The Supreme Court's Statement about Ultimate Authority

BY THOMAS A. HANUSIK AND MEGAN LOUISE WOLF

In June 2011, the Supreme Court issued a landmark opinion in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), a decision that packs quite a punch for defendants in securities fraud lawsuits. In *Janus*, the Court focused on a portion of the Securities and Exchange Act rule 10b-5(b) that, up until that point, had not been given a great deal of thought: what does it mean to "make" a material misstatement or omission? The Court held that only a person with "ultimate authority" over a statement can be its "maker"—a pretty dramatic conclusion. *Janus* is a game changer that has completely altered the landscape for all cases charging fraud under Exchange Act section 10(b)

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and Securities and Exchange Commission (SEC) rule 10b-5. Simply put, a maker of an alleged misstatement must have "ultimate authority" over not just the content of a statement, but also "whether and how" that statement is communicated.

Janus, the Abridged Version

SEC rule 10b-5(b) provides that "[i]t shall be unlawful for any person . . . [t]o make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading." (17 C.F.R. § 240.10b-5(b).) In *Janus*, the alleged "misstatement" appeared in Janus Investment Fund prospectuses; the Supreme Court held that to "make" these statements for purposes of rule 10b-5, the alleged maker must have "ultimate authority over the statement, including its content and whether and how to communicate it," and that the fund managers did not have that authority. (*Janus*, 131 S. Ct. at 2302.)

Janus arrived at the Supreme Court as a result of a class action brought by shareholders of Janus Capital Group (JCG), the entity that created the various Janus mutual funds, against JCG and its subsidiary Janus Capital Management (JCM), the investment advisor for the funds. (*Id.* at 2299–2300.) JCM and JCG were legally independent entities, but JCM was a wholly owned subsidiary of JCG, and all officers of the Janus Investment Fund were also officers of JCM. (*Id.* at 2299.) JCG had no employees of its own and was operated by the fund managers. (*Id.*) As the Supreme Court explained, mutual funds and the advisors that run them are very closely entwined—the advisors are responsible for the day-to-day management of the fund and are functionally employees of the fund who exercise significant influence over it. (*See id.* at 2304; Brief of John P. Freeman and James D. Cox as Amici Curiae in Support of Respondent, *Janus*, 131 S. Ct. 2296 (Nov. 2, 2010).)

The fraud alleged in *Janus* related to an omission concerning market timing. This practice takes advantage of the potential gap in what a fund is really worth and its quoted value, as the fund's value is generally calculated only once a day at close of US markets, potentially permitting a purchaser to buy shares of a fund at a lower price than it is really "worth." (*Janus*, 131 S. Ct. at 2300 n.1.) The *Janus* plaintiffs alleged that the Janus Investment Fund issued prospectuses stating that the funds were not engaged in market timing when JCM advisors actually permitted the practice. (*Id.* at 2300.) The Court was thus confronted with a rather "typical" misrepresentation case: JCM allegedly knew one thing (market timing was permitted) and said another in the public statements (no market timing was ocurring). Although the prospectuses were issued by the fund, the plaintiffs alleged that JCM, as the fund's manager, could be liable for misstatements therein because it was significantly involved in preparing the prospectuses. (*See id.* at 2301, 2304.) The Court rejected this as proof that JCM "made" the statement, and instead relied on that fact that regardless of JCM's involvement, the statements were still subject to the control of the Janus Investment Fund, giving it, and not JCM, the "ultimate authority" over the content of the prospectus. (*See id.*)

The Court announced a bright-line rule: "[T]he maker of a statement is the entity with authority over the content of the statement and whether and how to communicate it." (*Id.* at 2303.) Just supplying content for a statement is no longer sufficient to prove someone is a "maker." The Court analogized this to the speechwriter who drafts a speech that a separate speaker then gives (and thus "makes"); the ultimate choice of what to say remains with the speaker, regardless of what the speechwriter has written. Without the element of control or authority, a person is merely "suggesting" what to say, and it is not "'necessary or inevitable' that any falsehood will be contained in the statement." (*Id.* at 2302–03.) In applying this "bright line" to find that the Janus Investment Fund, not JCM, was the maker, the Court stressed the fact that the fund was a legally independent entity, corporate formalities were observed, and that the fund had the statutory obligation to file the prospectuses. (*Id.* at 2304–05.) The Court was not willing to look beyond the face of the statement at the reality of who was behind the statement. (*See id.* at 2305 ("Nor did anything on the face of the prospectuses indicate that any statements therein came from JCM. . . .").)

With this ruling, the Court has set a high bar for plaintiffs and the SEC—now both must plead this extra element of "ultimate authority." The decision also has proven to be a blessing for defendants, particularly those who are not directly linked to the statement at issue by a signature or quote, thus lacking "ultimate authority."

What "Ultimate Authority" Means to a Defendant

The threshold question: insiders versus outsiders. A threshold question for anyone facing fraud charges under section 10(b) and rule 10b-5 is whether the *Janus* defense is even available. The first step is to distinguish between corporate "insiders," such as executives and officers, and corporate "outsiders," such as public relations firms or accountants. Courts directly addressing the insider/outsider question have found nothing in the *Janus* holding limiting it to outsiders. (*See, e.g.*, Haw. Ironworkers Annuity Trust Fund v. Cole, 2011 WL 3862206, at *3–4 (N.D. Ohio Sept. 7, 2011) (finding that *Janus* applies to insiders because it is not limited only to "legally separate entities")).

However, at least one court—the District of New Jersey—has been much more hesitant to apply *Janus* broadly. (*See In re* Merck & Co. Sec., Derivative & ERISA Litig., 2011 WL 3444199 (D.N.J. Aug. 8, 2011).) In *Merck*, the district court found that the defendant was a "maker" under the *Janus* standard because the statements were directly attributed to him, either by a signature on SEC filings or quotes by him in his capacity as a Merck officer. (*Id.* at *24–25.) The court's language suggested that it would not permit a *Janus* defense for corporate insiders who are quoted or sign filings. In discussing the statements made by the defendant, the court said, "He made

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the statements pursuant to his responsibility and authority to act as an agent of Merck, not as in *Janus*, on behalf of some *separate and independent* entity." (*Id.* at *25 (emphasis added).) The court continued, "Taken to its logical conclusion, [the defendant's] position would absolve corporate officers of primary liability for all Rule 10b-5 claims, because ultimately, the statements are within the control of the corporation which employs them." (*Id.*) The District of New Jersey refused to apply that reasoning to corporate insiders speaking on behalf of their employers. Most courts, however, have skipped over this preliminary question to the "ultimate authority" question.

Content and delivery: the two prongs of the ultimate authority standard. If the *Janus* defense is available to a putative defendant, the lynchpin is whether the defendant had "ultimate authority" over the statement. This "ultimate authority" test requires that the "maker" have both the control over what was said (i.e., the "content") and "whether and how it [was] communicated" (i.e., "the delivery"). Certain courts have provided more clarity on this "ultimate authority" analysis by focusing on different facets of the *Janus* standard.

In *Hawaii Ironworkers*, the plaintiffs brought a rule 10b-5 claim against several former officers of a company alleging that they falsified financial information that made its way into public statements by the corporation. (2011 WL 3862206, at *1, *4–5.) The plaintiffs also alleged that top management imposed a "directive" on the defendants to show a certain profit margin increase and refused to accept any forecast that did not meet this specific number. (*Id.* at *4.) Under the *Janus* standard, as applied by the Northern District of Ohio, this allegation was fatal to the primary liability claim; the plaintiffs had effectively conceded in the complaint that the defendants did not have "ultimate authority" over the content of the financial results by alleging that higher management *required* a certain figure. (*Id.* at *4–5.) Arguably, *Hawaii Ironworkers* stands for the proposition that if a person further up the corporate food chain mandates the content of the statement, then there is no "ultimate authority" over the content of a statement exercised by the lower-level employees acting pursuant to said mandate.

Despite *Hawaii Ironworkers*, most post-*Janus* decisions have not devoted a great deal of attention specifically to the content prong. Rather, it is slowly becoming apparent that the authority over the delivery of the statement is where many battles are being fought. For example, in *SEC v. Radius Capital Corp.*, the Middle District of Florida specifically confronted the delivery question in the context of allegedly false statements contained in documents submitted to Ginnie Mae as well as in prospectuses. (2012 WL 695668 (M.D. Fla. Mar. 1, 2012).) The defendant in *Radius* was the president, CEO, and sole shareholder of Radius, facts on which the SEC relied in arguing that the defendant had ultimate authority over both the documents and the prospectuses. However, the court dismissed the primary claim arising from the prospectus because the SEC failed to properly allege "ultimate authority" by the defendant over the delivery of the prospectuses (i.e., the "whether and how"), and it chastised the SEC's attempt to prove authority by alleging "control" over the company. (*Id.* at *7–8.)

The significance of "control" over a subsidiary of a corporation also has caused confusion in some lower courts—and conflicting results. The Southern District of New York appears to endorse the idea that control over the actions of a subsidiary, such as corporate transactions and the sale of the subsidiary's stock, is sufficient to show ultimate authority. (*See* City of Roseville Employees' Ret. Sys. v. EnergySolutions, Inc., 814 F. Supp. 2d 395, 418 (S.D.N.Y. 2011).) These "indicia of control" show that the corporate parent had "control over the content of the message, the underlying subject matter of the message, and the ultimate decision of whether to communicate the message." (*Id.*) However, the Southern District of Texas has reached the opposite conclusion, holding that "control" of a company through majority stock ownership was not sufficient by itself to show "ultimate authority" over particular alleged misstatements. (*See* Kerr v. Exobox Techs. Corp., 2012 WL 201872, at *11 (S.D. Tex. Jan. 23, 2012).)

The pleading standard to which the SEC and private plaintiffs are effectively held may depend on the court, notwithstanding the "bright line" announced by the Supreme Court. Courts that require specific allegations of ultimate authority over both content and delivery (such as the *Radius* court) set a high bar for plaintiffs, who must either articulate robust allegations of ultimate authority or risk dismissal.

Two extremes: cases that meet neither prong and those that meet both. Despite the variances in the lower courts applying the content and delivery prongs, there are clearly some sets of facts that show the two extremes: meeting both prongs of the *Janus* test or failing to meet either. As to lack of authority, generally no longer can someone be a "maker" if the statement is no way attributable to that individual, regardless of any involvement in preparing the statement. This was *Janus* itself—the unattributed "speechwriter" preparing a statement for another to "make" is not a basis for a primary violation. Lower courts have been fairly consistent in applying this principle, in both SEC enforcement proceedings and private securities actions. (*See In re* Fannie Mae 2008 Sec. Litig., 2012 WL 3758537, at *16–17 (S.D.N.Y. Aug. 30, 2012) (holding underwriter defendant did not have ultimate authority when no misstatements were directly attributed to it, regardless of involvement it may have had in the drafting of the misstatement); *Exobox*, 2012 WL 201872, at *11 (holding defendant who assisted in preparation of filings, but did not sign them, "may not be held liable for statements in Exobox's registration filings, even if he supplied Exobox with the false statements at issue"); SEC v. Mercury Interactive, LLC, 2011 WL 5871020, at *2 ("[A]llegations regarding [the defendant's] involvement in preparing annual and quarterly reports that were not signed by or otherwise attributable to her are insufficient to state a Rule 10b-5(b) claim against [her].").)

On the other extreme are cases involving officers who sign and/or certify public filings. This seems to be a bit of a dividing line for some courts, showing authority over both content and delivery. In *SEC v. Das*, the former CFO defendants had argued that they were mere *preparers* of

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the statements on behalf of the company, an argument the court flatly rejected based on their signatures. (2011 WL 4375787, at *6 (D. Neb. Sept. 20, 2011).) The District of Nebraska reasoned that "[a]s the CFOs who signed and certified the statements, [the defendants] were the persons with ultimate authority and control over the content of the statements and whether and how they were communicated." (*Id.*) The Southern District of New York has taken a similar approach, summarily rejecting a *Janus* defense for corporate signatories and holding that the signatories were "makers" of any misstatements in the documents they signed. (*See In re* Smith Barney Transfer Agent Litig., 2012 WL 3339098, at *9 (S.D.N.Y. Aug. 15, 2012); *City of Roseville*, 814 F. Supp. 2d at 417.)

The concern precipitating this approach appears to be the fear that *Janus* will become an impenetrable liability shield for officers and directors signing the public filings that include the misstatement. (*See In re* Stillwater Capital Partners Inc. Litig., 858 F. Supp. 2d 277, 287–88 (S.D.N.Y. 2012).) In *Stillwater Capital*, the Southern District of New York was clearly concerned that *Janus* had the potential to gut rule 10b-5 liability for officers in private securities litigation, and stated that *Janus* "cannot be used to shield [the president], who signed the documents at issue and thereby 'made' the alleged misstatements." (*Id.*) That fear is less of a concern in SEC enforcement actions, as *Janus* provides no impediment to the SEC charging any person with aiding and abetting a corporate misstatement.

Some courts interpret *Janus* as suggesting that those who sign, certify, or otherwise directly attribute something to themselves will clear the "ultimate authority" bar. The Supreme Court in *Janus* noted that "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." (Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011).) Indeed, one fact upon which the Court relied in finding that JCM did not have ultimate authority over the fund's prospectuses was that nothing "*on the face of the prospectuses* indicate that any statements therein came from JCM rather than Janus Investment Fund—a legally independent entity." (*Id.* at 2305 (emphasis added).) Thus, if the certification of a CEO or CFO appears in an SEC filing, it may be enough for ultimate authority in certain courts. However, at least one court has applied a literal interpretation to the Supreme Court's guidance—just as the Supreme Court took a literal approach to rule 10b-5—holding that ultimate authority over both content and delivery must be present for liability to exist. (*See, e.g.*, SEC v. Radius Capital Corp., 2012 WL 695668, at *7–8 (M.D. Fla. Mar. 1, 2012).)

The role of directors: what authority does a board really have? In *Janus*, the fund's explicit statutory duty to file prospectuses was one of the main factors used to find that it, and not JCM, was the "maker" of statements in the filings. (*Janus*, 131 S. Ct. at 2304.) Although *Janus* involved two legally separate entities, this reasoning suggests a broader application. Both officers, such as the CEO and CFO, as well as the board of directors have statutory duties related to public filings that could potentially be used against both groups. This particular question has not yet been addressed by courts; some have relied on a director's signature itself as evidence of authority based on attribution, but none yet have said whether the statutory duty itself bestows one with ultimate authority over the delivery and content of the statement he and she signs. (*See* City of Roseville Employees' Ret. Sys. v. EnergySolutions, Inc., 814 F. Supp. 2d 395, at 417 (S.D.N.Y. Sept. 30, 2011).) The Southern District of New York in *City of Roseville* avoided this question. In that case, the plaintiff class sued the company and 11 individuals who served as directors and/or officers for alleged misstatements in registration statements. (*Id.* at 407–08.) The court held that all of the individuals who signed the registration statements "made" the statements under the *Janus* standard, but did not distinguish between the officers and the directors. (*Id.* at 417.) Two individual defendants, however, had been named to the board, but had not yet taken on the position at the time of the filing of one registration statement. (*Id.*) Those two, because they had not signed the statement and there was "no indication *anywhere*" in the statement that they "had *any* authority over its contents," could not be liable for that particular statement. (*Id.* (emphasis added).) This approach appears to leave open the argument that any indicia of authority over any part of the statement, such as either a statutory duty or a bylaw requiring director approval, would be sufficient to show "ultimate authority." Also, board minutes reflecting approval of SEC filings have the potential to become a critical factor in this analysis.

For most companies, the board of directors is typically vested with the full power to "manage the business and affairs" of the company (*see, e.g.*, Del. Code Ann. tit. 8, § 141), which encompasses the power to ensure that all legal obligations are fulfilled. Under this umbrella power, the board will generally "sign off" on financial statements and other required disclosures before they are filed with the SEC. This practice illuminates the prospect for tension between the authority of the board of directors and the authority of an individual officer. Consider the situation where the CFO prepared a particular financial statement and then presented it to the board for approval. In this situation, who has the true "ultimate authority"? Is it the CFO who prepared and signed the document, or is it the board that approved it for filing? Does this show some type of split control whereby the CFO perhaps controls the content of the document but the board controls the delivery of it? And, if so, do both lack "ultimate authority" over the content *and* delivery as both are necessary prongs in the Supreme Court's bright-line rule? No courts have confronted these particular issues yet, but given the obvious tension between the authority of the officers and the board, this is a likely future argument to be decided by the lower courts. There is an argument to be made that neither has the "ultimate authority" required under *Janus*. Preparing a filing goes only to content, not delivery of a statement in that filing. (*Cf.* Kerr v. Exobox Techs. Corp., 2012 WL 201872, at *4, *11 (S.D. Tex. Jan. 23, 2012).) In *Exobox*, the plaintiffs failed to show that the defendant, who prepared the registration

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statements and amendments containing the alleged misstatements, had "ultimate control" over the statements. (*Id.*) The court went further to state that the defendant "may not be held liable for statements in Exobox's registration filings, *even if he supplied Exobox with the false statements at issue*." (*Id.* at *11 (emphasis added).) In fact, this is precisely the process in *Janus* that was insufficient to show "ultimate authority." (Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2304 (2011).) In *Janus*, JCM prepared the content that was delivered by the fund, which the Supreme Court referred to as "merely an undisclosed act preceding the decision of an independent entity to make a public statement." (*Id.*)

At the very least, *Janus* gives putative officer defendants an opportunity to take the position that even if they created a misstatement, that is not enough to impose liability under the *Janus* test, as the board is responsible for whether and how the misstatement is communicated—a possibility about which the *Janus* dissenters were quite concerned. (*See id.* at 2310 (Breyer, J., dissenting).) Justice Breyer wrote:

> The possibility of guilty management and an 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 misstatements 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 "ma[d]e" a materially false statement. . . .

(*Id.* (alteration in original).)

Here of course, the "guilty" management would not be liable for lack of "ultimate authority," and the "innocent" board would not be liable for lack of scienter.

***Janus* in reverse? A shield for the company and a sword against management.** According to the Supreme Court, *Janus* involved the proverbial "speechwriter" preparing content for the speaker to deliver, but nothing in the decision limits its application to those who prepare the statements. What about the person who publishes the statement at the behest of another? Shouldn't the publisher, too, be shielded by *Janus*? The Supreme Court indicates that this would be the case; it held in *Janus* that just preparing or publishing the statement on behalf of another does not make someone a "maker" for purposes of rule 10b-5. (*Id.* at 2302 (majority opinion).)

Cases applying the *Janus* rule in the lower courts thus far have involved using the defense as a way to pass the proverbial hot potato of primary liability from the officer to the company or others. But there is certainly a contrary argument to be made for the company or the board that the officer who prepared the statements and signed or certified such is the maker and the company is the mere "publisher" on behalf of another. Interestingly, without addressing the issue directly, both *Hawaii Ironworkers* and *In re Merck* seem to endorse the above approach.

Hawaii Ironworkers, in discussing *In re Merck*, characterized the defendant in that case as the maker and the corporation as the publisher, stating "the outcome in *Merck* is undoubtedly correct; the defendant was the speaker, the corporation was the speechwriter, and 'it is the speaker who takes credit—or blame—for what is ultimately said.'" (Haw. Ironworkers Annuity Trust Fund v. Cole, 2011 WL 3862206, at *4 n.3 (N.D. Ohio Sept. 7, 2011).) The court in *In re Merck* focused on the agency relationship between the individual defendant and the company, finding that the defendant had ultimate authority because "[h]e made the statements pursuant to his responsibility and authority to act as an agent of Merck." (*In re* Merck & Co. Sec., Derivative & ERISA Litig., 2011 WL 3444199, at *25 (D.N.J. Aug. 8, 2011).) The company was thus seen as the enabler or facilitator of the statement, but not as a "maker." This is similar to how the court viewed the relationship between the defendant and his company in *Das*. (*See* SEC v. Das, 2011 WL 4375787, at *6 (D. Neb. Sept. 20, 2011).) In *Das*, the court rejected the argument that the company was the "maker" and the defendants—the former CFOs—were mere preparers. The court found that the defendants had ultimate authority over statements in proxy materials and forms 10-K and 10-Q and that the company was the publisher or facilitator for the defendant makers. (*See id.*)

Both lines of reasoning seem contrary to a company's obligation to file statements as the "maker" of those statements. In this respect at least, *Janus* is more complicated than it might appear at first read. It certainly has the potential to be used as a defense both on behalf of an officer and on behalf of the company, but the case law has not yet been developed enough on these or similar arguments. Any court of appeals confronting a *Janus* argument will almost certainly have to address all three elements—who, whether, and how—of *Janus*'s "ultimate authority" test.

Implications of *Janus* outside the Material Misstatement Context

Another significant impact of *Janus* may be its influence on a wide range of other provisions of the federal securities laws. While *Janus* involved only a material misstatement under subsection (b) of rule 10b-5, courts are grappling with whether it applies to the other subsections of that rule and whether it applies to other similar provisions of the securities laws, such as section 17(a) of the Securities Act. The central premise of *Janus*—that primary liability is intended for the person ultimately responsible for the misstatement—resonates far beyond the 10b-5 context to section 17(a) claims, Exchange Act section 14(a) claims, and others. In theory, virtually any case premised on a misstatement or omission, which always needs a maker, has the potential to argue applicability of the *Janus* bright-line rule.

The first question for the lower courts is whether *Janus* applies only to misstatements under subsection (b) or else to the entirety of rule 10b-5. While the Supreme Court did not confine its ruling to subsection 10b-5(b), it also said nothing to indicate that *Janus* should be extended beyond that specific provision. As a result, courts have routinely been presented with *Janus* arguments in the context of scheme liability claims under subsections (a) and (c) of rule 10b-5, and they just as

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frequently disagree over whether it applies. This appears to be a more fact-based application of *Janus*, and whether the holding applies to any particular scheme liability claim will depend on how much of a "scheme" the court believes there was beyond the misstatements. Courts that have applied *Janus* to scheme liability do so in part because of concern over the potential for the SEC and plaintiffs to do an end-run around *Janus*'s limiting principle by recasting what is essentially a misstatement claim as "scheme liability." (*See* SEC v. Kelly, 817 F. Supp. 2d 340, 343–44 (S.D.N.Y. 2011).)

In *Kelly*, the Southern District of New York held that *Janus* applies when the "scheme" is deceptive only because of the public misstatements, i.e., when the "scheme" is premised on the misstatement. (*Id.*) On the other hand, if a court sees the misrepresentations as only part of the scheme, and not the purpose of the scheme, *Janus* generally will not apply. (*See* SEC v. Pentagon Capital Mgmt., 844 F. Supp. 2d 377, 421–23 (S.D.N.Y. 2012); SEC v. Mercury Interactive, LLC, 2011 WL 5871020, at *2 (N.D. Cal. Nov. 22, 2011).) Potential defendants seeking to use a *Janus* defense against a scheme liability claim are likely to be more successful if the "scheme" is confined to misstatements as opposed to situations involving other deceptive acts.

Section 17(a) and beyond. There also has been a flurry of activity around the application of *Janus* to Securities Act section 17(a) claims, likely because section 17(a) claims are often brought by the SEC in conjunction with Exchange Act section 10(b) and rule 10b-5 claims. There is a true split in the district courts, and even within the Southern District of New York, as to whether *Janus* applies to section 17(a). The courts that apply *Janus* tend to use the straightforward reasoning that nothing in the opinion itself limits the holding to rule 10b-5, and, because "the elements of a claim under Section 17(a) are essentially the same as those for claims under Rule 10b-5," it would be inconsistent not to extend *Janus* to section 17(a). (*Kelly*, 817 F. Supp. 2d at 345 (internal quotation marks omitted); *accord* SEC v. Perry, 2012 WL 1959566, at *8 (C.D. Cal. May 31, 2012).) On the other hand, those that view *Janus* as inapplicable to section 17(a) claims generally focus on the policy concerns underlying the decision—the Supreme Court in *Janus* clearly was concerned with any potential expansion of the private right of action. (*See* Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011) ("[I]n analyzing whether JCM 'made' the statements for purposes of Rule 10b-5, we are mindful that we must give narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.") (internal quotation marks omitted)).) Because the policy concerns implicated by private suits do not apply to SEC enforcement actions under section 17(a), these courts find it inappropriate to extend *Janus* to section 17(a) actions pursued by the SEC. (*See, e.g.*, SEC v. Stoker, 2012 WL 2017736, at *7–8 (S.D.N.Y. June 6, 2012); SEC v. Sentinel Mgmt. Grp., Inc., 2012 WL 1079961, at *15 (N.D. Ill. Mar. 30, 2012); SEC v. Daifotis, 2011 WL 3295139, at *5–6 (N.D. Cal. Aug. 1, 2011).) Others simply conclude that the language of section 17(a) and rule 10b-5 differ, and because a statement is not literally required to be "made" for section 17(a) liability, *Janus* does not apply. (*See Pentagon Capital Mgmt.*, 844 F. Supp. 2d at 422–23; *Mercury Interactive*, 2011 WL 5871020, at *3.)

Section 17(a) may be a logical extension, given the similarity of the elements to a rule 10b-5 claim, but by no means does *Janus* stop there. There is the potential for *Janus* to apply to any case premised on a misstatement or omission. To do otherwise arguably permits inconsistent treatment of the very same conduct. Such an approach could extend *Janus*'s reach to provisions of the securities laws such as sections 13 and 14(a) of the Exchange Act and even section 34(b) of the Investment Company Act. For example, if *Janus* does not apply to section 14(a), a defendant could face primary liability for a misleading statement in a proxy statement under that section, but no primary liability under rule 10b-5 for the very same conduct. The results seem entirely inconsistent for provisions designed to outlaw essentially the same type of conduct—misstatements by those responsible for making them. Permitting this inconsistent liability would obliterate the *Janus* rule by allowing the SEC to avoid the *Janus* requirements by bringing an action under another section or rule. Surely, the Supreme Court did not intend to articulate a rule that could be so easily circumscribed.

The only court to specifically address this question thus far has held that *Janus* does not apply to section 14(a) or rule 14a-9, based on straightforward reasoning that maintains that because the section does not include the word "make" (the word interpreted in *Janus*), the holding does not apply. (*Mercury Interactive*, 2011 WL 5871020, at *3.) But other courts have rejected this very same reasoning with regard to section 17(a), indicating they may be open to this argument for other sections. (*See Kelly*, 817 F. Supp. 2d at 345.) Given the danger of eviscerating *Janus* by refusing to extend it, and the fact that it has already been applied outside the rule 10b-5(b) context, there is a strong argument that *Janus* extends to every other section applicable to material misstatements or omissions.

Conclusion

Courts have both clarified the applicability of the bright-line *Janus* rule and spawned a series of new questions. The lower courts have made clear that primary liability can no longer exist simply because a person prepares content that ultimately ends up in an SEC filing. A plaintiff, whether private or the SEC, must allege control over both the content of a particular statement and its dissemination to the public. The specifics of those two prongs continue to be refined as the courts consider new and novel arguments about the significance of managerial control of a company, signatures on corporate filings, and the role of the board of directors. No doubt the various courts of appeals will have more to say as aggrieved parties seek appellate review. The next big issue for courts to determine is the fate of *Janus* beyond rule 10b-5(b). If *Janus* applies more broadly to claims beyond rule 10b-5, the same defense that has already rattled the plaintiff's bar and the SEC's Division of Enforcement is sure to wreak havoc on the future of securities fraud lawsuits and enforcement actions. ■

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