 (describing broker-dealer’s role as “principal underwriter and distributor” of more than 140 funds).

93. See id. at 439-40. The court stated: “The short-term trading practice that lies at the epicenter of this case is known in the trade as ‘market timing.’” Id. at 439. The district court dismissed the complaint for failure to plead misstatements with sufficient particularity, and the SEC appealed. See id. at 440-41.

94. See id. at 439-40 (emphasizing executives allowed preferred customers to use techniques prohibited in prospectuses). The SEC also claimed the executives made an implied misrepresentation to investors that the executives reasonably believed the prospectuses were truthful and complete. See id. at 441. The First Circuit en banc rejected both arguments and affirmed the district court’s dismissal of the Rule 10b-5 claim. See id. at 450. The First Circuit also dismissed the SEC’s implied misrepresentation theory because it would impose on securities professionals an unconditional duty to disclose that “flies in the teeth of Supreme Court precedent.” Id. at 447-48.

95. See Tambone, 597 F.3d at 442-43 (using dictionary definitions to determine ordinary meaning of “make”).

96. See id. at 443 (quoting from texts of section 10(b) and Rule 10b-5). The court noted Rule 10b-5 was modeled on section 17(a) of the Securities Act, which makes it unlawful “to obtain money or property by means of any untrue statement of a material fact,” and yet the rule’s drafters chose the verb “make” instead of the phrase “by means of.” See id. at 444. “We must honor the drafters’ deliberate decision,” declared the court. Id. at 444-45. The opinion went on to state:
exerted the greatest influence on the Janus Court regarding the focal point for the Janus decision, namely, “the pivotal word... ‘make,’ as in ‘to make a statement.’” 97

IV. THE JANUS LITIGATION

In Janus, the three entities allegedly involved in “making” a misstatement were Janus Capital Group, Inc. (JCG), the Janus Investment Fund (JIF), and Janus Capital Management, LLC (JCM). 98 JCG, a Denver-based publicly traded corporation, was the parent company of the Janus family of mutual funds. 99 JCM, the investment adviser and administrator for the Janus family of funds, was a wholly owned subsidiary of JCG. 100 JIF was a separate legal entity organized as a Massachusetts business trust and fully owned by mutual fund investors. 101

The rule itself does not define that word, nor does it suggest that the word is imbued with any exotic meaning. In the absence of either a built-in definition or some reliable indicium that the drafters intended a special nuance, accepted canons of construction teach that the word should be given its ordinary meaning.

Id. at 442.

97. SEC v. Tambone, 597 F.3d 436, 442 (1st Cir. 2010). Indeed, JCG’s brief frequently cited the Tambone decision. See Brief for Petitioners at 29, 36, 37, 40, 42, 43 & 56, Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011) (No. 09-525).


99. Id. Mutual fund “families” consist of funds of various types and investment objectives unified under a single sponsor and/or investment adviser. See Laurin Blumenthal Kleiman & Carla G. Teodoro, The ABCs of Mutual Funds 2007: Forming, Organizing and Operating a Mutual Fund: Legal and Practical Considerations, 1612 PLI/CORP. 9, 22 (2007). Mutual funds are registered with the SEC and marketed to the public as an investment vehicle. Id. at 13.

100. Janus, 131 S. Ct. at 2299. The investment adviser’s responsibilities include developing investment strategies, appointing portfolio managers, and tending to operational matters. See Kleiman & Teodoro, supra note 99, at 30. Fund officers are usually affiliated with the adviser, which may also serve as fund administrator. Id. at 32-33. During the time period relevant to the case, all JIF officers were also JCM officers, but only one JIF trustee was associated with JCM. Janus, 131 S. Ct. at 2299. As the Court observed in Burks v. Lasker, “[t]he relationship between investment advisers and mutual funds is fraught with potential conflicts of interest.” 441 U.S. 471, 481 (1979) (quoting Galfand v. Chestnutt Corp., 545 F.2d 807, 808 (2d Cir. 1976)).

101. See Janus, 131 S. Ct. at 2299. Funds organized as business trusts—trusts with freely tradable ownership units governed by a board of trustees—are usually either Massachusetts business trusts (governed by common law) or Delaware statutory trusts. See Kleiman & Teodoro, supra note 99, at 20-21; cf. Burks, 441 U.S. at 480 (describing mutual fund as “a pool of assets, consisting primarily of portfolio securities, and belonging to the individual investors holding shares in the fund”). Under the Investment Company Act, at least forty percent of a fund’s board must be composed of independent outside directors, and the JIF board had more independent outsiders than required. Janus, 131 S. Ct. at 2299-2300; see also 15 U.S.C. § 80a-10(a) (2006) (setting forth membership requirements for investment company boards of directors). The Supreme Court has described the independent-director requirement as the “cornerstone” of the Investment Company Act’s “effort to control conflicts of interest within mutual funds.” Burks, 441 U.S. at 482. Some observers—foreshadowing Janus’s ultimate authority rule—indicate that governance of a mutual fund must be “the ultimate responsibility of independent individuals acting on behalf of the shareholders and not on behalf of the sponsor or its affiliates.” See Kleiman & Teodoro, supra note 99, at 25 (emphasis added).
income.102

A. The Mutual Fund Scandal

JCG’s troubles began on September 3, 2003, when New York Attorney General Eliot Spitzer announced a $40 million settlement agreement with the hedge fund Canary Capital Partners, LLC, following an investigation of mutual fund trading practices.103 Spitzer alleged Canary had obtained “special trading opportunities with leading mutual fund families,” including the Janus family.104 Spitzer’s complaint alleged Janus funds had engaged in market timing, a short-term trading technique that produces profits at the expense of long-term shareholders.105 While the funds’ prospectuses discouraged or prohibited timing, Spitzer claimed managers were in fact allowing certain investors to


103. Press Release, N.Y. State Office of the Attorney Gen., State Investigation Reveals Mutual Fund Fraud (Sept. 3, 2003), http://www.ag.ny.gov/press-release/state-investigation-reveals-mutual-fund-fraud. The settlement included $30 million in restitution and a $10 million penalty. Id. Edward J. Stern, Canary’s managing principal, was also a party. Id. As one Wall Street observer put it, “Mr. Spitzer, having secured another Wall Street pelt for his growing collection, was able to crow that he had brought Canary to ground and persuaded Mr. Stern to confess he had not done anything wrong but would never do it again.” Alan Abelson, Bird Dog, BARRON’S, Sept. 8, 2003, at 9.


105. See Complaint, supra note 104, at 7. This strategy works only because some funds use “stale” prices to calculate the value of securities held in the fund’s portfolio. These prices are “stale” because they do not necessarily reflect the “fair value” of such securities as of the time the [Net Asset Value, or NAV] is calculated. A typical example is a U.S. mutual fund that holds Japanese shares. Because of the time zone difference, the Japanese market may close at 2:00 a.m. New York time. If the U.S. mutual fund manager uses the closing prices of the Japanese shares in his or her fund to arrive at an NAV at 4:00 p.m. in New York, he or she is relying on market information that is fourteen hours old. . . . On such a day, a trader who buys the Japanese fund at the “stale” price is virtually assured of a profit that can be realized the next day by selling. This and similar strategies are known as “time zone arbitrage.” Taking advantage of this kind of short-term arbitrage repeatedly in a single mutual fund is called “timing” the fund.

time certain funds.\textsuperscript{106} According to the complaint, Janus allowed Canary to time various Janus funds in exchange for “sticky” assets,” i.e., money parked for a longer term in a Janus money market fund.\textsuperscript{107}

Intraoffice emails obtained by the attorney general reflected the concerns of some Janus employees about the apparent discrepancy between the company’s statements and actions; for example, one email noted:

Our stated policy is that we do not tolerate timers. As such, we won’t actively seek timers, but when pressed and when we believe allowing a limited/controlled amount of timing activity will be in JCG’s best interests (increased profitability to the firm) we will make exceptions under these parameters.\textsuperscript{108}

On September 4, 2003, the SEC’s enforcement division sent letters to the named mutual fund companies requesting documents and information about their trading practices.\textsuperscript{109} The news also prompted the filing of class-action lawsuits against various funds.\textsuperscript{110} On September 5, JCG acknowledged market

\begin{flushright}
Complaint, supra note 104, at 38.
\end{flushright}

\begin{flushright}
106. See Complaint, supra note 104, at 36. In response, a concerned employee emailed a Janus officer saying:

I’m getting more concerned w/ all of these market timers . . . . Now that we have our exchange limitation in our prospectus, I would feel more comfortable not accepting this type of business because its [sic] too difficult to monitor/enforce & it is very disruptive . . . . Obviously, your call from the sales side.

\textit{Id.}
\end{flushright}

\begin{flushright}
107. See Complaint, supra note 104, at 37. Another email was more blunt: “[I]f we are going to allow timing, we want to be sure that there are enough static assets [i.e., “sticky” assets] so that we are making a decent profit for all the trouble we are put through.” \textit{Id.}
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
109. See id. The law firm of Bernstein Liebhard & Lifshitz claimed to have filed the first class-action suit related to the investigation within a day or two of the announcement. \textit{Id.}
\end{flushright}

\begin{flushright}
110. The suit targeted Janus among others.
\end{flushright}
timers had invested as much as $750 million with the fund family in 2002 and 2003, and JCG chief executive Mark Whiston publicly apologized “for any concerns we’ve caused our investors.”

On April 27, 2004, the attorneys general of New York and Colorado, in cooperation with the SEC and the Colorado Division of Securities, announced a $225 million settlement with JCM to resolve the market-timing allegations. The SEC announced its findings on August 18, 2004, in the settlement of an enforcement action against JCM, where the investment adviser, without admitting or denying the findings, agreed to pay $100 million and consented to a cease-and-desist order and a censure. The order found that:

JCM entered into agreements with the Market Timers, which created a conflict of interest that JCM knowingly or recklessly failed to disclose to the Board of Trustees of the funds, and which were inconsistent with the funds’ prospectus disclosures.

... JCM filed several registration statements with the Commission containing prospectuses that falsely stated or otherwise represented that JCM did not permit frequent trading or market timing in its mutual funds.

---


114. Janus Settlement, supra note 113, at 1768 (emphasis added). On August 15, 2008, the SEC announced the distribution of over $18 million to more than 325,000 affected investors in the first in a series of planned Fair Fund payments stemming from the $100 million JCM settlement. See Press Release, SEC, SEC Announces $18 Million Fair Fund Distribution to Investors Affected by Undisclosed Market Timing in Janus
B. The Litigation: District Court

In November 2003, Craig Wiggins, a purchaser of JCG stock, filed the original complaint against JCG in U.S. District Court in Colorado. Wiggins’s action was transferred to the District of Maryland as part of a multidistrict litigation proceeding involving market-timing-related claims, where First Derivative Traders was appointed lead plaintiff. The complaint alleged that misstatements in the prospectuses—once revealed in September 2003—led to an exodus of investors from the funds and a corresponding drop in the value of JCG’s stock. Defendants JCM and JCG moved to dismiss the complaint for failure to state a claim, and the district court granted their motion.

In his decision, Judge Motz relied principally on the elimination of secondary liability in private securities fraud actions in Central Bank. The judge noted that in the Fourth Circuit, only statements “directly attributable” to the defendant were actionable. Accordingly, the judge dismissed the claim against JCG, finding the plaintiffs had not specifically attributed the misstatements in the prospectuses to JCG with sufficient particularity. Next, Judge Motz dismissed the claim against JCM for failure to demonstrate a connection between JCM’s alleged misstatements and the plaintiffs’ purchase or sale of JCG securities. Finally, based on his dismissal of the claim against
JCM, the judge also dismissed a claim alleging JCG, as a control person under section 20(a) of the Exchange Act, was liable for JCM’s Rule 10b-5 violations; without a primary violation, he noted, there could be no control-person liability. In an earlier, related action brought by mutual fund shareholders, Judge Motz also dismissed the claims against JIF, holding it would be inappropriate to make “innocent” present fund shareholders liable for payment to previous fund shareholders.

C. The Litigation: Appeals Court

The Fourth Circuit, following a de novo review, reversed the district court’s order and held the section 10(b) primary-liability claim against JCM and the section 20(a) control-person-liability claim against JCG were pleaded with sufficiency. Circuit Judge Michael, after a thorough restatement of the plaintiffs’ allegations (quoting at length from Attorney General Spitzer’s complaint) concluded, “[t]hese statements, taken together, allege that JCG and JCM, by participating in the writing and dissemination of the prospectuses, made the misleading statements contained in the documents.” The complaint, therefore, had sufficiently identified the defendants making the misrepresentation. The court went on to analyze the reliance element, holding that the plaintiffs had successfully pleaded reliance against JCM but not JCG. Nevertheless, the court held JCG liable, because the allegations of

---

123. See id. Section 20(a) states:

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and 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.


124. See In re Mut. Funds Inv. Litig., 384 F. Supp. 2d 845, 852 n.3 (D. Md. 2005). Fund shareholders had named the funds as defendants under section 10(b), because the funds, as registrants, had filed the allegedly misleading prospectuses with the SEC. Id. Defendants, however, successfully asserted that the funds, as trusts holding shareholder assets, had no separate assets with which payments could be made. Id.

125. Id. at 121. Unlike the district court, the Fourth Circuit set forth in detail the plaintiffs’ allegations based on the New York Attorney General’s complaint. Id. at 118. The appeals court included some emails cited by the attorney general and noted that JCG admitted to facts alleged in the attorney general’s complaint. Id. The court also detailed the $14-billion drop in JCM’s assets under management and the twenty-three-percent drop in the value of JCG common stock. Id.

126. Id. at 127-28. To plead reliance successfully, plaintiffs must allege facts sufficient for a court to infer that “interested investors” would have known the defendants “played a substantial role in drafting or approving the allegedly misleading prospectuses.” Id. at 124. Here, the court reasoned that interested investors would
ownership, management, and control in the complaint were sufficient to establish liability as a control person of JCM under section 20(a).

D. The Litigation: Supreme Court

The Supreme Court granted certiorari on the issue of whether JCM could be held liable for the allegedly false statements in JIF prospectuses. From the outset, the Court gave a lukewarm endorsement of the private right of action and promised to give it “narrow dimensions.” The Court narrowed those dimensions by three means: restrictive readings of the words “make” and “maker” line-drawing rationales based on the foreclosure of secondary liability in Central Bank; and applications of the rule to the unique legal structures of the parties in the case. Upon determining that First Derivative failed to state a claim under Rule 10b-5, the Court reversed the Fourth Circuit.

Ignoring the lower-court tests, the Court chose a different definition of what it means to “make” a statement under Rule 10b-5. “One ‘makes’ a statement by stating it,” wrote Justice Thomas, limiting the scope of the word to phrases in which the object expresses the action of a verb, such as “to make a promise”, “to promise” or “to make a proclamation”, “to proclaim.” The Court then proceeded to create a new test addressing the identity of the “maker” of a statement (i.e., a Rule 10b-5 defendant).

For purposes of Rule 10b-5, the maker of a statement is the person or entity

understand JCM’s role in the management and administration of the Janus funds. Id. at 126-27. The court also accounted for allegations that JCM, JCG, and JIF were presented to the investing public as a single entity, Janus, which disseminated prospectuses to the public through a single website. Id. at 127.

129. See In re Mut. Funds, 566 F.3d at 130-31. For control-person liability to attach, a claim “must allege: (1) a predicate violation of § 10(b) and (2) control by the defendant over the primary violator.” Id. at 129-30.

In this case, the Fourth Circuit concluded: “Taken together, plaintiffs’ allegations of complete ownership of JCM by JCG, overlapping management between JCG and JCM, control of JCM by JCG executives, and presumptive authority by JCG to regulate market timing activity in the Janus funds are sufficient to plead a prima facie case of control person liability.” Id. at 131.

130. See Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2301 (2011). First Derivative dropped its Rule 10b-5 claim against JCG, retaining the control-person claim against JCG and the Rule 10b-5 claim against JCM. Id. at 2301 n.5.

131. Id. at 2301-02. The Court noted Rule 10b-5 and section 10(b) do not create a private right of action, yet the implied private right of action “remains the law” despite “[c]oncerns with the judicial creation of a private cause of action.” Id.

132. Id. at 2302-05. See generally Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) (holding private plaintiffs may not sue for aiding and abetting under section 10(b)).

133. See Janus, 131 S. Ct. at 2305.

134. Id. at 2301.

135. Id. at 2302. The Court explained: “When ‘make’ is paired with a noun expressing the action of a verb, the resulting phrase is ‘approximately equivalent in sense’ to that verb.” Id. (citing 6 OXFORD ENGLISH DICTIONARY 66 (def.59) (1933)). And so, the Court concluded, “the phrase at issue in Rule 10b-5, ‘[t]o make any . . . statement,’ is thus the approximate equivalent of ‘to state.’” Id.

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. One who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed.137

The Court justified its new rule using policy rationales introduced in Central Bank and developed in Stoneridge.138 Central Bank excluded private suits against aiders and abettors, defined in Janus as “entities that contribute substantial assistance to the making of a statement but do not actually make it.”139 In Stoneridge, the Court upheld dismissal of a complaint alleging the defendants—customers and suppliers—participated in a scheme to mislead a company’s auditor and issue deceptive financial statements; the defendants’ acts, the Court reasoned, did not make the issuance of the deceptive statements “necessary or inevitable.”140 In Janus, the Court quoted from these precedents to reason that defendants who provide “substantial assistance” by adding content to a statement are not liable, because without “ultimate authority” it is not “necessary or inevitable” that the statement will include the content they supplied.141 Justice Thomas wrote:

[F]or Central Bank to have any meaning, there must be some distinction between those who are primarily liable (and thus may be pursued in private suits) and those who are secondarily liable (and thus may not be pursued in private suits).

137. Id. (emphasis added). The opinion offered the analogy of a speechwriter who drafts a speech and a speaker who delivers it. While both have a hand in bringing the speech about, only the speaker has full control over the content of the speech and receives full credit, or takes the blame, for what is said. Id. The analogy also appears in the petitioners’ brief: “Just as the President rather than his speechwriters ‘makes’ a speech, an issuer rather than its service providers ‘makes’ the statements in the prospectus.” Brief for Petitioners at 11, Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011) (No. 09-525).


140. Stoneridge, 552 U.S. at 161 (holding defendants’ undisclosed deceptive acts too remote to satisfy reliance requirement of section 10(b)); see also Janus, 131 S. Ct. at 2303 (detailing Stoneridge holding). The Court in Stoneridge concluded it was the company, Charter Communications, Inc., not the defendants “that misled its auditor and filed fraudulent financial statements; nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did.” Stoneridge, 552 U.S. at 161.

141. Janus, 131 S. Ct. at 2302-03. The Court acknowledged both Central Bank and Stoneridge were factually distinguishable from Janus: Central Bank turned on claims of secondary liability, not primary liability, and the defendants in Stoneridge were not alleged to be the “makers” of Charter Communications’ misstatements. Id. at 2302-03 nn.6-7.
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.\textsuperscript{142} Finally, the Court disposed of counterarguments, rejecting as inapt the government’s argument, as amicus curiae, that “make” should be defined as “create.”\textsuperscript{143} The Court declined to “disregard the corporate form” by considering the relationship between JIF and JCM (two legally independent entities), saying any exceptions to the legal separation between the two should be addressed by Congress.\textsuperscript{144} And, although JCM was “significantly involved” in the preparation and dissemination of the prospectuses, the Court nonetheless maintained the prospectuses were subject solely to JIF’s “ultimate control.”\textsuperscript{145}

V. ANALYSIS: THE CRAZY CLOCK

Justice Breyer’s dissent attacked the majority’s reasoning by suggesting the

\textsuperscript{142}. Janus Capital Grp., Inc. v. First Derivative Traders, Inc., 131 S. Ct. 2296, 2302 n.6. Justice Thomas reiterated the overarching policy requirement of giving the “now settled” private right of action a “narrow scope”: “[W]e will not expand liability beyond the person or entity that ultimately has authority over a false statement.” Id. at 2303.

\textsuperscript{143}. Id. (citing Brief for United States as Amici Curiae Supporting Respondent at 14–15, Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011) (No. 09-525) (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 1485 (2d ed. 1958) (defining “make” as “[t]o cause to exist, appear, or occur”))). The Court rejected the government’s more expansive definition on two grounds: (1) it did not conform with the Court’s preferred meaning of “make,” which is limited to objects expressing the action of a verb; and (2) it would extend liability to undisclosed participants in acts preceding the official statement. Janus, 131 S. Ct. at 2303-04. Moreover, the Court, finding the meaning of “make” in Rule 10b-5 not to be ambiguous, declined to consider the government’s interpretation of the word, adding, “we have previously expressed skepticism over the degree to which the SEC should receive deference regarding the private right of action. This also is not the first time this Court has disagreed with the SEC’s broad view of § 10(b) or Rule 10b-5.” Id. at 2303 n.8 (internal citations omitted).

\textsuperscript{144}. Janus, 131 S. Ct. at 2304. In its brief, First Derivative cited a number of Supreme Court cases recognizing the “symbiotic” relationship between a mutual fund and its investment adviser. Brief for Respondent at 21, Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011) (No. 09-525). The Court characterized First Derivative’s arguments as suggesting “an investment adviser should generally be understood to be the ‘maker’ of statements by its client mutual fund, like a playwright whose lines are delivered by an actor.” Janus, 131 S. Ct. at 2304. While the Court credited those arguments, they did not outweigh Janus’s compliance with statutory formalities, including a board of trustees more independent than required. See id. at 2304-05. The Court also declined to apply a theory of control-person liability under section 20(a) to the relationship between JCM and JIF. See id. at 2304. The Court similarly declined to address potential liability “for entities that act through innocent intermediaries” under section 20(b), a theory raised during oral arguments. See id. at 2304 n.10; see also 15 U.S.C. § 78t(b) (2006) (setting forth liability for controlling persons, persons who aid and abet violations, and persons who engage in unlawful activity by means of any other person.)

\textsuperscript{145}. Janus, 131 S. Ct. at 2305. The Court likened JCM’s role in preparing the content of the prospectuses to that of a speechwriter. See id. JCM’s hosting of the prospectuses on its website was similarly insufficient; the Court retorted, “we do not think JCM made any of the statements in Janus Investment Fund’s prospectuses for purposes of Rule 10b-5 liability, just as we do not think that the SEC ‘makes’ the statements in the many prospectuses available on its Web site.” Id. at 2305 n.12.
ultimate-authority test will prove as unreliable as a thirteen-hour clock. 146
Indeed, Janus provides potential defendants with a virtual roadmap for
avoiding liability in Rule 10b-5 private actions. 147 The following section
argues that while the majority defined a “maker” as the person or entity with
the greatest legal authority over a particular statement, such a definition will
frustrate the purpose of Rule 10b-5, because fraud can involve concealment
from the person or entity with ultimate legal authority over the statement. 148

A. Stating the Obvious

Janus’s definition of “make” initially used the dictionary to put a textualist
spin on the policy-based rulemaking that followed, an approach consistent with
Justice Thomas’s textualist predilections. 149 For its source, the Court chose the
1933 edition of the Oxford English Dictionary (OED), which contains ninety-
six definitions of the verb “make,” many of them archaic. 150 The first
definition supplied—“[t]o produce (a material thing) . . .”—seems apt in the
context of a mutual fund prospectus, but was passed over. 151 Instead, the Court
chose the fifty-ninth definition, finding “make” in the rule’s context to be the
approximate equivalent of “state,” a definition effectively eliminating the
independent significance of the verb “make.” 152 The majority thus reached the

146. See supra note 10 (referring to A.P. Herbert’s “crazy clock”).
147. See infra notes 171-173 and accompanying text (demonstrating how potentially actionable statement
can have no legal “maker”).
148. See infra note 160 and accompanying text (pointing to frequent concealment of fraudster’s role in fraud).
149. See H. Brent McKnight, Tribute, The Emerging Contours of Justice Thomas's Textualism, 12
Thomas’s judicial philosophy accords with the “new textualist movement” in his use of canons and dictionaries
to interpret statutory text. See id. When presented with an undefined statutory term, Justice Thomas turns to
the dictionary in search of the term’s “ordinary meaning.” See id. at 367. Justice Thomas “often prefaces his
opinions by stating, ‘we turn first, as always, to the text of the statute.’” Id. at 365 (internal citations omitted).
150. See 6 OXFORD ENGLISH DICTIONARY 60-71 (1933) (defining verb “make”).
151. 6 OXFORD ENGLISH DICTIONARY 60 (1933). The first definition states in full: “1. Senses in which
the object of the verb is a product or result. *To bring into existence by construction or elaboration, . . . 1.
trans. To produce (a material thing) by combination of parts, or by giving a certain form to a portion of matter;
to construct, frame, fashion.” Id.
152. See Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011). The selected
definition states in full:

59. With [substantives] expressing the action of [verbs] (whether etymologically cognate or not), make forms innumerable phrases approximately equivalent in sense to those verbs. In some of these phrases the [object]-noun appears always without qualifying word; in others it may be
preceded by the indefinite article, or by a possessive [adjective] relating to the subject of the sentence. When standing alone, the combination of make with its object is equivalent to a verb used
[intransitively] or [absolutely]; but in many instances the [object]-noun admits or requires
construction with of, and this addition converts the phrase into the equivalent of a transitive verb. In
this Dictionary these phrases are usually illustrated (and if necessary explained) under their
respective [substantives] . . . .
awkward conclusion that making a statement means stating a statement under Rule 10b-5. ¹⁵³

Reliance on dictionaries for the “plain meaning” of statutory text has long
been criticized as an abdication of judicial responsibility to analyze and interpret the law; in fact, dictionaries have been shown to be less “authoritative, precise, or scholarly [than] we and the Justices often assume.”¹⁵⁴ As Judge Easterbrook once remarked: “‘Plain meaning’ as a way to understand language is silly. In interesting cases, meaning is not ‘plain’; it must be imputed; and the choice among meanings must have a footing more solid [than] a dictionary . . . .”¹⁵⁵ Simplistic, dictionary-based formulas are particularly inadequate when applying ancient words with multiple nuances, such as “make,” to complex modern problems.¹⁵⁶ Making a statement, in the ordinary sense, means far more than simply stating it: It means describing or asserting a state of affairs or a fact, either truly or falsely.¹⁵⁷ One can make a statement verbally, by intentionally uttering certain words with certain definite meanings, or one can make it in writing, by intentionally attaching one’s name to a written utterance (the key in both cases being intent).¹⁵⁸ In the context of securities

¹⁵³. See Janus, 131 S. Ct. at 2302 (defining to “make” a statement as to “state” it).
¹⁵⁵. See Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 HARV. J.L. & PUB. POL’Y 61, 67 (1994); see Cabell v. Markham, 148 F. 2d 737, 739 (2d Cir. 1945) (Hand, J.) (“[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary.”).
¹⁵⁶. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 701 (10th ed. 2000) (noting more than seventy meanings of verb “make”). “Make” derives from the Old English macian and Old High German mahhon, both meaning “to prepare.” Id. You can make a dress, a living, a face, a bed, a scene, trouble, dinner, plans, laws, love, and war—each act with its own unique characteristics. Id. You can also make a mountain out of a molehill, make away with, make believe, make bold, make book, make common cause, make do, make ends meet, make eyes at, make fun of, make good, make hay, make headway, make it with, make light of, make much of, make no bones about, make one’s mark, make public, make sail, make sport of, make the grade, make the most of, make the scene, make time, make tracks, make use of, make water, make way, make weight, and make work. Id.
¹⁵⁷. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 1 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975). The OED defines “statement” as “[a] written or oral communication setting forth facts, arguments, demands, or the like.” 10 OXFORD ENGLISH DICTIONARY 857 (1933).
¹⁵⁸. See AUSTIN, supra note 157, at 60-61 (“[W]ritten utterances are not tethered to their origin in the way spoken ones are.”); cf. FED. R. EVID. 801(a) (defining statement for hearsay purposes as “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.”). The advisory committee note emphasizes, “nothing is an assertion unless intended to be one.” FED. R. EVID. 801(a) advisory committee’s note.
fraud, various persons or entities can have a hand in the creation of a false statement. And because concealment of “the fraudster’s role in the fraud” is essential to misrepresenting facts blamelessly, the one who utters a material misstatement is unlikely to seek credit for it. Making a material misstatement, therefore, is far more complicated than simply stating it; as the dissent pointed out, the majority defined “make” in a restrictive manner inconsistent with ordinary English.

Even under the Court’s circular definition of “make,” JCM could still have been liable for “stating” the statements in the prospectuses. As the SEC concluded, “JCM filed several registration statements with the Commission containing prospectuses that falsely stated or otherwise represented that JCM did not permit frequent trading or market timing in its mutual funds.” Because a restrictive definition of the verb alone would not produce the desired high threshold for liability, the Court added another layer to its test of primary liability based on its own definition of “maker” as “the person or entity with ultimate authority over a statement.” This new layer, however, ignored language in Central Bank placing other content providers within the scope of

---


Securities law violations frequently involve cooperative behavior among several participants. The cooperative behavior, especially in cases of systematic fraud or abuse, may involve the willing participation, acquiescence, or indifference of at least several persons, and more likely many people in one or more organizations. In many securities contexts, primary violations must pass under the eyes of many before causing injury to the investing public.

Id.

160. See id. at 58 (noting fraud victims frequently have no personal knowledge of party making misrepresentation).

161. See Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2307 (2011). The dissent asserted:

Every day, hosts of corporate officials make statements with content that more senior officials or the board of directors have “ultimate authority” to control. . . .

Nothing in the English language prevents one from saying that several different individuals, separately or together, “make” a statement that each has a hand in producing. . . . Practical matters related to context, including control, participation, and relevant audience, help determine who “makes” a statement and to whom that statement may properly be “attributed,” at least as far as ordinary English is concerned.

Id. (internal citations omitted).

162. See supra notes 134-135 and accompanying text (limiting verb to phrases in which object expresses its action).


164. See supra notes 136-137 and accompanying text (creating new restriction on identifying Rule 10b-5 defendant).
primary liability so long as the elements of Rule 10b-5 are met.165

B. Elements of Guile

A plaintiff must prove six elements in a Rule 10b-5 private action: “(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 or omission; (5) economic loss; and (6) loss causation.”166 Janus turned on the plaintiffs’ failure to state the first element: a material misrepresentation or omission made by the defendant.167

The pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act of 1995 (PSLRA) have long raised significant hurdles to establishing the first element successfully.168 Section 21D(b)(1) of the PSLRA mandates “the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the

165. See Janus, 131 S. Ct. at 2308. The Court in Central Bank, as quoted by the Janus dissent, stated:

Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met.


166. See Janus, 131 S. Ct. at 2301 n.3 (citation omitted) (enumerating elements of Rule 10b-5 cause of action); see also BLACK’S LAW DICTIONARY 1373 (8th ed. 2006) (defining “scienter” in context of securities fraud as intent to deceive, manipulate, or defraud).

167. See Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2301 (2011) (noting district court dismissed case for failure to state claim). The Supreme Court agreed that First Derivative failed to state a claim that the statements at issue were made by the defendant. See id. at 2305.

168. See FED. R. CIV. P. 9(b) (requiring circumstances surrounding alleged fraud be stated with particularity). Failure to plead fraud with sufficient particularity may lead to dismissal. See LOSS & SELIGMAN, supra note 25, at 1353 (indicating various ways to satisfy particularity requirement).

To satisfy the requirements of Rule 9(b), a complaint must “(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.” In other words, plaintiffs must allege “the who, what, when, where, and how” of the fraud.

D. Brian Hufford, Deterring Fraud vs. Avoiding the “Strike Suit”: Reaching an Appropriate Balance, 61 BROOK. L. REV. 593, 605-06 (1995) (quoting Acito v. Imcera Grp., Inc., 47 F.3d 47, 51 (2d Cir. 1995) and DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir.)). In the 1990s, congressional committees investigated abusive practices in private securities litigation, concluding that while such litigation was an indispensable tool in combating securities fraud, additional legislation was needed to discourage strike suits. See H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.). Accordingly, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), which imposes additional pleading requirements in actions brought under section 10(b) and Rule 10b-5. See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81-82 (2006) (describing enactment of Private Securities Litigation Reform Act of 1995).
statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.\footnote{169} Now, in addition to these requirements, \textit{Janus} holds a plaintiff must show the defendant had ultimate authority over the statement.\footnote{170}

But what about situations where those with ultimate authority over a statement lack the intent to make it?\footnote{171} Justice Breyer addressed this question in his dissent:

The possibility of guilty management and innocent board is the 13th stroke of the new rule’s clock. What is to happen when guilty management writes a prospectus (for the board) containing materially false statements and fools both board and public into believing they are true? Apparently under the majority’s rule, in such circumstances no one could be found to have “made” a materially false statement—even though under the common law the managers would likely have been guilty or liable (in analogous circumstances) for doing so as principals (and not as aiders and abettors).

Indeed, under the majority’s rule it seems unlikely that the SEC itself in such circumstances could exercise the authority Congress has granted it to pursue primary violators who “make” false statements or the authority that Congress has specifically provided to prosecute aiders and abettors to securities violations. That is because the managers, not having “made” the statement, would not be liable as principals and there would be no other primary violator they might have tried to “aid” or “abet.”\footnote{172}

The question points to a conflict between the first and second elements of Rule 10b-5 liability: Makers of statements must have “ultimate authority” over the statements.\footnote{173} But, makers of statements must also have the requisite intent for liability.\footnote{174}

The common-law principle behind the Court’s scienter requirement harks back to the 1889 English case of \textit{Derry v. Peek} in which an investor brought a
tort action of deceit against the directors of a tramway company based on misstatements in the company’s prospectus. Following two appeals, the House of Lords upheld dismissal of the case, finding the directors reasonably believed the statements in the prospectuses to be true. The Supreme Court imposed the scienter element on Rule 10b-5 in *Ernst & Ernst v. Hochfelder*, where defrauded investors sued an accounting firm for aiding a broker’s fraudulent scheme by negligently auditing his books. The Court, citing the text, structure, and legislative history of section 10(b), held that the investors had not stated a claim because the accountants lacked intent to deceive, manipulate, or defraud. To assert the scienter element, Section 21D(b)(2) of the PSLRA dictates a complaint must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”

Like the tramway company directors in *Derry v. Peek*, the innocent board members in Justice Breyer’s hypothetical lack the necessary scienter for liability. Meanwhile, the guilty managers who wrote the prospectus and fooled the board lack the ultimate authority required for liability. Thus, the false statement has no maker—a roadmap for fraud and the thirteenth stroke

---

175. See *Derry v. Peek*, [1889] UKHL 1 (stating facts of case).

176. Id. (upholding judge’s dismissal). Lord Herschell stated:

[F]raud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. . . . To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.


178. See *id.* at 193. The Court rejected the SEC’s argument, as amicus curiae, that Congress’s overarching purpose—the protection of investors from fraud—would be served best by barring both intentional and negligent conduct. *Id.* at 197-99 (noting SEC’s argument ignores text of statute). The Court concluded that the word “manipulative” in the statute showed congressional intent to bar only intentional conduct. *Id.* at 199. The word “manipulative,” the Court reasoned, “connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.” *Id.*


180. *Cf. Restatement (Second) of Torts § 526 (1977).*

A misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.

181. See *supra* note 172 and accompanying text (detailing lack of liability for management under ultimate-authority test).
that discredits the clock. Assuming the Court meant to preserve the private right of action and uphold Congress’s intent to deter fraud, a broader construction should be given to the phrase “ultimate authority” in cases outside the mutual fund industry. (Of course, the Janus test clearly applies to cases involving multiple independent legal entities, such as mutual fund families, where the Court mandated respect for the “corporate form.”)

Perhaps a solution can be found elsewhere: the phrase “ultimate control” appears twice in Justice Thomas’s opinion in a manner clearly synonymous with “ultimate authority.” As the Janus majority reasoned, “[w]ithout control, a person or entity can merely suggest what to say, not ‘make’ a statement in its own right.” At one point, Justice Thomas analogized the person with ultimate authority over a statement to a speaker, as opposed to a mere speechwriter. Janus’s counsel, during oral argument, referred in passing to a control-person statute as “the ventriloquist dummy statute.” What do a speaker and a ventriloquist have in common? Ultimate control over the statement, “including its content and whether and how to communicate it.” Equating ultimate authority with ultimate control—as Janus implicitly does—would solve the problem of the innocent board by assigning primary liability to managers who, like ventriloquists, knowingly control the truth or

182. See supra note 172 and accompanying text (demonstrating how misstatements could have no legal maker).

183. See supra note 131 and accompanying text (recounting Court’s lukewarm endorsement of private right); see also supra notes 16-32 and accompanying text (summarizing intent of Congress to combat securities fraud through section 10(b)).

184. See supra note 144 and accompanying text (detailing Court’s reluctance to disregard legal separation of entities absent clear Congressional intent).

185. Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011) (“A broader reading of ‘make,’ including persons or entities without ultimate control over the content of a statement, would substantially undermine Central Bank.” (emphasis added)); see also id. at 2305 (“[JCM’s] assistance, subject to the ultimate control of Janus Investment Fund, does not mean that JCM ‘made’ any statements in the prospectuses.” (emphasis added)).

186. Id. at 2302.

187. Id. (“This rule might best be exemplified by the relationship between a speechwriter and a speaker.”).

188. Transcript of Oral Argument at 22, Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (No. 09-525). Recall the importance of the control-person statutes to the plaintiffs’ claims at various points during the litigation. See supra notes 123, 129, 144, 172 and accompanying text. Section 20(a) requires a primary violation and therefore cannot survive dismissal of a related 10(b) claim. See 15 U.S.C. § 78t(a) (2006) (“Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable . . . .”); see also supra note 123 and accompanying text (discussing primary violation required for control-person liability). But section 20(b), the “ventriloquist dummy statute,” is more indicative of the degree of control management would exert over an innocent board. See supra notes 144, 172 and accompanying text. Section 20(b) states: “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 chapter or any rule or regulation thereunder through or by means of any other person.” 15 U.S.C. § 78t(b) (2006) (emphasis added). The Janus majority deliberately avoided this issue, however, leaving the matter open to interpretation. See Janus, 131 S. Ct. at 2304 n.10 (“We do not address whether Congress created liability for entities that act through innocent intermediaries in 15 U.S.C.A. § 78t(b).”).

189. Janus, 131 S. Ct. at 2302.
falsity of official statements issued through an unknowing board of directors. 190 By acting without the knowledge of an inattentive board, managers exercise ultimate control over the content of official statements despite the board’s legal authority over those statements. 191

VI. CONCLUSION

When the circuits, following the mandate of Central Bank, developed standards to determine makers of statements under Rule 10b-5, they focused on attribution and other distinctions between primary and secondary actors. In Janus, the Supreme Court dispensed with those standards and created a new test requiring “ultimate authority” over a statement as an element of liability. However, if boards are the only entities possessing sufficient authority for primary liability under Rule 10b-5, the Janus decision will effectively close the door on the private right of action. Plaintiffs’ difficulties in pleading Rule 10b-5’s scienter element will likely shield “inattentive” boards from liability, while the Janus test shields management, regardless of its role in creating a statement. Assuming the Court did not aim to dismantle the private right with Janus, a broader construction of the term “ultimate authority” is required. If “ultimate authority” does not yield a single primary statement maker for a particular statement, the term should be equated with “ultimate control” over the statement. Focusing on ultimate control over content and communication in such situations will enable courts to apply Rule 10b-5 with narrow dimensions, while ensuring the survival of its longstanding private right of action. Perhaps then the clock’s thirteenth stroke can be forestalled.

Andrew Power

190. See supra note 157 and accompanying text (offering dictionary definition of “statement” and listing truth or falsity among qualities of statement).

191. See supra notes 113-114 and accompanying text (detailing SEC findings). Illustrating the point, the SEC concluded “JCM knowingly or recklessly failed to disclose to the Board of Trustees of the funds” that JCM had entered into timing agreements that were inconsistent with prohibitions in the funds’ prospectuses. Janus Settlement, supra note 113, at 1768. Of course, the Janus holding was not based on the SEC’s findings of trustee ignorance, although the dissent did address those findings. See Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2310 (2011) (Breyer, J., dissenting) (“Here, it may well be that the Fund’s board of trustees knew nothing about the falsity of the prospectuses.”).