# INSIGHTS

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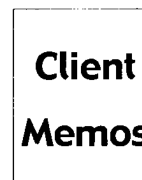


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# INVESTMENT MANAGEMENT

## *Janus* and its Impact on Mutual Funds

*The Supreme Court's seemingly simple approach to liability in the* Janus *decision generates complex questions for investment companies, their officers, directors, and advisers. Accordingly, mutual fund players must reexamine their roles.*

**By Darryl P. Rains, Eugene Illovsky, and Jay G. Baris**

Who speaks for a mutual fund? In *Janus Capital Group, Inc. v. First Derivative Traders*, the United States Supreme Court answered that, for purposes of Rule 10b-5 under the Securities Exchange Act of 1934, the only person who speaks for a fund "is the person or entity with authority over the content of the statement and whether and how to communicate it." A fund's investment adviser cannot be liable (under Rule 10b-5) for statements in the fund's SEC filings because the adviser does not have "ultimate authority" over those statements.[1] *(Editor's note: for a discussion of the* Janus *case, see INSIGHTS, July 2011.)*

*Janus*, however, raises as many questions as it answers. How should the Supreme Court's "ultimate authority" test be applied? Does it require application of corporate governance principles? Agency law? Do different persons or entities have ultimate authority over different types of statements (registration statements, prospectuses, advertising materials, oral statements, etc)? Can "ultimate authority" be shifted, limited, or disclaimed? Can it be indemnified or insured?

*Janus* also says that, usually, the entity to whom a statement is attributed is the entity with ultimate authority over that statement.[2] Under what circumstances is that not the case? Can parties negotiate attribution, and, if yes, how and when? *Janus* also suggests that statements might be attributed "implicitly" "from surrounding circumstances."[3] What circumstances might be used to show implicit attribution, and what steps can be taken to avoid it?

*Janus* creates a new "clean line" around the limits of primary liability under Rule 10b-5.[4] That line changes the allocation of risks among mutual funds and their advisers, officers, and directors. Mutual funds and other interested parties should use *Janus* as an opportunity to address a number of issues surrounding the proper allocation of their litigation risks. They should:

- Update the processes that document the review and approval of SEC filings, marketing materials, and oral statements, and adopt processes imposing clear lines of responsibility for those statements.
- See that fund directors understand their legal responsibilities, potential liabilities, and steps they can take to see that they have adequate defenses.
- Consider express attribution of statements to selected persons or entities and disclaimers of attribution to others.
- Review insurance programs to make sure they cover the right persons and entities and offer a safe amount of coverage.
- Review indemnification provisions in organic documents and agreements to determine whether they are adequate and appropriate.

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## Who Has "Ultimate Authority" over a Statement?

*Janus* held that a mutual fund's investment adviser cannot be liable, under Rule 10b-5, for statements contained in the fund's prospectus "because it d[oes] not make the statements in the prospectus."[5] According to *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."[6] A mutual fund's investment adviser does not have "ultimate authority" over statements in a fund's prospectus because a fund and its adviser are "legally separate entities" and only the fund "bears the statutory obligation to file the prospectuses with the SEC."[7]

*Janus*, in one sense, is a limited opinion. The case involved only one claim—Rule 10b-5—and it involved only the relationship between a mutual fund and its investment adviser. It did not specifically address other claims[8] or the roles and responsibilities of other parties,[9] such as fund officers and trustees. Moreover, *Janus* does not let investment advisers and their affiliates completely off the hook. They still may be liable under other statutes and rules, for breach of fiduciary duty, or under a breach of contract theory.

## Do Fund Officers or Directors Have "Ultimate Authority" over a Fund's SEC Filings?

While *Janus* says a fund is ultimately responsible for the contents of its SEC filings, it did not directly address whether anyone else at the fund—for example, the fund's senior officers or directors—also might have "ultimate authority" over the content of the fund's SEC filings. After all, a fund's directors sign the fund's registration statement, typically by giving power of attorney to a fund officer. And the directors vote to authorize the fund to file its registration statement with the SEC.

While *Janus* did not address this issue directly, several statements in *Janus* signal that a fund's officers and directors cannot be liable under Rule 10b-5 for false statements in a fund's registration statement or prospectus. *Janus* takes a straightforward approach in deciding which person or entity "makes" a statement to investors. A mutual fund "makes" the statements in its prospectus because it is the issuer of the securities being sold, is "legally obligated" to file the prospectus, and has its name on the front cover. A reasonable investor understands that a fund makes the statements in its own prospectus and has ultimate authority over them. *Janus* notes, in contrast, that other actors may "suggest" what to say in a prospectus, "draft" a statement, or "provide" false information for inclusion in a prospectus, without having "ultimate authority" over the statement's contents or communications.[10] These factors suggest that individuals involved in preparing a fund's prospectus, including the fund's directors and officers, and possibly other service providers, do not have "ultimate authority" over statements contained in a fund's prospectus.

Could a director or officer nonetheless be said to have "ultimate authority" over a fund's SEC filings? *Janus*, after all, establishes "ultimate authority" as the standard without ever identifying the source of that authority. One possible source is found in corporate governance law, including the law of the fund's state of incorporation and its articles of incorporation and bylaws. Most mutual funds are organized as Massachusetts business trusts, Maryland corporations, or Delaware statutory trusts. Those states' laws indicate that a trust or corporation is ultimately controlled by trustees or a board of directors. The board of directors, acting as a board, has authority to act for the fund.[11]

But saying a board of directors (or trustees) has authority to make statements for a mutual fund is not the same as saying any individual director or officer has that authority. An individual officer or director, for example, could not

authorize a fund to make its filings with the SEC. Moreover, neither state law nor any typical fund organizational document appears to convey any such authority. Thus, a fund director might vote against filing a registration statement and be outvoted by other directors It makes no sense to say that such a director nonetheless had "ultimate authority" over the fund's statements for purposes of Rule 10b-5. Indeed, while many, if not most, fund actions are authorized by unanimous board votes, that is not always the case.

The dissent in *Janus* seemed to understand this point. It complains that, "depending upon the circumstances, board members, senior firm officials, officials tasked to develop a marketing document, large investors, or others" all might "make" materially false statements without being subjected to primary liability.[12] The dissent goes on to argue that, under the majority's "ultimate authority" standard, a fund's directors would completely evade liability under Rule 10b-5 unless they could be shown to be controlling persons.[13] These criticisms indicate that *Janus*'s "ultimate authority" test excludes fund officers and directors from the scope of primary liability under Rule 10b-5, even when a fund director is an employee or officer of the fund's investment adviser.

At least one court recently has relied on the dissent's statements in concluding that "corporate insiders" "did not have ultimate authority over the content of" their company's statements.[14] Relying on *Janus*, the court dismissed primary Rule 10b-5 claims asserted against certain corporate officers because, according to the complaint, the officers were under a "mandatory directive" from the company's chief executive officer to make the statements.[15]

*Janus*'s focus on "ultimate authority" may well mean that the only entity with "ultimate authority" over statements in a fund's SEC filings is the fund itself. This poses a problem for plaintiffs' lawyers. A fund's only assets, of course, are investor assets. Funds typically have no assets apart from assets contributed by investors in exchange for shares issued by the fund. As a result, any liability under Rule 10b-5 could be satisfied only from investors' own assets—which is probably not what plaintiffs would have in mind.

## Who Has "Ultimate Authority" over Investor Communications?

What about marketing materials, oral statements, and other statements used to communicate with investors? Who has ultimate authority for these statements?

Marketing material, including advertising and supplemental sales material, usually is prepared by a mutual fund's distributor, which is typically an affiliate of the fund's investment adviser. Often it is drafted by the distributor's marketing department, reviewed by the distributor's compliance and legal functions, and then approved by the distributor's senior marketing executives in consultation with portfolio managers. The directors of the fund may have little or no oversight over this process. And that is how it should be. A fund properly may outsource marketing to its distributor, and the fund's directors should not have any responsibility for, or "ultimate authority" over, the content of advertisements or marketing materials produced by the distributor. Officers of the fund typically are employees of the fund's adviser, and they may also have responsibilities with the distributor, which means they may wear two hats with respect to the marketing material.

So who has ultimate authority over a fund's marketing material? One possible answer may be found in agency law. Under the principle of *respondeat superior*, a mutual fund would have ultimate responsibility for actions by its directors, officers, and agents for statements within the course and scope of their employment or agency. In other words, under this theory, the fund "makes" statements through the conduct of its agents and representatives, and has the ultimate authority over

the contents of those statements. *Janus,* however, does not address the issue and gives no hint as to how *respondeat superior* might be applied to marketing material.

***Janus did not address whether, or how, agency principles might be applied under Rule 10b-5.***

What about oral statements? Imagine, for example, that a portfolio manager makes an allegedly false statement during the course of a conference call with investors or in a press interview. The portfolio manager is employed by the fund's adviser, not the fund. And the fund's directors and officers have no practical ability to control statements by a portfolio manager on a conference call or press interview. Who has "ultimate authority" over the portfolio manager's statement? The portfolio manager? The adviser? The fund?

Agency law also suggests an answer to these questions. In this situation, the adviser has direct responsibility to supervise the acts of its portfolio manager, and thus should be liable for the statements the portfolio manager "made" to the public. But *Janus*, again, did not address whether, or how, agency principles might be applied under Rule 10b-5. Justice Breyer's dissent argues that "under the common law the managers would likely have been guilty or liable (in analogous circumstances) for doing so as *principals.*"[16] But his argument is not acknowledged or addressed in the Court's decision. The majority apparently chose to leave the matter unresolved.

**Can "Ultimate Authority" Be Shifted, Limited, or Disclaimed?**

One clear benefit from *Janus* is the "clean line" drawn around the scope of primary liability under Rule 10b-5. But application of the "ultimate authority" standard will depend on the facts. As a result, fund, advisers, directors, and fund officers may modify their future conduct in an attempt to stay outside *Janus*'s line around primary liability. They also may attempt to put other entities in the position of "ultimate authority." To what extent can "ultimate authority" be shifted, limited, or disclaimed?

Imagine, for example, that fund directors wish to ensure they are not found to have possessed ultimate authority for statements in a fund's registration statement. They might pass a resolution delegating ultimate authority for approval of a fund's prospectus to the fund's chief executive officer.[17] Would that work under *Janus*? Or imagine that a fund's adviser wishes to ensure it is not found to have ultimate responsibility for the contents of a fund's registration statement. It might negotiate for provisions in its advisory agreement expressly disclaiming any ultimate authority over the content of the fund's SEC filings and disclosures. Or it might insist on including a disclaimer in the prospectus itself. Or take this situation: A fund's prospectus includes a "style of investment" or "investment strategy" section that not only describes the fund's principal investment strategies, but also states, expressly, that the description was authored by the fund's adviser, which is solely responsible for its content. What effect would these steps have under *Janus*?

On the one hand, funds, advisers, directors, and fund officers could expressly identify the persons or entities with "ultimate authority" over statements, and, as well, allow other persons and entities to expressly disclaim any such ultimate authority. Nothing prohibits providing such clarifying information. On the other hand, various statutes and court cases have rejected attempts to shift or disclaim statutory disclosure obligations, at least under some circumstances.[18] Nothing in *Janus* indicates that a mutual fund could avoid "ultimate authority" for statements in an SEC filing even if it expressly attempted to allocate that responsibility to someone else.

### Can "Ultimate Authority" Be Indemnified or Insured?

Indemnification provisions are a common device for re-allocating risk from a party legally liable under the law to another party which, for whatever reason, "should" bear the risk of litigation. Corporations, in most states, are compelled by law to indemnify directors and officers and, sometimes, employees against liability and litigation risks arising in the course of their employment. And they commonly agree to indemnify their officers and directors against litigation costs and liability to the fullest extent permitted by law.

> ***Janus** should prompt a reexamination of the indemnification arrangements now in place between funds and their advisers.*

Mutual funds commonly agree to indemnify their investment advisers. The typical advisory agreement, for example, will obligate a fund to indemnify its adviser for all liability not caused by reckless or willful misconduct. This arrangement makes sense in many situations. For example, the adviser cannot guarantee that a particular investment strategy will achieve its desired results, and the adviser should not be responsible for picking the wrong stocks. Moreover, advisory fees typically do not compensate advisers for assuming the risk of guaranteeing that all its investment strategies will be successful. Rather, advisory fees typically assume that the adviser will incur regular or routine management costs. Unusual or one-time costs, such as those associated with litigation over a failed investment strategy, are not part of the bargain.

But shifting all liability to the fund often does not make sense. Using fund assets to pay litigation costs will deplete investor assets and negatively affect the fund's net asset value, making it less competitive and less able to attract new investor assets. Moreover, some litigation exposure might properly be borne by the adviser, especially in cases involving violations of fund investment policies, misleading advertising, or other conduct of the adviser.

*Janus* should prompt a reexamination of the indemnification arrangements now in place between funds and their advisers. As a practical matter, however, few advisers will be willing to assume additional litigation risks without corresponding adjustments in compensation. This dilemma can be illustrated as follows: By definition, the investment performance of half of all advisers will fall in the bottom 50 percent of funds in their peer group. Should advisers bear the litigation risks associated with this underperformance?

Mutual funds also typically indemnify their officers and directors against litigation risks. *Janus* also should prompt a reexamination of these provisions. Just as using fund assets to indemnify an adviser would deplete investor assets and worsen fund performance, using fund assets to indemnify fund officers and directors can hurt fund performance and scare away investors. Moreover, in serious cases, a fund may be left with little or no assets with which to fulfill its indemnification obligations. But, as a practical matter, without this indemnification, few directors would want to serve on fund boards. The compensation earned by most directors does not adequately compensate them for litigation risk.

This dilemma has directors and officers asking whether they also should seek indemnification from a fund's adviser, especially for litigation risks they feel are linked to the adviser's own conduct. Any such indemnification could cover litigation expenses as well as liability arising from something other than the officer's or director's own gross negligence, recklessness, or willful misconduct.

At the present time, fund directors and officers typically are not indemnified by their funds' advisers (except, of course, to the extent they are "inside" directors or officers who are also employees of the adviser). But a proper allocation of litigation risks might well call for indemnification of fund directors and officers by the adviser under at least some circumstances, including those where responsibility for alleged misconduct is most fairly allocated to the adviser rather than the fund. Of course, any increased indemnification burden could well cause the adviser to seek higher fees to compensate it for this additional risk.

*Janus* may well have a large impact on fund liability insurance. Many mutual funds have errors and omissions insurance policies that cover the fund, its officers and directors, and the fund's adviser. In other situations, funds and their advisers maintain separate errors and omissions insurance. *Janus*, however, says that, at least for Rule 10b-5, the fund, not the adviser, has the litigation exposure. Funds should review their insurance programs in light of *Janus*. In particular, funds should consider whether joint errors and omissions policies adequately and fairly cover the allocation of risks. Independent directors should seek separate "Side A" or "independent director" coverage to supplement any indemnification promised by the fund.

This does not mean, of course, that fund insurers will agree they have greater exposure to litigation risk. Insurers sometimes provide policies that insure fund officers and directors, but not the fund itself (or do not insure the fund for "securities claims"). These policies would not provide coverage for a Rule 10b-5 claim after *Janus*, as the only party with "ultimate authority" would be the party (the fund) without coverage. Other insurance policies provide for "allocation" among multiple defendants based upon their relative exposure. Insurers may well argue for allocation away from the fund and on to other parties (such as the adviser), but that argument would run afoul of *Janus*. And, there remains the question of how a mutual fund can, by itself, commit a "wrongful act," which is a precondition to any insurance coverage. Funds and their advisers should revisit their insurance programs to make sure they adequately address litigation risk after *Janus*.

## "Attribution" of Statements After *Janus*

While *Janus* says, in general, that a person or entity must have "ultimate authority" over a statement to be liable for its contents, the decision seems to leave open at least one other possible path to primary liability—attribution. The decision notes that, "in the ordinary case, attribution within a statement" is strong evidence that a statement was made by—and only by—the party to whom it is attributed."[19]

### Express Attribution

This statement from *Janus* largely supports the majority's main conclusion: that a fund's SEC filing, which is expressly attributed to the fund itself, is the responsibility of the fund and not others who might have substantially participated in the filing's preparation. But that is not always the case, as *Janus* acknowledges. Imagine, again, a prospectus containing an "investment strategy" section that expressly attributes certain representations—about proprietary trading strategies, risk limitation techniques, and the like—to the fund's investment adviser. This disclosure would be "strong evidence" that the adviser, not the fund, had "ultimate authority" over the statement's contents.

***Funds should review their insurance programs in light of* Janus.**

We believe that funds, advisers, and others may begin to use "attribution" strategically to allocate, or reallocate, ultimate responsibility for statements. How could this be done? And what kind of

evidence will be adequate to establish attribution under *Janus*? Does an individual's signature on an SEC filing mean the contents of the filing are attributed to the signer? Does a Sarbanes-Oxley Section 302 certification constitute attribution? Is a "quote" attributed to a fund portfolio manager, which in fact was drafted by marketers, edited by lawyers and compliance officers, and approved by other, more senior, executives, properly attributed to the portfolio manager? *Janus* does not answer these questions.

In our view, funds and advisers should not wait for courts to provide guidance on attribution. They should address the issue now by expressly attributing certain groups of statements to the party who properly should bear responsibility for the statements. A fund and its adviser might, for example, decide expressly to attribute certain statements in a fund's prospectus or Statement of Additional Information regarding investment strategies or constraints to the fund's adviser. They might also expressly attribute other statements, like the fund's investment objectives and risk factors, to the fund. Similarly, fund officers and directors might benefit from having statements in SEC filings expressly attributed to a fund or its adviser. We cannot say how courts will view attribution of statements in this fashion, but *Janus* makes it clear that attribution should be an important factor in allocating responsibility of "ultimate authority" under Rule 10b-5. A failure to address attribution will leave funds, their advisers, and their directors and officers without the benefit of a factual record in any subsequent litigation.

Attribution in marketing materials and oral statements also might be accomplished under some circumstances, and would appear to be consistent with *Janus*'s approach. *Janus* noted that, under Rule 10b-5, a person may "make" a false statement "directly or indirectly."[20] "Indirectly" means that a person communicated a statement to the recipient through some other person or entity.[21] The Court indicated, however, that no liability for an "indirect" communication could occur without attribution: "More may be required to find that a person or entity made a statement indirectly, but attribution is necessary."[22] *Janus* thus seems to envision a disclosure world in which a person or entity with "ultimate authority" would be solely liable under Rule 10b-5 unless it expressly attributes the offending statement to another.

Funds, advisers, directors, and officers should review their SEC filings and marketing materials to determine whether it would be appropriate expressly to attribute certain statements to a certain responsible party.

### Implicit Attribution "From Surrounding Circumstances"

*Janus* also indicates that attribution may be "implicit from surrounding circumstances."[23] This statement seems somewhat at odds with the court's later footnote that, "without attribution, there is no indication that" one party was "quoting or otherwise repeating a statement originally" made by another.[24] The footnote seems to refer to express attribution, and does not appear to allow for attribution to occur without someone "quoting or otherwise repeating" someone else's statement.

That said, *Janus* correctly recognizes that courts and regulators may attempt to infer attribution from "surrounding circumstances." What might those be, and what steps might be taken to avoid implicit attribution?

Imagine, for example, that a prospectus touts a star portfolio manager's expertise and track record. Imagine, further, that the prospectus, or annual report to shareholders, contains a detailed description of the manager's investment approach to picking stocks (or bonds). It might even contain a letter from the manager or include her picture. Would those "surrounding circumstances" cause a court to implicitly attribute to the manager any statements about her expertise, track record, and investment approach? Or how about statements in the manager's letter?

What if, in addition, the prospectus made it clear that the manager had recently joined the fund, and that statements about her track record and prior experience referred to prior funds and prior employers? Would investors infer that the manager, and not the fund, had "made" those statements?

An almost infinite variety of fact patterns can be imagined. All of them counsel against leaving the possibility of implicit attribution in the hands of a court or regulator. Funds, advisers, directors, and officers should make express statements about who is, and who is not, making statements in fund SEC filings.

**Can Attribution Be Disclaimed or Shifted?**

May attribution be disclaimed or shifted? Let's examine three possibilities.

First, imagine an effort to disclaim attribution. A portfolio manager speaks at an investor conference. Before launching into his remarks, he reads a short statement (perhaps drafted by his lawyer). In the statement, he says the statements he is about to make are not his and that he has no ultimate authority over their contents. He is, instead, speaking as an official spokesperson for the fund, to whom the statements should be attributed. Would that be enough for the portfolio manager to avoid primary liability under Rule 10b-5?

Second, imagine an effort to shift attribution. A fund's independent directors insist that the fund's adviser accept express attribution of portions or sections of a prospectus, including the "risk factors" and "investment strategy" sections, and the prospectus states that those sections are the responsibility of the adviser, not the fund. Would that work to shift liability from the fund to the adviser notwithstanding *Janus*'s "ultimate authority" holding?

And third, consider an attribution of a representation to a third party. Imagine that a fund's prospectus describes an investment vehicle, such as a mortgage-backed security, using a definition supplied by an investment data firm, rating agency, or even the federal government. Imagine, further, that the fund provides data regarding the mortgages pooled in the security using data provided by loan originators or even individual borrowers. And imagine that the fund expressly attributes those statements to their respective sources and expressly disclaims any responsibility for them. Would that be enough to shift liability under Rule 10b-5?

*Janus* does not answer these questions. Certainly a fund would retain "ultimate authority" for statements contained in the fund's prospectus. But that does not answer the question, because the "statement" may simply be an accurate rendition of a statement expressly attributed to someone else. "The individual borrowers said, in their applications, that they have enough income to pay their mortgages, and the fund disclaims any responsibility for the accuracy of those statements." There would not be anything "false" about the fund's statement even if the underlying statements by mortgagors turned out to be false.

*Janus* does not explain what would happen if express attribution conflicts with "ultimate authority," or whether "ultimate authority" might be shifted by means of an express attribution.

We believe that a fund cannot avoid its responsibility, generally, for the accuracy of its prospectus. We do believe, however, that it ought to be able expressly to attribute certain representations to third parties, including the fund's adviser, when a reasonable investor would understand that the third party is the source of the information or would understand the fund has no reasonable means for verifying the information. We also believe that directors and officers would benefit from provisions expressly attributing statements to the fund or other third parties.

## Conclusion

*Janus* creates a new "clean line" around the limits of primary liability under Rule 10b-5.[25] (Of course, *Janus* leaves intact other statutory provisions that could give to liability on the part of fund advisers.) *Janus*'s new "clean line" changes the allocation of risks among mutual funds and their advisers, officers, and directors. These interested parties should use *Janus* as an opportunity to revisit the apportionment of litigation risks inherent in their relationships and to bring them in line with *Janus* and business realities.

## Notes

1. *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. ___ (2011), No. 09-525 (June 13, 2011).
2. Slip op. at 6.
3. Slip op. at 6, 11 n.11.
4. Slip op. at 7 n.6.
5. Slip op. at 1.
6. Slip op. at 6.
7. Slip op. at 6, 7.
8. *Janus* should be extended to other statutes applicable to mutual funds. Many other statutes and regulations have the same "make" language found in Rule 10b-5, including Section 18(a) of the '34 Act and Section 34(b) of the '40 Act. *But see SEC v. Daifotis*, No. C 11-10037 WHA (N.D.Ca. 2011) (court, without explanation, declined to apply *Janus* to "make" language of Section 34(b)). *Janus* may also be extended to other statutes and regulations that, while they do not use the word "make," use other similarly restrictive words or phrases.
9. For example, fund directors and others who "sign" a fund's registration statement could still face liability under Section 11 of the '33 Act, and persons who "sell" mutual fund shares remain exposed to liability under Section 12 of the '33 Act.
10. Slip op. at 6.
11. For example, Section 3806 of the Delaware Statutory Trust Act provides, in relevant part, that "(a) Except to the extent otherwise provided in the governing instrument of a statutory trust, the business and affairs of a statutory trust shall be managed by or under the direction of its trustees. To the extent provided in the governing instrument of a statutory trust, any person (including a beneficial owner) shall be entitled to direct the trustees or other persons in the management of the statutory trust..."
12. Slip op. dissent, at 6.
13. *Id.* at 9.
14. *Hawaii Ironworkers Annuity Trust Fund v. Cole*, No. 3:10 CV371 (N.D. Ohio, September 1, 2011).
15. But another recent case concluded that *Janus* did not preclude liability on the part of a Merck executive to whom allegedly false statements were expressly attributed. *In re Merck & Co., Inc. Sec., Derivative & ERISA Lit.*, 2011 WL 3444199 (D.N.J. August 8, 2011). The court found that the executive "made the statements pursuant to his responsibility and authority to act as an agent of Merck," and it rejected the argument that only the company could be primarily liable under Rule 10b-5 "because ultimately, the statements are within the control of the corporation which employ[ed]" the executive. *See also Local 703, IBT Grocery & Food Emples. Welfare Fund v. Regions Financial Corp*, 2011 U.S. Dist. LEXIS 93873 (N.D. Ala. August 23, 2011) (corporate officers can be liable under Rule 10b-5 because they had ultimate authority over statements).
16. Slip op. at 10.
17. The directors, of course, would still need to perform their "due diligence" obligations under Sections 11 and 12 of the Securities Act of 1933.
18. *See generally Escott v. BarChris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968); *In re Phar-Mor, Inc., Sec. Litig.*, 848 F. Supp. 46 (W.D. Pa. 1993).
19. Slip op. at 6.
20. Slip op. at 5, 11 n.11.
21 *Id.* n.11.
22. What else is necessary? Intent to communicate by means of another? Some lower mental state? Could someone really be said to "make" a statement through another without having an understanding with that person? For example, what if a person violated a confidentiality agreement and disclosed a statement made in confidence? Could the original speaker be said to have made the statement? Would it be enough to create liability if the person who repeated it without permission expressly attributed the statement to the original speaker?
23. Slip op. at 6.
24. Slip op. at 11 n.11.
25. Slip op. at 7 n.6.