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UTILIZING RULE 10b-5 FOR REMEDYING SQUEEZE-OUTS OR OPPRESSION OF MINORITY SHAREHOLDERS†

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I. INTRODUCTION

This article discusses the utility of section 10(b) of the Securities Exchange Act of 1934¹ and its implementing rule, Securities & Exchange Commission Rule 10b-5,² in providing a remedy for a minority shareholder who is the victim of a squeeze-out or other form of oppression. The term "squeeze-out" means the elimination of one or more shareholders of a business by those who control it, through the use of their powers of control, inside information, or other technique, without fair value being paid in return.³ Of course, a minority shareholder need not be deprived of his shares to be treated unfairly by his fellow shareholders or by the directors and officers whom they control. He can be oppressed by action of the majority which reduces his claim on the corporation's assets or deprives him of the return on his investment to which he is entitled.

Numerous techniques may be employed by those in control of a corporation to benefit themselves at the expense of the minority:⁴

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¹ 15 U.S.C. § 78j(b) (1970).

² 17 C.F.R. § 240.10b-5 (1974).

³ The most comprehensive study presently in print of what causes squeeze-outs, what techniques are used to effect them, and what can be done to prevent them, is F. O'Neal & J. Derwin, *Expulsion or Oppression of Business Associates: "Squeeze-Outs" in Small Enterprises* (1961). An expanded revision of this work, focusing on squeeze-outs in corporations, F. O'Neal, "Squeeze-Outs" of Minority Shareholders: Expulsion or Oppression of Business Associates, will be published in 1975. The former will hereinafter be cited as O'Neal & Derwin, the latter as O'Neal.

⁴ O'Neal & Derwin, *supra* note 3, at chs. 3-5; O'Neal, *supra* note 3, chs. 3-6.

the squeezers may refuse to declare dividends;⁵ they may drain off the corporation's earnings by exorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives,⁶ by high rental agreements for property the corporation leases from majority shareholders,⁷ or by unreasonable payments under contracts between the corporation and majority shareholders;⁸ they may deprive minority shareholders of corporate offices and of employment by the company;⁹ they may cause the corporation to sell its assets at an inadequate price to the majority shareholders or to companies in which the majority is interested;¹⁰ they may organize a new company in which the minority will have no interest, transfer the corporation's assets or business to it, and perhaps then dissolve the old corporation;¹¹ or they may bring about the merger or consolidation of the corporation under a plan unfair to the minority.¹² These techniques merely illustrate the devices used by resourceful squeezers; furthermore, squeeze techniques often—in fact generally—are used in various combinations.¹³

A lawyer representing a minority shareholder who is being squeezed out or otherwise oppressed should always explore remedies that may be available under federal securities laws, especially Rule 10b-5.¹⁴ Indeed, Rule 10b-5 has been accurately described as "the

⁵ O'Neal & Derwin § 3.04, at 44; O'Neal §§ 3.04-.05.

⁶ O'Neal & Derwin § 3.06, at 54; O'Neal §§ 3.07-.08.

⁷ O'Neal & Derwin § 5.02, at 100; O'Neal § 3.12.

⁸ O'Neal & Derwin § 5.02, at 100; O'Neal § 3.14.

⁹ O'Neal & Derwin § 3.05, at 52; O'Neal § 3.06.

¹⁰ O'Neal & Derwin § 4.08, at 78; O'Neal §§ 5.17-.20.

¹¹ O'Neal & Derwin § 4.10, at 86; O'Neal § 5.25.

¹² O'Neal & Derwin § 4.05, at 67; O'Neal §§ 5.13-.15.

¹³ O'Neal & Derwin § 3.02, at 42; O'Neal § 3.02.

¹⁴ In addition to section 10(b), other sections of the Securities Exchange Act of 1934 and other securities legislation can provide effective weapons for an oppressed minority shareholder. For example, federal proxy requirements imposed by section 14 of the Securities Exchange Act, 15 U.S.C. § 78n (1970), and the corresponding SEC regulations, 17 C.F.R. § 240.14a (1974), may prove useful in challenging a merger or other fundamental corporate change prejudicial to minority shareholders. See *Coalition to Advocate Pub. Util. Responsibility, Inc. v. Engels*, 364 F. Supp. 1202 (D. Minn. 1973) (suit by minority shareholders alleging that corporate insiders had proposed at the last minute a change in the number of directors and a system of classifying and staggering the election of directors for a purpose of frustrating minority shareholders' efforts to place a representative on the board, and in sponsoring these changes had violated section 14 of the Securities Exchange Act and the federal proxy rules, and breached fiduciary duties imposed by state law; the court granted a preliminary injunction ordering the insiders to cease activities in furtherance of the proposed changes until further court order). See also O'Neal, *supra* note 3, at § 5.31.

Another provision of the Securities Exchange Act of 1934, § 15(c)(1), 15 U.S.C. § 78o(c)(1) (1970), states in part: "No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security . . . by means of any manipulative, deceptive, or other fraudulent device or contrivance. . . ." Rule 15 c1-2 to -9, 17 C.F.R. § 240.15c1-2 to -9 (1974), implements section 15(c)(1) by defining what is meant by "any manipulative, deceptive, or other fraudulent device or contrivance."

most potent and the most versatile instrument in the armamentarium of federal securities regulation."¹⁵

This article does not provide an exhaustive analysis of Rule 10b-5's applicability to the complete catalogue of squeeze-out techniques;¹⁶ nor does it assess the roles played in Rule 10b-5 liability by concepts such as scienter, materiality, privity, and reliance.¹⁷ Many basic features of Rule 10b-5 liability remain unsettled; and the rules established by case law are constantly being modified, limited, or refined.¹⁸

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p (1970), permits a corporation to recover from an officer, director, or holder of 10 percent of a class of that corporation's equity securities which are registered pursuant to the Act, any profit such "insider" has made on any purchase and sale or sale and purchase of that corporation's equity securities within a period of less than six months.

Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2) (1970), provides: Any person who . . . sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1970), is almost identical in wording to Rule 10b-5 except that § 17(a) focuses on fraud by the seller and affords a remedy only to the buyer. The requirements for a private cause of action under § 17(a) have been considered to be identical to those under Rule 10b-5. See *Lanza v. Drexel & Co.*, 479 F.2d 1227, 1280 n.2 (2d Cir. 1973); *White v. Abrams*, 495 F.2d 724, 727 n.2 (9th Cir. 1974). See also *Tucker v. Schwindt*, [1973-74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,402, at 95,373, (D. Kan. 1974) (minority shareholders can recover damages in a derivative suit under § 17(a)).

¹⁵ Note, *The Controlling Influence Standard in Rule 10b-5 Corporate Mismanagement Cases*, 86 Harv. L. Rev. 1007 (1973).

¹⁶ For a comprehensive discussion of Rule 10b-5 as it applies to acts of corporate mismanagement, see Jacobs, *The Role of Securities Exchange Act Rule 10b-5 in The Regulation of Corporate Management*, 59 Cornell L. Rev. 27 (1973). See also Cox, *Fraud is in the Eyes of the Beholder: Rule 10b-5's Application to Acts of Corporate Mismanagement*, 47 N.Y.U.L. Rev. 674 (1972); Susman, *Use of Rule 10b-5 As a Remedy for Minority Shareholders of Close Corporations*, 22 Bus. Law. 1193 (1967); Note, *The Controlling Influence Standard in Rule 10b-5 Corporate Mismanagement Cases*, 86 Harv. L. Rev. 1007 (1973).

¹⁷ For discussions of these topics, see R. Jennings & H. Marsh, *Securities Regulation: Cases and Materials* 1070-72, 1127-32, 1184-85 (3d ed. 1972); Epstein, *The Scienter Requirement in Actions Under Rule 10b-5*, 48 N.C.L. Rev. 482 (1970); Mann, *Rule 10b-5: Evolution of a Continuum of Conduct to Replace the Catch Phrases of Negligence and Scienter*, 45 N.Y.U.L. Rev. 1206 (1970); Meisenholder, *Scienter and Reliance as Elements in Buyer's Suit Against Seller Under Rule 10b-5*, 4 Corp. Prac. Commentator 27 (Feb. 1963).

¹⁸ See, e.g., *White v. Abrams*, 495 F.2d 724 (9th Cir. 1974) (trial court erred in instructing the jury that defendant violated the federal securities laws if he made a material misrepresentation even if he did not know the falsity of his statement); *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654 (7th Cir. 1973), cert. denied, 416 U.S. 960 (1974); *Lanza v. Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973).

This article does try to point out the tremendous potential of Rule 10b-5 for redressing minority shareholder grievances. It shows the broad scope of Rule 10b-5, as that rule has been interpreted and applied by the courts, conveys an idea of the tremendous variety of director, officer, and controlling shareholder acts that may fall within the ambit of the Rule, and sets forth a number of illustrative situations in which courts have applied the Rule to afford relief to oppressed shareholders. Finally, it notes some of the advantages of proceeding in federal court under Rule 10b-5 rather than proceeding in a state court under state law.

II. THE SCOPE OF RULE 10b-5

Section 10(b) makes it unlawful for any person "directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails"¹⁹ to "use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."²⁰ Rule 10b-5 gives a broad content to "manipulative or deceptive device or contrivance," by providing:

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

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

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.²¹

The breadth of the Rule should be noted, as by its language it reaches "any device" which is deceptively used by "any person"

¹⁹ 15 U.S.C. § 78j (1970). The section also proscribes the illegal use "of any facility of any national securities exchange," *id.*, but this provision is not applicable to most corporate "squeeze-outs."

²⁰ 15 U.S.C. § 78j(b) (1970).

²¹ 17 C.F.R. § 240.10b-5 (1974).

even if merely "in connection with" the purchase or sale of "any security."²²

Although there may be some doubt that Congress intended section 10(b) to apply to "private" deals in the securities of close corporations,²³ the federal courts have firmly established that transactions in shares are within the purview of that section and of Rule 10b-5, even though the shares are not listed on a securities exchange nor traded in an over-the-counter market by established businesses or brokers.²⁴ Thus, face-to-face or non-market transactions fall within the purview of Rule 10b-5.²⁵ Further, although neither section 10(b) nor the implementing rule expressly provides for private civil remedies, the courts have consistently permitted civil actions to be brought by persons injured by a violation,²⁶ to recover dam-

²² "For § 10(b) bans the use of any deceptive device in the 'sale' of any security by 'any person.'" Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 10 (1971). For interesting speculations on situations in which Rule 10b-5 might be applied, see Latty, The Aggrieved Buyer or Seller or Holder of Shares in a Close Corporation Under the S.E.C. Statutes, 18 Law & Contemp. Prob. 505, 530-32 (1953). See also Comment, Rule 10b-5 and Purchase by a Corporation of Its Own Shares, 61 Nw. U.L. Rev. 307 (1966).

²³ See Note, 64 Harv. L. Rev. 1018 (1951).

²⁴ Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 10-12 (1971); Fratt v. Robinson, 203 F.2d 627, 630-31 (9th Cir. 1953); Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834, 841-42 (D.N.J. 1972); Speed v. Transamerica Corp., 99 F. Supp. 808, 830-31 (D. Del. 1951); Robinson v. Difford, 92 F. Supp. 145, 147-48 (E.D. Pa. 1950). See also Kardon v. National Gypsum Co., 69 F. Supp. 512, 73 F. Supp. 798 (E.D. Pa. 1947), on request for additional findings of fact, 83 F. Supp. 613 (E.D. Pa. 1947). "I cannot agree . . . that 'investors' [as used in § 10(b)] is limited to persons who are about to invest in a security or that two men who have acquired ownership of the stock of a corporation are not investors merely because they own half of the total issue." 69 F. Supp. at 514. The courts agree on the result but not on the line of reasoning by which the conclusion should be reached. See Fratt v. Robinson, 203 F.2d 627, at 630-31 (9th Cir. 1953).

²⁵ Allen Organ Co. v. North Am. Rockwell Corp., 363 F. Supp. 1117, 1128 (E.D. Pa. 1973); Schine v. Schine, 250 F. Supp. 822, 823 (S.D.N.Y.), appeal dismissed, 367 F.2d 685 (2d Cir. 1966); Northern Trust Co. v. Essaness Theatres Corp., 103 F. Supp. 954, 960-61 (N.D. Ill. 1952).

²⁶ E.g., Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971); Fratt v. Robinson, 203 F.2d 627, 631-32 (9th Cir. 1953); Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 787 (2d Cir. 1951); Speed v. Transamerica Corp., 71 F. Supp. 457, 458 (D. Del. 1947); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

Rule 10b-5 has been held not to give a cause of action to a person injured by a sale if he is neither the seller nor the buyer. *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952). The *Birnbaum* purchaser-or-seller limitation has been rejected by some courts. See *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654 (7th Cir. 1973), cert. denied, 416 U.S. 960 (1974) (purchaser-seller limitation of *Birnbaum* case "is not part of the law" of the Seventh Circuit); *Manor Drug Stores v. Blue Chip Stamps*, 492 F.2d 136 (1973), cert. granted, 95 S. Ct. 302 (1974) (offeree who refused offer of stock made pursuant to consent decree arising out of alleged antitrust violations is not subject to purchaser-seller limitation); *Tully v. Mott Supermarkets, Inc.*, 337 F. Supp. 834 (D.N.J. 1972) (plaintiff-shareholders were neither buyers nor sellers in a stock transaction which formed the basis of an alleged conspiracy to usurp voting control, but court held they had standing to maintain an action under Rule 10b-5). Furthermore, subsequent cases decided in the Second Circuit have suggested several exceptions to the *Birnbaum* limitation and thereby have thrown in question the continuing validity of the *Birnbaum* rationale. See *Drachmann v.*

ages²⁷ and, under some circumstances at least, to compel offenders to account for profits realized.²⁸ Thus, a complaint which alleges that a corporation's majority shareholders acquired stock of the corporation from minority shareholders through fraudulent representations by use of the mails and instrumentalities of interstate commerce has been held to state a cause of action under section 10(b) and Rule 10b-5.²⁹

Section 10(b) and Rule 10b-5 do not apply unless, in the performance of the proscribed act, use is made of the mails, a means or

Harvey, 453 F.2d 722 (2d Cir. 1972) (redemption of debentures in self-dealing transaction was a "purchase" of a security, thus providing a basis for a derivative action by a minority shareholder); Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir.) (en banc), rev'g 405 F.2d 200 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969); Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1968), cert. denied, 395 U.S. 903 (1969); Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967) (cause of action found for injunctive relief but not damages); Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir. 1967), cert. denied, 389 U.S. 970 (1967); Heyman v. Heyman, 356 F. Supp. 958 (S.D.N.Y. 1973) (persons with a beneficial interest in securities bought or sold have standing to maintain an action); Lowenfels, *The Demise of the Birnbaum Doctrine: A New Era for Rule 10b-5*, 54 Va. L. Rev. 268 (1968); Note, *The Purchaser-Seller Limitation to SEC Rule 10b-5*, 53 Cornell L. Rev. 684 (1968). Cf. SEC v. National Sec. Inc., 393 U.S. 453, 464-72 (1969).

Despite the above-mentioned cases, the *Birnbaum* case has been strongly reaffirmed in *Iroquois Indus., Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), cert. denied, 399 U.S. 909 (1970); see also *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971). Cf. *Greenstein v. Paul*, 400 F.2d 580 (2d Cir. 1968).

²⁷ "Damages for such breach [of fiduciary duty in illegally calling stock] are usually, but not always, measured according to principles of restitution." *Speed v. Transamerica Corp.*, 135 F. Supp. 176, 179 (D. Del. 1955), aff'd, 235 F.2d 369 (3d Cir. 1956). Violation of Rule 10b-5 may also result in: (1) a shareholders' derivative action (if insiders have milked the corporation by selling it shares at an excessive price or buying shares from it at an inadequate price); and (2) a suit to rescind the transaction and recover the shares. See, e.g., *Baumel v. Rosen*, 283 F. Supp. 128 (D. Md. 1968), modified as to rescission, 412 F.2d 571 (4th Cir. 1969), cert. denied, 396 U.S. 1037 (1970). Although the company's financial progress in *Baumel* was far better than projected, the minority shareholders were told that the company was not doing well and that their shares must be purchased by the company to be used as a "sweetener" to obtain additional debt financing. The district court held Rule 10b-5 to be applicable, as a result of which the minority shareholders were entitled to full restoration of the shares subject to the sale "together with any dividends which may be declared and paid thereon from the date of decree until the date of delivery, and . . . any transfer taxes which may be imposed thereon." 283 F. Supp. at 148. The Fourth Circuit held that the minority shareholders had waived their right to rescission of the sale by their delay of eighteen months in bringing their 10b-5 action. 412 F.2d at 574-75.

²⁸ See *Kardon v. National Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa. 1947). In this case, the two Slavins, who owned half the stock, had made a deal to sell the corporate assets to outside interests. Without disclosing this fact, the Slavins bought out the Kardons, owners of the other half of the stock, and then proceeded to consummate the deal with the outsiders. The court treated the transaction as a sale by directors (in their own interest) of corporate assets and held that the Kardons were entitled to an accounting to ascertain their share of the profits. *Id.* at 801-02. In *Rochez Bros., Inc. v. Rhoades*, 491 F.2d 402 (3d Cir. 1973), a defrauded seller of securities was held to be entitled to "the benefit of whichever measure of damages provides the greater recovery: either the difference between the sale price of the stock . . . and its fair market value at [the time of the sale] or the amount of the fraudulent buyer's profit on resale." *Id.* at 417.

²⁹ *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953).

instrumentality of interstate commerce, or a facility of a national securities exchange.³⁰ Conceivably, some transactions involving fraudulent or deceptive practices in the purchase of securities might not come within their purview for that reason. The cases, however, have held that section 10(b) and its implementing rule apply as long as the fraud or deception is employed "in connection with" a transaction in which use is made of the mails or a means or instrumentality of commerce; the deceptive communication itself need not be transmitted through those facilities.³¹

III. APPLICATION OF RULE 10b-5 TO VARIOUS SQUEEZE-OUT TECHNIQUES

A. *Withholding Information About the Value of Shares*

A person who has sold his shares to the corporation's officers, directors, or controlling shareholders, or to the corporation, perhaps having been in part persuaded by the corporation's failure to pay dividends or by other pressure tactics of those in control of the corporation, often complains that the "insiders" misrepresented the value of shares they bought from him for themselves or the corporation or that they brought his shares without disclosing information affecting the shares' value. In these circumstances the aggrieved seller clearly can obtain relief in an individual action under Rule 10b-5.³² Interestingly enough, one case held that a corporation's

³⁰ Even an *intrastate* phone call has been held to be enough "jurisdictional means" where it is made over the same wires that carry interstate phone calls. See *Myzel v. Fields*, 387 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968); *Bredehoeff v. Cornell*, 360 F. Supp. 557 (D. Ore. 1966); *Nemitz v. Cunny*, 221 F. Supp. 571 (N.D. Ill. 1963). But see *Burke v. Triple A Mach. Shop, Inc.*, 438 F.2d 978 (9th Cir. 1971); *Rosen v. Albern Color Research, Inc.*, 218 F. Supp. 473 (E.D. Pa. 1963).

³¹ *Fratt v. Robinson*, 203 F.2d 627, 633-34 (9th Cir. 1953); *Northern Trust Co. v. Essaness Theatres Corp.*, 103 F. Supp. 954, 961-64 (N.D. Ill. 1952).

The purpose of Section 17(a) of the 1933 Act and Section 10(b) of the 1934 Act are similar and the phraseology employed is substantially similar. The court is of the opinion the comparable guide to be followed is the construction of the courts with respect to 17(a) and not 12(2). For this reason, the court holds that Section 10(b) does not apply solely to interstate business and does not require that misrepresentations or omissions be made through instrumentalities of commerce or through the mails.

Id. at 964. Cf. *Schillner v. H. Vaughan Clarke & Co.*, 134 F.2d 875 (2d Cir. 1943) (construing § 12(2) of the Securities Act of 1933); *Moore v. Gorman*, 75 F. Supp. 453, 547 (S.D.N.Y. 1948) (same). But see the following cases construing § 12(2) of the Securities Act: *Kemper v. Lohnes*, 173 F.2d 44 (7th Cir. 1949); *Murphy v. Cady*, 30 F. Supp. 466, 469 (D. Me. 1939), aff'd, 113 F.2d 988 (1st Cir.), cert. denied, 311 U.S. 705 (1940) (where the alleged misrepresentations were made in the interstate telephone conversation but the court also, evidently, thought that a necessity).

³² *Janigan v. Taylor*, 344 F.2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965) (consciously false representation); *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953) (fraudulent misrepresentations); *Schine v. Schine*, 250 F. Supp. 822 (S.D.N.Y.), appeal dismissed, 367 F.2d 685 (2d Cir. 1966) (failure to disclose negotiations to sell corporate assets); *Kardon v. National Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa. 1947) (failure to disclose intended sale of

attempts to buy its own stock from a shareholder at a "repeatedly

assets—"Under any reasonably liberal construction, these provisions apply to directors and officers who, in purchasing the stock of the corporation from others, fail to disclose a fact coming to their knowledge by reason of their position, which would materially affect the judgment of the other party to the transaction." *Id.* at 800.). Cf. Note, 47 Texas L. Rev. 509 (1969). For cases in which a shareholder with less stock holdings deceived a shareholder with larger individual holdings by false representation or nondisclosure in purchasing the larger holder's shares, see *Rogen v. Ilikon Corp.*, 361 F.2d 260 (1st Cir. 1966) (the defendants, as a group, held more stock than the plaintiff); *Janigan v. Taylor*, 344 F.2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965).

In *Nanfito v. Tekseed Hybrid Co.*, 341 F. Supp. 240 (D. Neb. 1972), aff'd, 490 F.2d 539 (8th Cir. 1973), plaintiff argued that Rule 10b-5 required corporate officers and directors not only to supply investors and shareholders with full information on a major corporate decision affecting the value of the corporation's assets and the value of its stock, but also to interpret the information and provide an expert opinion as to all possible ramifications of the decision on investor interests. 341 F. Supp. at 243. The district court, however, read the Rule as requiring no more "than full disclosure of all information which the ordinary investor of common business experience would require in making an informed investment decision." *Id.*

Some courts permit an action to be maintained for damages against some wrongdoers solely on the basis of a *negligent* misrepresentation or nondisclosure; they do not require fraud or intent to deceive. *SEC v. First Sec. Co.*, 463 F.2d 981 (7th Cir.), cert. denied, 409 U.S. 880 (1972) (brokerage firm, for negligence in controlling an agent); *Myzel v. Fields*, 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968); *Royal Air Prop., Inc. v. Smith*, 312 F.2d 210 (9th Cir. 1962). But see *R. Jennings & H. Marsh*, *supra* note 17, commenting:

It may still be questioned, by those who have not despaired of any check by the courts on the career of Rule 10b-5, whether any court would in fact impose a crushing liability upon a corporate officer in favor of thousands of purchasers in the market for simple negligence in the issuance of a press release.

Id. at 1072. Perhaps a few courts would impose liability for deception in the absence of any fault whatever on the part of the defendant. See, e.g., *Ellis v. Carter*, 291 F.2d 270, 274 (9th Cir. 1961). But see *R. Jennings & H. Marsh*, *supra*, at 1071 expressing doubt that the Court of Appeals for the Ninth Circuit would impose absolute liability, without any fault at all, on the part of a defendant. See also *Batchelor v. Legg & Co.*, 52 F.R.D. 545 (D. Md. 1971) ("This Court does not agree with plaintiffs that the test is one of absolute liability. . . .") *Id.* at 549. In the Second Circuit, a cause of action under Rule 10b-5 apparently does not exist "in the absence of allegation of facts amounting to *scienter*, intent to defraud, reckless disregard for the truth, or knowing use of a device, scheme or artifice to defraud. It is insufficient to allege mere negligence. . . ." *Shemtob v. Shearson, Hammil & Co.*, 448 F.2d 442, 445 (2d Cir. 1971). See *Lanza v. Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973). But cf. *SEC v. Spectrum, Ltd.*, 489 F.2d 535, 541-43 (2d Cir. 1973) (negligence is sufficient for injunctive relief against attorney preparing opinion letters as an aider or abettor). See also *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 863 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969) (injunction action under Rule 10b-5 can be based on negligence in issuance of corporate press release).

For the extent to which market information, as distinguished from operational information, must be disclosed to avoid a violation of Rule 10b-5, see *SEC v. Great Am. Indus.*, 407 F.2d 453 (2d Cir. 1968), cert. denied, 395 U.S. 920 (1969) (in a face-to-face sale of property to a corporation in exchange for the corporation's stock, a failure to disclose that a finder's fee of two-thirds of the stock will be paid to intermediaries is a violation of Rule 10b-5); *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970) (stock brokerage firm's failure to disclose to a customer, whose account it handled, that it was a "market maker" in securities it sold that customer in the over-the-counter market was a failure to disclose a material fact within Rule 10b-5).

At least one court has held that Rule 10b-5 applies if a misrepresentation is made as to the value of the *consideration* given for securities. *Errion v. Connell*, 236 F.2d 447 (9th Cir. 1956) (a fraudulent sale of overvalued oyster land for securities and real estate). Cf. *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) (corporation's directors were allegedly deceived into believing that the corporation would receive a certificate of deposit in

published book value or less" were implied representations that the prices offered were fair prices.³³

B. Withholding Dividends

Another frequent grievance of minority shareholders or of former minority shareholders who have sold their stock is that majority shareholders or the corporate managers depressed the value of the corporation's stock, typically by keeping dividends to a minimum, in order to buy minority stock at a bargain price. Manipulation of the market price of a corporation's stock and purposeful reduction of dividends in order to buy out minority shareholders cheaply has been held actionable under Rule 10b-5,³⁴ at least if the suit is brought by a shareholder who has sold his stock and thus can show a loss from the manipulation.³⁵ And, in a leading case, the United States Court of Appeals for the Second Circuit held that a complaint alleging that the corporation's controlling shareholders had manipulated the market price of the corporation's stock and had kept dividends to a minimum in order to force minority shareholders to sell their shares at depressed values stated a cause of action for *injunctive relief* to prevent the controlling shareholders from continuing to depress the price of the stock, although the complaint did not state a claim for *damages* by minority shareholders who had not sold their stock, at least in the absence of proof that those shareholders had suffered a loss from the manipulations.³⁶

exchange for its bonds, whereas in fact the proceeds from the bonds were credited to defendant's account).

³³ Cf. *Belcher v. Birmingham Trust Nat'l Bank*, 348 F. Supp. 61, 138 (N.D. Ala.), stay denied, 395 F.2d 685 (5th Cir. 1968). This action was predicated upon an Alabama criminal statute dealing with officer/director liability in manipulating the market and the court found an implied civil remedy by analogy to the section 10(b), Rule 10b-5 cases. 348 F. Supp. at 146-47.

³⁴ *Cochran v. Channing Corp.*, 211 F. Supp. 239 (S.D.N.Y. 1962). In *O'Neill v. Maytag*, 339 F.2d 764 (2d Cir. 1964), the court referred approvingly to the *Cochran* case: "[D]eception may take the form of nonverbal acts: In *Cochran v. Channing Corp.* . . . it consisted of reducing dividends in order to drive down the price of the corporation's stock. And it need not be deception in any restricted common law sense . . ." *Id.* at 768.

³⁵ *Greenstein v. Paul*, 400 F.2d 580 (2d Cir. 1968) (where directors, officers, and majority shareholders conspired to siphon the corporation's assets into another company, depressing the market value of the corporation's stock, with a view to buying out minority shareholders by squeezing them out, but plaintiff minority shareholder did not sell his shares and a planned merger of the corporation and the other company was abandoned, plaintiff was not a "seller" and could not invoke a Rule 10b-5 remedy); *Hoover v. Allen*, 241 F. Supp. 213, 227 (S.D.N.Y. 1965). Cf. *Belcher v. Birmingham Trust Nat'l Bank*, 348 F. Supp. 61 (N.D. Ala.), stay denied, 395 F.2d 685 (5th Cir. 1968) (violation of state criminal statute making it a criminal offense for corporate director or officer to depreciate value of corporate stock with intent to buy occurs whenever director or officer does or omits to do an act with intent to depreciate market value of the stock, even though he does not actually succeed in purchasing any of the stock).

³⁶ *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967) (in a suit for equitable or prophylactic relief it is not necessary to establish all the elements necessary in a suit to recover monetary damages).

C. *Mergers*

Rule 10b-5 also may provide relief for minority shareholders aggrieved by a merger into which their corporation has entered or is about to enter. A person who held shares in a corporation which has merged into another company and who has received shares in the surviving company in exchange for his old shares is a "seller" of the old shares and a "purchaser" of the shares of the surviving company within the meaning of Rule 10b-5;³⁷ thus that person can maintain an action under the Rule if the merger was accomplished or is being accomplished by deception or fraud.³⁸ Since a person who holds shares in the surviving corporation, as distinguished from one who holds shares in a merging or "disappearing" corporation, ordinarily is not called upon to exchange his shares for new securities, he might not qualify as a "seller" or "buyer" of shares for *individual* relief under Rule 10b-5. He can, however, bring a derivative action on behalf of the corporation because the corporation would be a "buyer" of the old shares held by shareholders in the disappearing corporation and a "seller" of the new shares it issued in exchange.³⁹ At least one case, however, has held that a shareholder in the

³⁷ See *SEC v. National Sec., Inc.*, 393 U.S. 453, 467 (1969); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 590 (5th Cir. 1974); *Swanson v. American Consumer Indus.*, 415 F.2d 1326, 1330 (7th Cir. 1969); *Mader v. Armel*, 402 F.2d 158, 161 (6th Cir. 1968), cert. denied, 394 U.S. 930 (1969); *Dasho v. Susquehanna Corp.*, 380 F.2d 262, 267 (7th Cir.), cert. denied, 389 U.S. 977 (1967). But cf. *In re Penn Central Sec. Litigation*, [1973-74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,452, at 95,577 (3d Cir. 1974) (shareholders who were induced to exchange their shares in a railroad for shares in a holding company by allegedly false proxy statements cannot maintain an action under Rule 10b-5 to recover their losses; the transaction does not come within the scope of the Rule because it constituted only "restructuring" and not a merger).

³⁸ *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (2d Cir. 1974); *Gerstle v. Gamble-Skogmo, Inc.*, 298 F. Supp. 66 (E.D.N.Y. 1969), modified as to interest, 478 F.2d 1281 (2d Cir. 1973). See also *Voege v. Ackerman*, 364 F. Supp. 72 (S.D.N.Y. 1973) (complaint by minority shareholders of merged corporation alleging a conspiracy stated a Rule 10b-5 cause of action. "[O]ne who knowingly participates in or joins in an enterprise whereby a violation of a fiduciary obligation is effected is liable jointly and severally with the recreant fiduciary." Id. at 74, quoting *Schein v. Chasen*, 478 F.2d 817, 822 (2d Cir. 1973)), vacated, 416 U.S. 38 (1974).

³⁹ For cases holding that shareholders who allege violations of Rule 10b-5 but are not "purchasers" or "sellers" of securities may nevertheless seek relief on behalf of the corporation in a derivative suit if the corporation is a "purchaser" or "seller" of securities, see *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970); *Rekant v. Desser*, 425 F.2d 872 (5th Cir. 1970); *City Nat'l Bank v. Vanderboom*, 422 F.2d 221 (8th Cir.), cert. denied, 399 U.S. 905 (1970); *Williams v. Pennsylvania Co.*, 367 F. Supp. 1158 (E.D. Pa. 1973) (a corporation's minority shareholders can maintain a derivative action under Rule 10b-5 against the corporation's parent company where the equivalent of a merger—a "de facto" merger—has allegedly been achieved by a round-about transaction induced by misrepresentations); *Ross v. Longchamps, Inc.*, 336 F. Supp. 434, 439 (E.D. Mo. 1971); *Miller v. Steinbach*, 268 F. Supp. 255 (S.D.N.Y. 1967). See also *Sargent v. Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974) ("the issuance of stock is a sale of securities for 10b-5 purposes and . . . an individual shareholder although not a purchaser or seller can bring a derivative claim on behalf of the corporation which has been fraudulently induced to issue its stock," in a refinancing plan if harm to the corporation is shown. Id. at 765.).

surviving company in a merger who is not called upon to exchange his shares can maintain an individual action for relief under Rule 10b-5 if the exchange ratio provided by the merger plan favors the disappearing corporation and the sponsors of the merger concealed facts necessary for the shareholders to make an intelligent decision on whether to consent to the merger.⁴⁰

The United States Court of Appeals for the Second Circuit has held that a shareholder in a corporation that has merged with another company under a short-form merger statute is entitled to maintain an action under Rule 10b-5 grounded on the fraud in the merger, even though he still retains possession of his original share certificates.⁴¹ He is, in fact, a "seller" of the stock even though he still possesses it, the court said, because the only choice he has left is to convert his shares into cash under the terms of the merger or have them appraised and purchased under the state dissenters' rights statute, unless of course he chooses to hold stock in a nonexistent corporation.⁴²

A few decisions indicate that some courts may grant a minority shareholder relief under Rule 10b-5 against a merger designed solely to squeeze him out of the enterprise, even in the absence of any deception. In a case arising in Georgia,⁴³ majority shareholders of Corporation A formed a new company, Corporation B, and exchanged their stock in A for stock in B. They did not permit a

⁴⁰ *Nanito v. Teksee Hybrid Co.*, 341 F. Supp. 234 (D. Neb. 1972) (the "purposes and spirit" of the Securities Exchange Act compel that in mergers "shareholders of both the disappearing and the surviving corporations [be given] the same remedies . . ." *Id.* at 238.)

⁴¹ *Vine v. Beneficial Fin. Co.*, 374 F.2d 627, 635-36 (2d Cir. 1967), cert. denied, 389 U.S. 970 (1967). For other cases applying the "forced seller" rationale of the *Vine* case, see *Coffee v. Permian Corp.*, 434 F.2d 383 (5th Cir. 1970) (shareholder's shares were converted into a claim for cash by an allegedly fraudulent corporate liquidation); *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970) (corporation holding shares in second corporation faced the threat of antitrust action if second corporation's merger with a third company was accomplished); *Bryan v. Brock & Blevins Co.*, 343 F. Supp. 1062 (N.D. Ga. 1972), aff'd, 490 F.2d 563 (5th Cir.), cert. denied, 419 U.S. 844 (1974). "Vine's informing principle, carried forward by *Crane*, is that a shareholder should be treated as a seller when the nature of his investment has been fundamentally changed from an interest in a going enterprise into a right solely to a payment of money for his shares." *Dudley v. Southeastern Factor & Fin. Corp.*, 446 F.2d 303, 307 (5th Cir.), cert. denied, 404 U.S. 858 (1971). But see *Sargent v. Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974) (dilution of shareholders' equity in corporation by a refinancing program providing for debentures to be converted into unissued common stock did not give existing shareholders standing as "forced sellers" to maintain action under Rule 10b-5).

For a discussion of the standing of "forced," "aborted," or "frustrated" sellers or "would-be" sellers to maintain an action under Rule 10b-5, see R. Jennings & H. Marsh, *supra* note 17, at 1182-83.

⁴² 374 F.2d at 634.

⁴³ *Bryan v. Brock & Blevins Co.*, 343 F. Supp. 1062 (N.D. Ga. 1972), aff'd, 490 F.2d 563 (5th Cir.), cert. denied, 419 U.S. 844 (1974). Cf. *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969). See generally Comment, 14 B.C. Ind. & Com. L. Rev. 1252 (1973).

minority shareholder of A, a former officer of that corporation, to purchase an interest in the new company, allegedly because of a policy restricting ownership to persons in the "active employment" of the company. Without disclosing plans they had for the expansion of the enterprise, majority shareholders adopted a plan to merge the two corporations. Under the plan the minority shareholder was to be paid cash for his interest, as was permitted by the Georgia merger statute. The federal district court found a violation of Rule 10b-5 and enjoined the merger.⁴⁴ The court concluded that the majority shareholders' withholding information from the minority shareholder about expansion plans was a violation of the Rule, stating:

The creative birth of [Corporation B] with its alleviating restrictions, was a device, scheme, or artifice to defraud [the minority shareholder] of his stock. The Court has found that the sole purpose and intent of the organization of [Corporation B] and the proposed merger was the elimination of the plaintiff. The proposed merger itself was a course of business which would operate as a fraud or deceit upon [the minority shareholder], in connection with the sale of his stock.⁴⁵

The Court of Appeals for the Fifth Circuit affirmed,⁴⁶ without passing on the district court's findings of deception and without deciding the "close question" of whether a plan can fall within Rule 10b-5 when it has "nothing to do with enabling the dissenting stockholder to consider or decide or make any commitment with respect to the sale of stock."⁴⁷ That court concluded that it could bypass those issues because the plaintiff's allegations of violations of federal securities laws presented serious and material questions; the district court under its pendent jurisdiction could therefore adjudicate any equitable cause of action that would lie under the same proof and the same findings; and, the Georgia merger statute does not permit a merger unless it comports "with equity in good conscience."⁴⁸ Thus, the court held that a plan, without a business purpose and designed solely to squeeze out a minority shareholder, clearly violated plaintiff's rights under Georgia law.⁴⁹ In other words, the court of appeals approved the district court's decision, but on the basis of general equity and state law.

⁴⁴ 343 F. Supp. at 1070.

⁴⁵ *Id.*

⁴⁶ 490 F.2d at 571.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

D. Other Squeeze-Out Techniques

Other types of oppressive conduct which may give rise to an action under Rule 10b-5 include the following: a corporation's issuance or sale of stock or other securities for inadequate consideration;⁵⁰ a corporation's purchase of stock or other securities for an excessive price;⁵¹ a corporation's purchase of stock for an improper purpose, *e.g.*, to avoid a shift of control or to "bail out" majority shareholders when the corporation is in shaky financial condition;⁵² misconduct by directors, officers, or controlling shareholders in connection with the corporation's issuance of stock options;⁵³ a corporation's payment of a property dividend in securities of a subsidiary, where some of the directors withheld information from other directors about the desirability of such a dividend;⁵⁴ a corporation's sale of its assets for stock in another company if information material to the transaction is withheld from minority shareholders, *e.g.*, information that the corporation's board of directors which recommended the sale was composed solely of directors and officers of the buyer;⁵⁵ a partially owned subsidiary's loan on unfair terms to the parent company in return for the parent's demand note;⁵⁶ a fraudulent dissolution of a corporation that converts a minority holder's shares into a claim for cash;⁵⁷ and perhaps, under some circumstances, a controlling shareholder's sale of his interest in a company at a premium.⁵⁸ Whenever a transaction falling within the

⁵⁰ *Bailes v. Colonial Press, Inc.*, 444 F.2d 1241 (5th Cir. 1971); *Rekant v. Desser*, 425 F.2d 872 (5th Cir. 1970); *Pappas v. Moss*, 393 F.2d 865 (3d Cir. 1968) *Annot.*, 3 A.L.R. Fed. 280 (1970); *Ruckle v. Roto Am. Corp.*, 339 F.2d 24 (2d Cir. 1964); *Hooper v. Mountain States Sec. Corp.*, 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961).

⁵¹ *Shell v. Hensley*, 430 F.2d 819 (5th Cir. 1970) (allegation that corporation purchased securities at inflated price); *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970) (allegation that corporation would be caused to purchase securities under disadvantageous terms).

⁵² See N. Lattin, R. Jennings, & R. Buxbaum, *Corporations: Cases and Materials* 1395 (4th ed. 1968).

⁵³ See Jacobs, *supra* note 16, at 80-86.

⁵⁴ *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974) (a "sale" by the dividend-declaring corporation even though its shareholders were not required to give any consideration in return for the dividend). Cf. *SEC v. Datronics Eng'rs*, 490 F.2d 250 (4th Cir. 1973), *cert. denied*, 417 U.S. 927 (1974) (corporation which spun off newly acquired unregistered securities in other companies to its shareholders violated Rule 10b-5 because of untrue statements made to the shareholders in connection with the spin-offs).

⁵⁵ *Swanson v. American Consumer Indus.*, 415 F.2d 1326 (7th Cir. 1969) (suit does not fail even though the sale would have been approved in any event by the seller's shareholders, since the purchaser controlled 87 percent of the seller's stock). See also *Kohn v. American Metal Climax, Inc.*, 322 F. Supp. 1331 (E.D. Pa. 1970).

⁵⁶ *Zeller v. Bogue Elec. Mfg. Corp.*, 476 F.2d 795 (2d Cir. 1973).

⁵⁷ *Coffee v. Permian Corp.*, 474 F.2d 1040 (5th Cir.), *cert. denied*, 412 U.S. 920 (1973) (district court, with court of appeals affirming, granted actual and punitive damages to plaintiff: a minority shareholder's right to relief under Rule 10b-5 is not defeated because the fraudulent scheme failed and the defrauding majority shareholder did not reap a profit. 474 F.2d at 1043).

⁵⁸ See *Ferraioli v. Cantor*, 281 F. Supp. 354 (S.D.N.Y. 1967). But see *Haberman v.*

ambit of Rule 10b-5 harms the corporation, as many of the transactions listed above do, a shareholder in the corporation can bring a derivative action under Rule 10b-5 on its behalf.

Often the deception of which a minority shareholder complains relates to misstatements in proxy solicitation material sent to shareholders or the failure in proxy solicitation material to disclose relevant information. That the defective proxy material used in accomplishing a fraudulent scheme provides a cause of action based on proxy regulation violations does not bar a shareholder's resort to section 10(b) and Rule 10b-5.⁵⁹ Indeed, an aggrieved shareholder often bases his suit on violations of both federal proxy regulations and Rule 10b-5.⁶⁰

E. *Prospects for the Continued Expansion of Rule 10b-5*

The various kinds of oppressive conduct mentioned herein as falling within the ambit of Rule 10b-5 are illustrative only. Courts can be expected to extend the application of the Rule in the future to cover new schemes by corporate directors and controlling shareholders to oppress or squeeze out minority shareholders. The United States Supreme Court has quoted with approval the following language from an opinion of the Court of Appeals for the Second Circuit:

"[We do not] think it sound to dismiss a complaint merely because the alleged scheme does not involve the type of fraud that is 'usually associated with the sale or purchase of securities.' We believe that § 10(b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws."⁶¹

Murchison, 468 F.2d 1305 (2d Cir. 1972); *Christophides v. Porco*, 289 F. Supp. 403 (S.D.N.Y. 1968). See generally, R. Jennings & H. Marsh, *Securities Regulation: Cases and Materials* 1227-29 (3d ed. 1972); Note, 15 B.C. Ind. & Com. L. Rev. 369 (1973); Note, 10 B.C. Ind. & Com. L. Rev. 743 (1969). For various kinds of corporate mismanagement which may give rise to a Rule 10b-5 cause of action, see generally Jacobs, *supra* note 16, at 75-104. See also note 16 *supra*.

⁵⁹ *Swanson v. American Consumer Indus.*, 415 F.2d 1326, 1330 (7th Cir. 1969).

⁶⁰ See, e.g., *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974) (violations of the tender offer provisions of the Williams Act); *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 543 (2d Cir. 1967); see also *Williams v. Pennsylvania Co.*, 367 F. Supp. 1158 (E.D. Pa. 1973) (violations of the antitrust provisions of the Sherman and Clayton Acts).

⁶¹ *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 11 n.7 (1971), quoting *A. T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967). See also *White v. Abrams*, 495 F.2d 724 (9th Cir. 1974).

And along the same line, the United States Court of Appeals for the Fifth Circuit has commented that section 10(b) and Rule 10b-5 "are not intended as a specification of particular acts or practices that constitute 'manipulative or deceptive devices or contrivances,' but are instead designed to encompass the infinite variety of devices that are alien to the 'climate of fair dealing'"⁶² Other courts talk in terms of "loosening the strictures" on the applicability of section 10(b) and Rule 10b-5.⁶³

In the relatively few cases in which the United States Supreme Court has considered section 10(b) and Rule 10b-5, it has definitely taken an expansionist approach to the interpretation of those provisions. It has indicated, for example, that whenever a person suffers an injury as a result of a fraudulent or deceptive practice "touching" a sale of securities, the practice meets the "in connection with the purchase or sale of a security" requirement and falls within the scope of section 10(b) and Rule 10b-5.⁶⁴ This holding puts to rest an argument advanced in some of the lower federal courts that a securities transaction must be central to the fraud in order for those provisions to apply.⁶⁵ Under the Supreme Court's view a tenuous connection between the fraud and a securities transaction suffices. The Supreme Court has also held that where a purchaser of securities withholds from the seller information affecting the value of the securities, the seller in some circumstances, at least (e.g., face-to-face dealings), is not required to show reliance on the non-disclosure in order to recover under Rule 10b-5: "All that is necessary is that the facts withheld be material in the sense that a reason-

⁶² *Herpich v. Wallace*, 430 F.2d 792, 802 (5th Cir. 1970), quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 201 (1963).

⁶³ *Lewis v. Marine Midland Grace Trust Co.*, [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,206, at 94,881 (S.D.N.Y. 1973).

⁶⁴ See, e.g., *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971). See also *Voege v. American Sumatra Tobacco Corp.*, 241 F. Supp. 369 (D. Del. 1965) (holding that corporation impliedly represented to plaintiff when she purchased her shares on the market in 1945 that if it ever entered into a merger it would do so only on terms that were fair to her and that therefore plaintiff's allegation that a 1960 merger was unfair stated a Rule 10b-5 cause of action). In commenting on the *Voege* case, R. Jennings & H. Marsh, *Securities Regulation: Cases and Materials* (2d ed. 1972), state: "One would have to go back at least several hundred years to find such a palpable creation of a fiction by a court to seize jurisdiction not otherwise conferred upon it." *Id.* at 1230.

⁶⁵ See *Cox*, *supra* note 16, at 680. See also *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 595 (5th Cir. 1974); *Lewis v. Marine Midland Grace Trust Co.*, [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,206, at 94,881 (S.D.N.Y. 1973) (concluding that, with its "touching" language the Supreme Court "intentionally avoided the language previously used by lower courts to the effect that a securities transaction cannot be merely 'incidental' to a fraudulent scheme or objective."). In *Drachman v. Harvey*, 453 F.2d 722 (2d Cir. 1971) (reversing on rehearing en banc an earlier decision on authority of the Supreme Court's decision in the *Bankers Life* case, 404 U.S. 6 (1971)), the Court of Appeals for the Second Circuit held that Rule 10b-5 liability arises only when fraud is "intrinsic to the securities transaction itself." 453 F.2d at 732.

able investor might have considered them important in the making of [his investment] decision,"⁶⁶ the "obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact."⁶⁷

Despite considerable litigation and the courts' expansionist tendencies, doubt still exists as to the standard to be applied in determining what corporate mismanagement falls within the ambit of section 10(b) and Rule 10b-5. In the past, most of the Rule 10b-5 cases had involved "deception," *i.e.*, a fraudulent misrepresentation or a failure to disclose information that might affect the investment decision of a "seller" or "buyer" of securities. However, in internal mismanagement cases, where the corporation itself is usually the immediately injured party and the harm to a minority shareholder is derivative, as where controlling shareholder-directors cause the corporation to issue shares to themselves at an inadequate price, the element of "deception" in a 10b-5 action plays a different and perhaps lesser role. How can a corporation be "deceived" by those who make its decisions? One line of cases suggests that relief will be available to the corporation in a derivative suit under Rule 10b-5 whenever the wrongdoers withhold material facts from *some* members of the board of directors, and if all members of the board are involved in the wrongful transaction, whenever the wrongdoers fail to disclose material facts to some of the shareholders.⁶⁸ Another line of decisions has developed a so-called "controlling influence" standard, which does not require a showing of deception at all in 10b-5 actions based on management-induced transactions: all plaintiffs must show is that: (1) the defendants, in bringing about a transaction, exerted "controlling influence" over the corporation; and (2) the transaction was unfair to the corporation.⁶⁹ This concept of liability

⁶⁶ *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972).

⁶⁷ *Id.* at 154. For other authorities discussing causation in Rule 10b-5 cases, see *Swanson v. American Consumer Indus.*, 415 F.2d 1326, 1331-32 (7th Cir. 1969); *Globus, Inc. v. Jaroff*, 271 F. Supp. 378, 380-81 (S.D.N.Y. 1967); *Eagle v. Horvath*, 241 F. Supp. 341, 344 (S.D.N.Y. 1965); *Comment*, 114 Pa. L. Rev. 578, 582-84 (1966). But see *Hoover v. Allen*, 241 F. Supp. 213, 231-32 (S.D.N.Y. 1965); *Barnett v. Anaconda Co.*, 238 F. Supp. 766, 770-74 (S.D.N.Y. 1965).

⁶⁸ *Pappas v. Moss*, 393 F.2d 865 (3d Cir. 1968), *Annot.*, 3 A.L.R. Fed. 280 (1970) (deception of independent shareholders constitutes deception of the corporation); *Ruckle v. Roto Am. Corp.*, 339 F.2d 24 (2d Cir. 1964) (failure of a majority of the board of directors to disclose to the remaining directors all the material facts about a proposed issuance of stock can constitute fraud on the corporation actionable under the Rule). Cf. *O'Neill v. Maytag*, 339 F.2d 764, 767-69 (2d Cir. 1974) (where entire board was aware of all material information relative to an exchange of stock, the directors' action merely constituted breach of fiduciary duty, which as such was not actionable under the Rule). See also *Dasho v. Susquehanna Corp.*, 461 F.2d 11 (7th Cir.), cert. denied, 408 U.S. 925 (1972) (a merger in which directors acting for the controlling shareholders undervalued the securities the corporation received for its common stock and so issued more shares than appropriate in the merger); *Cox*, *supra* note 16.

⁶⁹ *Shell v. Hensley*, 430 F.2d 819 (5th Cir. 1970); *Rekant v. Desser*, 425 F.2d 872,

under Rule 10b-5, which has been denominated "new fraud" by some commentators,⁷⁰ of course greatly increases the reach of the Rule in corporate mismanagement cases. However, expansion has not proceeded without some backtracking, as the United States Court of Appeals for the Second Circuit, in one fairly recent decision, has given new vigor to the "deception" requirement for Rule 10b-5 applicability.⁷¹

IV. ADVANTAGES OF SEEKING RELIEF UNDER RULE 10b-5

The federal courts have exclusive jurisdiction over violations of Rule 10b-5.⁷² A proceeding under Rule 10b-5 in a federal court has a number of advantages over an action in a state court based on state law to redress some forms of shareholder oppression. In the first place, an action under Rule 10b-5 may furnish a remedy to an oppressed shareholder for the redress of an injury for which relief might not be available under state law. In transactions to which Rule 10b-5 applies, it seemingly imposes at least as strict a fiduciary duty on directors, officers and shareholders as that imposed by the laws of most states.⁷³ Further, in a state in which appraisal and

879-82 (5th Cir. 1970); *Schoenbaum v. Firstbrook*, 405 F.2d 215, 219-20 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969). See generally Bloomenthal, *From Birnbaum to Schoenbaum: The Exchange Act and Self-Aggrandizement*, 15 N.Y.L.F. 332 (1969); Note, *The Controlling Influence Standard in Rule 10b-5 Corporate Mismanagement Cases*, 86 Harv. L. Rev. 1007 (1973).

⁷⁰ Jacobs, *supra* note 16, at 57-61; Comment, 55 Va. L. Rev. 1103 (1969).

⁷¹ *Popkin v. Bishop*, 464 F.2d 714 (2d Cir. 1972), holds that Rule 10b-5 does not apply to an unfair merger if there was no deception in obtaining shareholder approval of it. *Id.* at 719-20. (Query, whether the holding of the case covers a self-dealing or other unfair transaction where there is full disclosure but shareholder approval is not sought). In *Popkin*, plaintiff, seeking to enjoin a merger on the ground that the exchange ratio proposed in the merger plan was unfair, admitted that "full and fair" disclosure had been made in the proxy statement sent to shareholders asking for proxies to vote in favor of the merger. The court held that Rule 10b-5 did not provide a basis for relief, pointing out that minority shareholders could sue under the state law to enjoin the merger if it was, in fact, unfair. The court commented that "[s]ection 10(b) . . . and Rule 10b-5 are designed principally to impose a duty to disclose and inform rather than to become enmeshed in passing judgments on information elicited." *Id.* at 719-20. The *Popkin* decision is severely criticized in Note, *The Controlling Influence Standard in Rule 10b-5 Corporate Mismanagement Cases*, 86 Harv. L. Rev. 1007, 1040-46 (1973).

⁷² Securities Exchange Act of 1934, § 27; 15 U.S.C. § 78aa (1970).

⁷³ Furthermore, in the leading case of *Strong v. Repide*, 213 U.S. 419 . . . (1909), the Supreme Court found common law fraud by an insider in the purchase of stock from a minority shareholder, even though "perfect silence was kept" by the defendant. Surely we would suppose that Rule 10b-5 is as stringent in this respect as the federal common law rule which preceded it.

List v. Fashion Park, Inc., 340 F.2d 457, 461-62 (2d Cir.), cert. denied, 382 U.S. 811 (1965). See also *Janigan v. Taylor*, 344 F.2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965) (if a director or officer violates Rule 10b-5 in purchasing stock in his corporation, the seller can recover profits the director or officer realized because of the stock's appreciation in value, irrespective of whether the appreciation was foreseeable at the time of the purchase. "It is more appropriate to give the defrauded party the benefit of windfalls than to let the fraudu-

purchase of a dissenter's shares under a dissenter's rights statute is the only remedy available to a shareholder aggrieved by a merger of other fundamental corporate change,⁷⁴ a dissenting shareholder who brings his suit in federal court under Rule 10b-5 is not limited to the appraisal-and-purchase remedy because federal law governs what relief is available to redress violations of federal securities laws.⁷⁵

A proceeding under Rule 10b-5 may also have venue and procedural advantages over a proceeding in a state court. A plaintiff asserting a right under the Rule may choose as a forum the district in which "the defendant is found or is an inhabitant or transacts business" or the district where "any act or transaction" violative of the Rule took place.⁷⁶ Further, under the so-called "co-conspirator" theory of venue, whenever the action being brought is a multi-defendant securities proceeding in which a common scheme of acts or transactions to violate the securities acts is alleged, and venue is established for any of the defendants in the forum district, venue in that district is extended to cover the other defendants, even in the absence of any contact or substantial contact by any of the other defendants within that district.⁷⁷ Thus, a plaintiff bringing a Rule

lent party keep them." *Id.* at 786). Cf. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); *Kardon v. National Gypsum Co.*, 73 F. Supp. 798, 800-02 (E.D. Pa. 1947); *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961).

The federal courts have also expanded the class of persons liable under Rule 10b-5 well beyond the officer, director and majority shareholder categories typically subjected to liability for trading on inside information under the law in a minority of states. See *SEC v. Texas Gulf Sulphur Co.*, *supra*. In *Ross v. Licht*, 263 F. Supp. 395 (S.D.N.Y. 1967), three persons acted as conduits to pass stock from minority shareholders to the majority shareholder at a price of \$120 per share, although the conduits and the majority shareholder knew that the corporation planned a private offering of its shares at \$300 a share and public offering at \$600 a share. Two of the conduits were not shareholders and held no official position with the corporation; they were merely close friends of the controlling family group with knowledge of the impending private and public offerings. Nevertheless, the two conduits were held jointly and severally liable on three alternatives theories: (1) they were "insiders," *i.e.*, persons who "had such a relationship to the corporation that [they] had access to information which should be used 'only for a corporate purpose and not for the personal benefit of anyone,'" *id.* at 409; (2) they were "'tippees' persons given information by insiders in breach of trusts," *id.* at 410; and (3) they were "aiding and abetting a violation of Rule 10b-5," *id.* at 410, quoting from *In re Cady, Roberts*, *supra* at 912.

For comparisons of state law liability with liability under Rule 10b-5, compare Hill, *The Sale of Controlling Shares*, 70 Harv. L. Rev. 986 (1957), with Folk, *Corporation Law Developments—1969*, 56 Va. L. Rev. 755 (1970) and Leech, *Transactions in Corporate Control*, 104 U. Pa. L. Rev. 725 (1956).

⁷⁴ See F. O'Neal, "Squeeze-Outs" of Minority Shareholders: Expulsion or Oppression of Business Associates § 5.29 (to be published in 1975).

⁷⁵ *Miller v. Steinbach*, 268 F. Supp. 255, 268 (S.D.N.Y. 1967).

⁷⁶ Exchange Act § 27, 15 U.S.C. § 78aa (1970). The courts have been liberal in determining that a transaction violative of the Rule occurred in the forum district. See Lowenfels, *Rule 10b-5 and the Stockholder's Derivative Action*, 8 Vand. L. Rev. 893, 899 (1965).

⁷⁷ *Wyndham Associates v. Bintliff*, 398 F.2d 614 (2d Cir.), cert. denied, 393 U.S. 977

10b-5 action may have considerable room for choice in selecting a forum. Further, a plaintiff in a Rule 10b-5 action enjoys the benefit of nation-wide service of process; process may be served on a defendant in any district in which he is an inhabitant or wherever he can be found.⁷⁸ Defendants upon whom service of process in a state proceeding would be impossible, difficult or expensive are easily reached in a Rule 10b-5 proceeding. In addition, the Federal Rules of Civil Procedure, especially those applicable to discovery procedures⁷⁹ and class actions,⁸⁰ are more liberal than are the rules of some state courts. Perhaps another advantage of an action under Rule 10b-5 is that it may be possible to reach a larger number of defendants in that kind of action because conspiracy theories and aiding and abetting theories are readily available for use.⁸¹ On occasion, a plaintiff may be able to obtain a more favorable application of the statute of limitations by proceeding under Rule 10b-5 rather than bringing a suit based on state law.⁸² Finally, state statutes requiring shareholders bringing derivative actions to post security for expenses, including attorneys' fees, are not applicable to actions brought under Rule 10b-5.⁸³

V. CONCLUSION

In its first forty years of existence, section 10(b) of the Securities Exchange Act of 1934, bolstered by Rule 10b-5, has proved to be of greater benefit to oppressed minority shareholders than its draftsman could reasonably have expected. Undoubtedly, the courts' application of section 10(b) and Rule 10b-5 to many corporate "dirty tricks" is largely due to the broad language of the provisions themselves. A contributing cause to expansive applica-

(1968); *SEC v. National Student Mktg. Corp.*, 360 F. Supp. 284 (D.D.C. 1973); *Zorn v. Anderson*, 263 F. Supp. 745 (S.D.N.Y. 1966).

⁷⁸ For cases in which defendants have been served outside the district in which the suit was brought, see *Clapp v. Stearns & Co.*, 299 F. Supp. 305 (S.D.N.Y. 1964); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946).

⁷⁹ Fed. R. Civ. P. 26-37.

⁸⁰ Fed. R. Civ. P. 23.

⁸¹ See O'Neal, *supra* n.69, at § 7.10.

⁸² See *Janigan v. Taylor*, 344 F.2d 781, 783-84 (1st Cir.), cert. denied, 382 U.S. 879 (1965) (even though the period of limitation for actions brought under Rule 10b-5 is determined by state law, federal law determines the date of an action's accrual; federal law establishes with more liberality than Massachusetts law that if fraud is involved, a cause of action does not arise until discovery of the fraud).

⁸³ See *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *McClure v. Borne Chem. Co.*, 292 F.2d 824 (3d Cir.), cert. denied, 368 U.S. 939 (1961). The state security-for-expense statute applies, however, to any pendent jurisdiction state cause of action. *Phelps v. Burnham*, 327 F.2d 812 (2d Cir. 1964). The amount of bond required might be diminished by the fact that the defense of the state claim would probably largely duplicate the defense of the federal claim.

tion of Rule 10b-5 has been the lamentable failure of state statutory and common law to protect adequately the reasonable expectations of minority shareholders.⁸⁴ Indeed, while Rule 10b-5 has become increasingly effective in protecting minority shareholders, some commentators have discovered a pronounced trend in state corporation law toward less shareholder protection.⁸⁵ However, regardless of the reasons behind the expansion of Rule 10b-5 as a remedy for squeeze-outs or oppression of minority shareholders, still further expansion in this area should be expected.

⁸⁴ F. O'Neal & J. Derwin, *Expulsion or Oppression of Business Associates: "Squeeze-Outs" in Small Enterprises*, ch. 8 (1961); O'Neal *supra* n.69, at ch. 9.

⁸⁵ See Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 *Yale L.J.* 663 (1974); Marsh, *Are Directors Trustees?*, 22 *Bus. Law.* 35 (1966).