

WHO IS AN "OFFICER" UNDER SECTION 16(b)— WHO KNOWS?

INTRODUCTION

The purpose of this article is to explore the spreading confusion and tests that are proliferating from the federal courts in their quest to resolve the dilemma of "who is an officer?" under section 16(b) of the 1934 Securities Exchange Act.¹

It would seem to be a relatively simple matter to define "officer" for the purposes of 16(b), but there are many perplexing questions involved. Consider the status of an assistant treasurer, secretary, or comptroller; the officer of a division of the parent company; the president of a subsidiary; an executive who holds the title of vice-president but has no duties comparable to the title of his office;

1. 15 U.S.C. § 78p(b) (1970). Section 16(b) reads as follows:

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, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period of exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

Although section 16(b) regulates other corporate groups besides officers, the limitation on the length of this article limits the coverage of 16(b) to officers alone. Nor is it possible to make any comparisons to 10b-5. For the legislative history of 16(b) see H.R. REP. Nos. 1383, 1838, 73d Cong., 2d Sess. (1934); S. REP. Nos. 792, 1455, 73d Cong., 2d Sess. (1934) [Section 16(b) will be cited hereinafter as 16(b)].

March 1975 Vol. 12 No. 2

or the employee who is not an officer under the by-laws but performs important executive functions. Are these corporate employees to be treated as "officers" within the scope of 16(b)? Are the courts doing the public a service or disservice in interpreting the term "officer" in a restrictive fashion? Does the 1934 Act's attempt to eliminate unfair insider trading by officers mean that 16(b) is to be given an expansive reading? The potential issues and ramifications are virtually unlimited. Ultimately, the matter will have to be resolved either by Congress or by the Supreme Court—or perhaps by both.

AN OVERVIEW OF SECTION 16

The underlying purpose of section 16 is to prevent certain insiders from unfairly using information to make a profit in the purchase and sale or sale and purchase of the stock of the company. "Insiders" under this section include: directors, officers, or ten percent owners of the equity security of the issuer which is registered under section 12² of the Securities Exchange Act of 1934.³

Generally, section 16 represents an attack upon possible abuses of inside information by corporate insiders.⁴ Section 16(a)⁵ requires the reporting by certain insiders of their stockholdings and transactions in the company's securities.⁶ The reports filed pursu-

2. 15 U.S.C. § 78l (1970).

3. 11A E. GADSBY, BUSINESS ORGANIZATION: FEDERAL SECURITIES EXCHANGE ACT OF 1934, at § 8.01 (7th ed. 1974) [hereinafter cited as GADSBY].

4. Prior to the enactment of 16(b) under the 1934 Act, Congressional hearings revealed startling abuses of inside information by many prominent members of the financial community, who apparently believed that these sure-thing profits came with their offices. Thus, 16(b) was introduced "to protect the interests of the public against the predatory operation of directors, officers, and principal stockholders of corporations by preventing them from speculating in the stock of the corporation they owe a fiduciary duty." S. REP. No. 1455, 73d Cong., 2d Sess. 68 (1934). "A renewal of investors' confidence in the exchange markets can be effected only by a clearer recognition, upon the part of officers of companies whose securities are publicly held, of their responsibilities as trustees for their corporations. Men charged with the administration of other people's money must not use inside information for their own advantage." H.R. REP. No. 1383, 73d Cong., 2d Sess. (1934). Thus, a corporate officer who realizes short-swing profits in dealing with his company's stock cannot argue that he did not use inside information in an attempt to escape 16(b) liability. *Petteys v. Butler*, 367 F.2d 528, 532 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967).

5. 15 U.S.C. § 78p(a) (1970) [hereinafter cited as 16(a)].

6. 16(a) reads as follows:

Every person who is directly or indirectly the beneficial owner of

ant to 16(a) are matters of public information and are published by the SEC on a monthly basis.⁷

Under 16(a), as amended in 1964, every officer of a corporation which is registered under section 12 must file reports as to his stock-holdings and any changes in such holdings.⁸ The goal of this provision is to ensure complete publicity as to the stock interest of the executive holding a position of control in a corporation.⁹

The purpose of 16(b) is to permit the corporation or a security holder to bring an action on the corporation's behalf to recover short-swing profits realized by insiders within any six-month period.¹⁰

Sections 16(a) and 16(b) are necessarily interrelated. Generally, if one is subject to the reporting requirements of 16(a), one is also subject to the short-swing profit limitations of 16(b).¹¹ Lit-

more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to Section 12 of this title, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to Section 12(g) of this title, or within ten days after he becomes such beneficial owner, director, or officer, a statement with the Commission (and, if such security is registered on a national securities exchange, also with the exchange) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been a change in such ownership during such month, shall file with the Commission (and if such security is registered on a national securities exchange, shall also file with the exchange) a statement indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

7. SEC, OFFICIAL SUMMARY OF SECURITY TRANSACTIONS AND HOLDINGS OF OFFICERS, DIRECTORS AND PRINCIPAL STOCKHOLDERS. This summary can be obtained from the Government Printing Office in Washington.

8. The rules of the Commission require that the initial statement of ownership by an officer be filed on Form 3 and that monthly statements of changes of ownership be filed on Form 4. These forms are printed and supplied by the SEC with detailed instructions. Form 4 requires that the "exact date" of the change be recorded and statements are not deemed filed until "actually received by the Commission or exchange." Forms 3 and 4 are available at any SEC office. Failure to file the forms required by 16(a) enables the SEC to seek injunctive relief. See note 32, *infra*.

9. "Because it is difficult to draw a clear line as a matter of law between truly inside information and information generally known by the better-informed investors, the most potent weapon against abuse of inside information is full and prompt publicity. For this reason, this bill requires the disclosure of the corporate holdings of officers . . . and prompt disclosure of any changes that occur in their corporate holdings." H.R. REP. NO. 1383, 73d Cong., 2d Sess. (1934).

10. 15 U.S.C. § 78p(b) (1970).

11. *Feder v. Martin Marietta Corp.*, 406 F.2d 260, 268 (2d Cir. 1969). Rule 16a-10 provides that any transaction exempted by the SEC from the provisions of 16(a) shall be likewise exempted from 16(b). However, the

igation under 16(a) and 16(b) usually occurs in unanticipated situations. Consequently, section 16 transactions that are litigated generally will involve a reorganization, merger or an option situation. An officer of a company which has equity security registered under section 12 should be cognizant of section 16 and of incurring short-swing profits.¹²

In order for 16(b) to have any effect, the issuer's stock in which the defendant officer deals must be an equity security under section 12 of the Act.¹³ While the cases discussed generally involve corporate equity securities, 16(b) is applicable to equity securities registered under section 12 of unincorporated business organizations as well.¹⁴ Exempted securities are narrowly limited under the Act to governmental securities and very few others.¹⁵ Even if the corporation has only registered a class of common stock, all other equity securities of the issuer are subject to 16(b). The Act and rules adopted thereunder broadly define equity securities to include, among others, debt securities convertible into equity securities.¹⁶ Thus, any officer of a moderately sized or larger company can rest assured that if he involves himself in short-swing transactions, he is within the scope of 16(b).

THE EARLY CASES AND COMMISSION GUIDELINES—
AN UNCERTAIN BEGINNING

Under the 1934 Act, 16(b) is applicable to "every person who is . . . an officer of the issuer of such security . . ." In spite of this seemingly specific enumeration of the persons who are subject to

Second Circuit has held that the rule is invalid to the extent it exempts 16(b) transactions "comprehended within the purpose" of 16(b). *Id.* at 267-69. Also note there are a limited number of situations in which one is no longer subject to the reporting requirements of 16(a) but continues to be subject to the provisions of 16(b). See 3A H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 10.04[2] nn.44-49 (2d ed. 1974) for an excellent summary of these exceptions to the 16(a)-16(b) relationship [hereinafter cited as BLOOMENTHAL].

12. GADSBY, *supra* note 3, at § 8.01.

13. 15 U.S.C. § 78p(b) (1970).

14. BLOOMENTHAL, *supra* note 12, at 10.03; see also §§ 3.03, 3.09.

15. 15 U.S.C. § 78c(a)(12) (1970) gives the SEC general power to exempt. 15 U.S.C. § 78w(a) (1970) gives the Commission a general grant of authority to make rules and regulations necessary to the execution of the Act.

16. 15 U.S.C. § 78c(a)(11) (1970).

this section, there has been considerable controversy over the scope of the coverage.¹⁷

The 1934 Securities Exchange Act gave a clear definition of the term "director."¹⁸ Strangely, in creating 16(b) Congress never provided a definition of who is an officer. Because of this lack of guidelines the Commission, pursuant to its rule-making power under the Act, responded with rule 3b-2, which reads:

The term "officer" means a president, vice-president, treasurer, secretary, comptroller, and any other person who performs for an issuer, whether incorporated or unincorporated, functions corresponding to those performed by the foregoing officers.¹⁹

Although the rule narrowed the scope of 16(b) officers, there still remained many troublesome problems. One of these was the status of an assistant secretary or assistant treasurer who held a position of substantial importance but was not named in rule 3b-2. The General Counsel for the Commission attempted to resolve this matter in a 1940 release which provided:

[A]n assistant would be an "officer" if his chief is so inactive that the assistant is really performing his chief's functions. However, an assistant, although performing some functions which might be those of his chief, would not be an "officer" so long as these duties were under the supervision of his chief. Temporary absence or brief vacation of an officer during which an assistant performs the officer's duties would not constitute the assistant an "officer." Subject to the foregoing, assistant treasurers, assistant secretaries, and assistant comptrollers, for example, are not to be considered "officers" for the purposes of this definition.²⁰

Thus, if an assistant treasurer performs all or a substantial amount of the duties of the treasurer, the assistant should be considered an officer within the purview of section 16. On the other hand, the Commission would not consider one an officer who performed none of the functions of the treasurer, or who performed some of such functions under the supervision of the treasurer.²¹

Even with the promulgation of rule 3b-2 and the General Counsel's ruling, it remained unclear what caused the corporate em-

17. Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 397 (1953). This two part article by the SEC's Chairman and Special Counsel, although now more than 20 years old, is still highly informative and useful in understanding the basics of 16(b) of the 1934 Act [hereinafter cited as Cook & Feldman].

18. Section 3(a)(7) defines a director as: "[A]ny director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated." 15 U.S.C. § 78c(a)(7) (1970).

19. 17 C.F.R. § 240.3b-2 (1949).

20. SEC Securities Exchange Act Release No. 2687 (1940).

21. Comment, *Current Problems Under Section 16 of the Securities Exchange Act of 1934*, 44 MARQ. L. REV. 59, 60-61 (1960).

ployee to be treated as an "officer" for the purposes of section 16. There appeared to be two tests upon which liability was predicated: (1) the employee's holding of an enumerated position, or (2) the degree of administrative responsibility shouldered by the employee.²² The case of *Colby v. Klune*²³ attempted to resolve this uncertainty.

Colby involved a production manager of Twentieth Century Film Corporation who allegedly made a profit as a result of short-swing trading in the company stock. A stockholder brought an action on behalf of the corporation to recover the profits realized by the defendant. The production manager was granted a summary judgment by the district court, on the ground that he was not an officer of the corporation and therefore was not subject to any liabilities under 16(b).²⁴ The district court, in ruling in the defendant's favor, had focused primarily on the Commission's 3b-2 rule. It determined that the production manager clearly was not one of the officers specifically enumerated in 3b-2, nor was he performing the duties in place of one of these officers.²⁵

On appeal to the Second Circuit, the Commission in an amicus curiae brief attempted to further clarify its 16(b) officer position found in 3b-2 and the General Counsel's opinion. Essentially, the Commission felt that in each case the function performed should be analyzed to determine whether the person was one who had some responsibility for the policy of a substantial segment of the corporate affairs and who participated in executive councils of the corporation.²⁶

However, the Second Circuit in reversing expressed doubts even in the validity of 3b-2.²⁷ Judge Frank, in writing the court's opinion, instead chose an altogether new test to be utilized in determining who is an "officer" under 16(b). His test has a subjective tinge in place of the rather objective bent of the Commission's rule 3b-2.

22. Cook & Feldman, *supra* note 17, at 398.

23. 178 F.2d 872 (2d Cir. 1949).

24. *Colby v. Klune*, 83 F. Supp. 159 (S.D.N.Y. 1949).

25. *Id.* at 161.

26. 178 F.2d at 875.

27. *Id.* at 873: "Assuming for the moment that Rule X-3b-2, issued by the S.E.C., is not authorized by the statute As we think that, at this stage of the case, it is well to reserve decision concerning the statutory power of the S.E.C. to issue Rule X-3b-2"

[W]e construe "officer" as . . . inter alia, a corporate employee performing important executive duties of such character that he would be likely, in discharging these duties, to obtain confidential information about the company's affairs that would aid him if he engaged in personal market transactions. It is immaterial how his functions are labeled or how defined by the by-laws, or that he does or does not act under the supervision of some corporate representative.²⁸

As for the General Counsel's release of 1940, interpreting the status of highly placed corporate "assistants" and "managers," the *Colby* court expressly rejected it.²⁹

Thus, the Second Circuit seems to have ignored the SEC's proposals and instead focused on whether the "corporate employee performing important executive duties . . . would be likely . . . to obtain confidential information about the company's affairs . . ." ³⁰ Under such a definition it is immaterial how the employee's functions are labeled or how the by-laws define them. Apparently, the *Colby* court favored a broader officer test as being more consistent with the spirit of section 16, since the possibility of obtaining and unfairly using inside information was not limited to the select few who fell within the Commission's 3b-2 definition.

Because of the Second Circuit's indifference to previous SEC interpretations of "officer," the Commission sought to amend its definition to more resemble the *Colby* definition.³¹ To get the feelings of the business community, the Commission solicited comments from corporate personnel on the proposed change. The response was overwhelmingly negative. Corporate management was alarmed at the expansiveness of the *Colby* decision which appeared to them to radically enlarge the area of potential liability. They felt that the subjective test of *Colby* would necessitate much additional proof in each case, and make the position of the quasi-officer very uncertain.³² In view of this reaction and in view of the uncertainty of the *Colby* court's definition, the Commission decided not to adopt the proposal but to await further expression of the court's view.³³

The SEC did not have long to wait after its decision not to adopt

28. *Id.*

29. *Id.* at 875 n.15: ". . . that 'release' also sets forth 'the opinion of the General Counsel of the Commission' as to the meaning of 'officer' under Rule X-3b-2. As this 'opinion' of the General Counsel is not part of the 'Commission's formal action,' it does not bind the Commission and certainly not the courts. Since we disagree with it, we disregard it."

30. *Id.* at 873.

31. 20 U.S.L.W. 2613 (June 24, 1952); see also 106 F. Supp. 810, 814 (S.D. Cal. 1952).

32. Comment, *supra* note 21, at 63.

33. Cook & Feldman, *supra* note 17, at 399.

the *Colby* definition. In 1952, the Southern District Court of California offered the first judicial guidance on the 16(b) officer dilemma since the *Colby* decision some three years earlier.

*Lockheed Aircraft Corp. v. Rathman*³⁴ was an action brought by the company under 16(b). Lockheed sought to recover profits realized by its assistant treasurer in buying and selling Lockheed stock under an employee option plan within a six-month time period. The option plan had been set up for the benefit of valuable corporate employees other than the president, vice-president, treasurer, secretary, and comptroller. Top executives were excluded because of the corporation's recognition of the applicability of 16(b) to those persons. Thus, the question presented to the court was whether the assistant treasurer was an "officer" whose transactions fell within the scope of 16(b).³⁵

The district court accepted the definition of "officer" found in 3b-2.³⁶ It interpreted the SEC's 3b-2 definition of "officer" as relating only to the specific officers named, and to persons in establishments other than corporations who performed duties identical with those of the officers named, but under different titles.³⁷ In the instant case, the court noted that the functions of the assistant treasurer's office did not correspond to those performed by the treasurer. The judge went on to hold:

The evidence . . . established that plaintiff corporation, during defendant's tenure as assistant treasurer, was possessed of a full time and fully capable treasurer . . . who preempted the executive functions of that office to the exclusion of defendant's performing any of the functions of treasurer.³⁸

Of particular significance is that the district court in *Rathman* construed the decision in *Colby* as a condemnation of "trial by affi-

34. 106 F. Supp. 810 (S.D. Cal. 1952).

35. Annot., 40 A.L.R.2d 1360; A.L.R. provides a good summary of the early 16(b) officer cases.

36. 106 F. Supp. at 812: "The Commission in carrying out the power granted by Congress to define 'technical trade, and accounting terms' 15 U.S.C.A. § 78c(b), intended its definition of the term 'officer' to be analogous to the Congressional definition" Thus, the court specifically rejected that portion of the opinion in *Colby v. Klune* which cast doubt upon the validity of rule 3b-2.

37. *Id.* at 813.

38. *Id.* Although the court never mentioned SEC Release 2687 (*supra* note 20) it is interesting to note the similarity between present quotes and the release. It seems that *Lockheed v. Rathman* approved of both 3b-2 and the General Counsel's opinion.

davit,"³⁹ rather than as a definitive expression of its views on who is an "officer" as used in section 16. Under the *Rathman* court's analysis, the Commission rule could be reinstated as the sole guide to the definition of "officer." Furthermore, many of the problems raised by the broad language of *Colby* could be avoided by considering it applicable only to the facts of that case.

The final matter to be considered by the *Rathman* court was the defendant's reliance on the SEC's previous assurance that he was not an officer for section 16 purposes. After the defendant was elected assistant treasurer, the corporation had inquired of the Commission as to whether or not he was an officer under section 16(a). The SEC answered this question in the negative and the defendant then exercised his option. Thus, the odd result of this case was that the company was suing to recover compensation it had intended to give to the defendant after it had encouraged him to exercise his option. The court held that even if it were to assume that the defendant was an officer of Lockheed, it could nevertheless find no liability because of the defendant's good faith reliance on the SEC ruling, which gave him exempt status under section 23 (a) of the Securities Exchange Act.⁴⁰

The case of *Lockheed v. Campbell*⁴¹ immediately followed the *Rathman* decision. The question that was presented in that case was whether an employee who was both an assistant treasurer and assistant secretary was liable to the corporation for short-swing profits realized in trading the corporation's stock.

A different judge of the same district court which decided *Rathman* refused to adopt either the subjective test of *Colby* or the objective test of 3b-2 utilized by the *Rathman* court. The court felt that *Colby* went too far in holding that it was immaterial under 16(b) how the alleged officer's functions were labeled or whether he acted under the supervision of some other corporate representative. However, the judge felt that *Rathman's* heavy reliance on 3b-2 was perhaps too limited a viewpoint. Thus, the judge sought out a middle of the road position. He ruled:

I think the question which confronts us here can be solved without adopting either view in its entirety. [I]t is conceivable that in a corporation like Lockheed, with complex activities, two persons might perform the functions of treasurer, secretary and comptroller,

39. *Id.*

40. 15 U.S.C. § 78w(a) (1970) provides: "[N]o provision of this chapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission or the Board of Governors of the Federal Reserve System, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

41. 110 F. Supp. 282 (S.D. Cal. 1953).

each doing, *within a certain sphere of the corporation's far-flung activities*, exactly the same things.⁴²

The court therefore inquired into the actual responsibilities of the defendant's job, and finding that he had no concern with questions of policy, held him not to be an officer within the meaning of 16(b).⁴³

As a result of *Rathman* and *Campbell*, the status of the Commission's rule 3b-2 was settled.⁴⁴ The legal commentary⁴⁵ that followed these decisions generally applauded *Rathman* and *Campbell* as being the only practical approach to the section 16 officer issue. These articles found *Colby's* "confidential information" test largely unworkable because of the necessity of having additional proof to show how the "employee . . . obtain[ed] confidential information" and the seemingly unlimited class of potential violators.

Yet *Colby* seems to have been more than one circuit's unusual interpretation of unusual facts. The SEC recognized this in a 1952 release that cautioned the business community. The Commission warned that the courts might declare provisions of the Act applicable to certain officers in order to reach a broader class than might otherwise appear from the definition contained in the Securities Exchange Act rule 3b-2.⁴⁶

RECENT CASES—RECENT CONFUSION

Apparently, the California district court's decision in *Campbell*, taking a middle of the road position in defining section 16 officers, was successful, or at least it was for fifteen years. The 1968 case of *Lee National Corporation v. Segur*⁴⁷ presented an entirely new problem involving the status of a highly placed employee who clearly appeared to be an "officer" under any test—*Colby*, *Rathman*, *Campbell*, or 3b-2. The complicating factor was

42. *Id.* at 284.

43. *Id.* at 285. Support for this holding was found in the testimony of the employee's superior that the employee was primarily engaged in the supervision of the mechanics of the persons working in the finance department of the corporation and that he was essentially an administrator who never performed the functions of his superiors.

44. 106 F. Supp. at 813; 110 F. Supp. at 286.

45. See Cook & Feldman, *supra* note 17, at 400; Cole, *Insiders' Liabilities under the Securities Exchange Act of 1934*, 12 SOUTHWESTERN L.J. 147, 159 (1958); Comment, *supra* note 21, at 63.

46. SEC Securities Exchange Act Release No. 4754, at 2 (1952).

47. 281 F. Supp. 851 (E.D. Pa. 1968).

that this important executive was not an officer of the suing corporation but rather an officer of the subsidiary of the company. There was no question that he had indeed bought and sold stock of the parent corporation within a six-month time period. Thus, the sole issue before the District Court of Eastern Pennsylvania was whether an officer of a subsidiary who deals in the parent company's stock within a six-month period has violated section 16. In ruling in the defendant's favor, the court held:

Section 16 (b) limits its application to the 'officer' of the 'issuer' and section 16 (a) is likewise limited to 'officer of the issuer' of such security. Regulation 240.3b-2 . . . defines the term 'officer' as meaning a president, vice-president, treasurer, secretary, comptroller, and any other person who performs certain functions 'for an issuer.'⁴⁸

The plaintiff's counsel conceded that the company was merely seeking a judicial determination to the effect that while the language of 3b-2 expressly refers to an "officer of the issuer," it also extended to an officer of a subsidiary corporation. The company's attorney further admitted that the officer had not been employed by the subsidiary to avoid the purposes of section 16.⁴⁹ The court used emphatic language in rejecting the judicial broadening of the definition of "officer" sought by the plaintiff. The court ruled:

While the purpose of the Act is to recover 'short swing profits' realized by so-called 'insiders,' the fact is that if it be of the congressional intent to include officers of subsidiary corporations as well as officers of the 'issuer' corporation, this can be quickly accomplished by a simple amendment to the Act. It need not be accomplished by . . . 'judicial legislation.' [P]laintiff seeks a construction of the statute not heretofore granted by any Court.⁵⁰

After listening to oral argument and reviewing briefs, the Pennsylvania district court granted defendant's motion to dismiss plaintiff's complaint.⁵¹ The court felt that in light of the present language of 3b-2, the parent corporation's allegation of a 16(b) violation by the subsidiary's officer was without merit.

The year 1973 brought with it several significant 16(b) officer cases. Two of the cases were handled by the Southern District Court of New York,⁵² and the remaining case was heard by the

48. *Id.* at 851-52.

49. *Id.* at 852: "Fraud is not alleged and plaintiff's counsel frankly concedes that it is not involved. Neither does he contend that defendant's employment as an officer with a subsidiary corporation was in any way a subterfuge."

50. *Id.*

51. *Id.*

52. *Schimmel v. Goldman*, 57 F.R.D. 481 (S.D.N.Y. 1973) and *Morales v. Holiday Inns*, 366 F. Supp. 760 (S.D.N.Y. 1973) It is important to note that both of these cases are from the same circuit which rendered the *Colby* decision.

Eastern District Court of Pennsylvania.⁵³ These three cases are similar on one key issue—can a corporate employee who holds the title of vice-president still escape the burdens of 16(b) officer status? Unlike the *Lee National Corporation v. Segur* case, these executives were all vice-presidents of the parent company and not a subsidiary. Thus, for the first time the courts were faced with a 16(b) officer issue involving a corporate executive who was not a production manager,⁵⁴ assistant treasurer,⁵⁵ assistant secretary,⁵⁶ or officer of a subsidiary.⁵⁷ As would be expected, the results of the three cases are varied.

The first of the 1973 cases was *Schimmel v. Goldman*.⁵⁸ The defendant was a vice-president of a company whose stock he sold and bought within a six-month period. The plaintiff brought a shareholder's derivative suit, alleging that Goldman had violated 16(b) and therefore must turn over to the corporation any profits realized.⁵⁹ As a result of the plaintiff's suit, the corporation and the defendant entered into a compromise settlement under which the defendant paid \$60,000, or 72% of his profit, to the company.

Although no shareholders objected to the agreement, the SEC submitted an amicus curiae memorandum challenging the settlement on the grounds that "the defenses set forth in the moving papers . . . are too weak to justify the substantial discount at which . . . [the] claim is proposed to be settled."⁶⁰ Apparently the Commission felt that Goldman's defense that he was not an officer for 16(b) purposes was so frivolous that no compromise was justified. Thus, the issue before the court was whether a vice-president's de-

53. *Selas Corporation of America v. Voogd*, 365 F. Supp. 1268 (E.D. Pa. 1973). Although a different judge sat on this case, this is the same district court that heard *Lee National Corporation v. Segur*, 281 F. Supp. 851 (E.D. Pa. 1968).

54. *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949).

55. *Lockheed v. Rathman*, 106 F. Supp. 810 (S.D. Cal. 1952).

56. *Lockheed v. Campbell*, 110 F. Supp. 282 (S.D. Cal. 1953). The defendant also served as an assistant treasurer.

57. *Lee National Corporation v. Segur*, 281 F. Supp. 851 (E.D. Pa. 1968). The court never specifically spelled out what position defendant held with issuer's subsidiary.

58. 57 F.R.D. 481 (S.D.N.Y. 1973). The decision was rendered on Jan. 8.

59. *Id.* at 483. The total "profit" of defendant was \$83,490.80, which was calculated on total amount received in the sale of shares in the relevant time period minus the original cost of purchase.

60. *Id.*

fense that he was not an officer as defined in 16(b) was substantial enough to permit a settlement which allowed him to escape with 28% of his profit.⁶¹

The court stated that on first impression it would seem that the defendant should not be able to deny he was an officer under 16(b) in light of the fact that he had consistently characterized himself as a corporate officer in reports filed with the SEC.⁶² Despite the fact that even under his own description he was vice-president, the defendant contended that he would not be foreclosed from arguing at trial that his position was merely titular. Goldman claimed that the title of vice-president was deceiving because he had no policy making functions or access to inside information. The SEC responded to this contention with a rather unique argument that if a "person wishes to enjoy the prestige of an office, he shares the responsibilities under section 16."⁶³

The court considered the Commission's and the defendant's contentions and sought to resolve the matter by turning to the language of *Colby*.⁶⁴ It noted:

61. *Id.* at 486. "[T]he question for this Court is not whether Goldman was or was not a corporate officer, but whether this argument is substantial and justifies some discount from maximum recovery."

62. *Id.* at 485. "[I]t is not disputed that Goldman submitted several Form 4's, the reporting document required by § 16(a), 15 U.S.C. § 78p(a), describing himself as a Vice-President of Banner." Because he did file Form 4, the SEC could only pursue the matter in an amicus brief and not as a plaintiff itself. Had Goldman failed to file Form 4, reporting any transaction in the past month, the SEC could have sought injunctive relief. *SEC v. Golconda Mining Co.*, 297 F. Supp. 125 (S.D.N.Y. 1968); *SEC v. Shattuck Denn Mining Corp.*, CCH 1967-69 Fed. Sec. L. Rep. ¶ 92,117 (S.D.N.Y. 1968). Furthermore, failure to file not only tolls the statute of limitations, but also exposes the insider to criminal prosecution. *United States v. Guterma*, 281 F.2d 742 (2d Cir. 1960), *cert. denied*, 364 U.S. 871 (1960).

63. 57 F.R.D. at 485. The court went on to say that the Second Circuit had never adopted such a position. *See also* First of Michigan Corporation, 181 SEC. REG. AND L. REP. at c-2 (1972) no-action letter. A Company that had 22 employees entitled "Assistant Vice-President" inquired of the SEC whether they must register for purposes of section 16(a) even though "these individuals are not empowered to make and do not participate in the making of policy decisions for the firm." (letter of inquiry, 9/5/72). The Commission responded: "The term 'officer' as defined in Rule 3b-2 . . . is interpreted by this Division to include any person who bears the title Vice-President, as well as any person who performs in the capacity of an officer, regardless of his title. Accordingly, the 22 Assistant Vice-Presidents must comply with the requirements of section 16(a), unless their titles are changed to indicate that they are not officers of the company." (reply memorandum of 11/7/72) (emphasis added).

64. The judge in *Schimmel* seems to have misread the facts of *Colby* because at 485 he states "[T]he District Court granted summary judgment for plaintiff, but the Second Circuit reversed because the defendant's allegation that he was not in fact an officer raised material questions of fact,"

[T]here remains much room for inquiring into the facts at a trial. For the functions of a "vice-president" or "comptroller" are not so well settled as to be self-evident, and there is need for evidence concerning those functions. Under that Rule as we interpret it, it does not matter whether or how the by-laws of this particular company defines the duties of such officers. The question is what this particular employee was called upon to do in this particular company, i.e. the relation between his authorized activities and those of this corporation.⁶⁵

The court went on to say that the SEC was being inconsistent because in the present case it proposed one guideline to be used with 3b-2, while in *Colby* it suggested another.⁶⁶ In light of the *Colby* decision and the SEC's interpretation of 3b-2 in that case, the court in *Schimmel* held that:

[N]either the Second Circuit nor the SEC were willing to assume Rule 3b-2 foreclosed the defendant from arguing that, although given the title of an officer, he did not perform the policy making functions or have access to inside information which characterize an "officer" for purposes of § 16(b) Neither the parties' research nor my own discovered any decision in this Circuit which holds Rule 3b-2 valid or invalid or interprets it further than *Colby v. Klune* Thus, defendant Goldman would be free at trial to raise the issue of whether he was an insider despite the Form 4 reports and Rule 3b-2.⁶⁷

The district court which initially dealt with the *Colby* case stated "[T]hese are cross motions for summary judgment," 83 F. Supp. at 159, and it ruled that "Plaintiff's cross-motion is denied and defendant's granted," 83 F. Supp. at 162. The court of appeals decision, 178 F.2d at 872, summarized the results of the lower court's decision as "The District Court of the Southern District of New York, 83 F. Supp. 159, rendered a summary judgment for the defendants, and the plaintiff appealed." Thus it would appear that it was the defendant who received a summary judgment which was reversed when the plaintiff appealed the district court's decision that defendant production manager was not an officer for the purposes of 16(b).

What is also unusual is that two other cases in 1973 interpreted the *Colby* facts in the same manner. *Selas Corporation of America v. Voogd*, 365 F. Supp. 1268, 1270 (E.D. Pa. 1973), stated "In this case [*Colby*], the court reversed the district court's granting of a summary judgment for the plaintiff." *Morales v. Holiday Inns*, 366 F. Supp. 760, 762 (S.D.N.Y. 1973) said that the district court in *Colby* "[R]everse[d] a summary judgment against an officer [defendant]."

65. 57 F.R.D. at 485-86, citing *Colby v. Klune*, 178 F.2d 872.

66. *Id.* at 486:

Interestingly, the SEC did not argue in *Colby v. Klune*, as it does here, that Rule 3b-2 forecloses any inquiry into what the defendant did but rather argued: [I]t is significant that the employee has or has not "responsibility for the policy of at least a substantial segment of the corporation's affairs" and participates in "executive councils of the corporation as an officer". . . .

67. *Id.* at 486.

Thus, the *Schimmel* court seems to have relegated 3b-2 to a judicial limbo—neither confirming it nor rejecting it.⁶⁸ The reasoning behind this effort appears to have been to enable the court to escape the emphatic language of 3b-2 describing a vice-president as an officer. Instead, the *Schimmel* ruling focuses on the *Colby* court's viewpoint which downplays the significance of an employee having a certain title and asks whether the executive performs policy making functions or has access to inside information.⁶⁹

Several months after the *Schimmel* result, the Eastern District Court of Pennsylvania wrestled with the 16(b) officer issue in *Selas Corporation of America v. Voogd*.⁷⁰ The defendant had exercised an option and sold it within a six-month span. At all times relevant to the purchase and sale in question, the defendant had been executive vice-president of international operations of Selas Corporation.⁷¹ Despite the fact that "executive vice-president" appeared to be within the scope of 3b-2, Voogd denied that he was an officer for 16(b) purposes. He asserted that he was a mere figurehead, having no say in the company's affairs and having no access to inside information.⁷² The plaintiff corporation moved for a summary judgment, alleging that the facts left no possible doubt that the defendant was an officer under 16(b).

Thus, the *Selas* court was faced with a *Schimmel* type situation—a corporate vice-president claiming that 3b-2 did not create a conclusive presumption that an enumerated officer was automatically an insider under the terms of 16(b). Like the *Schimmel* court had done, the judge in *Selas* turned to the language of *Colby*. He noted that *Colby* left the status of 3b-2 unclear.⁷³ The judge then went on to the *Schimmel* case itself which he interpreted as also casting

68. The court did mention *Lockheed Aircraft Corp. v. Campbell*, 110 F. Supp. 282 (S.D. Cal. 1953), and *Lockheed Aircraft Corp. v. Rathman*, 106 F. Supp. 810 (S.D. Cal. 1952), both of which had held 3b-2 valid. However, it distinguished these cases from the present matter when it ruled "[T]hese holdings are of little precedential value because the issue in each case was whether an assistant treasurer, a position not included in the Rule's definition of 'officer,' was an insider for the purposes of § 16(b)." 57 F.R.D. at 486.

69. *Id.* at 487: "In conclusion, I find that the settlement is fair and reasonable. It represents approximately 72% of the maximum recovery sought by the plaintiff. When balanced against the substantial hazards and additional expenses of a trial, it appears to be a fair settlement . . . His . . . defense is also substantial and, if successful, would defeat any recovery by the corporation."

70. 365 F. Supp. 1268 (E.D. Pa. 1973). The decision was rendered on Sept. 5th. See note 53, *supra*.

71. *Id.* at 1270.

72. *Id.*

73. *Id.* "The validity and effect of 3b-2 has not been clearly established."

doubt on the role of 3b-2.⁷⁴ Finally, the *Selas* court focused on an eastern district of Virginia case, *Gold v. Scurlock*,⁷⁵ which it cited with approval. "Being a corporate officer without portfolio does not per se make him an 'insider' as contemplated in 16(b)."⁷⁶

The court apparently reasoned that these three cases had cast sufficient doubt on rule 3b-2 being the sole determinant of 16(b) status that a corporation's vice-president was not to be precluded from asserting at trial that he was outside of the rule. Nevertheless, the court granted the plaintiff's motion for summary judgment. The court noted:

The affidavits and exhibits submitted by the plaintiff . . . clearly indicate that Voogd was of the more active members of the executive committee, and that he was the chief operating officer of the most important section of plaintiff's business which, at that time, was producing most of the profits for Selas. The minutes of the executive committee meetings . . . show that defendant Voogd had intimate knowledge of the innerworkings of Selas, that he had a substantial voice in policy of the corporation, and in fact, functioned as a corporate officer [I]t cannot be said that he did not have access to inside information as contemplated by § 16(b) of the Act.⁷⁷

In reaching its decision, the *Selas* court appears to have utilized the "confidential information" test outlined in *Colby*.⁷⁸ This is not particularly surprising, because the court had made extensive reference to the *Colby* case. However, what is interesting is that the court in *Selas* also used the guidelines the SEC had proposed in *Colby* to be used in interpreting 3b-2.⁷⁹

Perhaps if Voogd had emulated the approach of Goldman, his counterpart in *Schimmel*, he might have been more successful. When a 16(b) loss seemed likely, Goldman entered into a compromise with his company whereby he agreed to give them 72% of his profits. Only when the SEC objected to the settlement did the matter get before the court. This is the distinguishing point between

74. *Id.* at 1271.

75. 324 F. Supp. 1211, 1215 (E.D. Va. 1971). The Fourth Circuit Court of Appeals accepted the case on appeal. It affirmed the district court's result in part but reversed the finding of liability on several defendants. See notes 89-105, *infra*.

76. 365 F. Supp. at 1271.

77. *Id.*

78. 178 F.2d at 873. Note in particular the phraseology of the last sentence of the above quote.

79. See notes 26 and 66, *supra*.

the two cases. In *Schimmel* the court was asked to rule on the legitimacy of a settlement, and in the *Selas* case the court had to rule as to whether a vice-president was an officer under 16(b). Because it was considering the worthiness of a settlement, the *Schimmel* court never inquired into Goldman's possible status as an officer. Instead, it focused on the question of whether it was possible for an employee who clearly fell within rule 3b-2 to escape the rigors of 16(b). The *Schimmel* court held that 3b-2 does not create a conclusive presumption that a vice-president was an officer and that Goldman would be free to litigate the issue in a trial. After considering the potential court costs saved by the compromise, the court approved the settlement—and with it the defendant's retention of 28% of his profit.⁸⁰

After the *Selas* decision, the focus again returned to the southern district of New York, in *Morales v. Holiday Inns*.⁸¹ The facts in *Morales* were virtually identical to those in *Schimmel*, especially those involving the corporate position and the compromise settlement. The only significant difference was in the result.

The essential elements of this case were that the defendant, Jones, was a vice-president of Holiday Inns, in charge of Inn operations. There was no dispute that he had bought and sold his company's stock within the prohibited time period. When a shareholder threatened to bring a derivative suit on the corporation's behalf against the defendant, he entered into a compromise settlement with the company. Under the terms of this agreement, Jones retained some 30% of his profits, the remainder going to the corporation.⁸²

The shareholder objected to the settlement and filed suit. He felt that there was no reason for a compromise under the present facts and that 100% compensation was due Holiday Inns. Jones, in rebuttal, claimed that 16(b) did not apply since he was not an officer, despite the fact that he was listed as vice-president in the corporation's records and SEC filings.⁸³

80. See notes 61 and 69, *supra*.

81. 366 F. Supp. 760 (S.D.N.Y. 1973). The decision was rendered on Nov. 12th.

82. Although the court in this case did not rely on the *Schimmel* decision, it would appear that the defendant borrowed quite liberally from it. In *Schimmel*, the defendant-corporation split was 28%-72%. In this case it was 30%-70%. Also, after considering Jones' defense in the present case (see text accompanying note 83, *infra*), it is apparent that the defendant also hoped for a *Schimmel* result.

83. 366 F. Supp. at 762. The language defendant uses in the present case is virtually the same as Goldman's in the *Schimmel* decision. See 57 F.R.D. at 485.

Prior to rendering its decision, the court summarized the issue before it:

As in any settlement, a fair compromise is one that does not assume certain victory or certain defeat. Of course, if the Court believes that the legal issue tendered is colorably contrived to mask the real intention of the parties unduly to favor the officer against his corporation, or if there is simply no merit to the defense, equity will not give sanction to the settlement. The issue is whether Jones' contention that he was not an officer for Section 16(b) purposes was substantial enough not for victory, but for getting a discount of 30% on a settlement.⁸⁴

Moving on to other matters, the judge noted that the Second Circuit's *Colby* decision put a "gloss" on the meaning of "officers" under 3b-2 for 16(b) purposes and that rule 3b-2 alone was not sufficient to establish officer status. The court then turned to *Colby* and its "access to confidential information" test,⁸⁵ and held that Jones had "access to information concerning both the financial and operational performance of the Company-owned inns which comprised twenty percent of all the Holiday Inns."⁸⁶

In granting the plaintiff's motion for a summary judgment, the court ruled that there was little doubt that Jones' position enabled him to acquire important information relating to the business of the company and that such information would be beneficial in market transactions. The court further added that "[t]his 'defense,' aside from Rule 3b-2, could not be sustained under *Colby v. Klune*, . . . Jones' title was not honorific."⁸⁷

The district court in *Morales v. Holiday Inns* apparently sensed that the *Schimmel* ruling permitted a creative defendant who violated the terms of 16(b) to enter into a settlement with the company and salvage some of his profits. The *Morales* court felt that such a maneuver was not within the spirit of 16(b). To prevent this occurrence the court did not turn to 3b-2 for its precedent but rather placed its reliance in *Colby's* "confidential information"

84. 366 F. Supp. at 762.

85. *Id.* at 762-63:

The test required in *Colby v. Klune* . . . is that "an officer" under 16(b) be "a corporate employee performing important executive duties of such character that he would be likely, in discharging these duties, to obtain confidential information about the company's affairs that would aid him if he engaged in personal market transactions"

86. *Id.* at 763.

87. *Id.*

test.⁸⁸ Thus for 16(b) officer purposes, in the prestigious southern district of New York, *Colby* still commands.

The *Schimmel*, *Selas*, and *Morales* decisions can more or less be viewed as belonging to the same colony. Although the facts and results of each case were varied, the same basic theme is woven through the three—rule 3b-2 is not a conclusive determinant of 16(b) officer status. The three cases place their faith in *Colby's* "access to confidential information" standard, as applied to the facts of the particular case. Essentially, all three decisions represent a very subjective approach to the 16(b) officer issue.

A 1973 case that seems to depart from the *Schimmel*, *Selas*, and *Morales* mold is the Fourth Circuit's decision in *Gold v. Sloan*.⁸⁹ The case was appealed to the court by a group of defendants⁹⁰ who felt that the district court's⁹¹ approach to a 16(b) issue was too expansive.

Essentially, the issue before the court of appeals was whether two officers of a newly merged company who had engaged in short-swing trading could avoid the grasp of 16(b). At the district court level, defendant Rumbel had avoided liability because the court felt that he performed minor duties that did not accurately reflect his title as vice-president. Rumbel, it reasoned, was not bound by

88. See note 85, *supra*.

89. 486 F.2d 340 (4th Cir. 1973), *cert. denied*, *Gold v. Scurlock*, 43 U.S.L.W. 3212 (Oct. 15, 1974). This case should be approached with caution. Unlike the other 1973 16(b) officer decisions *Gold v. Sloan* involved a merger situation. In reaching its conclusion the majority placed great emphasis on *Kern County Land Co v. Occidental Petroleum Corp.*, 411 U.S. 582 (1972). This case is of particular significance because the defendant was able to avoid 16(b) liability although it was a 10% shareholder. The Supreme Court felt that the unusual facts involved in the *Kern County* case (a merger-like situation) permitted the use of a "subjective test." The Fourth Circuit apparently borrowed this subjective approach and applied it to the officers in the present case who otherwise appeared to be within the scope of 16(b).

90. The issue before the court of appeals was much broader than 16(b) officer status. There were questions involving mergers, purchase and sale, directors' abuse of inside information, as well as 16(b) officers. For the purposes of this article we will only concern ourselves with the defendants Keith Rumbel and Glen Sloane. Rumbel was a senior vice-president of the pre-merger company. Pursuant to the merger, he became senior vice-president of a division of the acquiring company. Rumbel held this position when he engaged in short-swing trading. Sloane likewise was a vice-president of the pre-merger company. Upon the merger he became a vice-president of a subsidiary of the purchasing parent company, and several months later he became vice-president of the parent company itself. For a general summary of the *Gold v. Sloan* case see Comment, *Securities Exchange Act Section 16(b): Fourth Circuit Harvests Some Kernels of Gold*, 42 *FORDHAM L. REV.* 852 (1974).

91. *Gold v. Scurlock*, 324 F. Supp. 1211 (E.D. Va. 1971).

16(b) because his duties were "mere staff functions—routine administrative chores."⁹²

The Fourth Circuit affirmed the lower court's judgment that Rumbel was not within the scope of 16(b). It interpreted the district court's decision to be based on the premise that the defendant never had any opportunity to avail himself of inside information. Further, the appellate court noted that the district court had held that Rumbel's title was merely "titular" and thus it was ineffective to clothe him with the reality of an officer.⁹³ Interestingly, the lower court never used any of the phraseology which the circuit court associated with its *Gold v. Scurlock* decision. Perhaps the Fourth Circuit felt that the district court's reasoning in finding no officer status for Rumbel was too abstract. Whatever the reason, the court of appeals instead chose a *Colby*-like "access to confidential information" test when it affirmed Rumbel's acquittal.⁹⁴

Circuit Judge Winter, concurring in part and dissenting in part, felt that both the majority and the district court had approached Rumbel's officer status in an awkward manner. He thought that although Rumbel was a senior vice-president, he could avoid 16(b) liability, but not for the reasons put forth by the majority. Instead, Justice Winter focused on the wording of 3b-2⁹⁵ that the vice-president must be an officer of the "issuer." He noted:

There is a semantic difference between "vice-president of the issuer," the obvious reading of the rule, and "vice-president of a division of the issuer." That this difference may be important is suggested by the rule that an officer of a subsidiary of the issuer is not an officer of the issuer, unless it is proven that he actually performs the function of an officer for the parent. . . . I do not think it sound to include, within the categories of 'officers' specifically enumerated in Rule X-3b-2, a person beyond the literal scope of those categories.⁹⁶

92. *Id.* at 1215.

93. *Gold v. Sloan*, 486 F.2d 340 (4th Cir. 1973).

94. The district court never cited any rule or case in holding that Rumbel was not an officer under 16(b). The Fourth Circuit in a footnote cited *Colby* when it affirmed the lower court's decision. 486 F.2d at 351 n.24.

95. Winter, in his opinion, gave the first judicial affirmation of the validity of Rule 3b-2 since the decision in *Lee National Corp. v. Segur*, 281 F. Supp. 851 (E.D. Pa. 1968). The *Schimmel*, *Selas*, and *Morales* cases all left the status of 3b-2 unclear. The majority of the Fourth Circuit also seemed to have ignored the rule. Winters noted "The rule has been held to be a valid exercise of the S.E.C.'s power under § 3(b), 15 U.S.C.A. § 78c(b) (1971), to define 'technical, trade, and accounting terms.'" 486 F.2d at 358. He cited both of the *Lockheed* cases as authority for holding 3b-2 valid.

96. 486 F.2d at 358 (Winter, J., concurring and dissenting).

Thus, while the court of appeals held Rumbel not liable because of some vague *Colby*-like standard, Winter instead utilized the *Lee National* court's approach and resolved the problem by again using 3b-2 as the measuring rod. The yes-no approach of Winter appears to eliminate the legal contortions required by the Fourth Circuit's subjective test.

The facts involving defendant Sloane were more complicated. After the merger agreement, he was elected a vice-president of the parent corporation's subsidiary.⁹⁷ On December 4, 1967, the merger became effective. It was on this date, while still an officer of the subsidiary, that he exercised an option in the parent company's stock. He became vice-president of the parent company on April 26, 1968. On May 8, 1968, Sloane sold the shares. Thus, the only defense available to the defendant was that he was not a 16(b) officer because his market activities were obviously within a six month period.

While the district court had little difficulty in finding Rumbel not liable, it felt otherwise about Sloane. The lower court's decision was overturned by the court of appeals, because the majority decided that Sloane was merely a member of the lower management hierarchy in spite of his office.⁹⁸ The Fourth Circuit ruled that the district court's record contained no evidence to indicate that Sloane had any access to inside information which could serve as a vehicle for speculative abuse. Thus, it would appear that the majority was using the *Colby* standard in determining 16(b) officer liability.

Once again, Justice Winter questioned the validity of the majority's approach to officer status. He revealed his feelings on the matter when he stated:

I do not believe Sloane's participation in the events that transpired and his access to inside information during the pre-merger period is determinative. Rather, I would look to the first six months of the post-merger period.⁹⁹

Justice Winter noted that when Sloane purchased¹⁰⁰ the parent company's stock he was still an officer of the subsidiary. The subsequent sale took place after the defendant had become an officer

97. Had he remained on as vice-president of the subsidiary, he probably would not have been liable under the test proposed by Winter. See text accompanying note 96, *supra*.

98. 486 F.2d at 351.

99. *Id.* at 359 (Winter, J., concurring and dissenting).

100. The "purchase" for the purposes of this case occurred when Sloane exchanged his present stock holdings for stock in the parent corporation with which his old company had merged.

in the parent corporation. Using rule 3b-2 as a guide, Winter observed that the defendant had not been a 16(b) officer at the time of the merger, but only when he sold.¹⁰¹ In a complex explanation, he staggered to the conclusion that Sloane probably was not liable.¹⁰² Winter suggested that an inquiry should be made as to whether or not during the post-merger period the defendant was in a position to obtain and use inside information in planning a disposition of the parent company's stock.¹⁰³ His final recommendation was to remand the Sloane matter back to the district court for further exploration of the situation.¹⁰⁴

In resolving Rumbel's dilemma as an officer of a subsidiary, Winter used a concise and logical approach. Unfortunately, his resolution of the Sloane question was not nearly so masterful. Instead, he offered a confusing parade of tests¹⁰⁵ that can only serve to leave the lower courts in total disarray when dealing with the post-merger status of an officer under 16(b). The majority's use of *Colby's* "access to inside information"¹⁰⁶ test would seem to be a better guide than the awkward proposal of Winter. Although *Colby* is a subjectively difficult standard, it at least has some precedential background.

CONCLUSION

Clarification of the officer issue is urgently needed, because in a fluctuating stock market, short-swing trading is particularly attractive. Those who are clearly leaders of their corporations should not be permitted to avoid 16(b) liability by utilizing *Colby's* subjective test with its higher standard of proof. Nor should they

101. 486 F.2d at 359.

102. *Id.*

103. *Id.* at 356. At 353-356 Winter explains his basic overall approach to the problem. Interestingly, in this opening section he cites *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1972) with approval. Apparently this is the standard Winter wanted to apply to Sloan.

104. *Id.* at 359:

As to Sloane, I would therefore remand to the district court for further exploration of whether, prior to April 26, 1967—the date of his election as an officer of Susquehanna—Sloane performed any functions for Susquehanna corresponding to those of any of the categories of officers enumerated in Rule X-3b-2. If the district court finds that he did, judgment should go against him; but if he did not, he should be exonerated.

105. See notes 102-103, *supra*.

106. See note 89, *supra*.

be able to deny their officer role and enter into compromises which allow them to retain a portion of their profits. At the same time however, the insignificant borderline officer should receive more guidance as to his status than *Colby* provides. If he involves himself in the market, he risks either a 16(b) suit or the prospect of being forced to hold a lackluster stock for the required period of time.

So far, the district courts and courts of appeal have failed to resolve the 16(b) officer dilemma. Furthermore, it appears unlikely that a sufficiently broad fact situation could ever be presented which would afford the Supreme Court with the opportunity to render a comprehensive definition. Thus, the final resolution of this quandary will emerge only when Congress moves against the tide of the judiciary's increasingly subjective approach and provides a long needed definitive standard upon which the business community can rely.

A. JOHN MURPHY