discover the presence or absence of the degree of care that a particular fact situation may require. A consideration of the *White* factors will help the jury determine what a reasonable man in defendant's position would have done.

It is submitted that the traditional concept of negligence, developed by the common law in response to a need for flexibility in handling a range of fact situations, should be incorporated into the *White* standard to satisfy the need for specificity as to the theory of liability. The federal courts have found the concept of a reasonable man useful in defining the other principal element of a private action—materiality[72]—and there is no reason why this concept may not be applied in the context of the degree of culpability. This could be done by defining the general duty imposed upon a defendant by Rule 10b-5 as that of making a reasonable investigation, and by requiring the jury to consider the factors enumerated in *White* when determining whether a defendant's investigation in a particular case was reasonable.

In sum, the *White* factors could, with the addition of the requirement of a reasonable investigation, provide a suitable standard for imposing liability under a negligence theory. However, it is submitted that it is not permissible to allow the theory of liability in a private action under Rule 10b-5 to vary from case to case as it will under the *White* standard of liability. Not only is it contrary to the theory of our legal system to allow the jury to determine the law applicable to a given set of facts, but it is also unfair as a matter of practice to give those engaged in securities transactions no prospective guidelines for conforming their behavior to the requirements of the securities laws. A buyer or seller of securities, in order to know how thorough an investigation is required of him in a particular transaction, needs to know whether section 10(b) and Rule 10b-5 impose liability on an intent theory or on a negligence theory.

JEFFREY B. STORER

Corporations—Mismanagement—Equitable Principles Applicable to the Issue of Standing—*Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.* [1]—On October 13, 1964, petitioner Bangor Punta Corp. (Bangor Punta)[2] acquired 98.3% of the outstanding

[72] "A material fact is one to which a reasonable man would attach importance in determining his choice whether to make the sale or not." Ross v. Licht, 263 F. Supp. 395, 408 (S.D.N.Y. 1967).

[1] 417 U.S. 703 (1974).

[2] Bangor Punta, a Delaware corporation, is a diversified investment company. It effected this transaction, the subsequent sale of the assets of the Railroad, and the other transactions forming the basis of the complaint through its wholly-owned subsidiary, petitioner Bangor-Punta Operations, Inc., a New York corporation. Throughout the litigation, Bangor Punta

stock of respondent Bangor & Aroostook Railroad Co. (the Railroad),[3] by purchasing all of the assets of the Railroad's holding company, the Bangor & Aroostook Corporation (the holding company).[4] By virtue of this acquisition, Bangor Punta controlled and directed the operation of the Railroad until October 2, 1969 when it sold its entire stock interest in the Railroad to Amoskeag Company for $5,000,000.[5] At this time, Amoskeag assumed managerial responsibility for the Railroad. Subsequently, Amoskeag purchased additional Railroad stock, which increased its total ownership of the outstanding stock to over 99%.[6] Throughout the entire period when the holding company and Bangor Punta managed the Railroad, approximately 1% of the Railroad's outstanding stock was held by individual minority stockholders.[7]

In 1971, the Railroad instituted suit against Bangor Punta.[8] The complaint alleged thirteen counts of mismangement, misappropriation, and waste of the Railroad's corporate assets which related to four intercompany transactions allegedly resulting in injury to the Railroad.[9] In sum, the complaint alleged that from 1960 to 1967, the Railroad had been drained of its assets solely for the benefit of the holding company and its successor in interest, Bangor Punta;[10] and, further, that these transactions were in violation of

---

and its subsidiary have been coupled as defendants. Id. at 705. In the interest of clarity, reference will be made solely to Bangor Punta.

[3] Respondent, the Railroad, a Maine corporation, was joined by its wholly-owned subsidiary, Bangor Investment Company, as co-plaintiff. The subsidiary is also a Maine corporation. Id. at 706. Reference will be made solely to the Railroad.

[4] The Railroad established the holding company in 1960. Bangor & A.R.R. v. Bangor Punta Operations, Inc., 353 F. Supp. 724, 725 (D. Me. 1972).

[5] Amoskeag is a Delaware investment corporation controlled by one Frederic C. Dumaine, Jr. Id.

[6] 417 U.S. at 706.

[7] The minority shareholders consisted of 22 individuals, many of whom had acquired their interest in the Railroad even prior to the formation of the holding company. Brief for Respondents at 6, Bangor Punta Operations, Inc. v. Bangor & A.R.R., 417 U.S. 703 (1974) [hereinafter cited as Brief for Respondents].

[8] Bangor Punta's liability for acts allegedly taking place from 1960 to October 13, 1964, when its predecessor in interest, the holding company, had owned and managed the Railroad, was predicated on the 1964 purchase agreement between Bangor Punta and the holding company whereby Bangor Punta assumed all liabilities of the holding company. 417 U.S. at 706 n.1.

[9] Counts I-II specifically charged that the holding company and, subsequently, Bangor Punta had overcharged the Railroad for nominal legal, accounting, printing and other services. Counts III-VI charged that the holding company had improperly acquired the stock of the St. Croix Paper Company which was owned by the Railroad. Counts VII-X were based on the accusation that the holding company and Bangor Punta had improperly caused the Railroad to declare special dividends to its stockholders and, further, that they caused the Railroad's subsidiary, Bangor Investment Company, to borrow in order to pay regular dividends. Counts XI-XIII charged that the holding company had improperly caused the Railroad to excuse it and Bangor Punta from interest payments due on a loan made by the Railroad to itself. 353 F. Supp. at 726.

[10] The district court, the court of appeals and the Supreme Court each characterized the essence of the complaint differently. In stating or eliminating the public interest in summation of the case, the characterization by each court is indicative of the respective disposition of the

section 10 of the Clayton Act,[11] section 10(b) of the Securities Exchange Act of 1934[12] and Rule 10b-5,[13] promulgated thereunder by the Securities and Exchange Commission, section 104 of the Maine Public Utilities Act[14] and the common law of Maine.[15] Damages of $7,000,000 were sought for redress of the alleged injury sustained by the Railroad.[16]

The federal district court granted Bangor Punta's motion for summary judgment and dismissed the action.[17] The court held that, where the present controlling stockholder and thus the ultimate beneficiary of the corporate recovery would be barred from maintaining a derivative suit, the corporate plaintiff is barred from bringing the action where its claims were based upon typical stockholder claims seeking an accounting from former controlling stockholders.[18] Amoskeag, the court noted, would be barred from bringing suit by the equitable principle of the "tainted shares" doctrine which bars suit by a subsequent shareholder who acquired his shares from the alleged wrongdoer.[19] The wrongdoer would have been barred by his own misconduct from bringing suit.[20] In addition, Amoskeag would be prohibited from maintaining a derivative action because of the contemporaneous ownership qualification

---

case. See 417 U.S. at 707; Bangor & A.R.R. v. Bangor Punta Operations, Inc., 482 F.2d 865, 867 (1st Cir. 1973); 353 F. Supp. at 726.

[11] 15 U.S.C. § 20 (1970), which provides in pertinent part:

> No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce . . . to the amount of more than $50,000, in the aggregate, in any one year, with another corporation . . . when the said common carrier shall have upon its board of directors or as its president . . . any person who is at the same time a director [or] manager . . . of . . . such other corporation . . . unless . . . such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding . . . .

Counts IV and XII were based on § 10 of the Clayton Act. 353 F. Supp. at 726.

[12] 15 U.S.C. § 78j(b) (1970), which provides in pertinent part:

> It shall be unlawful for any person . . . (b) 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.

Counts VI, VIII, X and XIII were based on § 10(b) of the Securities Exchange Act of 1934. 353 F. Supp. at 726.

[13] 17 C.F.R. § 240.10b-5 (1974). Counts VI, VIII, X and XIII were based on Rule 10b-5. 353 F. Supp. at 726.

[14] Me. Rev. Stat. Ann. tit. 35, § 104 (1964), which prohibits specific transactions between railroads, as public utilities, and their stockholders without approval by the public utilities commission. Counts II and V were based on this Maine statute. 353 F. Supp. at 726.

[15] Counts I, III, VII, IX and XI were based on the common law of Maine. 353 F. Supp. at 726, Brief for Respondents, supra note 7, at 4.

[16] 417 U.S. at 706.

[17] 353 F. Supp. at 730.

[18] Id. at 728.

[19] Id. at 727.

[20] Note, Corporate Incapacity to Sue Where Stockholders Would Be Barred From Suing Derivatively—The Vicarious Incapacity Rule: A Public Interest Exception, 54 B.U.L. Rev. 355, 362-66 (1974).

imposed by Rule 23.1 of the Federal Rules of Civil Procedure.[21] The two individual bars that were found applicable to Amoskeag are premised, in part, on the idea that neither the holder of tainted shares, who stands in the shoes of the wrongdoer, nor the non-contemporaneous shareholder suffers injury from a wrong done to the corporation.[22] Therefore, any recovery that Amoskeag would recoup, not having suffered an injury, would be an inequitable windfall. Reasoning that Amoskeag, as controlling shareholder of the Railroad, would be the real beneficiary of any recovery by the corporate plaintiff, the trial court concluded that the corporate claim failed for lack of equity on the part of the true beneficiary of the action.[23]

The United States Court of Appeals for the First Circuit reversed, holding that, regardless of a possible windfall to the principal stockholder, the corporate cause of action by the Railroad could be maintained because of the public interest in improving the financial condition of railroads which, as public utilities, have a unique status in the fabric of American economic and commercial life.[24] The court of appeals proposed that, on remand, the district court might issue an order limiting the use to which the Railroad could put any recovery that it might receive.[25] The court's ruling,

[21] 353 F. Supp. at 728 Fed. R. Civ. P. 23.1 provides in pertinent part:

> In a derivative action brought by one or more shareholders . . . to enforce a right of a corporation . . . , the corporation . . . having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder . . . at the time of the transaction of which he complains or that his share . . . thereafter devolved on him by operation of law . . . .

[22] Note, Corporation Incapacity to Sue Where Stockholders Would Be Barred From Suing Derivatively—The Vicarious Incapacity Rule: A Public Interest Exception, 54 B.U.L. Rev. 355, 364-65, 371 (1974).

[23] 353 F. Supp. at 728.

[24] Bangor & A.R.R. v. Bangor Punta Operations, Inc., 482 F.2d 865, 869 (1st Cir. 1973). Congressional recognition of the public importance of rail carriers is embodied in: Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1970) (federal regulation of rail services and rates); Bankruptcy Act § 77, 11 U.S.C. § 205 (1970) (financial reorganization and maintenance of services of bankrupt railroads); Regional Rail Reorganization Act, 45 U.S.C. §§ 701-93 (1974) (commitment of federal tax dollars to preservation of adequate rail service for the United States).

Maine statutes also regulate rail carriers as "public utilities," Me. Rev. Stat. Ann. tit. 35, §§ 15.13 et seq. (1964), and allow land to be taken for railroad purposes by eminent domain, Me. Rev. Stat. Ann. tit. 35, §§ 651 et seq. (1964).

[25] 482 F.2d at 871. Presumably, the public interest would best be served by requiring any funds recovered to be put to use by upgrading of ways and purchasing equipment so that service would be improved. Brief for Respondents, supra note 7, at 30. The court of appeals was confident that an appropriate order could prohibit the Railroad from using the funds in conflict with federal or state law. The doubt expressed by the court of appeals was whether a more restrictive decree to prevent Amoskeag from coffering the funds by declaring legal distributions to itself as controlling stockholder would be within the power of the district court. 482 F.2d at 871. See note 99 infra. Alternatively, the recovery could be plowed into improving railroad services, thereby freeing up other corporate funds to the advantage of Amoskeag. At the very least, the value of Amoskeag's investment would increase dramatically as a result of the sudden infusion of cash. 417 U.S. 715 n.11.

however, was not conditioned on the issuance of such an order.[26] The First Circuit concluded that the desirability of protecting the separate public interest and deterring future siphoning of railroad funds in violation of federal and state laws made any windfall recovery that might accrue to Amoskeag irrelevant.[27]

In *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.*,[28] the Supreme Court reversed the court of appeals in a closely-divided decision.[29] The fundamental issue confronting the Supreme Court was whether the asserted public interest in the Railroad would suffice to allow the corporate cause of action to survive the defendants' motion for summary judgment by preventing a determination that the controlling shareholder, Amoskeag, was the real party in interest, and that the Railroad lacked standing.[30] HELD: the public interest in railroads does not suffice to confer standing upon a railroad corporation to sue its former owners for corporate waste and mismanagement, and for violations of the federal antitrust and securities laws and state public utilities law, despite the corporate fiction, where the present controlling shareholder, and the real beneficiary of any corporate recovery would lack standing in equity under the principle that a stockholder may not complain of acts of corporate mismanagement if he acquires his shares from the alleged wrongdoers.[31] The Court stated that Amoskeag, the controlling stockholder would not be permitted to accomplish indirectly, by proceeding in the corporate name, what it could not accomplish directly in a derivative suit.[32] In the dissenting opinion, Justice Marshall vehemently contended that any windfall recovery that Amoskeag would receive was tolerable in light of the

---

[26] 482 F.2d at 871.

[27] Id. The court of appeals specifically left open the question of whether equitable defenses should prevent suits under the federal antitrust and securities laws, which were enacted to protect interests in addition to those of the corporate entity and its stockholders. 482 F.2d at 868.

[28] 417 U.S. 703 (1974).

[29] Justice Powell wrote the majority opinion on behalf of himself, Justices Blackmun, Rehnquist and Stewart and Chief Justice Burger. Justice Marshall wrote the dissent on behalf of himself and Justices Douglas, Brennan and White. Id. at 705, 719.

[30] The Supreme Court granted certiorari, 414 U.S. 1127 (1974), to consider the following questions:

> (1) May party, which has itself suffered no injury, maintain action for benefits of general public, notwithstanding principles enunciated in Sierra Club v. Morton, 405 U.S. 727, 40 U.S.L.W. 4397 (1972)? (2) Does fact that corporation is railroad suspend applicable rules with respect to standing so as to permit actions by general public for alleged violations of securities and antitrust laws and for corporate waste and mismanagement? (3) Should contemporaneous-share-ownership requirement embodied in Fed. R. Civ. P. 23 (1) be abandoned with respect to corporations whose business affects public welfare?

42 U.S.L.W. 3381 (U.S. Jan. 7, 1974).

[31] 417 U.S. at 715.

[32] Id. at 713.

probability that the public would benefit from any improvement in the financial condition of the Railroad.[33]

The justices reached different conclusions on three principle issues. First, the Court divided over the applicability of the "tainted shares doctrine"[34] to suits by corporations against former controlling shareholders in industries imbued with public interest.[35] Secondly, the dissenting justices contended that it is of greater importance to insure that a remedy is granted in order to further the public's interest in a railroad's financial health and its interest in the enforcement of federal laws than to prevent a windfall recovery,[36] while the majority reasoned that the unjust enrichment of the real beneficiary of the recovery precluded the action.[37] Finally, the justices disagreed over the factual issues. The majority concluded that Amoskeag had suffered no injury,[38] and assumed that the public would not benefit from any recovery by the Railroad against the defendants.[39] The minority reached opposite conclusions.[40] Having found the tainted shares doctrine applicable, the majority of the Court reasoned that the Railroad had suffered no injury and assumed that the public would not benefit from any recovery by the Railroad against the defendants.[41] Consequently, it reached the conclusion that the Railroad lacked standing.[42]

This note will begin with an examination of the propriety of applying the tainted shares doctrine to bar suit by a corporation asserting, and imbued with, a public interest and an analysis of the justifications for disregarding the corporate entity. Next, the nature of the public interest advanced by the Railroad and its legal significance will be examined. Finally, the potential impact of the Supreme Court's possible recognition of the public interest as a cognizable legal interest will be assessed.

The majority of the Court considered Amoskeag's position in equity to determine whether Amoskeag would be prohibited from maintaining the suit by application of the tainted shares doctrine first enunciated in *Home Fire Insurance Co. v. Barber.*[43] *Home*

---

[33] Id. at 723-25 (dissenting opinion).

[34] The tainted shares doctrine was first cogently espoused in Home Fire Ins. Co. v. Barber, 67 Neb. 644, 669-70, 93 N.W. 1024, 1033 (1903).

[35] See 417 U.S. at 710-12, 719-23.

[36] Id. at 732 (dissenting opinion).

[37] Id. at 711.

[38] Id.

[39] Id. at 715.

[40] Id. at 723 (dissenting opinion). In addition, the dissent took issue with the majority's presumption that Amoskeag would in fact recoup a windfall. Id.

[41] Id. at 711.

[42] Id. at 715-16.

[43] 67 Neb. 644, 93 N.W. 1024 (1903). The concomitant question of whether Rule 23.1 of the Federal Rules of Civil Procedure would apply to a suit brought by the Railroad in its own right was ignored by the Court, although it was briefed and argued. See Brief for the Respondents, supra note 7, at 27-29; Brief for the Petitioners at 19-20, Bangor Punta Operations, Inc. v. Bangor & A.R.R., 417 U.S. 703 (1974) [hereinafter cited as Brief for the

Fire, relied on by the majority[44] and distinguished by Justice Marshall,[45] was decided in 1903 by Commissioner Roscoe Pound of the Supreme Court of Nebraska. In *Home Fire,* maintenance of the corporate action was denied because the stockholders of record had purchased all of their shares from the alleged wrongdoers, in an arm's length transaction, after the alleged wrongs had occurred. In effect, corporate recovery would have amounted to a recoupment of the purchase price of the stock.[46] The majority in *Bangor Punta* reasoned that recovery by Amoskeag would be similarly inequitable: "Amoskeag seeks to recover for wrongs Bangor Punta did to itself as owner of the railroad."[47]

Home Fire can be distinguished from *Bangor Punta* on two grounds. First, the *Home Fire* court limited its holding to claims arising in equity, as opposed to those which, as in the instant case, arose in law.[48] As Pound said in *Home Fire:* "Where a corporation is proceeding at law . . . the corporation is regarded as a person separate and distinct from its stockholders, or any or all of them."[49]

Petitioners]. Rule 23.1 is a procedural response to the problems peculiar to a stockholder's derivative suit and is inappropriate in the context of a suit maintained by the corporate entity. 3B J. Moore, Federal Practice, ¶ 23.1.15 (1974).

Hawes v. Oakland, 104 U.S. 450 (1882) first enunciated the problem of abuse inherent in the derivative suit against which the contemporaneous ownership requirement has satisfactorily safeguarded. The two problems were: (1) obtaining diversity of jurisdiction through the collusive transfer of shares and (2) bringing strike suits to encourage large out of court settlements. Id. at 459. These purposes are not served by extending the Rule to the corporate entity, and Rule 23.1 should not be strained by applying it to a corporation's suit, even where the corporate veil has been pierced, unless the corporate cause of action is in fact extinguished because of complete identity between the noncontemporaneous owner and the corporation. See Capitol Wine & Spirit Corp. v. Pokrass, 277 App. Div. 184, 98 N.Y.S.2d 291 (App. Div. 1950), aff'd 302 N.Y. 734, 98 N.E.2d 704 (1951); Comment, 18 Buffalo L. Rev. 184 (1968); Comment, 3 Stan. L. Rev. 151 (1950); Note, 36 Cornell L. Q. 740 (1951); Recent Cases, 65 Harv. L. Rev. 345 (1951). The contemporaneous ownership rule conceivably rests in part on a policy of limiting relief to only those stockholders who have been harmed by a particular transaction and who therefore are deserving of aid through the judicial process. If so, that purpose is not advanced where a corporation is bringing the suit, and in doing so, is asserting that there are other interests at stake. See Note, Corporate Incapacity to Sue Where Stockholders Would Be Barred From Suing Derivatively—The Vicarious Incapacity Rule: A Public Interest Exception, 54 B.U.L. Rev. 355, 373 (1974); Recent Developments, 74 Colum. L. Rev. 528 (1974).

[44] 417 U.S. at 710-12. In Amen v. Black, 234 F.2d 12 (10th Cir. 1956), cited by the majority, 417 U.S. at 710, *Home Fire* is referred to for the proposition that "equity . . . will make sure that the beneficiaries of the corporate redress are equitably entitled to the fruits of its processes." 234 F.2d at 23. Accord, Matthews v. Headley Chocolate Co., 130 Md. 523, 100 A. 645 (1917). Unlike the present case, there was no allegation in *Matthews* that the corporate stock had in any way been impaired. *Matthews* is also distinguishable in that equitable relief was sought. Overfield v. Pennroad Corp., 48 F. Supp. 1008 (E.D. Pa. 1943), cited *Home Fire* for the broad contention that "if the shareholders have no standing in an equity proceeding, the corporation will not be permitted to recover." Id. at 1018.

[45] 417 U.S. at 720-21 (dissenting opinion).

[46] 67 Neb. at 655, 93 N.W. at 1028.

[47] 417 U.S. at 712.

[48] 67 Neb. at 669-70, 93 N.W. at 1033.

[49] Id.

Second, in *Home Fire,* where the sale of all of the stock was involved, the corporate cause of action was extinguished because of the complete identity of the corporation and the successor-purchaser of the wrongdoer.[50] The additional authority relied upon by the majority to justify applying the tainted shares doctrine[51] can also be distinguished from the instant case. These decisions permit the inference of a rule barring suit by a successor in interest who was actually or constructively knowledgeable about his predecessor's wrongs which would not necessarily preclude suit by an unknowledgeable successor of the wrongdoer.[52]

Yet, in spite of the factual distinctions among the earlier cases applying the tainted shares doctrine, the rationale underlying the application of the doctrine in those cases is the same: one who has not sustained injury should not be unjustly enriched where no other interests are to be served by the windfall recovery.[53] The majority was careful to point out that it was the "considerations supporting the *Home Fire* principle [that] are especially pertinent in the present case."[54] Justice Powell, for the majority, found three factors particularly troublesome: the recovery would constitute a windfall for Amoskeag; Amoskeag would, in effect, be recouping its purchase price although the transaction had been at arm's length; and Amoskeag would be permitted to reap a profit for wrongs done to others, thereby encouraging such speculation.[55] The minority suggested

---

[50] 417 U.S. at 722. In Central Ry. Signal Co. v. Longden, 194 F.2d 310 (7th Cir. 1952), *Home Fire* was cited for the proposition that "where all the stockholders of a corporation had purchased stock with full knowledge of wrongful acts on the part of the seller, they could not, themselves, by virtue of contract with the seller, enforce any claim by reason of such wrongfull act." 194 F.2d at 322.

Apparently, Dean Pound himself, later in his career, had cause to limit the *Home Fire* case to its facts. Overfield v. Pennroad Corp., 48 F. Supp. 1008, 1018 (E.D. Pa. 1943).

[51] 417 U.S. at 710, citing Bloodworth v. Bloodworth, 225 Ga. 379, 169 S.E.2d 150 (1969) (stockholder estopped by her own acquiescence in complained of wrongs); Babcock v. Farwell, 245 Ill. 14, 91 N.E. 683 (1910) (legatee could not maintain suit where decedent has signed general waiver); Bookman v. R.J. Reynolds Tobacco Co., 138 N.J. Eq. 312, 48 A.2d 646 (1946) (subsequent holder bound by notice of plan printed on face of certificate not physically transferred). See note 50 supra.

[52] Note, Corporate Incapacity to Sue Where Stockholders Would Be Barred From Suing Derivatively—The Vicarious Incapacity Rule: A Public Interest Exception, 54 B.U.L. Rev. 355, 366 (1974).

[53] See Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N.W. 1024 (1903). Prior to the court of appeals decision in *Bangor Punta,* the only recognized outside interest, other than that of minority stockholders, which would keep a corporate claim alive, even though its stockholders would be equitably estopped, was the interest of creditors. See Matthews v. Headley Chocolate Co., 130 Md. 523, 529, 100 A. 645, 648 (1917) (if, on remand, creditors were found to have an interest, the corporation would not be barred); Capitol Wine & Spirit Corp. v. Pokrass, 277 App. Div. 184, 185, 98 N.Y.S.2d 291, 292 (App. Div. 1950), aff'd 302 N.Y. 734, 98 N.E.2d 704 (1951) (no creditors showed interest in litigation and corporation barred as was sole stockholder). It is in this regard that the court of appeals in *Bangor Punta* broke new ground when it recognized the public interest as another "eligible interest." 482 F.2d at 867.

[54] 417 U.S. at 711.

[55] Id.

that, due to the nature of the wrongs done by the defendants, not even a sophisticated purchaser, exercising due diligence, could have discovered the wrongs without a full-scale Interstate Commerce Commission investigation.[56] Therefore, Amoskeag would be an unknowledgeable successor of the wrongdoer, deserving of protection, to whom the tainted shares rule should not apply.[57]

The majority also rejected the respondents' argument that where the action is brought by the corporation the corporate entity may not be disregarded in an action at law.[58] The Court relied upon the equitable principle that courts may disregard the corporate form where it is being used to defeat an overriding public policy.[59] Evidently, the avoidance of a windfall recovery by Amoskeag and the attendant factors of preventing both recoupment of purchase price and encouragement of speculation in litigation constituted the overriding public policy that dictated disregard of the corporate fiction. The dissenting justices noted that the application of this equitable principle to the facts of *Bangor Punta* perverted the objective of the principle.[60] The doctrine is generally used as a tool by the courts to frustrate those who attempt to evade the mandates of statutory requirements by asserting the protection of the corporate barrier.[61] In *Bangor Punta,* the Railroad argued that the corporate entity should not be disregarded in order to allow the corporation to advance the public's interest. Although it has been stated that the sacrosanctity of the corporate veil is particularly indefensible "when urged in the context of regulated industries,"[62] the majority does not satisfactorily explain why its implicit conclusion that avoidance of a windfall recovery by Amoskeag is equivalent to an overriding public policy.

The application of the tainted shares doctrine yielded a finding

---

[56] 417 U.S. at 723.

[57] Note, Corporate Incapacity to Sue Where Stockholders Would Be Barred From Suing Derivatively—The Vicarious Incapacity Rule: A Public Interest Exception, 65 B.U.L. Rev. 355, 366 (1974).

[58] 417 U.S. at 713. Whether the majority's disregard of the corporate entity is part and parcel of applying the *Home Fire* tainted shares doctrine or whether it represents a separate step of "piercing the corporate veil," is immaterial for purposes of this analysis.

[59] 417 U.S. at 713. See 1 W. Fletcher, Corporations § 41, at 166 (perm. ed. rev. repl. 1974).

[60] 417 U.S. at 719-20 (dissenting opinion).

[61] The doctrine of piercing the corporate veil is used as a sword to disallow an obstacle to the due protection of, and enforcement of, public or private rights. 1 W. Fletcher, Corporations § 41.2, at 179 (perm. ed. rev. repl. 1974).

In New Colonial Ice Co. v. Helvering, 292 U.S. 435, 442 (1934) (disallowance of two tax deductions by subsequent corporations with practically identical stockholders), recognition of the corporate entity presented an obstacle to the due protection of, or enforcement of, public or private rights. Accord Chicago, M. & St. P. Ry. v. Minneapolis Civic Ass'n., 247 U.S. 490 (1918) (subsidiary's legal title to railroad tracks resulted in unequal treatment for shippers); United States v. Lehigh Valley R.R., 220 U.S. 257 (1911) (subsidiary formed to potentially effect rates of transportation).

[62] Central & S. Motor Freight Tariff Ass'n. v. United States, 273 F. Supp. 823, 832 (D. Del. 1967).

that Amoskeag, which the Court concluded would be the real beneficiary of a recovery by the Railroad, lacked standing in equity and, consequently, resulted in the failure of the Railroad's action.[63] To buttress the conclusion that the Railroad's action should fail, the Court proceeded without regard for the "mere forms of action or [the] niceties of pleadings,"[64] to attribute Amoskeag's lack of injury to the corporation.[65] The Railroad, of course, alleged that it had suffered injury.[66] The district court, however, determined that there were no facts to support this contention.[67] The fact that the Railroad owed a debt of approximately $23 million, and, in 1970, net revenue was a loss of approximately $1.3 million,[68] and yet was able to declare dividends in June and October of 1973 of $1.00 per share of common stock[69] appears to have convinced the majority that the Railroad had not sustained any injury.[70] However, it is unclear that these figures evince any more than reversal of

---

[63] 417 U.S. at 712. In addition to applying the tainted shares doctrine to the federally-based allegations, the Court found that Maine law would require the same result regarding the state-based allegations. Id. at 714. The majority assumed that Maine would also bar the corporate action by application of that state's formulation of the tainted shares doctrine in reliance upon Forbes v. Wells Beach Casino, Inc., 307 A.2d 210 (Me. 1973). 417 U.S. at 714. In doing so, the Court ignored the fact that the issue before the Supreme Court of Maine in that case was whether a non-contemporaneous stockholder could maintain a derivative action to recover corporate property wrongfully withheld by an officer of the company. In holding that the derivative action could be maintained, the Maine Court referred to Hyams v. Old Dominion Co., 113 Me. 294, 93 A. 747 (1915): "The *Hyams* court made clear its acceptance of the equitable principles that the stockholder has no standing if either he or his vendor participated or acquiesced in the wrong." 307 A.2d at 223 n.10. However, the *Forbes* court stated that the holding of the *Hyams* court was that "when officers of a corporation have taken corporate property wrongfully and are holding it wrongfully, a stockholder is not barred from seeking to restore it to the corporation." 307 A.2d at 223. The *Forbes* and *Hyams* courts apparently drew the same legal claim—equitable claim distinction as is drawn in *Home Fire*. At best, the two Maine cases are equivocal as to whether Maine has fully adopted the *Home Fire* rule as applied in *Bangor Punta*.

[64] Amen v. Black, 234 F.2d 12, 24 (10th Cir. 1956).

[65] This is a point of contention between the members of the divided Court. See 417 U.S. at 716 n.12; 723. The dissent's point is that even though Amoskeag was dealing with Bangor Punta in an arm's length transaction, when no fraud was alleged, Amoskeag could not know of the wrongful transaction prior to the public disclosure, in July of 1971, of the ICC's Bureau of Accounts Report. Id. at 723 (dissenting opinion). That report made the following recommendation: "We recommend that all legal remedies be explored to require the holding company, which sold the carrier, to pay back to the carrier for assets with no compensation and charges made where no services were performed." Brief for Respondents at 42, Bangor Punta Operations, Inc. v. Bangor & A.R.R., 417 U.S. 703 (1974) [hereinafter cited as Brief for Respondents] quoting Bureau of Accounts, ICC Report to the Commission, Review of Diversified Holding Company Relationships and Transactions of Bangor Punta Corporations (1971).

[66] Brief for Respondents, supra note 65, at 8.

[67] 353 F. Supp. at 727 n.1. The majority stated that this contention was not renewed on appeal. 417 U.S. at 711 n.6.

[68] 417 U.S. at 726 (dissenting opinion).

[69] Reply Brief for Petitioners at 3-4 & App. A, Bangor Punta Operations, Inc. v. Bangor & A.R.R. 417 U.S. 703 (1974) [hereinafter cited as Reply Brief for Petitioners].

[70] See 417 U.S. at 715.

a bad situation by new management.[71] Since injury is the prerequisite of standing to sue, it is suggested that where the facts in the record are not wholly dispositive of the issue of corporate injury, dismissal on a summary judgment seems particularly inappropriate.[72]

As Justice Marshall noted in his dissenting opinion, the reasoning of the majority led to an incongruous result: the corporation was barred from maintaining an action which its minority stockholders could have instituted.[73] It is interesting to observe that both the presence of minority stockholders and the coordinate theoretical problems raised by their existence, were relegated to a footnote in the majority opinion.[74] The purpose of a stockholder's derivative action is to allow the shareholders to enforce a corporate right when the management of the corporation has refused to do so.[75] Although the corporation is nominally a defendant, it is the real party in interest, and it is bound by the result of the suit, and the proceeds of the action belong to it.[76] Because the cause of action advanced belongs to the corporation rather than to the stockholders individually, it follows that recovery is considered to be an asset of the corporation.

The allowance of full corporate recovery may be challenged by a defendant as resulting in the unjust enrichment of barred stockholders where the derivative suit is brought by non-barred stockholders.[77] The defendant may urge that, in order to avoid such unjust enrichment, recovery of damages should be limited to a percentage of the total damages that is equal to the percentage of the

---

[71] The 1973 dividends were the first declared since December of 1967. Reply Brief for Petitioners, supra note 69, at App. A, A-1.

[72] Cf. Fed. R. Civ. P. 56. A summary judgment is only proper when no issue of fact is in contention and where, under such facts, there is no legal basis upon which the plaintiff could successfully recover, or the defendants defend. M. Rosenberg, J. Weinstein & H. Smit, Elements of Civil Procedure 606-32 (1970). The identical point can be made with respect to the question of whether the public would actually receive a benefit through the Railroad's recovery.

[73] 417 U.S. at 722 (dissenting opinion). A stockholder's derivative suit to litigate the corporate cause of action has been recognized under § 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), and Rule 10-b(5), 17 C.F.R. § 240.10b-5 (1974), promulgated thereunder. Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir. 1967); Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir. 1967); Howard v. Furst, 238 F.2d 790 (2d Cir. 1956), cert. denied, 353 U.S. 937 (1957); Ross v. Longchamps, Inc., 336 F. Supp. 434 (E.D. Mo. 1971). A derivative suit to litigate the corporate cause of action is also recognized under the Clayton Act. Rogers v. American Can Co., 305 F.2d 297 (3d Cir. 1962) (15 U.S.C. §§ 15, 26 (1970)); Gottesman v. General Motors Corp., 268 F.2d 194 (2d Cir. 1959) (15 U.S.C. §§ 12 (1970)); Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731 (2d Cir. 1953) (15 U.S.C. §§ 15, 16 (1970)).

[74] 417 U.S. at 718 n.15.

[75] Meyer v. Fleming, 327 U.S. 161, 167 (1946); Penn Central Securities Litigation, 335 F. Supp. 1026, 1039 (E.D. Pa. 1971); 13 W. Fletcher, Corporations § 5911 at 285 (perm. ed. rev. repl. 1970).

[76] Ross v. Bernard, 396 U.S. 531, 538 (1970).

[77] Perlman v. Feldmann, 219 F.2d 173, 178 (2d Cir.), cert. denied, 349 U.S. 952 (1955).

outstanding stock held by the non-barred stockholders.[78] There are a number of cases where pro-rata recovery has been awarded because the circumstances dictate that to do otherwise would be inequitable.[79] The courts of appeals, however, have been wary about allowing such recovery.[80] The Supreme Court has mandated pro-rata recovery only where the essence of the claim was injury to the stockholders as individuals, rather than to the corporation.[81] The concept of pro-rata recovery has been criticized,[82] and where interests outside of the corporate family are affected, they are weighed in the balance to determine the appropriateness of allowing full corporate recovery even though some insiders might unjustly benefit.[83] In particular, pro-rata distribution of recovery has been denied and full recovery allowed where creditors had a legitimate interest at stake.[84] The majority was careful to leave the question of pro-rata recovery and its appropriateness open in *Bangor Punta,*[85] but there persists the anomolous result of the majority's disallowance of the corporate cause of action when minority stockholders' rights are viable. This anomoly undercuts the rationale for applying the tainted shares doctrine to the Railroad because Amoskeag would not be the sole beneficiary of any corporate recovery even if the public interest goes unrecognized.

---

[78] Grenier, Prorata Recovery by Shareholders on Corporate Causes of Action As A Means of Achieving Corporation Justice, 19 Wash. & Lee L. Rev. 165, 169 (1962); The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 231 (1974); Note, Shareholders' Derivative and Direct Actions—Individual Recovery, 35 N.C.L. Rev. 279, 282 (1957).

[79] 13 W. Fletcher, Corporations § 6028, at 535 (perm. ed. rev. repl. 1970). The three fact situations predominately involved are: (1) where the corporate action is against insiders who have appropriated funds in order to prevent funds disgorged from the wrongdoers from reverting to their control, Backus v. Finkelstein, 23 F.2d 357 (D. Minn. 1927); Eaton v. Robinson, 19 R.I. 148, 32 A. 339 (1895); (2) where "guilty" and "innocent" stockholders would benefit by corporate recovery, Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), cert. denied, 349 U.S. 952 (1955); Joyce v. Congdon, 114 Wash. 239, 195 P. 29 (1921); Chaunis v. Laing, 125 W. Va. 275, 23 S.E.2d 628 (1942); (3) where the corporation is no longer a viable concern, Sale v. Ambler, 335 Pa. 165, 6 A.2d 519 (1939); Bailey v. Jacobs, 325 Pa. 187, 189 A. 320 (1937). Note, 69 Harv. L. Rev. 1314 (1956). See also Matthews v. Headley Chocolate Co., 130 Md. 523, 100 A. 645 (1917).

[80] Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), cert. denied, 380 U.S. 956 (1965) (error to grant pro-rata recovery where corporation still extant); Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), cert. denied, 349 U.S. 952 (1955) (pro-rata recovery approved under the "tainted shares" doctrine).

[81] Southern Pac. Co. v. Bogert, 250 U.S. 483 (1919).

[82] E.g., Note, 69 Harv. L. Rev. 1314 (1956). The most objectionable aspect of pro-rata recovery is that, in effect, it "forces a dividend to be declared and thereby deprives the corporation's management the opportunity to exercise its business judgment as to the proper disposition of the fund for corporate purposes." Id. at 1319.

[83] See note 53 supra.

[84] E.g., Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), cert. denied, 380 U.S. 956 (1965), where the court stated: "Moreover, its creditors, if any, have rights against [the judgment] that are superior to those of its stockholders." 333 F.2d at 275. It should be remembered that the Railroad was in debt for approximately $23 million. 417 U.S. at 713.

[85] 417 U.S. at 718 n.15.

The startling aspect of the majority opinion is that the inclusion of the public interest in railroads within the scope of legally cognizable interests is seemingly accomplished without making the painstaking case for its acceptance that the court of appeals and the dissenters felt compelled to make.[86] The Court may not be acknowledging the public interest and may be considering it solely for the sake of argument. It appears, however, that it is only the majority's skepticism that the public would ever glean the benefit of enhanced carrier services as a result of the corporate recovery that ensured dismissal of the Railroad's action.[87] The Court reasoned that Amoskeag would not be legally compelled to upgrade the equipment or services of the Railroad or to effectuate a rate reduction to consumers of railroad services and that an equitable decree could not require such use of an award.[88] As controlling stockholder, Amoskeag would be entirely within its legal rights to cause the board of directors of the Railroad to distribute recovery in the form of dividends.[89]

While the precise nature of the public interest in the operation of railroads is not specifically discussed in either opinion of the divided Court, the minority cited authority to the effect that the public's interest in a common carrier railroad is merely the interest in adequate services provided at reasonable rates.[90] The wide scope of federal regulatory provisions with respect to railroads[91] insures

[86] Id. 727-28 (dissenting opinion); 482 F.2d at 868-71.

[87] See 417 U.S. at 715. The majority's skepticism that the public would benefit from a Railroad recovery could have gone even deeper. The basic assumption that a sudden infusion of capital will save the ailing railroads of this nation has not gone unchallenged. Kneafsey & Edelman, A Market-Oriented Solution to the Northeast Railroad Dilemma, 41 ICC Prac. J. 174, 186 (1974). One of the most devastating factors in the failure of any railroad is the removal of shippers from its region. Brewer, The Eastern Railroad Situation: Danger of Nationalization (The Opening Wedge?), 40 ICC Prac. J. 581, 586 (1973). In the Northeast, because a substantial amount of industry has, over several decades, relocated in the South, railroads which historically serviced those departed industries have had to struggle for survival. The Bangor & Aroostook Railroad has not been adversely affected by such factors and continues to service its potato crop and forest product shippers who have remained in Maine. Id.

[88] 417 U.S. at 715.

[89] The Court ignores the facts that the Railroad and Amoskeag had agreed to enter into a stipulation to ensure that any recovery would be reinvested in the Railroad, for upgrading the right-of-way and for the acquisition of new equipment. 417 U.S. at 725 (dissenting opinion). However, even use of the recovery in such an approved manner would, in the majority's view, constitute a windfall to Amoskeag in that the value of its investment would increase dramatically and other corporate funds would be freed for disposal by Amoskeag at its own option. 417 U.S. at 715 n.11.

[90] 417 U.S. at 727-28 (dissenting opinion), citing New Haven Inclusion Cases, 399 U.S. 392 (1970); Texas & P. Ry. v. Gulf, C., & S. Fe Ry., 270 U.S. 266 (1926); United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290 (1897); Regional Rail Reorganization Act, 45 U.S.C. §§ 701-93 (1974) (federal government committed tax dollars on a long-term basis to preserve adequate railroad service for the nation. The constitutionality of this Act has been upheld in Blanchette v. Connecticut Gen. Ins. Corps., — U.S. —, 95 S. Ct. 335 (1974) (Regional Rail Reorganization Act Cases).

[91] Part I, Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1970) (carrier must obtain ICC

that these interests of the public will be protected.[92] The Court may have been hesitant to interfere in an area so predominated by the Congress, and condone the fashioning of an equitable decree thereby undermining the regulatory scheme enacted by the legislative branch.[93]

As viewed by the miniority of the Court, the public interest involved in the *Bangor Punta* case is dual; first, the public has an interest in the financial health of railroads, and second, it has an interest in seeing that the federal securities and antitrust laws are enforced even at the cost of tolerating the possible windfall recovery by Amoskeag.[94] Under the second of these interests the dissenters challenged the majority's position that the Railroad had suffered no injury and that the public must recoup a tangible benefit in order to hold the Railroad entitled to maintain the litigation.[95] The dissenters maintained that an injury was adequately alleged by the Railroad. Since judicial review was properly invoked by the presence of actual injury on the part of the plaintiff, the injured person could assert the public interest. It would be immaterial whether the benefit to the public was concrete or intangible—in the form of mandating compliance with federal laws.[96] The position of the

approval before expanding or abandoning any rail lines, before combining with another carrier, or before issuing any capital stock or bond; the ICC also has the power to determine reasonable rates and to require carriers to provide adequate and safe facilities or to extend lines in the public interest); Section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1970) (provides that services to the public will be adequately maintained even if the carrier is in receivership).

[92] Brief for ICC as Amicus Curiae at 5-6, Bangor Punta Operations, Inc. v. Bangor & A.R.R., 417 U.S. 703 (1974). The federal statutes may be, as the ICC urged in its brief, inadequate to perform their ostensible function. Brief for ICC as Amicus Curiae at 6. In particular, the ICC has no jurisdiction when a railroad establishes its own holding company, nor any authority to control intercorporate transfers of assets or advances to and from affiliates of the type alleged to have taken place in the *Bangor Punta* case. 49 U.S.C. § 5 (1970). However, as the ICC pointed out in its brief, remedial legislation is now before the Congress to cure this deficiency. Brief for ICC as Amicus Curiae at 6-7.

[93] It is beyond the scope of this note to examine fully the appropriateness of an equitable decree in the *Bangor Punta* case. In general, however, courts of equity may, and frequently do, go much farther to give or deny relief in furtherance of the public interest than when only private interests are involved. E.g., Union Pac. R.R. v. Chicago & Nw. Ry., 226 F. Supp. 400 (N.D. Ill. 1964). The court of equity has power to make the granting of relief dependent on the performance of conditions by a party litigant, if the conditions are imposed in the exercise of sound discretion. S.E.C. v. United States Realty & Improvement Co., 310 U.S. 434 (1940).

However, the Supreme Court has been particularly sensitive in federally regulated industries to avoid the fashioning of remedies that would interfere with the appropriate agency's power to act. Central Ky. Natural Gas Co. v. Railroad Comm'n., 290 U.S. 264 (1933) (federal court without power to prescribe rates because function reserved to states). This reluctance is based on the Court's realization that there are limitations upon the power of a federal court of equity to prescribe such conditional relief, which are inherent in the nature of the jurisdiction which the federal courts exercise. Id. at 271.

[94] 417 U.S. at 728-31 (dissenting opinion).

[95] Id. at 730-31 (dissenting opinion).

[96] Id.

dissenting justices has been tacitly approved by the Court previously and is an extension of the cases which discard the traditional notion that an injury widely shared by members of the public is insufficient to provide the basis for judicial review.[97] This extension of the prior cases merely constitutes a formalization of the concept that it is irrelevant whether the public receives the proposed benefit in a tangible or intangible form. The minority, however, confined its analysis of the intangible recovery in terms of the private enforcement rationale under the Clayton Act.[98] This Clayton Act analysis may indicate that a "windfall recovery" is much less offensive under the Clayton Act than it would be under the Securities Exchange Act of 1934, because, under section 4 of the Clayton Act, treble damages are recoverable and, in practical effect, serve as a "windfall" to those plaintiffs who have standing to bring the action.[99] The minority contended that equitable defenses as applied by the majority in *Bangor Punta* should not bar an action under the federal laws here involved.[100] This argument, however, mistakes the majority's basis for disallowing the Railroad suit. The majority barred the suit not only because an equitable defense had been asserted successfully, but also because application of that equitable principle to Amoskeag, combined with the conclusion that Amoskeag would be the primary beneficiary of any recovery, resulted in the finding that the Railroad had suffered no injury, and therefore lacked standing.[101]

The majority recognized an anomaly inherent in the minority's assertion that the public has an interest in the deterrence of violations of these federal laws through private enforcement.[102] The result reached by the minority would allow a corporate member of a public-interest industry which has itself sustained no injury to champion the public interest. Under present standing doctrines, the members of the public would be unable to herald their own cause. It appears clear that no member of the public would have standing under section 10 of the 1934 Securities Exchange Act and Rule 10(b)—5 in the instant cases because only the Railroad met the requirement of having "purchased or sold" securities.[103] Under the

---

[97] Sierra Club v. Morton, 405 U.S. 727, 738 n.13 (1972).

[98] 417 U.S. at 729-31 (dissenting opinion).

[99] 15 U.S.C. § 15 (1970). To establish the requisite standing to sue under the Clayton Act is a very complex task. There are, however, two primary requirements which must be met: (1) the plaintiff must be injured in his "business" or "property" and (2) that injury must be "by reason of" acts violative of the antitrust laws. Vogelson, Federal Antitrust Litigation: Standing to Sue, 35 Texas Bar J. 345, 346 (1972). For two thoughtful and succinct treatments of the complexities of the standing requirements under the Clayton Act, see Pollack, Standing to Sue, Remoteness of Injury and the Passing-On Doctrine, 32 A.B.A. Antitrust L.J. 5 (1966); Vogelson, supra.

[100] 417 U.S. at 731 (dissenting opinion).

[101] Id. at 712.

[102] Id. at 716 n.13.

[103] This limitation on standing can be seen in the actual language of § 10 and of the Rule. See notes 12, 13 supra.

Clayton Act a shipper-consumer of railroad services would be the only conceivable member of the public who would be injured in his "business" or "property."[104] However, the federal courts are divided on the question of whether the shipper-consumer would be deemed to have standing under section 4 of the Clayton Act.[105]

The majority recognized the public's interest in enforcing the federal laws, but refused the invitation to expand that interest beyond a case where the plaintiff would have standing in his own right.[106] The Railroad may have the merits of its case decided by the standards of the public's interest, but its standing to bring the action must be measured in terms of private injury.[107] Injury to the plaintiff is the requirement for standing.[108] It appears that when a plaintiff seeks to assert and vindicate the interest of the public in a period in which the Court is predisposed to broaden its cognizance of legally protectible interests,[109] the injury that the plaintiff claims to have sustained will undergo rigorous and exacting scrutiny.[110] *Bangor Punta* makes it clear that if the injury is claimed in an institutional framework, principles of equity, such as the tainted shares doctrine relied upon here, will be utilized to test the veracity of the alleged injury. The standing requirements are imposed "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination . . . ."[111]

In addition to assuring that the case is a justiciable controversy within the jurisdiction of the federal courts,[112] the Court has another concern. If more inchoate and amorphous legal rights, such

[104] Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972); Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 396 (1906).

[105] Compare Cleary v. Chalk, 488 F.2d 1315 (D.C. Cir. 1973) (fare paying passenger of transit line had standing) with Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (7th Cir. 1963) (consumers denied standing). The disagreement involves the issue of whether the injured plaintiff was himself the "object" or "target" of the conspiracy or other violation, or whether he was injured because of his business relationship with another party who had been the "object" or "target." Pollack, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A.B.A. Antitrust L.J. 5,13 (1966).

To illustrate in the context of the *Bangor Punta* case how strained the results can be under the "target" principle, the shipper-consumer, the only party actually "injured," has no remedy and the Railroad, the only party with a remedy, was not actually "injured." See id. at 16.

[106] 417 U.S. at 717.

[107] See F.C.C. v. National Broadcasting Co., 319 U.S. 239, 265-66 (1943) (Douglas, J., dissenting).

[108] O'Shea v. Littleton, 414 U.S. 488, 493-99 (1974) United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 699, 683-90 (1973); Golden v. Zwickler, 394 U.S. 103, 108 (1969).

[109] United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686 (1973); Sierra Club v. Morton, 405 U.S. 727, 783 n.13 (1972); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); Barlow v. Collins, 397 U.S. 159, 162-63 (1970); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970).

[110] See Sierra Club v. Morton, 405 U.S. 727, 735-36 (1972).

[111] Baker v. Carr, 369 U.S. 186, 204 (1962).

[112] Id.

as the public's interest in the financial health of a railroad, are recognized by the Court, the floodgates must not be opened to allow "any plaintiff willing to file a complaint," to litigate cases of important national concern.[113] The Court is quite aware that the public interest is a "very unruly horse, and when once you get astride it you never know where it will carry you."[114] Had the Court's decision in *Bangor Punta* affirmed the concept that the public does have a legally protectible interest in quasi-public corporations,[115] and that such an interest may be vindicated by a non-injured plaintiff, the scope of such a holding would have been virtually unlimited. The Court properly adopted its only available watchdog technique by restricting standing through application of the tainted shares principle. In this fashion, the Court is trying to insure that the federal courts will not be inundated by privately motivated public interest litigation and that the public interest, once recognized, will be vindicated effectively.

The impact of the *Bangor Punta* decision is, for the moment, uncertain. The Court's acceptance of the public interest advanced by the Railroad is questionable at least and mere dicta at best.[116] Only one reasonably assured prediction can be made: where the public interest is advanced by a corporate plaintiff in a quasi-public industry, the injury alleged by the plaintiff must be able to withstand meticulous examination. The injury alleged may also be challenged by the defendant's assertion of an equitable defense. If the equitable defense involves the tainted shares doctrine, the corporate barrier will not remain impenetrable. In *Bangor Punta,* the majority presumed that preventing a windfall recovery by Amoskeag was an overriding public policy which required that the Railroad's suit fail. It is this aspect of the holding that is least explicable. Does this portend that all future corporate plaintiffs in an industry imbued with a public interest and controlled by a shareholder who might recover a windfall must show a countervailing public policy to be advanced by the suit? For instance, would the result in *Bangor Punta* have been different if the Railroad had been able to convince the Court that the public would receive the direct benefit of the corporate recovery? Or, is this possibility of questioning the importance of a windfall recovery foreclosed to the plaintiff because the public interest will not be recognized by the

[113] 417 U.S. at 717.

[114] Richardson v. Mellish, 1824-34 All E. R. Rep. 258 (Ct. Com. Pl. 1824).

[115] Quasi-public corporations are private corporations which have been given certain powers of a public nature to enable them to discharge their duties for the public benefit. 18 Am. Jur. 2d Corporations § 9, at 555 (1965). Among the types of corporations which have been held to be quasi-public corporations are private corporations operating toll bridges, railroads, canals, and turnpikes, and corporations which supply municipalities with water, gas, electricity, heat, telephone and transit services. 18 C.J.S. Corporations § 18(c), at 396 (1939). Most recognizable within this category of "quasi-public" corporations are those corporations which are commonly considered to be public utilities.

[116] 417 U.S. at 714-16.

courts? Does it mean that until consumers have standing in their own right to challenge such wrongs as were done to the Railroad in *Bangor Punta,* their interests must go unvindicated unless the party acting on their behalf has sustained his own separate and private injury? These are the intriguing speculations left unanswered by the decision in *Bangor Punta.*

BARBARA E. BRUCE