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Private Damage Actions under SEC Rule 10b-5 Are Limited to Actual Purchasers or Sellers of Securities.

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The Court of Appeals for the Tenth Circuit after considering the circumstances and their interrelation with each other determined that the totality of unusual occurrences was indeed extraordinary, and would justify relief under rule 60(b)(6).⁷¹ However, the manner in which the decision was rendered has left no alternative to the district court when the appellants file their rule 60(b) motion. It is true that the court has not ruled directly on the rule 60(b) motion, but in finding extraordinary circumstances to justify vacation of the affirmance of *Pierce* the court has, in effect, instructed the district court that it should also find such circumstances. The discretion of the trial court, in its consideration of the rule 60(b) motion, has been removed. The outcome is apparent; should the district court in its consideration of the rule 60(b) motion fail to find extraordinary circumstances justifying relief then the appellants need only appeal to the court of appeals to obtain relief.

The ruling in *Pierce* is sound, except for the infringement upon the trial court's discretion, and should not be interpreted as destructive in any degree of the concept of finality in judgments. The circumstances are indeed extraordinary and justify relief under rule 60(b)(6). The decision is an exception to the principle that a final judgment will not be vacated due to a subsequent change in the law. Relief granted in accordance with this decision should be strictly limited to instances where the change in the law produces an inequitable judgment against an innocent party and that party, through no fault of his own, must accept the judgment and has no legal remedy available. The change in the law was not the reason for the relief, rather it was the catalyst which produced the extraordinary circumstances justifying relief.

James F. Pigg

**SECURITIES REGULATION—Standing to Sue—Private Damage
Actions Under SEC Rule 10b-5 Are Limited to Actual
Purchasers or Sellers of Securities**

Blue Chip Stamps v. Manor Drug Stores,

—U.S. —, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975).

In 1963 the United States filed a civil antitrust action against the Blue Chip Stamp Company alleging conspiracy to restrain trade and monopoliza-

71. *Pierce v. Cook & Co.*, 518 F.2d 720, 723-24 (10th Cir. 1975).

tion of the trading stamp business in California. The litigation was terminated in 1967 by a consent decree.¹ Under the decree Blue Chip Stamp Company was required to merge into a new company, Blue Chip Stamps, which was to offer, at bargain prices, approximately half of its shares of common stock to retailers who had previously used the stamps, but who were not shareholders in the old company.

Certain recipients of the stock offers filed a class action suit against Blue Chip Stamps claiming damages under the general antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission.² Blue Chip Stamps allegedly violated these provisions by issuing an overly pessimistic prospectus which discouraged acceptance of the stock offers and, consequently, enabled the company to sell the stock to the general public at higher prices. The United States District Court dismissed the complaint and held that a plaintiff must be either a purchaser or seller of securities in order to maintain a private action for damages under section 10(b) and rule 10b-5. On appeal, the Court of Appeals for the Ninth Circuit reversed, asserting that the case came within an exception to the purchaser-seller limitation.³ The United States Supreme Court granted a writ of certiorari. Held—*Reversed*. Standing to bring a private damage action under rule 10b-5 of the Securities and Exchange Commission is limited to actual purchasers or sellers of securities, as those terms are defined by the Securities Exchange Act of 1934.⁴

1. *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom.*, *Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968).

2. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1970), provides:

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 . . .

(b) To use or employ, in connection with the *purchase or sale of any security* registered on national securities exchange or any security not so registered, 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.

(Emphasis added).

Rule 10b-5, 17 C.F.R. § 240.10b-5 (1975), provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate [sic] 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*.

(Emphasis added).

3. *Manor Drug Stores v. Blue Chip Stamps*, 492 F.2d 136 (9th Cir. 1973), *rev'd*, — U.S. —, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975).

4. *Blue Chip Stamps v. Manor Drug Stores*, — U.S. —, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975). The Securities Exchange Act of 1934 was enacted in response to the financial disaster of the late 1920's, its primary objective being to protect investors by

The Securities and Exchange Commission was authorized in Section 10(b) of the Securities Exchange Act of 1934 to deal with new manipulative devices in security transactions by promulgating any rules and regulations which it deemed necessary.⁵ Pursuant to this authority, the Securities and Exchange Commission in 1942 adopted rule 10b-5,⁶ which essentially prohibited fraud by *any person* in connection with the purchase or sale of securities, and was designated by the SEC as "an additional protection to investors."⁷

Section 10(b) and rule 10b-5 do not expressly provide civil remedies for their violation; however, an implied private right of action has been recognized in case law since 1946.⁸ Although a private right of action was acknowledged, the class of potential plaintiffs to which the remedy was available was not specifically identified. The broad, remedial language of section 10(b) is silent as to the class of persons protected; which, without restrictions, could conceivably invite a vast number of complaints dealing with an infinite variety of security frauds.

In 1952 the Second Circuit Court of Appeals felt there was a need for a "limiting doctrine" and, in *Birnbaum v. Newport Steel Corp.*⁹ declared that section 10(b) was directed solely at that type of fraudulent practice usually associated with the sale or purchase of securities and that rule 10b-5 extended only to defrauded purchasers or sellers.¹⁰ There, minority stock-

preventing inequitable and unfair practices in securities transactions. Mr. Justice Blackmun, dissenting in *Blue Chip Stamps*, suggests that the purpose and scope of the Securities Exchange Act of 1934 is indicated in 78 Cong. Rec. 2271 (1934), which basically states that the Act protects the investing public in securities transactions from the fraudulent manipulations of not only "professional market operators," but also "corporate insiders." *Id.* at —, 95 S. Ct. at 1939, 44 L. Ed. 2d at 566; *accord*, *Herpich v. Wallace*, 430 F.2d 792, 801 (5th Cir. 1970); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 847-48 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *see* 1 A. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10b-5* § 2.2 (100-400), at 21-22.6 (Supp. 1970); 3 L. LOSS, *SECURITIES REGULATION 1424-25* (2d ed. 1961). Although legislative history indicating the purpose of section 10(b) is scarce, it is generally acknowledged to be an expansive "catch-all" provision enacted to prevent practices employed in connection with the purchase or sale of securities which are contrary to the interest of the public and investors. 1 A. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10b-5* § 2.2 (332), at 22.4; *accord*, *Herpich v. Wallace*, 430 F.2d 792, 801 (5th Cir. 1970); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 859 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); Hearing before House Comm. on Interstate and Foreign Commerce on H.R. 7852 and H.R. 8720, 73d Cong., 2d Sess. 115 (1934).

5. 15 U.S.C. § 78j(b) (1970).

6. 17 C.F.R. § 240.10b-5 (1975).

7. 1 A. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10b-5* § 2.2 (420), at 22.7 (Supp. 1970); *see* 8 SEC Ann. Rep. 10 (1942).

8. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 513 (E.D. Pa. 1946); *accord*, *Hooper v. Mountain States Sec. Corp.*, 282 F.2d 195, 201 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); *Johnson v. Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764, 766 (S.D.N.Y. 1972).

9. 193 F.2d 461, 464 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

10. *Id.* at 464.

holders in a representative and derivative action, alleged that corporate directors had violated section 10(b) and rule 10b-5 by rejecting a favorable merger offer in order to sell their own shares of stock at a substantial profit. Neither the plaintiffs nor the company had actually purchased or sold securities. The plaintiffs contended that the "in connection with" language of section 10(b) and rule 10b-5 indicated that relief was not intended to be limited exclusively to defrauded purchasers and sellers.¹¹ In rejecting the plaintiffs' argument, the court relied heavily on its own interpretation of the legislative and administrative intent behind rule 10b-5, and concluded that the "only" purpose of rule 10b-5 was to extend the prohibition against the fraudulent sale of securities to fraudulent purchases as well.¹² Thus, it was determined that standing to sue under rule 10b-5 was limited to purchasers and sellers of securities.

The purchaser-seller requirement, or the *Birnbaum* rule, has been widely accepted in federal courts for over 20 years.¹³ However, adherence to the rule has not been without question. The *Birnbaum* rule has been continually criticized for being too restrictive and for being in conflict with the remedial nature of securities law.¹⁴ The Seventh Circuit Court of Appeals

11. *Id.* at 464.

12. *Id.* at 463-64. In *Birnbaum* the court relied on the SEC news release which stated that "the new rule closes the loop-hole in the protection against fraud . . . by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." *Id.* at 463. The court noted that no provision of the 1933 Act or 1934 Act prohibited fraud on a seller of securities by the purchaser if the latter was not a broker or a dealer; thus, it reasoned that rule 10b-5 was enacted to fill this gap. *Id.* at 463.

13. *See, e.g.*, *Lutgert v. Vanderbilt Bank*, 508 F.2d 1035, 1037 (5th Cir. 1975); *Landy v. FDIC*, 486 F.2d 139, 152-58 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974); *Haberman v. Murchison*, 468 F.2d 1305, 1311 (2d Cir. 1972); *Mount Clemens Indus., Inc. v. Bell*, 464 F.2d 339, 341 (9th Cir. 1972); *Simmons v. Wolfson*, 428 F.2d 455, 456 (6th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971). *Contra*, *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654, 660-61 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

14. For cases in which the SEC filed *amicus curiae* briefs advocating the abolition of the *Birnbaum* rule see *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1974); *Manor Drug Stores v. Blue Chip Stamps*, 492 F.2d 136 (9th Cir. 1973), *rev'd*, — U.S. —, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975); *Mount Clemens Indus., Inc. v. Bell*, 464 F.2d 339 (9th Cir. 1972); *Iroquois Indus., Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970); *Dasho v. Susquehanna Corp.*, 380 F.2d 262 (7th Cir. 1967); *Vine v. Beneficial Fin. Co.*, 374 F.2d 627 (2d Cir. 1967). Numerous commentaries have also been critical of the *Birnbaum* rule. *See, e.g.*, Boone & McGowan, *Standing to Sue Under SEC Rule 10b-5*, 49 TEXAS L. REV. 617 (1971); Froelich & Spiegel, *Standing of Federal Securities Plaintiffs—Which Way the Trend*, 24 DE PAUL L. REV. 510 (1975); Comment, *Dumping Birnbaum to Force Analysis of the Standing Requirement Under Rule 10b-5—Eason v. General Motors Acceptance Corp.*, 6 LOYOLA L.J. 230 (1975); Comment, *Standing to Sue in 10b-5 Actions: Eason v. GMAC and Its Impact on the Birnbaum Doctrine*, 49 NOTRE D. LAW. 1131 (1974); Comment, *The Birnbaum Rule Rejected: Will Analysis of Right to Bring Private Action Under § 10b Be Simplified?*, 31 WASH. & LEE L. REV. 757 (1974).

has expressly rejected *Birnbaum*.¹⁵ Most courts, however, have avoided the harsh results of strict application by creating modifications and exceptions to the *Birnbaum* rule. This is frequently accomplished by liberally interpreting the language of section 10(b) and rule 10b-5, particularly focusing on the words "purchase" and "sale" and the phrase "in connection with."¹⁶

Exceptions to the *Birnbaum* rule fall into several categories, the broadest one involving injunctive suits: No technical purchase or sale is required in those cases in which injunctive relief is sought for section 10(b) and rule 10b-5 violations.¹⁷ The usual justification for eliminating the purchaser-seller requirement in injunctive suits is that the remedy sought is preventive rather than compensatory. This view is supported by a Supreme Court decision which states: "It is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages."¹⁸ Therefore, injunctive relief under rule 10b-5 is more readily available to non-purchasing or non-selling plaintiffs than monetary relief.

Another exception to the purchaser-seller requirement of *Birnbaum* is the "forced seller" doctrine. Rule 10b-5 standing has been granted under this exception when it has been shown that due to the fraudulent acts of the defendant, the plaintiff is forced to sell his stock at a discount or to hold worthless stock.¹⁹ Because the alleged fraud leaves the plaintiff with no viable choice of action, he is considered to be a "seller" of securities. The *Birnbaum* rule has also been avoided by the "aborted purchaser-seller" exception. Rule 10b-5 standing is conferred in these cases when the plaintiff affirmatively establishes that the purchase or sale of stock was prevented by

15. *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654, 661 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

16. *See, e.g.*, *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971) (defrauded corporation considered to be a "seller" of securities); *SEC v. National Sec., Inc.*, 393 U.S. 453, 467 (1969) (shareholders deemed "purchasers" when they exchanged old stock for shares in new company); *SEC v. Texas Gulf Sulfur Co.*, 401 F.2d 833, 860 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) (phrase "in connection with" purchase or sale of any security means any device which would cause reasonable investors to rely thereon, and in connection therewith, to purchase or sell securities); *Dasho v. Susquehanna Corp.*, 380 F.2d 262, 266-67 (7th Cir. 1967), *cert. denied*, 389 U.S. 977 (1968) (Congressional intent is that the words "purchase" and "sale" are not limited to transactions ordinarily governed by commercial law of sales; merger of corporations was a "sale").

17. *See, e.g.*, *Kahan v. Rosenstiel*, 424 F.2d 161, 174 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 547 (2d Cir. 1967).

18. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193 (1963).

19. *Vine v. Beneficial Fin. Co.*, 374 F.2d 627, 633 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967); *see, e.g.*, *Coffee v. Permian Corp.*, 434 F.2d 383, 386 (5th Cir. 1970), *cert. denied*, 412 U.S. 920 (1972); *Herpich v. Wallace*, 430 F.2d 792, 806-807 (5th Cir. 1970).

the defendant's alleged fraud.²⁰ The plaintiff is then elevated to "purchaser" or "seller" status for 10b-5 purposes.

Derivative suits comprise another category of cases which have modified the strict purchaser-seller requirement. The rationale of this category is that the shareholder in a derivative suit assumes the position of the defrauded corporation for the purposes of section 10(b) and rule 10b-5. Thus, the shareholder can maintain a derivative suit on behalf of the corporation without being a purchaser or seller, provided the corporation can be considered a purchaser or seller. Rule 10b-5 relief has been granted in derivative suits where there was a merger of a corporation, corporate issuance of stocks, and in other similar transactions.²¹ Indirect or equitable owners of securities also have been held to have standing under rule 10b-5 when the purchase or sale was actually executed by another. This exception to the purchaser-seller requirement of *Birnbaum* usually involves a trust situation. The beneficiary of the trust has been allowed standing under rule 10b-5 to sue those who fraudulently sold or purchased trust securities.²²

A further exception to the purchaser-seller requirement involves contractual relationships. Parties to contracts for the purchase or sale of securities have been recognized as statutory purchasers and sellers in light of Section 3(a)(13) and (14) of the Securities Exchange Act of 1934, which deem contractual relationships tantamount to actual purchases or sales.²³ Consequently, private rights of action under section 10(b) and rule 10b-5 for the breach of contracts to purchase or sell securities have been permitted.²⁴

The Ninth Circuit Court of Appeals in *Manor Drug Stores v. Blue Chip Stamps*,²⁵ expanded on this theory and proposed a liberal exception to the *Birnbaum* rule. It was asserted that the consent decree involved in the case

20. See, e.g., *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 396-97 (2d Cir. 1967); *Goodman v. H. Hentz & Co.*, 265 F. Supp. 440, 444-45 (N.D. Ill. 1969); *Voegel v. American Sumatra Tobacco Corp.*, 241 F. Supp. 369, 374 (D. Del. 1965).

21. See, e.g., *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 9 (1971) (corporation deemed "seller" in liquidation suits); *SEC v. National Sec., Inc.*, 393 U.S. 453, 467 (1969) (merged corporation); *Drachman v. Harvey*, 453 F.2d 722, 737 (2d Cir. 1971) (derivative action allowed where redemption of debentures constituted a "purchase"); *Dasho v. Susquehanna Corp.*, 380 F.2d 262, 268 (7th Cir. 1967) (merged corporation deemed to be "seller" of securities); *Ruckle v. Roto Am. Corp.*, 339 F.2d 24, 27 (2d Cir. 1964) (issuance by a corporation of its own shares was a "sale"); *Hooper v. Mountain States Sec. Corp.*, 282 F.2d 195, 200-203 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961) (corporate issuer of stock deemed to be seller of securities).

22. See *James v. Gerber Prod. Co.*, 483 F.2d 944, 948-49 (6th Cir. 1973); *Heyman v. Heyman*, 356 F. Supp. 958, 964-67 (S.D.N.Y. 1973).

23. 15 U.S.C. § 78C(a)(13), (14) (1970).

24. See, e.g., *Walling v. Beverly Enterprises*, 476 F.2d 393, 396 (9th Cir. 1973); *Richardson v. MacArthur*, 451 F.2d 35, 40 (10th Cir. 1971); *Richardson v. Salinas*, 336 F. Supp. 997, 1001-1002 (N.D. Tex. 1972).

25. 492 F.2d 136, 141-42 (9th Cir. 1973), rev'd, — U.S. —, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975).

served the same function as a contractual relationship since the parties, price, quantity, time of sale, and the plaintiffs' intention to purchase or sell could be ascertained from the agreement.²⁶ Consequently, even though the plaintiffs had neither purchased nor sold securities and were not parties to the consent decree, the court held that dismissal of their action on the basis of *Birnbaum* was premature.²⁷ While the *Birnbaum* rule was not rejected, it was determined that its strict requirements should be relaxed due to the unusual circumstances of the case.²⁸

Although uncertainty and controversy had existed among the federal courts for over 20 years as to private damage actions under section 10(b) and rule 10b-5, the Supreme Court had not specifically dealt with the issue until the *Blue Chip Stamps* case. In this long-awaited decision, the Supreme Court approached the issue conservatively, and after determining that the *Birnbaum* rule was still viable and necessary, reaffirmed that doctrine and acknowledged few exceptions to it.²⁹ While it was conceded that injunctive suits, derivative actions, and contractual rights to buy or sell securities are not excluded by *Birnbaum*, the contractual, "functional equivalent" proposal of the Ninth Circuit Court of Appeals was rejected on the theory that acceptance would open the *Birnbaum* rule to "endless case-by-case erosion."³⁰

The majority based its decision on three factors: (1) the consistency of the *Birnbaum* rule with the intent of Congress, (2) policy considerations, and (3) the precedential support of *Birnbaum* for over 20 years.³¹ In its analysis the Court first traced the legislative history of section 10(b) and rule 10b-5 in an attempt to ascertain the purpose and extent of the provisions, but admittedly, was unable to fully determine the congressional intent as to private causes of action under section 10(b) and rule 10b-5.³² Strictly construing the provisions, it was noted that no express civil remedies existed for violations. Acknowledgment was given, however, to an implied

26. *Id.* at 141-42.

27. *Id.* at 141-42.

28. *Id.* at 141-42.

29. *Blue Chip Stamps v. Manor Drug Stores*, — U.S. —, 95 S. Ct. 1917, 1932, 44 L. Ed. 2d 539, 557 (1975).

30. *Id.* at —, 95 S. Ct. at 1934, 44 L. Ed. 2d at 560.

31. *Id.* at —, —, 95 S. Ct. at 1932, 1934, 44 L. Ed. 2d at 557, 559. The dissenting opinion vehemently attacked the decision, stating that "the Court exhibits a preternatural solicitousness for corporate well-being and a seeming callousness toward the investing public quite out of keeping . . . with . . . the intent of the securities law." *Id.* at —, 95 S. Ct. at 1938, 44 L. Ed. 2d at 564 (Blackmun, J., dissenting). The dissent further stated *Birnbaum* should have been abandoned in favor of a more general test of nexus as set out by the Seventh Circuit which had rejected the *Birnbaum* rule in *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654, 657, 659 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

32. *Blue Chip Stamps v. Manor Drug Stores*, — U.S. —, 95 S. Ct. 1917, 1926, 44 L. Ed. 2d 539, 547 (1975). See generally 1 A. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10b-5* § 2.2 (330-400, at Supp. 1970).

right of action under section 10(b) and rule 10b-5 which was recognized in federal courts and had been sanctioned by the Supreme Court.³³

When no express statements were found as to the class of plaintiffs who could enforce the implied right of action under rule 10b-5, the Court looked to other antifraud provisions of the Securities Acts of 1933 and 1934, and by analogy determined that Congress intended that only purchasers and sellers could sue for damages.³⁴ Of course, the question remained as to who is a purchaser or seller. The dissent suggested that rather than looking to other provisions for the interpretation of section 10(b) and rule 10b-5, the wording of the provisions should be given a liberal meaning in view of the overall purpose of the Act.³⁵

The view of the dissent is supported by case law. In construing the words "purchase or sale" in section 10(b) and in rule 10b-5, the Supreme Court in *SEC v. National Securities, Inc.*³⁶ expressed the view that the interdependence of the various sections of the securities laws was a relevant factor in any interpretation of the language that Congress has chosen, but ordinary rules of statutory construction still apply and the meaning of the particular phrase must be determined in context, regardless of what other words might mean in other contexts.³⁷ It was further stated that in considering the terms of section 10(b) and rule 10b-5 the Court must ask whether the conduct in question is the type of fraudulent behavior which was meant to be forbidden by the statute and the rule.³⁸

Cases in agreement with these views have interpreted the terms "in connection with" and "purchase" or "sell" liberally and flexibly in order to effectuate the remedial purpose of section 10(b) and rule 10b-5, thus extending civil remedies to a broader class of plaintiffs.³⁹ The Supreme Court in the instant case failed to take such a broad view of the scope and purpose of section 10(b) and rule 10b-5, and refused to accept the Ninth Circuit Court of Appeals contention that the purchaser-seller requirement was met

33. *Blue Chip Stamps v. Manor Drug Stores*, — U.S. —, 95 S. Ct. 1917, 1923, 44 L. Ed. 2d 539, 546 (1975).

34. *Id.* at —, —, —, —, 95 S. Ct. at 1922, 1924, 1925, 1934, 44 L. Ed. 2d at 544, 545, 547, 548, 560.

35. *Id.* at —, 95 S. Ct. at 1939, 44 L. Ed. 2d at 566 (Blackmun, J., dissenting).

36. 393 U.S. 453 (1969).

37. *Id.* at 466.

38. *Id.* at 467.

39. *See, e.g., Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971) (section 10(b) must be read flexibly, not technically and restrictively); *SEC v. Texas Gulf Sulfur Co.*, 401 F.2d 833, 858-62 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) ("in connection with" means any device causing investor reliance, resulting in the purchase or sale of securities); *Vine v. Beneficial Fin. Co.*, 374 F.2d 627, 634-35 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967) (term "sale" in antifraud provisions has broader meaning than common-law definitions); *Hooper v. Mountain States Sec. Corp.*, 282 F.2d 195, 202-203, 202 n.9 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961) (terms "sale" and "sell" each include any contract to sell or otherwise dispose of).

since the antitrust consent decree served the same function as a contractual relationship.⁴⁰ It was determined that since the plaintiffs were not parties to the original consent decree, they could not enforce it directly or collaterally, and that recognition of the exception would invite circumvention of *Birnbaum* on a case-by-case basis.⁴¹

The major portion of the opinion is devoted to what is designated as policy considerations. The Court justified basing a decision on these considerations because of the lack of legislative history pertaining to private causes of action under section 10(b) and rule 10b-5.⁴² The majority was primarily concerned with vexatious litigation entailing abuse of the judicial process by nuisance or "strike" suits, and the requirement that the proof of the plaintiffs' cases be dependent almost entirely on oral testimony.⁴³ Other considerations were that damages would be difficult to prove, pending suits would frustrate normal business activity of a defendant, and there would be abuse of the liberal discovery rules resulting in unwarranted settlements.⁴⁴ According to the Court these undesirable situations can be avoided by the strict application of the *Birnbaum* rule, which outweighs the disadvantage of depriving deserving plaintiffs of a remedy.⁴⁵

The dissent attacked these policy considerations as being premature and speculative in nature, warning that "we should be wary about heeding the seductive call of expediency, and about substituting convenience and ease of processing for the more difficult task of separating the genuine claim from the unfounded one."⁴⁶ In view of the purpose of section 10(b) and rule 10b-5—to protect investors—the majority's "policy considerations" were unwarranted, especially when possible solutions to the problems are feasible. While the majority was concerned that a plaintiff who is neither a purchaser nor seller would have to seek conjectural recovery,⁴⁷ the court of appeals in the lower decision had no difficulty in determining the plaintiff's actual damages.⁴⁸ Also, the fact that exceptions to or the abolition of the *Birnbaum* rule probably would broaden the scope of potential plaintiffs does not neces-

40. *Blue Chip Stamps v. Manor Drug Stores*, — U.S. —, —, 95 S. Ct. 1917, 1932, 44 L. Ed. 2d 539, 557-58 (1975).

41. *Id.* at —, 95 S. Ct. at 1932-34, 44 L. Ed. 2d at 557-60.

42. *Id.* at —, 95 S. Ct. at 1926, 44 L. Ed. 2d at 551.

43. *Id.* at —, 95 S. Ct. at 1927-31, 44 L. Ed. 2d at 551-56.

44. *Id.* at —, 95 S. Ct. at 1927-31, 44 L. Ed. 2d at 551-56.

45. *Id.* at —, 95 S. Ct. at 1926-27, 44 L. Ed. 2d at 551.

46. *Id.* at —, 95 S. Ct. at 1941-42, 44 L. Ed. 2d at 569 (dissenting opinion).

47. *Id.* at —, 95 S. Ct. at 1925, 44 L. Ed. 2d at 549.

48. *Manor Drug Stores v. Blue Chip Stamps*, 492 F.2d 136, 139 (9th Cir. 1973), *rev'd*, — U.S. —, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975). Pursuant to the consent decree the shares were to be offered on a pro-rata basis in units consisting of three shares of common stock and a \$100 debenture. Each unit was offered to plaintiffs at \$101 and was later sold to the general public at \$315 per unit, thus damages could be easily computed by multiplying the difference between the cost of the units by the number of plaintiffs and the number of units they were entitled to. *Id.* at 139.

sarily mean there would be no limits. Plaintiffs would still have to establish their status as proper plaintiffs, and would have to prove injury as a direct consequence of the defendant's fraud. The court in *Eason v. General Motors Acceptance Corp.*,⁴⁹ which rejected *Birnbaum*, stated that even if a complete abandonment of *Birnbaum* will significantly increase the courts' workload, the purpose of rule 10b-5 should not be forgotten.⁵⁰

It seems that the undesirable consequences of abandonment of *Birnbaum* as expounded in the opinion could be avoided if the rule of the *Eason* case and the suggestions of the Securities and Exchange Commission were employed. *Eason* simply requires that there be a connection between the injured plaintiff and the alleged fraudulent conduct.⁵¹ The SEC in its *amicus curiae* brief encouraged abolition of the *Birnbaum* rule and, as to adverse effects, suggested requiring stricter standards of proof by corroborative evidence and by limiting vicarious liability.⁵² The Court, however, dismissed these suggestions as insufficient.⁵³ It is obvious that a court should consider the possible adverse effects of its decisions, however, a holding based primarily on "policy considerations" seems unjustified when workable solutions, as well as ample statutory case law, are available in support of an opposite result. The decision is particularly unwarranted since consistency and ease of court decisions was deemed paramount to the interests of legitimate plaintiffs.

The majority also based its decision on the "precedential support" of the *Birnbaum* rule over a period of more than 20 years,⁵⁴ and stated that an opposite result than that reached would "leave the *Birnbaum* rule open to endless case-by-case erosion . . ."⁵⁵ These statements and others throughout the opinion fail to acknowledge the multitude of decisions in the previous 20 years which have already eroded the *Birnbaum* rule by employing various exceptions to and extensions of that rule. Although the majority conceded that injunctive suits, derivative actions, and actions based on contracts are not excluded by *Birnbaum*,⁵⁶ it still maintains an unrealistic position in narrowly interpreting section 10(b), rule 10b-5, and the *Birnbaum* rule with no allowance for unique situations. The creation of modifications to the *Birnbaum* rule by the federal court clearly demonstrated that more flexibility as to standing in rule 10b-5 actions was necessary. This obvious need was ignored.

49. 490 F.2d 654 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

50. *Id.* at 660-61.

51. *Id.* at 658-59.

52. *Blue Chip Stamps v. Manor Drug Stores*, — U.S. —, —, 95 S. Ct. 1917, 1930, 44 L. Ed. 2d 539, 555 (1975).

53. *Id.* at —, 95 S. Ct. at 1930-31 n.10, 44 L. Ed. 2d at 556 n.10.

54. *Id.* at —, 95 S. Ct. at 1932, 44 L. Ed. 2d at 557.

55. *Id.* at —, 95 S. Ct. at 1934, 44 L. Ed. 2d at 560.

56. *Id.* at —, —, —, 95 S. Ct. at 1926, 1932, 1933 n.14, 44 L. Ed. 2d at 547, 557, 558 n.14.

In its analysis the Supreme Court considered the issue of standing in rule 10b-5 only in terms of the *Birnbaum* rule and failed to discuss the purchaser-seller requirement in relation to the standing requirements governed by Article III of the United States Constitution. The *Eason* court, on the other hand, in determining whether plaintiffs had rule 10b-5 standing, rejected the generally accepted view of the *Birnbaum* rule as a standing requirement. Standing under article III of the Constitution was viewed as requiring only that the plaintiff have a sufficient interest in real controversy with the defendant to be entitled to invoke the jurisdiction of the federal court.⁵⁷ *Eason* would grant rule 10b-5 relief to those plaintiffs who met the constitutional requirement and sufficiently established a connection between their damages and the defendant's alleged fraud, regardless of whether or not they were purchasers or sellers.⁵⁸ When these flexible standards are applied to the facts of the instant case, they appear to be met. The Court, however, declined to take such a liberal approach and found no basis whatsoever for rule 10b-5 standing.

While the Supreme Court repeatedly asserted the viability of, and its adherence to the *Birnbaum* rule, it neglected to thoroughly examine the reasoning on which that rule was based. It was noted that the rule was based on the Court's interpretation of the administrative intent as to the enactment of rule 10b-5, however examination of the origin of the *Birnbaum* rule ended there.⁵⁹ It is alleged that the *Birnbaum* case erred in its decision by looking to the SEC's purpose in promulgating the rule, rather than to the enabling statute and Congressional intent pertaining to that statute.⁶⁰ The interpretation of the rule requiring a purchaser-seller limitation appears to be inconsistent with the broad Congressional intent of the statute.⁶¹ The soundness of a decision which relies on and reaffirms a rule which itself is possibly based on erroneous reasoning is questionable.

While considerable controversy and confusion have existed for the past 20 years in the determination of standing in section 10(b) and rule 10b-5 actions, courts have awaited guidance from the United States Supreme Court. Rather than seizing the opportunity to thoroughly examine this area

57. *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654, 657-58 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

58. *Id.* at 658-59.

59. *Blue Chip Stamps v. Manor Drug Stores*, — U.S. —, —, 95 S. Ct. 1917, 1923, 44 L. Ed. 2d 539, 547 (1975).

60. See Boone & McGowan, *Standing to Sue Under Rule 10b-5*, 49 TEXAS L. REV. 617, 621-22 (1971); Comment, *Dumping Birnbaum to Force Analysis of the Standing Requirement Under Rule 10b-5—Eason v. General Motors Acceptance Corp.*, 6 LOYOLA L.J. 230, 234 (1975).

61. Boone & McGowan, *Standing to Sue Under SEC Rule 10b-5*, 49 TEXAS L. REV. 617, 621-22 (1971); Comment, *Dumping Birnbaum to Force Analysis of the Standing Requirement Under Rule 10b-5—Eason v. General Motors Acceptance Corp.*, 6 LOYOLA L.J. 230, 234 (1975).