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NOTE

The "New Fraud" Becomes No Fraud: Santa Fe Industries, Inc. v. Green

A wholly owned subsidiary of defendant Santa Fe Industries owned ninety-five percent of the capital stock of Kirby Lumber Corporation, a Delaware corporation. For the sole purpose of returning Kirby to private status by eliminating the publicly held shares, Santa Fe created a holding company and merged it into Kirby pursuant to the Delaware short form merger statute.[1] Plaintiffs, minority shareholders of Kirby, were then notified of the transaction and informed that they must exchange their stock for an amount of cash previously determined by the defendants, Santa Fe and Morgan Stanley and Company, or, if dissatisfied with the exchange rate, seek appraisal of the value of the stock in state court.[2] Plaintiffs brought an action seeking damages and rescission of the merger under section 10(b) of the Securities Exchange Act of 1934[3] and SEC rule 10b-5,[4] alleging undervaluation of their stock and no prior notice of the merger. The district court granted defendant's motion to dismiss for failure to allege subject matter jurisdiction and failure to state a claim for relief on the grounds that the complaint failed to allege nondisclosure or misrepresentation.[5] The court of appeals reversed, finding that a "going private" short form merger gives rise to a federal cause of action for minority shareholders when the merger is performed without either a justifiable corporate purpose or prior notice, and when there is an inordinately low valuation of the stock. The court held that in such a case no allegation of misrepresentation or non-disclosure is required for stating a cause of action under rule 10b-5.[6] *Held, reversed*: The

1. DEL. CODE tit. 8, § 253 (1975). The statute has been amended as of July 1, 1976. *Id.* (Supp. 1976). A short form merger is a special type of cash-out merger. A cash-out merger is one in which the shareholders of a corporation being acquired can be compelled to take cash in the amount determined by the merger agreement. In a long form merger the agreement must be ratified by the stockholders of both companies. When the two companies are parent and subsidiary, and the parent owns most of the stock of the subsidiary, no shareholder approval is necessary; this latter type of transaction is a short form merger.

2. DEL. CODE tit. 8, § 262 (1975). The statute has been amended as of July 1, 1976. *Id.* (Supp. 1976).

3. 15 U.S.C. § 78j(b) (1970).

4. 17 C.F.R. § 240.10b-5 (1975):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

5. Green v. Santa Fe Indus., Inc., 391 F. Supp. 849 (S.D.N.Y. 1975).

6. Green v. Santa Fe Indus., Inc., 533 F.2d 1283 (2d Cir. 1976). For a case involving a long form merger with a similar result in the court of appeals see Marshel v. AFW Fabric Corp., 333

short form merger complained of involved neither deception nor manipulation as those words are used in section 10(b), and without an allegation of at least one of those concepts a claim of fraud and fiduciary breach does not state a cause of action under rule 10b-5 or section 10(b). *Santa Fe Industries, Inc. v. Green*, 97 S. Ct. 1292, 51 L. Ed. 2d 480 (1977).

I. THE "GOING PRIVATE" SYNDROME

A. *Background*

"Going private" is a term used to describe the efforts of a publicly held corporation to become a privately held corporation.[7] Going private techniques[8] are conflict transactions where the minority stockholders are ousted for the benefit of the majority.[9] The parties to the transaction are the company and the people acting for or controlling the company. Since those controlling the company also have a personal stake in the outcome, the transaction is deprived of any arm's-length quality.[10]

The results of these conflict transactions are often criticized as an oppression of the minority stockholders.[11] With respect to short form mergers,[12] this charge of oppression is grounded on inequities in state law which permit a board of directors unilaterally to determine the value of their company's stock with no input from the minority stockholders.[13]

A minority stockholder who objects to a short form merger may seek appraisal of the value of the stock in state court[14] or challenge the merger itself under state law.[15] Neither of these alternatives, however, provides an

F.2d 1277 (2d Cir.), *vacated and remanded for a determination of mootness*, 97 S. Ct. 228, 50 L. Ed. 2d 162 (1976).

7. The SEC suggests two definitions of "going private":

> [1] [A]ny transaction or series of transactions engaged in by an issuer or its affiliate, which would, if successful, permit the issuer to cease filing reports under the Exchange Act. [Or,]
>
> [2] any transaction by an issuer or its affiliate which might directly or indirectly result in the issuer being able to cease filing reports under the Exchange Act or which might result in a significant impairment in the liquidity of the trading market in its equity securities.

SEC Securities Exchange Act Release No. 11231, 40 Fed. Reg. 7947, 7948 (1975).

8. There are five techniques, all of which can be used alone or in combination with one another: (a) the repurchase of shares other than through cash tender offers, (b) cash tender offers, (c) exchange offers, (d) reorganization through cash-out merger or sale of assets, and (e) a reverse stock split. Moore, *Going Private: Techniques and Problems of Eliminating the Public Shareholder*, 1 J. CORP. L. 321 (1976).

9. When the minority stock is eliminated the majority stockholders benefit from higher earnings per share, higher book value per share, and larger proportional control for their holdings. 3 A. BROMBERG, SECURITIES LAW: FRAUD (New Matter) § 4.7, at 400.2 (Supp. 1975).

10. 1 A. BROMBERG, SECURITIES LAW: FRAUD § 4.7 (000), at 83-84 (Supp. 1972-73).

11. F. O'NEAL, "SQUEEZE OUTS" OF MINORITY SHAREHOLDERS: EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES (1976); O'Neal & Janke, *Utilizing Rule 10b-5 for Remedying Squeeze-Outs or Oppression of Minority Shareholders*, 16 B.C. INDUS. & COM. L. REV. 327 (1975).

12. *See* note 1 *supra*.

13. *See, e.g.*, DEL. CODE tit. 8, § 253 (1975); TEX. BUS. CORP. ACT ANN. art. 5.16 (Vernon Supp. 1976-77). These statutes permit a parent corporation owning at least 90% of the capital stock of a subsidiary to merge the parent and subsidiary upon approval by the parent's board of directors and to provide for the amount and method of payment for subsidiary shares not owned by the parent. The only notice required to be given to minority shareholders is that they be told of the merger within 10 days after the effective date of the transaction.

14. DEL. CODE tit. 8, § 262 (Supp. 1976); N.Y. BUS. CORP. LAW § 623 (McKinney 1963 & Supp. 1976-77); TEX. BUS. CORP. ACT. ANN. art. 5.16 (Vernon Supp. 1976-77).

15. The most successful challenges to the mergers under state law use the principles of fiduciary duty. *See* Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE

adequate remedy.[16] Judicial appraisal involves delay and expense,[17] and the power of the majority to determine the timing of the merger could obscure accurate valuation of the stock.[18] Even if successful, appraisal fails to consider the tax impact on the minority stockholder whose holdings are suddenly liquidated.[19]

Where the minority stockholder is able to challenge the merger at all,[20] he generally has to prove fraud resulting from deception.[21] In view of the lack of success of minority stockholders in proving deception,[22] this option provides little help. Besides the lack of substantive remedies, a minority stockholder in state court has to cope with serious procedural obstacles relating to discovery,[23] service of process,[24] and security for expenses.[25]

L.J. 663 (1974); Fillman, *Cash and Property as Consideration in a Merger or Consolidation*, 62 Nw. U.L. Rev. 837 (1968).

16. *See generally* Borden, *Going Private—Old Tort, New Tort or No Tort?*, 49 N.Y.U.L. Rev. 987 (1974); Kerr, *Going Private: Adopting a Corporate Purpose Standard*, 3 Sec. Reg. L.J. 33 (1975); Solomon, *Going Private: Business Practices, Legal Mechanics, Judicial Standards and Proposals for Reform*, 25 Buffalo L. Rev. 141 (1975); Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 Harv. L. Rev. 1189 (1964). *See also* Address by A. A. Sommer, Jr., "Going Private": A Lesson in Corporate Responsibility, Law Advisory Council Lecture, Notre Dame Law School, Nov. 20, 1974, in [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,010 (1974); Address by A. A. Sommer, Jr., Further Facts on "Going Private," Second Annual Securities Seminar of the Detroit Institute for Continuing Legal Education, March 14, 1975, in 294 Sec. Reg. & L. Rep. (BNA) D-1 (March 19, 1975). *See generally* Bialkin, *Fraud, Inside Information and Fiduciary Duty under Rule 10b-5* (ALI-ABA Conference), 298 Sec. Reg. & L. Rep. (BNA) A-12, A-13 (1975); Carter, Testimony before the SEC's fact-finding investigation on beneficial ownership—Takeovers and Acquisition, in 281 Sec. Reg. & L. Rep. (BNA) A-8 (1975).

17. Vorenberg, *supra* note 16, at 1201.

18. *Id.* at 1202-03. The most advantageous time for a company to go private is when the price of the company's stock is depressed. At that time, a higher value of the stock is speculative and under such circumstances the appraisal process tends to produce conservative results.

19. *Id.* at 1203. Forced liquidation exposes the minority stockholder to the capital gains tax and prior to Jan. 1, 1977, avoided the stepped up basis available to the stockholder's beneficiaries if he held the stock up to his death. The Tax Reform Act of 1976, Pub. L. No. 94-455, § 1023, 90 Stat. 1520, eliminated the stepped-up basis, and, thus, this disadvantage is no longer applicable.

20. In some jurisdictions appraisal has been held to be an exclusive remedy, thus preventing the minority stockholders from seeking any other relief in state court. *See, e.g.*, Stauffer v. Standard Brands, Inc., 41 Del. Ch. 7, 9-10, 187 A.2d 78, 80 (Sup. Ct. 1962); Beloff v. Consolidated Edison Co., 300 N.Y. 11, 87 N.E.2d 561 (1949).

21. Stauffer v. Standard Brands, Inc., 41 Del. Ch. 7, 10-11, 187 A.2d 78, 80 (Sup. Ct. 1962); Matteson v. Ziebarth, 40 Wash. 2d 286, 305, 242 P.2d 1025, 1036 (1952).

22. *See, e.g.*, Stauffer v. Standard Brands, Inc., 41 Del. Ch. 7, 11, 187 A.2d 78, 80 (Sup. Ct. 1962). Lack of success in proving deception stems from the requirement that actual fraud be proved, and, thus, a mere showing of unfairness is insufficient. Actual fraud requires proof of concealment or misrepresentation of fact with the attendant burden of scienter. *See generally* Cary, *supra* note 15; Comment, *Corporate Freeze-Outs Effected by Merger: The Search for a Rule*, 37 U. Pitt. L. Rev. 115 (1975).

23. The discovery rules under state law tend to be stricter than their federal counterparts. *See generally* Bahlman, *Rule 10b-5: The Case for Its Full Acceptance as Federal Corporation Law*, 37 U. Cin. L. Rev. 727 (1968). Stricter rules may thwart the plaintiff's cause because cases involving detailed financial transactions are generally won or lost in discovery. 1 A. Bromberg, *supra* note 10, § 4.7 (120) (Supp. 1972-73).

24. Personal jurisdiction statutes of the states may make it difficult to serve process on the myriad defendants involved in securities litigation. Thus, a plaintiff would have to bring several actions in different jurisdictions, a procedure which is not only inconvenient and inefficient, but expensive. *See* Patrick, *Rule 10b-5, Equitable Fraud and Schoenbaum v. Firstbrook: Another Step in the Continuing Development of Federal Corporation Law*, 21 Ala. L. Rev. 457, 458-61 (1969).

25. Security for expenses statutes allow a defendant to demand that plaintiff post a bond as a condition to maintaining a derivative suit, and to collect attorneys' fees against an unsuccessful plaintiff. *See, e.g.*, N.Y. Bus. Corp. Law § 627 (McKinney 1963 & Supp. 1976-77); Tex. Bus. Corp. Act Ann. art. 5.14 (Vernon Supp. 1976-77).

Thus, in the absence of an effective state remedy, the only alternative available to the minority stockholder is to seek relief under the federal securities laws.[26]

B. *The Development of "New Fraud"*

Rule 10b-5 was promulgated by the SEC to fill the gaps left by the otherwise comprehensive antifraud rules which Congress had enacted in 1933 and 1934.[27] The rule is drafted in broad language, but there is no written record of what kind of conduct the SEC sought to prohibit by rule 10b-5.[28] Congressional attention was focused primarily on insuring a climate of fairness in the marketplace.[29] The attitude of the SEC was that fairness could be achieved by maintaining free and open access to investment information.[30] Thus, the original application of rule 10b-5 was toward deception[31] cases since the full disclosure of pertinent information theoretically removed any unfairness that might prevent equal bargaining between buyers and sellers of securities.[32]

The necessity of finding deception as a prerequisite to 10b-5 liability proved a major obstacle when 10b-5 protection was sought in conflict situations such as going private transactions.[33] In some cases the deception requirement was a complete bar to finding a 10b-5 violation.[34] In other cases the courts were forced into creating legal fictions, such as substituting shareholders in place of the corporation,[35] or holding the deception of a director to be a deception of the corporation,[36] in order to allow 10b-5 claims. The rationale behind the latter decisions raised conceptual difficulties because traditional theory holds that the directors are the corporation and a corporation, like a person, cannot deceive itself.[37]

26. The federal rules of procedure would eliminate a plaintiff's procedural problems if federal substantive law provided a cause of action. F. O'NEAL, *supra* note 11, § 5.29; O'Neal & Janke, *supra* note 11, at 343-45.

27. 1 A. BROMBERG, *supra* note 10, § 2.2 (420) (Supp. 1970-71).

28. *Id.*

29. The preamble to the 1934 Act states that regulation and control of securities dealings is necessary "to insure the maintenance of fair and honest markets in such transactions." 15 U.S.C. § 78(b) (1970).

30. Comment, *Schoenbaum v. Firstbrook: The "New Fraud" Expands Federal Corporation Law*, 55 VA. L. REV. 1103, 1119 (1969).

31. "Deception" is used here to encompass both misrepresentation and nondisclosure. *See* 1 A. BROMBERG, *supra* note 10, § 4.7 (541) (Supp. 1972-73).

32. Comment, *supra* note 30, at 1119.

33. 1 A. BROMBERG, *supra* note 10, § 4.7 (542) (Supp. 1972-73).

34. *See, e.g.*, O'Neill v. Maytag, 339 F.2d 764 (2d Cir. 1964) (court held rule 10b-5 inapplicable to breach of fiduciary duty where breach does not involve deception).

35. *See, e.g.*, Pappas v. Moss, 393 F.2d 865 (3d Cir. 1968) (deception found by viewing fraud as though independent shareholders who were deceived were standing in place of defrauded corporate entity).

36. *See, e.g.*, Ruckle v. Roto American Corp., 339 F.2d 24 (2d Cir. 1964) (allegation that corporation has been or may be defrauded into issuing or selling securities through the failure or refusal of some directors fully to disclose to remaining directors material facts concerning transactions or financial condition of the corporation states a cause of action under rule 10b-5).

37. Comment, *supra* note 30, at 1104 n.10. These decisions were also criticized on the grounds that such holdings hindered an effective use of rule 10b-5 in the corporate sector.

> 10b-5 [should] be applied where necessary for the protection and facilitation of an investment decision. [Shell v. Hensley, 430 F.2d 819 (5th Cir. 1970)]. However, to continue to accomplish this all-too-apparent goal through the machinery of deception is to continue to hide the real consideration under the rubric of materiality. Furthermore, because the concepts of misrepresentation and deceit

The Second Circuit rejected the traditional deception requirement for a finding of fraud under rule 10b-5 in *Schoenbaum v. Firstbrook*.[38] There, Aquitane Company of Canada, Ltd. became the controlling shareholder of Banff Oil, Ltd. and placed three of its representatives on Banff's eight-man board of directors. Prior to announcing a major oil discovery, Banff's board of directors authorized the sale of treasury stock to Aquitane at a price far below what the stock traded for immediately after news of the oil find was released. A derivative action was brought on behalf of Banff, and, in ruling on the pleadings, the en banc court held that where it is alleged that one corporation exercised a controlling influence over another corporation, causing it to issue its stock at an inordinately low price, a violation of rule 10b-5(c)[39] is stated.[40] Although the court used some ambiguous language,[41] the decision is generally read as establishing "unfairness" plus "control"[42] as a separate violation of rule 10b-5, as distinguished from a finding of "deception."[43]

The holding in *Schoenbaum* that activity other than deception constituted fraud under rule 10b-5 became known as "new fraud."[44] New fraud signified a judicial awakening to the fact that minority stockholders in conflict transactions are vulnerable to securities frauds which would not threaten stockholders in general.[45] This realization spread to the other circuits where the new fraud theory was also adopted.[46]

The advancement of new fraud suffered a setback when the Second

> are anchored in the law of torts, which provides rigidly defined elements of those causes of action, the continued emphasis upon deception will perpetuate the requirements of reliance and causation, concepts ill-suited to a charge of fraud upon a corporation or its stockholders.

Cox, *Fraud is in the Eyes of the Beholder: Rule 10b-5's Application to Acts of Corporate Mismanagement*, 47 N.Y.U.L. REV. 674, 699 (1972) (citations omitted).

38. 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

39. 17 C.F.R. § 240.10b-5(c) (1975). For text of this clause see note 4 *supra*.

40. 405 F.2d at 219.

41. After giving the holding of the court, Judge Hays continued, "Moreover, Aquitane and the directors of Banff were guilty of *deceiving* the stockholders of Banff (other than Aquitane)." *Id.* at 220 (emphasis added). Some have read this passage as limiting the effect of *Schoenbaum*. *See* note 44 *infra* and accompanying text.

42. "Control" is a term of art in securities law. *See* 17 C.F.R. § 240.12b-2(f) (1975). *See also* 1 L. LOSS, SECURITIES REGULATION 770, 778-79 (2d ed. 1961); Note, *The Controlling Influence Standard in Rule 10b-5 Corporate Management Cases*, 86 HARV. L. REV. 1007, 1034-35 (1973).

43. 1 A. BROMBERG, *supra* note 10, § 4.7 (623) (Supp. 1974) and authorities cited therin, especially Jacobs, *The Role of Securities Exchange Act Rule 10b-5 in the Regulation of Corporate Management*, 59 CORNELL L. REV. 27, 57-61 (1973). Adding to this view is the disposition by the court of a claim against a third party who had purchased Banff stock through an arm's-length transaction. The court indicated the most important factor in dismissing the complaint as to the third party was "there is no reason to believe that Paribas was in any position to influence the judgment of the Banff directors by any improper means." 405 F.2d at 219. *But see* Solomon, *supra* note 16, at 163-64.

44. Popkin v. Bishop, 464 F.2d 714, 719 (2d Cir. 1972).

45. Comment, *supra* note 30, at 1117. The Supreme Court appeared to support the result reached in *Schoenbaum* in Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971). In upholding a 10b-5 claim by stockholders of a company against a group of investors who purchased the company and then paid for the transaction by fraudulent conversion of the company's assets, the Court found that the company "was injured as an investor through a deceptive device which deprived it of any compensation for the sale of its valuable block of securities." *Id.* at 10.

46. Rekant v. Desser, 425 F.2d 872, 881-82 (5th Cir. 1970); Pappas v. Moss, 393 F.2d 865, 869-70 (3d Cir. 1968); Dasho v. Susquehanna Corp., 380 F.2d 262, 269-70 (7th Cir.), *cert. denied*, 389 U.S. 977 (1967).

Circuit created an exception to the "controlling influence and unfair terms" test to determine 10b-5 liability in the case of *Popkin v. Bishop*.[47] The dispute in *Popkin* centered around a merger of Bell Intercontinental Corporation into its controlling stockholder, the Equity Corporation, on terms that the plaintiff, a minority stockholder of Bell, alleged to be "grossly inadequate" for Bell and its stockholders.[48] Since, however, state law had required a shareholder vote and plaintiffs conceded full disclosure, the court refused to grant injunctive relief.[49] The court held that once shareholder approval was "fairly sought and freely given, the principal federal interest is at an end."[50] Further, full disclosure would arm the shareholders with sufficient information to sue for an injunction under state law.[51]

Some commentators read *Popkin* as invalidating the new fraud holding in *Schoenbaum* and reinstituting deception as a necessary requirement for a finding of 10b-5 liability.[52] The *Popkin* opinion's emphasis on the decision's narrow grounds,[53] the gaps in the logic of the decision,[54] and a subsequent Second Circuit case,[55] indicated, however, that *Popkin*'s characterization of "non-disclosure as a key issue in rule 10b-5 cases" has not overruled *Schoenbaum*. *Popkin* left a great deal of uncertainty as to how much weight was to be given to the "controlling influence and unfair terms test" and the extent to which nondisclosure would be actionable.[56] The strongest statement that could be made was that full disclosure still remained the most effective means of avoiding 10b-5 liability.[57]

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47. 464 F.2d 714 (2d Cir. 1972).

48. *Id.* at 717.

49. The court took issue with the proposition that rule 10b-5 is more than a disclosure rule. After quoting Judge Hays' language in *Schoenbaum* (*see* note 41 *supra*), the court opined:

> Thus it seems clear that our emphasis on improper self-dealing did not eliminate non-disclosure as a key issue in rule 10b-5 cases. [That rule is] designed principally to impose a duty to disclose and inform rather than become enmeshed in passing judgments on information elicited. . . . This design has special relevance to merger transactions that, under state law, must be subjected to shareholder approval. In the context of such transactions, if federal law ensures that shareholder approval is fairly sought and freely given, the principal federal interest is at an end. Underlying questions of the wisdom of such transactions or even their fairness become tangential at best of federal regulation.

464 F.2d at 719-20.

50. *Id.* at 720.

51. *Id.*

52. *See, e.g.*, Note, *Securities Regulations—The Reincarnation of the Deception Requirement*, 51 N.C.L. REV. 942 (1973).

53. *E.g.*, Popkin v. Bishop, 464 F.2d 714, 720 (2d Cir. 1972) (the rarity of concession of full disclosure by plaintiffs and the mandatory shareholder vote).

54. Equity was a controlling stockholder, thereby rendering the stockholder vote a foregone conclusion. Thus, how can it be said that "shareholder approval" was "freely given?" Further, when the approval is certain and the terms are unfair it is doubtful that such approval is "fairly sought." 1 A. BROMBERG, *supra* note 10, § 4.7 (626)(3) (Supp. 1974). *See generally* Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 302-03 (1974); Jacobs, *The Role of Securities Exchange Act Rule 10b-5 in the Regulation of Corporate Management*, 59 CORNELL L. REV. 27, 72-73, 88-92 (1973); Note, *The Controlling Influence Standard in Rule 10b-5 Corporate Mismanagement Cases*, 86 HARV. L. REV. 1007 (1973).

55. *See* Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974), *noted in* 63 CALIF. L. REV. 563 (1975).

56. *Compare* University Capital Corp. v. Barbara Lynn Stores, Inc., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,949 (S.D.N.Y. 1975), *with* Broder v. Dane, 384 F. Supp. 1312 (S.D.N.Y. 1974), *and* Levine v. Biddle Sawyer Corp., 383 F. Supp. 618 (S.D.N.Y. 1974).

57. Kaufman v. Lawrence, 386 F. Supp. 12 (S.D.N.Y. 1974); Tanzer Economic Assocs. v. Haynie, 388 F. Supp. 365 (S.D.N.Y. 1974).

The SEC was also concerned with the plight of the minority stockholder in "going private" transactions.[58] The Commission had proposed alternative rules calling for full disclosure, an independently determined fair price, and a business purpose, before a company went private.[59] The full disclosure and fair price requirements were fairly explicit, but the business purpose requirement was left undefined.[60] The reasoning behind the latter move appears to permit the SEC to make case-by-case determinations of valid business purposes or to adopt the formulations of the courts.[61] The requirement has been most fully developed in the Fifth Circuit,[62] but whether it would act as a deterrent to improper "going private" transactions remains doubtful, as it seems likely that any corporation could construct a suitable justification for "going private."[63]

Despite the inequities of the short form merger, and the response of the judiciary and the Commission to problems in the going private area,[64] the prospect of an expansive interpretation of rule 10b-5 by the Supreme Court to provide relief for minority stockholders was doubtful. In light of recent decisions announced by the court,[65] the probability of new fraud being extended to short form mergers was small.[66]

II. SANTA FE INDUSTRIES, INC. V. GREEN

Plaintiff's complaint in *Santa Fe* alleged unfairness in the valuation of Kirby stock and breach of the majority stockholders' duty to deal fairly with the minority.[67] The Supreme Court refused to hold that such allegations alone gave rise to a cause of action under rule 10b-5 and section 10(b).[68]

58. Sommer, *supra* note 16.

59. Proposed rules 13e-3A and 13e-3B, SEC Securities Exchange Act Release No. 1132, 40 Fed. Reg. 7947, 7950-52 (1975). Both proposed rules require detailed disclosures and fair terms determined by an independent third party.,The latter proposed rule sets forth the requirement for a business purpose. For a discussion of the proposed rules see Moore, *supra* note 8, at 362-65; Solomon, *supra* note 16, at 172-76.

60. *See* Moore, *supra* note 8, at 362-75; Solomon, *supra* note 16, at 172-76.

61. The business purpose test received mixed support from the bench. *See generally* Kerr, *Going Private: Adopting a Corporate Purpose Standard*, 3 SEC. REG. L.J. 33 (1975).

62. Bryan v. Brock & Blevins Co., 490 F.2d 563 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974); Grimes v. Donaldson, Lufkin, & Jenrette, Inc., 392 F. Supp. 1393 (N.D. Fla. 1974) (the desire of the parent corporation to eliminate potential claims of conflicts of interest with its subsidiaries was a valid business purpose for the proposed merger), *noted in* Kessler, *Elimination of Minority Interests by Cash Merger: Two Recent Cases*, 30 BUS. LAW. 699 (1975). *See also* 3B H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 11.154 (rev. ed. 1976).

63. *See* H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 172 (2d ed. 1970); Stone, *A Corporation's Repurchase of its Own Shares*, 49 L.A. B. BULL. 106, 109-10 (1974).

64. See the concurring opinion of Judge Mansfield in Green v. Santa Fe Indus., 533 F.2d 1283, 1294 (2d Cir. 1976), for a review of going private problems.

65. Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

66. A Supreme Court affirmance of the Second Circuit opinions could properly be viewed as an extension of the "new fraud" doctrine even though the lower court had added the requirements of business purpose and prior notice to the *Schoenbaum* test. Such affirmance would have indicated that proof of deception is not necessary to a 10b-5 claim in the proper case, a decision which no court of appeals had rendered prior to *Santa Fe*. Most courts had supported their decisions by finding deception as an alternative holding. *See* 89 HARV. L. REV. 1917, 1926 (1976).

67. 97 S. Ct. at 1297-98, 51 L. Ed. 2d at 488.

68. *Id.* at 1301, 51 L. Ed. 2d at 492.

Justice White's majority opinion[69] reflected the same attitude of the Court towards rule 10b-5 as evidenced in *Blue Chip Stamps v. Manor Drug Stores*[70] and *Ernst & Ernst v. Hochfelder*.[71] Section 10(b)'s "plain meaning"[72] policy considerations behind that language[73] constitute the grounds upon which the decision was based.

In *Ernst & Ernst* the Court stated that whether a cause of action exists under rule 10b-5 depends upon the language of section 10(b). Thus, the foundation for the *Santa Fe* decision had been laid.[74] The opinion focused on the words "manipulative or deceptive" as used in section 10(b),[75] and found them to limit the reach of rule 10b-5; the Securities and Exchange Commission has no power to adopt a rule whose scope exceeds congressional will as expressed in the statute. Thus limited, the majority determined that the word "fraud" in rule 10b-5 could not be read as encompassing breaches of fiduciary duty that happen to occur in connection with a securities transaction.[76] Only if a claim of fraud and fiduciary breach in a transaction were fairly viewed as manipulative or deceptive would a cause of action be stated under the rule. Accepting the district court's finding that no minority shareholders were deceived in the short form merger transaction,[77] the Court concluded that no violation of rule 10b-5 was stated.[78]

Because deception was not involved, the Court distinguished all the cases relied upon by the court of appeals in finding liability.[79] The majority simply stated that in each of the breaches of fiduciary duty in the cases relied on by the court of appeals there existed an element of deception. Thus, in one sentence the Court ended the long debate on the existence of new fraud.[80]

The majority opinion also found no "manipulation," a virtual term of art when used in relation to securities.[81] Manipulation was defined by the Court as artificially affecting market activity in order to mislead investors.[82] Since

69. White, J., delivered the opinion of the Court, in which Burger, C.J. and Stewart, Marshall, Powell, and Rehnquist, J.J., joined, and in all but Part IV of which Blackmun and Stevens, J.J., joined. Blackmun and Stevens, J.J., filed opinions concurring in part. Brennan, J., filed a dissenting opinion.

70. 421 U.S. 723 (1975), *noted in* 29 Sw. L.J. 951 (1975).

71. 425 U.S. 185 (1976).

72. "Plain meaning" refers to the principal basis of Justice Powell's majority opinion in *Ernst & Ernst* in which he put primary reliance on the actual language of the statute. *Id*. at 200-01.

73. *See* notes 84-88 *infra* and accompanying text.

74. 97 S. Ct. at 1300, 51 L. Ed. 2d at 491.

75. Section 10(b) of the 1934 Act makes it "unlawful for any person . . . to use or employ . . . any manipulative or deceptive device or contrivance in contravention of [Securities Exchange Commission Rules]." 15 U.S.C. § 78j (1970).

76. 97 S. Ct. at 1300, 51 L. Ed. 2d at 491.

77. That finding centered upon the data contained in an Information Statement prepared for defendant Santa Fe in contemplation of the merger. The statement included an appraisal of all the assets of Kirby and an opinion letter by Morgan Stanley and Co. which set a valuation on the stock of Kirby. 533 F.2d 1283, 1288 (2d Cir. 1976).

78. 97 S. Ct. at 1301, 51 L. Ed. 2d at 492.

79. *Id*.

80. The Court's statement is correct on its face, but it ignores the basis upon which new fraud was founded. Each of the cases cited by the Court did include an element of deception. Deception, however, was generally an alternative holding. Most of the discussion in the opinions centered on whether deception needed to be alleged at all. See Judge Medine's majority opinion in the court below. 533 F.2d 1283 (2d Cir. 1976). By reading the cases as it does, the Court is declaring, in effect, that the new fraud rationale is unfounded.

81. 97 S. Ct. at 1302, 51 L. Ed. 2d at 493-94.

82. The Court tied the word manipulation to practices such as wash sales, matched orders, and rigged prices. *Id*.

nondisclosure is so closely tied to manipulation, in that deception is necessary to the success of a manipulative scheme, and both are the principal target of section 10(b), the Court concluded that Congress did not intend the statute to be used against instances of corporate mismanagement where the only claim is unfair treatment.[83]

The second basis for the decision, the policy considerations behind the language of section 10(b), is presented in Part IV of the Court's opinion. Despite the assertion that the language of the section is dispositive, the Court went on to discuss additional factors which weighed heavily against a finding of 10b-5 liability. First, the majority dealt with the philosophy of full disclosure which the Court has described as the fundamental purpose of the Act.[84] Since the Court interpreted the purpose of rule 10b-5 as a vehicle to ensure full disclosure rather than as a standard for judging the fairness of what was fully disclosed, the Court declined to allow a 10b-5 action based on allegedly unfair terms.[85]

Secondly, the Court held that expanding the scope of rule 10b-5 to cover breaches of fiduciary duty would encroach on an area traditionally relegated to state law.[86] *Cort v. Ash*[87] had made it clear that unless federal law expressly creates a duty on the part of a director, state law governs the internal affairs of the corporation. Since the facts of the instant case showed only corporate mismanagement, the Court was satisfied that it was entirely appropriate for the minority shareholders to pursue appraisal under the Delaware statute.[88]

Justices Blackmun and Stevens both filed opinions concurring in all but Part IV of the majority's opinion.[89] Blackmun's disagreement with Part IV was based on his dissents in *Blue Chip Stamps* and *Ernst & Ernst*.[90] Stevens refused to concur in Part IV for the reasons stated in Blackmun's dissent in *Blue Chip Stamps* and his own dissent in *Piper v. Chris-Craft Industries*.[91] Justice Brennan dissented for substantially the same reasons expressed in the majority and concurring opinions in the Second Circuit Court of Appeals.[92]

Santa Fe is consistent with recent Supreme Court securities cases in the same sense as the majority opinion in *Ernst & Ernst* had a "certain technical consistency."[93] Both cases display an attitude on the part of the Court

83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. 422 U.S. 78, 80 (1975).
88. 97 S. Ct. at 1301, 51 L. Ed. 2d at 492.
89. 97 S. Ct. at 1304, 51 L. Ed. 2d at 496.
90. 421 U.S. 723, 761 (1975); 425 U.S. 185, 215 (1976). Justice Blackmun was chiefly concerned with the policy considerations used to reach a decision. He felt that the proper route was to interpret the language of the statute which he felt properly conveyed a broad remedial design.
91. 97 S. Ct. at 1304-05, 51 L. Ed. 2d at 496-97. Justice Stevens was of the opinion that securities legislation must be interpreted in light of the basic policy of the Act to provide protection to investors.
92. 97 S. Ct. at 1304, 51 L. Ed. 2d at 496.
93. Justice Blackmun, in dissenting from the majority opinion in *Ernst & Ernst*, 425 U.S. at 215, had described the majority reasoning as having a certain technical consistency. *Id.* at 216. By saying that, Blackmun was admitting that so far as the Court's reasoning went it was

towards securities legislation in general and rule 10b-5 in particular: the securities laws will not be used as a cure for all corporate ills.[94] But in the narrow reinterpretation of rule 10b-5, the Court is ignoring the history of the problems before it.

By accenting disclosure, the Court fails to come to grips with the real issue in conflict situations. As pointed out earlier,[95] a going private short form merger lacks any arm's-length qualities. Yet equal bargaining power was Congress' goal in creating the disclosure requirement. It is anomalous that the Supreme Court would decide that full disclosure removes the federal question when the possession of the information disclosed does nothing to improve the minority stockholder's bargaining position.[96] Because disclosure does not eliminate the basic unfairness of the terms disclosed, and since appraisal is not a realistic alternative,[97] the Supreme Court's decision in *Santa Fe* solves no problems in the going private area. Rather, it creates a situation in which many problems will arise.

Santa Fe will be cited many times for the proposition that rule 10b-5 requires deception or manipulation before liability will be found. But what deception means will be the subject of many lawsuits, just as it was before new fraud was developed. The creation of new fraud was a direct result of a dissatisfaction with the old deception requirement.[98] Lower courts strained the definition of deception to cover fact situations which were not adequately covered by the 1934 conception of fraud.[99] In *Schoenbaum* the Second Circuit sought to eliminate the need for the artificial use of deception by deciding the issue without first stating the legal conclusion that the plaintiffs were deceived.[100]

Santa Fe, by explicitly requiring a finding of deception or manipulation will force the lower courts back into the same decisional pattern that gave birth to new fraud in the first place.[101] The Supreme Court admits that short form mergers raise significant issues of fiduciary duty.[102] But in the absence of effective state fiduciary standards and appraisal statutes that give a minority stockholder a realistic chance of obtaining full value for his shares, the lower courts will continue to fashion remedies with the tools at hand. In the case of short form mergers the lower courts will state the facts and conclude that deception existed. The result will be confusion as the ill-defined term "deception" is used to determine 10b-5 liability.

logically correct, but it failed to consider either the context in which the problem arose or the ultimate goal of protecting investors from victimization however it occurs. Since the decision in *Santa Fe* relied almost totally on *Ernst & Ernst*, it is subject to the same criticism.

94. 97 S. Ct. at 1304, 51 L. Ed. 2d at 496.

95. *See* note 10 *supra* and accompanying text.

96. Theoretically, a corporation could give its minority shareholders $.01 so long as it fully disclosed all the information which led to that valuation. Under *Santa Fe* the minority shareholders would have no recourse against the majority by way of 10b-5.

97. *See* notes 17-19 *supra* and accompanying text.

98. *See* Comment, *Schoenbaum v. Firstbrook: The "New Fraud" Expands Federal Corporation Law*, 55 VA. L. REV. 1103 (1969).

99. *See* notes 35 and 36 *supra* and accompanying text.

100. Comment, note 30 *supra*.

101. Thus, decisions will be subject to the same criticisms as were directed to the earlier deception cases. *See* note 37 *supra*.

102. 97 S. Ct. at 1304, 51 L. Ed. 2d at 496.

III. Conclusion

Santa Fe Industries, Inc. v. Green holds that no cause of action is stated under rule 10b-5 unless the complaint alleges deception or manipulation. By expressly requiring either deception or manipulation, the decision eliminates new fraud as an alternative to finding 10b-5 liability. The result will be a resurgence of confusion as the courts once again seek to decide whether a given set of facts presents a case of deception or manipulation. Minority stockholders of corporations engaged in going private transactions may still find federal relief available, however, since lower courts will tend to conclude that deception or manipulation exists where the facts show severe unfairness.

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