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**CHIPPING AWAY AT THE BIRNBAUM DOCTRINE:
MANOR DRUG STORES v. BLUE CHIP STAMPS¹**

In June of 1972, the Court of Appeals for the Ninth Circuit, in *Mount Clemens Industries, Inc. v. Bell*,² adopted the so-called *Birnbaum* doctrine,³ which requires that a plaintiff must either be a purchaser or seller of securities in order to satisfy the standing requirement in a 10b-5 cause of action.⁴ Approximately fifteen months after the *Mount Clemens* decision, the Ninth Circuit carved out an exception to the purchaser-seller limitation in *Manor Drug Stores v. Blue Chip Stamps*. The majority opinion, written by Judge Browning and joined in by Judge Choy, held that where a consent decree establishes with certainty the parties, the prices and the amounts of securities to be purchased or sold, there need not be an actual purchase or sale to fulfill the *Birnbaum* standing requirement.⁵ Judge Hufstедler strongly dissented, arguing that the policy enunciated by the majority created an unwarranted exception to the *Birnbaum* doctrine and was inconsistent with the court's earlier decision in *Mount Clemens*.⁶

1. 492 F.2d 136 (9th Cir. 1973), *cert. granted*, 95 S. Ct. 302 (1974).

2. 464 F.2d 339 (9th Cir. 1972).

3. *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

4. Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. 78j(b) (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 a 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.

Rule X-10b-5, 17 C.F.R. 240.10b-5 (1974), provides:

It shall be unlawful for any person

(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).

5. 492 F.2d at 142.

6. *Id.*

The original judicial promulgation of the purchaser-seller limitation in 10b-5 actions was set forth in the landmark case of *Birnbaum v. Newport Steel Corp.*⁷ In *Birnbaum*, the defendant held the dual position of president and controlling shareholder of Newport Steel Corporation. He refused to consummate what was allegedly a highly advantageous tender offer and, instead, negotiated on his own behalf to sell his control shares at a substantial premium to a syndicate of Newport's customers, which would then use Newport to supply the syndicate with products at a reduced price.⁸ This latter transaction, which enabled the defendant to reap a huge profit, resulted in substantial detriment to the other shareholders.⁹ The plaintiff, a shareholder of Newport, brought the action alleging violation of rule 10b-5. His one obstacle to trial on the merits was that no "purchase or sale" of a security had been made.¹⁰ Realizing the necessity for limiting the scope of rule 10b-5,¹¹ the *Birnbaum* court analogized this rule with section 16(b)¹² of the Securities and Exchange Act of 1934:

The absence of a similar provision in Section 10(b) strengthens the conclusion that that Section was directed solely at that type of misrepresentation or fraudulent practice usually associated with the *sale or purchase* of securities rather than at fraudulent mismanagement

7. 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

8. *Id.* at 462.

9. *Id.*

10. *Id.* at 462-63.

11. In coming to the conclusion that the purchaser-seller limitation was needed, the court in *Birnbaum* referred to the SEC Exchange Release No. 3230, May 21, 1942, in order to demonstrate that the intent of the rule was to close an existing loophole in the securities law. 193 F.2d at 463. The court noted that the wording of the rule "copied" that of section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a) (1970), with the two exceptions that the words "the person" were substituted for the phrase "any purchaser" and the clause "in connection with the purchase or sale of any security" was unique to the rule. 193 F.2d at 463. Section 17(a) basically dealt with fraud or deceived purchasers and section 15(c) of the 1934 Act, 15 U.S.C. 78o(c) (1970), dealt with fraud on broker-dealers. The loophole was that no cause of action existed for "sellers" within the statutory scheme of the securities law. See 1 A. BROMBERG, SECURITIES LAW: FRAUD SEC RULE 10b-5 17-20 (1971) [hereinafter cited as BROMBERG]; Whitaker, *The Birnbaum Doctrine: An Assessment*, 23 ALA. L. REV. 543, 546 (1971) [hereinafter cited as Whitaker].

12. Section 16(b) of the 1934 Act provides in pertinent part:

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, . . . shall inure to and be recoverable by the issuer.

15 U.S.C. 78p(b) (1970).

of corporate affairs, and that Rule X-10b-5 extended protection only to the defrauded purchaser or seller.¹³

The *Birnbaum* court thus read into rule 10b-5 the prerequisite that a plaintiff must either be a purchaser or seller of a security "in connection with" the activities proscribed by the rule in order to acquire standing.¹⁴

The United States Supreme Court has offered no definitive statement as to the necessity of the purchaser-seller limitation. In *Superintendent of Insurance v. Bankers Life & Casualty Co.*,¹⁵ the Court specifically re-

13. 193 F.2d at 464 (emphasis added). The legislative history of the Securities and Exchange Act and the administrative history of rule 10b-5 clearly indicate that the Act was intended neither to cover all types of corporate fraud nor to preempt the securities field; rather, the Act was intended to supplement the securities field and protect certain exchanges in the market. For a general discussion of the legislative and administrative history and for the purpose of the section and the rule, see *Mount Clemens Industries, Inc. v. Bell*, 464 F.2d 339, 342 n.6 (9th Cir. 1972); *Kohn v. American Metal Climax, Inc.*, 458 F.2d 255, 276-78 (3d Cir.) (Adams, J., concurring and dissenting), cert. denied, 409 U.S. 874 (1972); 1 BROMBERG, *supra* note 11, at 22-22.8; Note, *SEC Action Against Fraudulent Purchasers of Securities*, 59 HARV. L. REV. 769, 770 (1946).

14. 193 F.2d at 494.

15. 404 U.S. 6 (1971). *Bankers Life* involved a deliberate, carefully planned and quite complex five million dollar fraud. Bankers Life wholly owned Manhattan Casualty, which was purchased by Bourne and Begole for \$5,000,000, the funds of which came from a loan from Irving Trust Co. To pay off this loan, the new president of Manhattan, installed by Bourne and Begole, sold four and one-half million dollars of the company's Treasury Bonds in a bona fide transaction. Proceeds from the sale, plus cash from Manhattan, were used to pay off Irving Trust. The entire transaction occurred on the same day. To cover-up this fraud, another \$5,000,000 was borrowed from Irving and deposited in another financial institution. Using the certificate of deposit from this financial institution as collateral, money was borrowed to pay off Irving Trust. It thus appeared that Manhattan had sold the bonds and deposited the money, thereby covering up any fraud.

The only injury in this fraud was not to the shareholders of Manhattan, since Bourne and Bogole were the sole shareholders, but rather to the creditors of Manhattan. The question here becomes whether the Superintendent of Insurance of New York, who became a receiver for the bankrupt Manhattan, could sue under rule 10b-5.

The district court held that the fraud was not "in connection with the purchase or sale" of the bonds, but rather a fraudulent misappropriation of the proceeds from the sale. In doing so, the court used a limited reading of *Birnbaum*, that 10b-5 was not intended to remedy general corporate fraud, but only designed for fraud "in connection with" the purchase or sale of securities. The court of appeals supported this narrow holding when it stated that the fraud was not affecting investors or the securities market and that the public market was unaffected.

The *Bankers Life* case was unanimously reversed on appeal, Justice Douglas writing the opinion. The Court held that both the district and circuit courts had read the scope of 10b-5 too narrowly and that, while the statute did not intend to regulate all the internal management of a corporation, it nonetheless must be given a broad and expansive reading. Justice Douglas stated that "[t]he crux of the present case is that Manhattan

fused the opportunity to determine whether or not a purchase or sale was in fact required.¹⁶ With the Supreme Court's refusal to deal with the limitation, there has arisen a number of cases which attempt to avoid the *Birnbaum* doctrine, either by distinguishing the factual pattern or by forging an exception to the limitation itself.¹⁷ The most recent case to do so is the Seventh Circuit case of *Eason v. General Motors Acceptance Corp.*¹⁸ In *Eason*, the plaintiffs were shareholders of an issuer that exchanged stock for a car leasing business. The plaintiffs also guaranteed notes given by the issuer to the defendant. The car leasing business failed, and a 10b-5 action was brought for misrepresentation of the value of the business. The court held that the shareholders were both investors and direct parties to the transaction; thus they should be protected by 10b-5.¹⁹ Although the plaintiffs did not have to be purchasers-sellers, the court concluded that the plaintiffs were required to

[the seller] suffered an injury as a result of deceptive practices touching its sale of securities as an investor." *Id.* at 12-13.

16. *Id.* at 13-14 n.10.

17. For those cases supporting the *Birnbaum* doctrine, see, e.g., *Smith v. Murchison*, 310 F. Supp. 60 (S.D.N.Y. 1970); *Erling v. Powell*, 298 F. Supp. 1154 (D.S.D. 1969), *aff'd*, 429 F.2d 795 (8th Cir. 1970); *Christophides v. Porco*, 289 F. Supp. 403 (S.D.N.Y. 1968). For those cases which have successfully distinguished the *Birnbaum* doctrine, see, e.g., *Eason v. GMAC*, 490 F.2d 654 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974); *Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967); *A.T. Brod & Co. v. Perlow*, 375 F.2d 383 (2d Cir. 1967).

18. 490 F.2d 654 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974). *Eason* involved the sale of a car leasing business to the shareholders of a corporation. Plaintiffs, shareholders of the purchasing company, individually guaranteed certain notes issued by the car leasing business. The leasing business subsequently failed, and the defendant brought suit to collect on the guarantee. The plaintiffs responded by filing suit in United States district court charging a violation of section 10(b) and seeking rescission of the guarantees. *Id.* at 656. Plaintiffs contended (1) that they were "forced sellers," (2) that they were indirect purchasers of the stock, and (3) that the *Birnbaum* doctrine should be overruled, at least in the Seventh Circuit.

The *Birnbaum* case, according to the court of appeal, interpreted the 10b-5 standing requirement in a "constitutional and jurisdictional sense." The court disagreed with that interpretation and stressed that the proper standing test really was whether "the plaintiff is a person who has suffered a legal wrong." Thus, the question for this case becomes whether plaintiff was in the class of persons to be protected and whether there was an injury. *Id.* at 658.

The court then discussed the broad application that has been given section 10(b) actions as well as the broad scope of "persons" protected by the action. With this background, the court found that the plaintiffs indeed should be protected from this fraudulent scheme. *Id.* at 658-60. In a final analysis, the court found that neither the mere possibility of an influx of section 10(b) cases nor the appearance of consistency in interpretation was paramount to the protection of defrauded investors. Hence, the plaintiffs were granted standing to sue under section 10(b). *Id.* at 660-61.

19. *Id.* at 659.

show that they were within the class of persons sought to be protected by the rule.²⁰ Recent cases such as *Eason* lead inescapably to one conclusion: in a jurisdiction where the *Birnbaum* doctrine is in force, it is mandatory to determine who is and who is not considered a purchaser or seller.

Given the recent judicial interpretations, it should be noted that one need not be an actual "purchaser or seller" of securities in order to qualify for standing. The Securities and Exchange Act itself recognizes in section 3(a)(13) and (14) that a contractual relationship to buy or sell a security is tantamount to an actual purchase or sale,²¹ hence, legally enforceable contracts have universally been held by courts as granting to the plaintiff the position of a statutory purchaser-seller.²² Congress, however, has not elaborated as to exactly what constitutes a contract for the purposes of 10b-5.²³ Of course, any contract in the traditional sense of the word falls within the rule. A question arises only when an agreement is not technically a contract under a strict legal definition, but nonetheless is sufficiently analogous to one to come within a broad definition of the term. Generally, the courts have been disposed to give 10b-5 a broad and liberal interpretation²⁴ and thus

20. *Id.* at 660.

21. 15 U.S.C. 78c (13) & (14) (1970) provide:

(13) The terms "buy" and "purchase" each include any contract to buy, purchase, or otherwise acquire.

(14) The terms "sale" and "sell" each include any contract to sell or otherwise dispose of.

22. *See* *Mount Clemens Indus. v. Bell*, 464 F.2d 339, 345 (9th Cir. 1972).

23. In making the provision to treat a contract as an actual purchase or sale, Congress realized that the parties to a contract, and the rights or correlative duties of the parties, are sufficiently defined so that, in the case of a breach, the courts will not have to worry about both the identity of the party possessing the right and the extent of the right possessed. From the viewpoint of the securities market, there is no question that a contract or option contract is a legally enforceable agreement; thus the purchase or sale is constructively made when the contract is signed and has become enforceable. It is entirely logical that such a contract be given the same treatment as an actual purchase or sale.

In the determination of what constitutes a contract, 15 U.S.C. 78c (1970) is not helpful since the term "contract" is not defined. "Congress merely used the word contract. It reads too much into the use of this word to conclude that executed contracts fall within the definitions but that executory contracts are not covered." *Whitaker, supra* note 11, at 558 n.70.

24. In *A.T. Brod & Co. v. Perlow*, 375 F.2d 393 (2d Cir. 1967), there was a scheme to perpetrate a fraud on a stockbroker. Perlow, the defendant, placed orders to buy certain securities on the New York Stock Exchange with the intent of paying for the stock only if the price subsequently rose. Perlow ordered a block of shares of two different stocks which went down in price after the order but before he had paid for them, and he refused to pay for them. Consequently the broker, Brod, was forced to resell at a loss. *Id.* at 395. The district court dismissed the action for a lack of "fraud or deceit"

give "contracts" a broad interpretation so that a plaintiff may acquire standing under 10b-5.

The courts have also recognized a number of exceptions which extend standing under 10b-5 even though the disputed transactions did not involve an "actual" purchase or sale or a contractual relationship. The most notable qualification to the purchaser-seller limitation is the so-called "forced seller" doctrine, enunciated by the Second Circuit in *Vine v. Beneficial Finance Co.*²⁵ In *Vine*, the holders of the Class B common stock negotiated a sale of their minority control stock for a substantial premium in a transaction which resulted in a short-form merger. The Class A shareholders were given the option to either tender their shares to the purchasing corporation at a fraction of their market value before the merger or hold onto their shares of a now defunct corporation.²⁶ The plaintiffs decided not to sell the stock to the purchasing company because of the low offering price²⁷ and subsequently brought suit for a 10b-5 violation. The district court dismissed the suit on grounds that the plaintiffs failed to meet the purchaser-seller requirement.²⁸ The Second Circuit, however, upheld the plaintiffs' contention that they had standing to assert a violation of 10b-5 because they were "forced sellers." It reasoned that for all practical purposes their only *real* alternative was to sell their Class A stock at a fraction of its pre-merger value.²⁹

within the scope of section 10(b) or rule 10b-5.

The court of appeals reversed, stating that section 10(b) was connected with preventing manipulative devices perpetrated "in connection with the purchase or sale" of any securities. The court held that, since the section was to have regulations established "in the public interest," stockbrokers as well as investors should be protected. Since this was an action only upon the pleadings, the court assumed that the allegations of the complaint were true and held these allegations did state a claim under which relief could be granted under 10b-5. The court went on to note that this type of practice must be curtailed and that "artificial" distinctions should not be made in dealing with 10b-5 recoveries.

25. 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967).

26. *Id.* at 630.

27. *Id.* at 630-31.

28. *Id.* at 630.

29. *Id.* at 635. In this case, there was an allegedly fraudulent plan to take over Crown, a small loan corporation, by the larger NYSE-listed corporation of Beneficial Finance. Beneficial sought to receive a better price for the short-form merger by overpaying the relatively small number of Class B stockholders, who numbered approximately 45,000, but because of special voting arrangements, controlled the corporation. Beneficial would then grossly underpay the approximately 625,000 Class A shareholders, thereby making a highly advantageous take-over of Crown. In this manner, Beneficial convinced the management of Crown to advise the less sophisticated Class A shareholders to sell at the undervalued price; the minority Class B shareholders would

Another Second Circuit decision evidencing a liberal attitude toward the standing requirement of 10b-5, *Mutual Shares v. Genesco, Inc.*,³⁰ held that the purchaser-seller limitation had no application to those cases in which the remedy sought was equitable relief. The plaintiff in *Mutual Shares*, a minority shareholder, had brought suit seeking equitable relief and monetary damages alleging various fraudulent schemes. The controlling shareholders manipulated the market price of the shares and withheld dividends in order to force minority shareholders to sell out at deflated prices.³¹ The court held that the plaintiffs must rely on sales of shares made at the deflated value in order to collect monetary damages. But, as to the equitable relief sought for the prevention of future manipulation, the court held that the *Birnbaum* doctrine did not apply.³² Referring to *SEC v. Capital Gains Research Bureau, Inc.*,³³ it observed, "It is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages."³⁴

While the Second Circuit has provided an incessant array of cases dealing with the *Birnbaum* doctrine, it was not until the *Mount Clemens*³⁵ decision that the Ninth Circuit dealt with this issue in depth. The plaintiff in *Mount Clemens* alleged that he was precluded from purchasing securities at a sheriff's sale because of misrepresentations made by the defendant that the securities were worthless.³⁶ The district court held that the plaintiff was barred from bringing an action because he had not purchased or contracted to purchase any securi-

benefit and the Class A shareholders would be injured. In this manner, Beneficial would underpay approximately \$300,000 in tangible assets and \$500,000 in going business value. *Id.* at 630-31.

Beneficial succeeded in purchasing 95% of the outstanding Class A stock, thereby successfully completing a short-form merger. Vine was one Class A shareholder who neither sold his stock nor accepted his statutory appraisal rights. The alternative was to hold worthless shares of a now defunct corporation. The plaintiff decided to hold out and not participate in the fraudulent scheme, thus he never sold the stock. The court noted, "It is true that appellant still has his stock; if he turned it in for the price of \$3.29 a share, it would be clearer that appellant is a seller. Assuming that this would not otherwise affect his right to sue under the Act and the Rule, requiring him to do so as a condition to suit seems a needless formality." *Id.* at 634. The court further concluded that, since Vine was a seller, Beneficial was an imputed buyer. Hence, an action under 10b-5 was upheld.

30. 384 F.2d 540 (2d Cir. 1967).

31. *Id.* at 542.

32. *Id.* at 546-47.

33. 375 U.S. 180 (1963).

34. 384 F.2d at 547, citing 375 U.S. at 193.

35. 464 F.2d 339 (9th Cir. 1972).

36. *Id.* at 340-41.

ties.³⁷ The Court of Appeals, in affirming the lower court decision, relied significantly upon the reasoning of *Iroquois Industries, Inc. v. Syracuse China Corp.*,³⁸ one of the most recent affirmations of the *Birnbaum* doctrine. The *Mount Clemens* court did indicate that a plaintiff need not be an actual purchaser or seller if he is a party to a contract or falls within the "forced seller" exception. As the court noted:

Yet that circumstance [that plaintiff was not actually a purchaser or seller] does not end our inquiry, for under the liberal interpretation that has sometimes attended the application of the *Birnbaum* doctrine, there have been cases in which standing has been afforded to persons who, even though not actual purchasers or sellers, have been deemed to have the required status.³⁹

The court also discussed the "aborted purchaser-seller" doctrine which applies in a situation where material misleading information causes the purchaser or seller to refuse to carry through with the transaction. The court went to great lengths to note that it is the element of a contractual relationship that elevates this type of transaction to the realm of purchaser-seller.⁴⁰ Hence, the "aborted purchaser-seller" doctrine is not an exception to the standing requirement, but rather a judicial recognition of the statutory purchaser-seller.⁴¹ Since there was no contractual relationship present in *Mount Clemens*, the court concluded that the plaintiff could not be vested with standing under the poorly phrased "aborted purchaser-seller exception."

Ironically, the *Mount Clemens* court intimated that, if the plaintiffs would have brought a derivative action instead of a direct one, they

37. *Id.* at 341.

38. 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970). In *Iroquois*, the appellant made a public offer to purchase 50,000 shares of Syracuse China. Syracuse resisted, the tender offer failed, and Iroquois instituted this action under 10b-5. The action alleged that there was a fraudulent resistance to the tender offer by a misleading letter from the management of Syracuse to the shareholders arguing that the tender offer should be defeated. Allegations included false statements regarding the up-coming merger of the corporations. The question became whether or not this fraud could be redressed by 10b-5.

The court, after reviewing a great deal of case law, concluded that the *Birnbaum* doctrine had not been overruled, at least so far as damages were concerned, and that the policy reasons behind the doctrine were still viable. The court therefore found that the plaintiffs did not have standing and dismissed this action, suggesting that the plaintiffs bring an action under state blue sky laws or perhaps under another section of the federal securities law.

39. 464 F.2d at 345.

40. *Id.* at 345-46.

41. See note 21 *supra* and accompanying text.

would have qualified as "forced sellers."⁴² However, the court felt that the case had progressed too far to allow a change in the nature of the action. The result of denying standing because of the method of filing an action contravenes the basic posture that other courts have felt should be the proper approach to the *Birnbaum* doctrine.⁴³

The *Birnbaum* doctrine was firmly established in the Ninth Circuit when the *Manor Drug* case was decided in October of 1973. The case evolved from previous litigation which had been resolved by a consent decree.⁴⁴ In the original proceeding, the United States brought suit against Blue Chip Stamp Company and nine other co-defendants for monopolizing the California trading stamp business in violation of sections 1 and 2 of the Sherman Act.⁴⁵ Non-shareholding distributors of the stamps also claimed that they had an equitable interest in \$20,000,000 of the accumulated profits of Blue Chip Stamp Company.⁴⁶ The Company agreed to a consent divestiture decree which required that it sell approximately 55% of the outstanding shares of a new corporation, Blue Chip Stamps (hereinafter BCS), to non-shareholding users of the stamps in proportion to their use of the stamps. This was to be accomplished by selling "units" of securities of BCS; each unit was to consist of one debenture and three shares of common voting stock.⁴⁷ The unit selling price for the participating users was \$101, but the fair market value of each unit was \$315.⁴⁸ In this manner, the

42. 464 F.2d at 344 n.9, 347 n.14. Mount Clemens Industries and Mount Clemens Corporation alleged that they were fraudulently dissuaded from purchasing securities from Missile Dynamics Corporation at a sheriff's sale. The alleged fraudulent misrepresentations were made to them by a former director of Missile Dynamics who claimed that the stock was worthless. As it related to 10b-5, the district court dismissed the claim. *Id.* at 340-41.

On appeal, the plaintiffs argued that the *Birnbaum* doctrine had been distinguished by so many different qualifying factual situations that it had been eroded to the point where it was no longer the law. In addition, the SEC, in an amicus curiae brief, argued that the *Birnbaum* decision was incorrect when decided, even if it had not been eroded out of the case law. *Id.* at 341. The court was not persuaded by either of these arguments and went on to hold that, since the plaintiffs could not be "purchasers," the ruling of the district court should be affirmed and the action dismissed. *Id.* at 344-47.

43. See note 13 *supra*.

44. *United States v. Blue Chip Stamps Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom.*, *Thrifty Shoppers Scrip Co. v. United States*, 398 U.S. 580 (1969).

45. 15 U.S.C. §§ 1 & 2 (1970). Blue Chip Stamp Company was originally intended to be a nonprofit organization wholly owned and controlled by the patronizing users of the stamps.

46. 492 F.2d at 139.

47. *Id.*

48. *Id.*

profits of the old company would be evenly distributed to all users of the stamps who chose to purchase the shares of the new corporation at the pro rata amount.

The existing shareholders of Blue Chip Stamp Company, who opposed the dilution of their holdings, proceeded to discourage new offerees from accepting the offer as formulated pursuant to the consent decree.⁴⁹ This was achieved by making fraudulent representations concerning the true value and future outlook of BCS securities through the circulation of a prospectus which raised serious questions as to the financial future of BCS. Specifically, the prospectus over-emphasized outstanding unsettled litigation against the company and overstated the redemption rate of the stamps in comparison with previous years.⁵⁰ Because these misrepresentations dissuaded the plaintiffs from exercising their right to purchase their pro rata number of offered units, they commenced a 10b-5 action seeking damages in the amount of the difference between the offering price and the present fair market value of the units.⁵¹

Since neither a purchase nor a sale had been made and since no contractual relationship, in the strict legal sense of the term, was involved, the issue centered around whether or not the plaintiffs could satisfy the purchaser-seller requirement. Indeed, the district court had dismissed the case for a failure to comply with *Birnbaum*.⁵² However, in reviewing the transactions, the *Manor Drug* majority stated that rule 10b-5 was not confined to "consummated purchases or sales."⁵³ By characterizing the consent decree as a functional equivalent of a contract,⁵⁴ the court extended the *Birnbaum* purchase-sale requirement to encompass parties to a consent decree where the price, quantity, and parties of the sale were specifically designated.

In discussing atypical transactions qualifying under 10b-5, the *Manor Drug* court, relying on *Mount Clemens*, stated that the "common link" which elevates non-purchaser-sellers to actual purchaser-seller status is the contractual relationship of the parties. (This is not, as previously noted, an accurate statement, since the Act itself gives standing to parties of a contract, and thus they need not be elevated to that position.) It seems reasonable to conclude that, if the consent decree⁵⁵ is

49. *Id.*

50. *Id.* at 139 n.6.

51. *Id.* at 140.

52. *Id.* at 138.

53. *Id.* at 140.

54. *Id.* at 142.

55. *Black's Law Dictionary* defines a consent decree as "[o]ne entered by consent of

sufficiently analogous to a contract,⁵⁶ then it should be afforded the same status as a contract. In finding that a consent decree served the same function as did a contract, the court realized that, although it is not directly enforceable against a violating party (as is a contract),⁵⁷ it is indirectly enforceable in that it will evidence any stipulated facts.⁵⁸ Moreover, the majority's opinion is not premised on the aspect of enforceability of either the contract or the consent decree. Rather, the majority is concerned with the ability of the consent decree to satisfy with certainty the elements and necessary details of the 10b-5 cause of action; such factors include the plaintiffs, the price and the number of securities in question.⁵⁹ Even though the contract and the consent decree differ in the matter of enforceability, the court found that there were enough other similarities to dismiss the argument that the plaintiffs did not fall within the *Birnbaum* doctrine.⁶⁰

In such circumstances, Judge Browning and Judge Choy felt that the consent decree was just as efficacious in determining the elements of proof of loss and causation as a contract.⁶¹ In a contract, the parties, price and other provisions are sufficiently definite to enable the courts to determine actual damages suffered by either party. The consent decree involved in *Manor Drug* offered the same protections: the plaintiffs, the non-shareholding users of the stamps, were entitled to receive the \$101 units in an amount specifically determined by the number of

the parties; it is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties, made under the sanction of the court, and in effect an admission by them that the decree is a just determination of their rights upon the real facts of the case, if such facts had been proved." BLACK'S LAW DICTIONARY 499 (4th ed. rev. 1968). For an in depth look at the use of the phrase "consent decree," see Norman v. Norman, 111 N.E.2d 377 (Ill. App. Ct. 1953); Dulles v. Dulles, 85 A.2d 134, 137 (Pa. 1952); 8A WORDS AND PHRASES *Consent Decree* (1951).

56. See notes 21-24 *supra* and accompanying text.

57. 492 F.2d at 142 n.14.

58. *Id.* at 142.

59. *Id.*

60. The majority, although explicitly noting in a footnote that a consent decree could not be directly enforceable, emphasized the insignificance of this factor. The action was not brought for a violation of a consent decree but rather under 10b-5; the only use of the consent decree was to insure standing. The plaintiff only incidentally relied on the decree, and the extent of its enforceability was not crucial for its use in the case. *Id.* at 142 n.14.

61. See note 23 *supra*. Under the recent Supreme Court decision, the causation required under a 10b-5 cause of action is that of "causation in fact." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1971). Thus, the question in *Manor Drug* becomes, did the defendants "in fact" dissuade the plaintiffs from exercising their right to a pro rata distribution of the stock of BCS. For a further treatment of damages and causation, see note 63 *infra*.

stamps they used. Also, the fair market value of the units was readily verifiable at \$315 per unit.⁶² With the certainty of these factors, the court would have little difficulty in ascertaining who has been injured and the extent of that injury.⁶³ Thus, the majority's conclusion that these factors make the consent decree commensurate to a contract for the purposes of 10b-5 is reasonable. The great price differential between the offering price and the fair market value insured that, but for the false representations, the plaintiffs would have purchased all of the units offered to them. Even if the offerees were low on cash and were forced to purchase on margin, it is highly unlikely that they would have failed to participate in what was, in reality, an outright distribution of profits. Thus, the court reversed and remanded the case for trial on the merits.⁶⁴

Judge Hufstедler, in denouncing the majority's expansion of the purchaser-seller doctrine, thought the opinion to be inconsistent with the earlier decision in *Mount Clemens*. First, she voiced concern for the majority's characterization of the consent decree as the functional equivalent of the contractual relationship by stating that "the functions of a contract and of the consent decree are . . . not equivalent."⁶⁵ Second, and more importantly, she asserted that "[a] consent divestiture decree cannot function similarly because it is not a 'contract' within the meaning of the statute . . ."⁶⁶

No one would seriously disagree with Judge Hufstедler's first assertion; however, she incorrectly assessed the majority's analysis. The

62. 492 F.2d at 139.

63. For cases dealing with related problems in the determination of damages and causation, see, e.g., *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1971) (in which the "causation in fact" test was firmly established as the proper causation test); *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 495 F.2d 228 (2d Cir. 1974) (private action for non-disclosure in which the court held that lack of privity, an inability to prove reliance, and the fact that the plaintiffs bought on the exchange did not prevent the claim for damages); *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970) (which followed the causation in fact test); *Crane Co. v. Westinghouse Air Brake Company*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970) (where it was held that the lack of privity between parties should not bar a 10b-5 action); *Globus v. Law Research Service, Inc.*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) (it was reiterated that if there were no causation for damages the defendants could be held liable to all the people in the world); *List v. Fashion Park, Inc.*, 340 F.2d 457 (2d Cir.), *cert. denied*, 382 U.S. 811 (1965) (where the court refused to discard the basic causation element to the 10b-5 cause of action).

64. 492 F.2d at 142.

65. *Id.* at 143.

66. *Id.* at 144.

majority only stated that, when dealing with the consent decree for the purposes of the 10b-5 standing requirement, it is functionally equivalent to contractual relationships, although admittedly not embracing all of the formalities of that relationship.

Judge Hufstедler's second point clearly ignores the liberal interpretation that courts have universally applied to the definition of a contract for the purpose of 10b-5 standing.⁶⁷ Although the terms "purchase" and "sale" are defined by Congress,⁶⁸ it has been left to the courts to ascertain what Congress intended the term "contract" to encompass.⁶⁹ To summarily dismiss the consent decree seems to be a basic contradiction of the congressional purpose of including the term "contract" within the phrase "purchase or sale."⁷⁰ Courts have always been ready to admit that the unorthodox transactions should not escape the purview of the 10b-5 proscription solely because of their uniqueness.⁷¹ This is exemplified by the Second Circuit case of *A.T. Brod & Co. v. Perlow*,⁷² wherein the court stated:

We believe that Section 10(b) and Rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.⁷³

If such were not the case, many transactions would be structured in a manner to avoid potential 10b-5 liability. And, from the viewpoint of the individual investor, there seems to be no strong rationale to tell one investor that he may sue because he has a legally binding contract, and to say to another that he may not sue because his transaction, although providing the same protections of a contract and although the functional equivalent of a contract, is not a contract within the strict interpretation of the word.⁷⁴

67. See *Mount Clemens Industries, Inc. v. Bell*, 464 F.2d 339, 346 n.12 (9th Cir. 1972). See also *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

68. See note 21 *supra*.

69. *Id.*

70. *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 464 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

71. See *Boone & McGowan, Standing to Sue Under SEC Rule 10b-5*, 49 TEXAS L. REV. 617, 623 (1971). See also *Lowenfels, The Demise of the Birnbaum Doctrine: A New Era for Rule 10b-5*, 54 VA. L. REV. 268 (1968); *Entel v. Allen*, 270 F. Supp. 60 (S.D.N.Y. 1967).

72. 375 F.2d 393 (2d Cir. 1967).

73. *Id.* at 397.

74. See notes 20-24 *supra* and accompanying text.

The apparent motivation of the dissent throughout the opinion is the fear of potential adverse ramifications inherent in expanding the class of persons who will be granted standing under 10b-5. At one point, Judge Hufstedler states:

Incautious loosening of the purchaser-seller rule will generate federal litigation, increase the cost of marketing securities, inject into securities marketing new risk factors that defy accurate assessment, expose offers to draconian damage claims, and invite strike suits.⁷⁵

Yet the majority did not abolish the purchaser-seller limitation, nor did it make compliance easy for anyone and everyone. Rather, it merely responded with a specific isolated exception clearly merited by the factual context. To prevent these plaintiffs from suing because of an overly narrow construction of the term "contract" would "subordinate substance to form"⁷⁶ and would disregard the underlying purpose of the statute. Although the majority's position might require more court time in determining what circumstances will lead to a functional equivalent of a contract (certainly all consent decrees cannot be said to have this status) and might lead to less uniformity in the application of 10b-5, these inherent evils should be tolerated in order to more effectively prevent misrepresentation in the securities market.

Although the majority's position is well reasoned, the admonitions of the dissent should not be perfunctorily disregarded.⁷⁷ If the expansion of the standing requirement is not closely scrutinized to make sure that the aspects of proof of loss and causation are certain, the courts will, for all practical purposes, overrule the *Birnbaum* doctrine. And, one must agree with the logic of the dissent that once a rule has been expanded, further expansion is inevitable.⁷⁸ The only answer to this caveat is that the courts in the future must be painfully aware of what the purchaser-seller rule is designed to do and heed those purposes.⁷⁹ If this is done, then there will be no question that 10b-5 will

75. 492 F.2d at 147 (footnote omitted).

76. *Id.* at 142.

77. One argument in Judge Hufstedler's dissent is that a federal standing requirement "insures" that the litigants are sufficiently adverse to satisfy the case or controversy requirement of Article III of the Constitution and that the standing requirement thus confines the persons who may bring suit to only those whom Congress intended to provide a remedy. *Id.* at 146. But it is this very factor of congressional intent that the majority relied upon to buttress its decision. *Id.* at 141. As is often the case, different judges have read congressional purpose as supportive of different results on the same issue.

78. *Id.* at 142-48.

79. The *Manor Drug* court set forth the purpose of the rule as follows:

Like the provisions of the statute and rule relating to coverage, the *Birnbaum*

not outgrow its purpose. This responsibility lies with the trial courts to determine in each "atypical or novel" situation whether there is a functional equivalent to the contractual relationship; if this is accomplished, then the standing rule shall be exactly as it was conceived to be.

CONCLUSION

On November 12, 1974, the United States Supreme Court granted certiorari to review the *Manor Drug* decision. The continuing validity of the Ninth Circuit opinion as well as the *Birnbaum* doctrine will depend on the Court's final resolution of the case.

On petition for certiorari,⁸⁰ the petitioners first argued that the Ninth Circuit's decision is in conflict with opinions of the Second,⁸¹ Third,⁸² Fifth,⁸³ Sixth⁸⁴ and Eighth⁸⁵ Circuits, which require a plaintiff under

"purchaser-seller" standing requirement is to be construed to accomplish Congress' purpose. If this were the sole consideration, standing would be allowed to any person whose investment decision was affected by fraud, whether the fraud caused him to buy or prevented him from doing so. In either case the fraud would frustrate Congress' purpose, as we have said; and, in either case, allowing the private remedy would serve to vindicate that purpose.

The standing requirement rests in part upon other considerations, however.

Cases allowing private suits for injunctive relief make it clear that the "purchaser-seller" prerequisite to standing to sue for damages rests largely on the assumption that if plaintiff does not allege that he purchased or sold the stock involved in the fraud it is evident at the outset that his claim must fail "both on proof of loss and the causal connection with the alleged violation of the Rule."

This assumption is usually justified. Ordinarily there will be little proof (other than the non-purchaser's own opinion, after the loss) that the non-purchaser would in fact have purchased but for the fraud, and, if so, how much, when or at what price; also, generally, the potential number of non-purchasers will be without definable limit.

Id. at 141, quoting, *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 547 (2d Cir. 1967) (citations and footnotes omitted). In *Manor Drug* these requirements were met because there existed (1) objective evidence of a plaintiff's intention to purchase or sell but for the fraud, which establishes causation, and (2) objective evidence of "price, quantity, and time of sale, thus making it possible to calculate damages." *Id.* at 142.

80. Petitioner's Brief for Certiorari, *Blue Chip Stamps v. Manor Drug Stores*, 95 S. Ct. 302 (1974) [hereinafter cited as Petitioner's Brief].

81. See, e.g., *Haberman v. Murchison*, 468 F.2d 1305, 1311 (2d Cir. 1972); *Greenstein v. Paul*, 400 F.2d 580 (2d Cir. 1968).

82. See, e.g., *Landy v. Federal Deposit Ins. Corp.*, 486 F.2d 139, 156-57 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

83. See, e.g., *Sargent v. Genesco, Inc.*, 492 F.2d 750, 763 (5th Cir. 1974); *Rekant v. Dresser*, 425 F.2d 872, 879 (5th Cir. 1970).

84. See, e.g., *Simmons v. Wolfson*, 428 F.2d 455, 456 (6th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971).

85. See, e.g., *City Nat'l Bank v. Vanderboom*, 422 F.2d 221, 227-28 (8th Cir.), *cert. denied*, 399 U.S. 905 (1970); *Vanderboom v. Sexton*, 422 F.2d 1233, 1243 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970); *Erling v. Powell*, 429 F.2d 795, 799-800 (8th Cir. 1970).

a 10b-5 cause of action to be a purchaser-seller of the securities in question.⁸⁶ The petitioners, although noting that the Seventh Circuit has expressly abrogated the purchaser-seller limitation, insist that the doctrine is still vital and fulfills a necessary function in the regulation of securities.⁸⁷ Any "exceptions" to the *Birnbaum* doctrine have been carefully distinguished and explained; further, the petition states that the facts of this case do not present a situation where there should be a promulgation of a further exception to the doctrine.⁸⁸

The respondent in the *Opposition to the Petition for Writ of Certiorari*⁸⁹ stresses the "anomalous circumstance[s]" of the case, noting the exceptions to the *Birnbaum* doctrine that other courts have been willing to fashion when the facts justify such a treatment.⁹⁰ In addition, the Securities and Exchange Commission filed an amicus curiae brief in support of the Writ of Certiorari which tendered yet another position, namely that the *Birnbaum* doctrine itself is "unsound and should be rejected."⁹¹

If the Court should decide the case on this issue, it can make that decision on one of three potential alternatives: first, affirming the *Birnbaum* doctrine and denying that the facts here are deserving of a specific exception; second, affirming the *Birnbaum* doctrine but with a

86. Petitioner's Brief, *supra* note 80, at 14-15.

87. Petitioner's Brief, *supra* note 80, at 15.

88. Petitioner's Brief, *supra* note 80, at 17.

89. Respondent's Brief in Opposition to Certiorari, *Blue Chip Stamps v. Manor Drug Stores*, 95 S. Ct. 302 (1974) [hereinafter cited as Respondent's Brief].

90. Respondent's Brief, *supra* note 89, at 20-23. The respondent argues:

It cannot be over-stressed that the facts in the present case present a situation unlike any other with which a court in determining standing under section 10(b) and rule 10b-5 has had to wrestle. Succinctly stated, we have here the anomalous circumstance wherein a defendant under the mandate of a court decree must offer, to a specified class, securities at a bargain price, yet which offering, for reasons of its own monetary gain the defendant hopes and attempts to insure through its fraud will be unsuccessful.

Id. at 23.

91. Brief for SEC as Amicus Curiae at 5, *Blue Chip Stamps v. Manor Drug Stores*, 95 S. Ct. 302 (1974). The SEC argues:

The *Birnbaum* rule is yet another such restrictive construction unjustified by the words or the purposes of the Act. Although there is a private right of action for damages caused by a violation of Rule 10b-5, the *Birnbaum* rule operates to deny this remedy to an entire class of fraud victims, depriving them of the protection the securities laws were intended to afford. There are often misrepresentations the purpose or effect of which—as in the instant case—is to prevent the purchase or sale of securities. There is no reason why victims of a fraud who suffer a loss should be treated less favorably when the loss results from their failure to make a "bargain" purchase than when it results from making a purchase that turns out to be no bargain.

Id. at 6 (citations omitted).

broad and liberal interpretation of the doctrine, allowing for an exception for this and other anomalous fact situations; or third, abolishing the *Birnbaum* doctrine.

The petitioner's second allegation is that the Court of Appeals decision allows a non-party to a consent decree to assert the rights of that decree in a separate proceeding,⁹² contrary to the decisions of the United States Supreme Court⁹³ and the Eighth Circuit.⁹⁴ This argument notes that the majority in the lower court opinion used the consent decree to give rights to the respondents and that, since a consent decree has a very limited purpose, it should be delimited to the decree itself, and not incorporate by reference any other avowed purposes.⁹⁵ Therefore, the petitioners assert that the respondents should not be given the privilege of relying on rights which were not really theirs. The respondents counter that the decision does not depend or rely on the enforcement of the consent decree by non-parties; instead, the Court of Appeals merely used the decree to show the right to receive certain securities at a certain price which evolved from the consent decree in favor of the respondents.⁹⁶ It is further noted that the cause of action asserted was a federal regulating statute, not a breach of a consent decree.⁹⁷ If the Court should decide the case on this issue, it would implicitly, if not explicitly, accept the basic contention of the *Birnbaum* doctrine. If the Court should accept the SEC's position to abolish the entire doctrine,⁹⁸ the question of rights under the consent decree would be moot.

The third and final contention made in the petition for certiorari is that the lower court opinion is in conflict with the 1933 Act's policy of discouraging unduly optimistic prospectuses.⁹⁹ Petitioners reason that, under the 1933 Act, any adverse potentialities must be disclosed with a statement as to their importance. Further, if under 10b-5 one would be required to conservatively assess negative factors, the prospectus draftsman would be in a very difficult (impossible?) position:

92. Petitioner's Brief, *supra* note 80, at 18-22.

93. *United States v. Armour & Co.*, 402 U.S. 673 (1971).

94. *Data Proc. Fin. & Gen. Corp. v. International Bus. Mach. Corp.*, 430 F.2d 1277 (8th Cir. 1970), *aff'g* *Control Data Corp. v. International Bus. Mach. Corp.*, 306 F. Supp. 839 (D. Minn. 1969).

95. Petitioner's Brief, *supra* note 80, at 19.

96. Respondent's Brief, *supra* note 89, at 40-44.

97. Respondent's Brief, *supra* note 89, at 44.

98. See note 91 *supra* and accompanying text.

99. Petitioner's Brief, *supra* note 80, at 22-25.

on the one hand, the draftsman would be required to disclose and adequately discuss adverse factors and on the other hand, not unjustly highlight these factors.¹⁰⁰ Because of this precarious position, petitioners urge that the Court of Appeals decision be reversed so that the 1933 and 1934 Acts are read in harmony.¹⁰¹ Respondents answer that there is nothing in the 1933 Act which sanctions an over-emphasis of adverse factors to fraudulently dissuade sales to prospective purchasers. Moreover, all the 1933 Act requires is "an honest and fair disclosure and presentation."¹⁰² This, it is argued, is not in disagreement with the purposes of the 1934 Act.¹⁰³

By granting certiorari, the Court has presumably decided to clarify the existing nebula surrounding the *Birnbaum* doctrine. Although the petitioners raise three arguments,¹⁰⁴ it is clear that the gravamen of the case is the right of a non-purchaser-seller to use the 10b-5 cause of action. It would do a disservice to litigators of future securities cases not to elucidate the standing requirement for one of the most widely relied-upon sections of the federal securities law. The Supreme Court has, in the past, intentionally avoided discussing the validity or invalidity of the *Birnbaum* doctrine, leaving this question to the discretion of the nation's district and circuit courts.¹⁰⁵ As a result, there is not only conflicting case law between the circuits,¹⁰⁶ but also confusion within the individual circuits. Whatever position the Supreme Court adopts with respect to the *Birnbaum* doctrine, it should be definitively espoused to terminate the speculation encompassing this enigmatic concept. Such goals as uniform national regulation, one of the main purposes of most national legislation, will continue to be sacrificed until this issue is unequivocally resolved. For these reasons, it is imperative that the Court decide the main issue of this case, that of the *Birnbaum* doctrine, and not decide the case on the basis of one of the two peripheral arguments propounded by the petitioners.¹⁰⁷

In the past, the *Birnbaum* doctrine has served the purpose of limiting

100. Petitioner's Brief, *supra* note 80, at 25.

101. Respondent's Brief, *supra* note 89, at 44-47.

102. 15 U.S.C. 77j (1970).

103. *Id.*

104. See text accompanying notes 80-103 *supra*.

105. There have been a plethora of cases on this issue in which certiorari has been denied. *E.g.*, *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

106. See notes 80-85 *supra* and accompanying text.

107. See text accompanying notes 92-103 *supra*.

the plaintiffs who can use the 10b-5 vehicle to redress securities-related fraud. By so doing, the doctrine has been a manifestation of the policy courts adopted in determining who 10b-5 was promulgated to protect: if affirmed, the *Birnbaum* doctrine will continue to serve this function. The question which must be faced is whether, since the establishment of the purchaser-seller limitation in 1952, attitudes toward the purpose of 10b-5 have changed sufficiently to justify the change of what has heretofore been one of the main prerequisites of the 10b-5 cause of action, thereby allowing greater accessibility to the courts of those injured by fraud or negligence in the securities market.

In casting the mold for future 10b-5 litigation, the Court must take a number of factors into account, and the policy and purpose of the cause of action must necessarily be carefully scrutinized. In addition, there are a number of practical ramifications which must not be forgotten, as expounded by Judge Hufstедler in her *Manor Drug* dissent.¹⁰⁸ Probably the most troubling of these considerations is the potential influx of federal litigation which might flow should the limitation be abrogated. This type of concern is often stressed in judicial opinions by such phrases as "opening the floodgates to litigation"; however, it is impossible to ascertain to what extent the federal judiciary will actually be burdened. Another related problem with eradicating the *Birnbaum* doctrine is proving the elements of causation and proof of loss. Although critics of the purchaser-seller doctrine, including the SEC, argue that this is not a primary function, or at least it is not the sole function, of the doctrine, they seldom express any opinion as to how causation and proof of loss will be determined without this type of limitation.¹⁰⁹

These and other practical considerations should not be the sole guiding light for the Supreme Court's opinion; they should be but one set of factors that is balanced with the policy of the provisions of 10b-5. And, after weighing all the considerations, it is somewhat unlikely that the Court will be willing to scrap completely the *Birnbaum* doctrine, at

108. See text accompanying note 75 *supra*; but see *A.T. Brod v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967).

109. See, e.g., Brief for SEC as Amicus Curiae, *Blue Chip Stamps v. Manor Drug Stores*, 95 S. Ct. 302 (1974), wherein the SEC fails to discuss any of the potential adverse ramifications which could arise if the doctrine is repudiated. Whatever the SEC's reason for this omission may be, it seems that their position as to the abolition of the *Birnbaum* doctrine would be enhanced with a careful evaluation and analysis of the issues and why they believed that the doctrine should not be controlling.

least without providing some other viable alternative to take its place. On the other hand, the limitation should not be so formalistic as to vitiate a seemingly proper plaintiff's cause of action when he is not within the strict confines of the doctrine but nonetheless can show special facts which are equivalent to fulfilling the limitation. Such a strict reading of *Birnbaum*, although providing for national uniformity, would be harsh in its application to "novel or atypical" transactions. From this vantage point, the most suitable alternative is that of affirming the Ninth Circuit's holding that the *Birnbaum* doctrine, although still viable, should be construed liberally to allow plaintiffs with all the protections of the purchase or sale to be on the same footing as those parties with an actual purchase or sale.

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