Journal of Civil Rights and Economic Development

Volume 5
Issue 1 *Volume 5, 1989, Issue 1*

Article 8

September 1989

SEC v. Levine: Determining the Fate of Disgorged Assets Obtained in Settlement

Maria Credle

Arnold F. Mascali

SEC v. LEVINE: DETERMINING THE FATE OF DISGORGED ASSETS OBTAINED IN SETTLEMENT

The Securities Exchange Act of 1934[1] (Act) was enacted to protect investors from unfair practices and strengthen credibility in the securities market system.[2] Under section 4(a) of the Act, Congress established the Securities and Exchange Commission[3] (SEC)

[1] 15 U.S.C. § 78b (1988). The section provides in pertinent part:

> For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, to remove impediments to and perfect the mechanisms of a national market system for securities transactions and the safeguarding of securities and funds related thereto, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect and make more effective the national banking system and Federal Reserve System, and to issue the maintenance of fair and honest markets in such transactions.

Id.

The constitutionality of the Act flows from the commerce clause of the Constitution. *See* American Power Co. v. SEC, 329 U.S. 90, 96-98 (1946) (all provisions of Act are to be read to eliminate evils connected with holding companies involved in interstate commerce).

[2] *See* Securities Exchange Act preamble, 48 Stat. 881 (1934) (act to prevent unfair practices and secure credibility in the market). *See also* Basic Inc. v. Levinson, 485 U.S. 224, 230 (1988) (court noted importance of full disclosure to maintain honest market system); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976). Court recognized purposes of 1934 Act were "to protect investors against fraud" and "to promote ethical standards of honesty and fair dealing." *Id.* The dual purpose of 1934 Act was to provide for regulation of the securities market and to protect investors. Crofoot v. Sperry Rand Corp., 408 F. Supp. 1154, 1156 (E.D. Cal. 1976); S. Rep. No. 792, 73d Cong., 2d Sess., 13 (1934). "[T]he initiative and responsibility for promulgating regulations pertaining to the administration . . . remain with the exchanges . . . where they fail adequately to provide protection to the investors the Commission is authorized to step in and compel them to do so." *Id.*; Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware, 414 U.S. 117, 130 (1973) ("[i]t is thus clear that the congressional aim in supervised self-regulation is to insure fair dealing and to protect investors from harmful or unfair trading practices."); 1975 U.S. CODE CONG. & ADMIN. NEWS 322 (reaffirms protective purpose and amends for further protection). *See generally* JENNINGS & MARSH, SECURITIES REGULATION CASES AND MATERIALS 52 (6th ed. 1987). The SEC has a duty to enforce federal securities laws including possible violations of the 1934 Act. *Id.*; Thomforde, *Negotiating Administrative Settlements in SEC Broker-Dealer Disciplinary Proceedings*, 52 N.Y.U. L. REV. 237, 239-51 (1977) (means, practices and policies underlying Commission's settlement negotiations and disciplinary actions).

[3] 15 U.S.C. § 78d(a) (1988) provides in part: "There is hereby established a Securities and Exchange Commission to be composed of five commissioners to be appointed by the

which is authorized to review all securities and exchange practices[4] and to implement disciplinary action where needed.[5]

In recent years, the courts have been subjected to a sharp rise in the number of insider trading disputes.[6] In response, recent legislation has broadened the SEC's authority to impose and enforce civil and criminal penalties for insider trading conduct.[7]

President by and with the advice and consent of the Senate . . . ." *Id.*

[4] 15 U.S.C. § 78f (1988) (exchanges cannot be registered, and would operate unlawfully *See* 15 U.S.C. § 78e (1988) (unless rules of exchange conform to Commission's rules and meet Commission's review). *See, e.g.*, Thomforde, *supra* note 2, at 239 n.8 (cites wide variety of other sources from which Commission draws its authority). *See also* Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) (by exercise of authority Commission can request exchanges to modify rules and disapprove of rules adopted by exchanges). The Commission has authority to extend regulatory powers over savings and loan associations in the event of fraud. *Id.* at 350. *Cf.* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 986 (2d Cir.) (provisions of Securities Exchange Act apply to many transactions outside American markets), *cert. denied*, 423 U.S. 1018 (1975). *See generally* Jennings, *Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission*, 29 LAW & CONTEMP. PROBS. 663, 670 n.51 (1964) (SEC is both regulator and disciplinarian of market inequities).

[5] *See* C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1438 (10th Cir. 1988) (SEC has primary responsibility to impose sanctions for violations of 1934 Act); Quinn & Co. v. SEC, 452 F.2d 943, 947 (10th Cir. 1971) (Commission, not courts, is primarily responsible for protection of investors), *cert. denied*, 406 U.S. 957 (1972). Broad discretion to apply sanctions for violations of the securities transactions belongs to the Securities and Exchange Commission. *Id. See also* SEC v. Warner, 652 F. Supp. 647, 648 (S.D. Fla. 1987) ("Congress exercises no control over the actions of the Commissioner of the SEC."). *But see* Foremost-McKesson, Inc. v. Provident Sec. Co., 423 U.S. 232, 259-60 (1976) (where views of Commission are inconsistent with intent of Congress, no deferential treatment afforded); United Housing Foundation Inc., v. Forman, 421 U.S. 837, 858 n.25 (1975) (agency's determinations will be given considerable weight, however, when inconsistent, no special weight accorded to the agency's views). *See generally* Jennings, *supra* note 4, at 670 (discussion of SEC as disciplinarian); Werner, *The SEC as a Market Regulator*, 70 VA. L. REV. 755, 770-79 (1984) (SEC highly visible in antifraud actions).

[6] Bahls, *This Little Piggy Went to Market*, STUDENT LAW. October 1989, 19-20 (most recent cases have involved multi-million dollar securities). *See, e.g.*, Dirks v. SEC, 463 U.S. 646, 648-49 (1983) (officer of brokerage firm received information from corporate insider that reports of its assets had been grossly exaggerated); Chiarella v. United States, 445 U.S. 222, 223-24 (1980) (petitioner acquired names of takeover target companies and subsequently bought stock in those companies reaping huge profits); SEC v. Materia, 745 F.2d 197, 199-204 (2d Cir. 1984) (affirming conviction for insider trading through information obtained as proofreader at financial printer's office), *cert. denied*, 471 U.S. 1053 (1985). *See generally* Carlton & Fishel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 872-82 (1983) (arguments in favor of prohibitory insider trading and suggests that it is efficient to compensate corporate managers); Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 1-28 (1980) (restrictions on insider trading and enforcement process).

[7] *See, e.g.*, 15 U.S.C. § 78u(d) (1988). The Insider Trading and Securities Fraud Enforcement Act of 1988 provides in pertinent part:

> Whenever it shall appear to the Commission that any person is engaged in or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities ex-

One sanction commonly used is disgorgement, an equitable remedy whereby a defendant is compelled to forfeit the funds by which he was unjustly enriched.[8]

Recently, the Second Circuit Court of Appeals specifically focused on the SEC's utilization of disgorgement for insider trading allegations in *Securities and Exchange Commission v. Levine*.[9]

In *Levine*, the SEC filed a complaint against Dennis Levine alleging insider trading activities in violation of sections 10(b) and 14(e) and rules 10(b)-5 and 14(e)-3 of the Act.[10] Levine subse-

> change or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

Id. See generally, Goelzer & Berueffy, *Insider Trading: The Search for a Definition*, 39 ALA. L. REV. 491, 494-95 (1988) (in addition to civil liability defendant may be subject to criminal liability of up to $100,000 and imprisonment for up to five years or both (citing 15 U.S.C. § 78ff (a) (Supp. IV 1986, amended by 15 U.S.C. § 78ff(a) (1988)) (increased fines up to $1,000,000 and imprisonment for up to 10 years or both))).

The drafters of the new legislation expressed an intention that the courts should be inventive with respect to the insider trading doctrine. Langevoort, *The Insider Trading Sanctions Act of 1984 and Its Effect on Existing Law*, 28 CORP. PRAC. COMMENT. 89, 90-91 (1986-87) (originally published in 37 VAND. L. REV. 1273 (1984)). The decisions in an insider trading action should reflect a result-oriented approach with a focus on a wide range of abuses. *Id.* at 91.

[8] *See* SEC v. Blavin, 557 F. Supp. 1304, 1316 (E.D. Mich. 1983), *aff'd*, 760 F.2d 706 (6th Cir. 1986). "The deterrent effect of the SEC enforcement action would be greatly undermined if securities law violators were not to disgorge illegal profits." *Id.*; SEC v. Manor Nursing Ctrs., 458 F.2d 1082, 1105-06 (2d Cir. 1972) (proper exercise of district court's equity powers to order refunding of proceeds illegally obtained); Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965) (when no speculation that defendant made profit, and "profit was proximate consequence of fraud," it is more appropriate to give defrauded party benefit of windfalls rather than allow fraudulent party to obtain them). *See also* Marcus v. Otis, 168 F.2d 649, 660 (1948) (Hand, J. concurring) ("[W]rongdoers should also pay over all profits so that they will not benefit in any manner from their wrong.").

[9] SEC v. Levine, 881 F.2d 1165 (2d Cir. 1989). Appeals were taken by Dennis Levine, Robert Wilkis, the Internal Revenue Service (IRS), the New York State Department of Taxation and Finance and Arden Way. *Id.* This Comment will focus only on the appeal made by Levine and the IRS.

[10] *Id.* at 1168; SEC v. Levine, 689 F. Supp. 317 (S.D.N.Y. 1988), *aff'd in part rev'd in part*, 881 F.2d 1165 (2d Cir. 1989). *See* 15 U.S.C. §§ 78j(b) and 78n(e) (1988). Section 78j provides:

> that is unlawful to use the means of interstate commerce or the mails to use any "manipulative or deceptive devices" in the sale or purchase any security, whether registered or not. 15 U.S.C. § 78j(b). Section 78n(e) provides that it is unlawful to misrepresent, omit, or use deception with any material fact in connection with tender offers or solicitation of security holders connected with the offer. Also, the Commission has authority to define and prescribe means to prevent such fraudulent

quently agreed to a settlement of the charges,[11] consenting, *inter alia*, to disgorge approximately $11.5 million.[12] Meanwhile, in a separate action, the Internal Revenue Service (IRS) levied against Levine's assets for federal income tax liabilities on unreported income.[13] The district court approved the settlement agreement between the SEC and Levine and entered a Judgment by Consent, leaving distribution of the assets contingent upon an SEC distribution plan to be approved by the court.[14]

In its decision to approve the distribution plan, the district court rejected a claim presented by the IRS and Levine proposing that the IRS would have priority over Levine's disgorged assets upon distribution.[15] The district court, sitting in equity to review the distribution plan, determined that the funds never "belonged" to Levine, and imposed a constructive trust.[16] In viewing the funds as "embezzled or misappropriated," Levine was treated as a holder of "bare legal title" who served as a trustee for the

activities.

15 U.S.C. § 78n(e) (1982).

Levine faced violations of trading based on use of material non-public information, defrauding investors and breach of fiduciary duty. Brief for Appellant at 32-34, SEC v. Levine, 881 F.2d at 1168 (2d Cir. 1989) (No. 88-6294).

[11] *Levine*, 881 F.2d at 1170. Levine agreed to the entry of a permanent injunction prohibiting him from buying or selling securities while he was in possession of material non-public information. *Id.* at 1169. He also promised to give full cooperation in any other investigations by or on behalf of the Commission. *Id.*

[12] *Id.* Levine consented to a disgorgement of $11.5 million to a receiver to satisfy any and all claims against him arising from the sale or purchase of the securities which were alleged in the Commission's complaint. *Id.* at 1169.

[13] *Id.* at 1168-69. The IRS had been investigating Levine's federal income tax liabilities for the years prior to 1986. *Id.* "On May 23, 1986, an $11 million assessment for tax liabilities including deficiencies, interest and penalties was issued for the years 1983 through 1985 and a lien for $8.5 million" was obtained. *Id.*

[14] SEC v. Levine, 689 F. Supp. 317, 319 (S.D.N.Y. 1988). On June 5, 1986 the court signed the Proposed Judgment, and it was entered as the judgment of the court. *Id.* The judgment ordered Levine to comply with the terms of the Consent and to disgorge the sum described therein. *Id.* The original distribution plan proposed to allocate 58% of the available disgorgement fund to investors and 42% to the appropriate tax authorities. Brief for Appellee at 11, SEC v. Levine, 881 F.2d at 1168 (2d Cir. 1989) (No. 88-6294). The district court rejected the plan after it determined a constructive trust should be imposed on the funds. *Id.* An amended distribution plan which, after payment of administrative expenses, called for all remaining disgorged trading profits to be allocated to investors was approved by the court. *Id.*

[15] *Levine*, 689 F. Supp. at 321.

[16] *Id.* at 320-22. *See infra* notes 54-59 and accompanying text (discussion of constructive trust).

benefit of the defrauded investors.[17]

On appeal, the IRS and Levine challenged the district court's order that denied the attachment of the federal tax lien through the imposition of a constructive trust on the disgorged assets.[18] Reversing the district court's determination, the court of appeals held that since the transactions leading to the SEC's allegations amounted to voidable rather than void contracts, Levine had property rights in the disgorged assets to which the federal tax lien could attach, thus the IRS was entitled to preferential treatment.[19]

This Comment will discuss the SEC's regulatory authority and ability to effectuate the purposes of the Act. It will also examine the analysis of the court of appeal's decision and suggest reasons for affirming the district court's decision.

I. THE SECURITIES EXCHANGE COMMISSION: REGULATION AND ENFORCEMENT

The Securities and Exchange Commission is an independent, quasi-judicial regulatory agency whose function is to preserve fairness in security transactions and to uphold the integrity of the securities markets.[20] To achieve this aim, the SEC is responsible for investigating possible violations of the securities laws.[21] Once the

[17] *Id.*

[18] *Levine*, 881 F.2d at 1174-77.

[19] *Id.* at 1175.

[20] *See The Work of the SEC* (Oct. 1986), *reprinted in* JENNINGS & MARSH, SECURITIES REGULATION, CASES AND MATERIALS, at 37 (6th ed. 1987) (role and methods of enforcement of the SEC); *supra* note 2 and accompanying text (SEC provisions are to promote fairness). *See also* Freeman, *A Private Practitioner's View of the Development of the Securities and Exchange Commission*, 28 GEO. WASH. L. REV. 18, 19-28 (1959) (discussion of the early controversies and decisions which shaped the course of the SEC); Lowenfels, *Securities and Exchange Commission Investigations: The Need for Reform*, 45 ST. JOHN'S L. REV. 575, 579-82 (1971) (critiquing lack of supervision in investigations to ease judicial fact-finding exercise).

[21] *See* 15 U.S.C. § 78w(a) (1975) (SEC has power to make rules and regulations); 15 U.S.C. § 78u(a) (1980) (SEC has investigative authority). *See also* Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 286 (9th Cir. 1988) (recognizing Commission's "plenary authority over the arbitration procedures adopted by the national securities and exchange associations"); Austin Mun. Sec. v. National Ass'n of Sec. Dealers, 757 F.2d 676, 680 (5th Cir. 1985) ("[e]very self-regulatory organization must comply with the provisions of the Exchange Act, its own rules, and the rules of both the SEC and Municipal Securities Rulemaking Board."); *cf.* Sartain v. SEC, 601 F.2d 1366, 1372 (9th Cir. 1979) (where Commission's case not supported by substantial evidence, court cannot overturn Commission's findings (citing Pierce v. SEC, 239 F.2d 160, 162 (9th Cir. 1956))).

SEC has concluded an investigation and notified the parties involved of the alleged misconduct,[22] it may then proceed, after an administrative review,[23] to bring an action in federal district court to seek appropriate equitable relief.[24] Such relief is in the discretion of the court, though deference is usually given to the SEC's determinations.[25] The court is granted exclusive jurisdiction to affirm and enforce or set aside the SEC's findings,[26] and may exer-

[22] *See* 15 U.S.C. § 78w(c) (1975) (prompt notice must be given of any adverse action accompanied by written statement of reasons). *Cf.* Wickham, *Let the Sun Shine In!: Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 Nw. U.L. Rev. 480, 481 (1973) (truly democratic nations should make all investigations by government public so that citizen's have knowledge of government's activities).

[23] *See* Mister Discount Stockbrokers v. SEC, 768 F.2d 875, 876 (7th Cir. 1985) (associations of security brokers have original jusrisdiction of all complaints regarding misconduct and has authority to conduct hearings and discipline its members); Wolfson, *A Critique of the Securities and Exchange Commission*, 30 Emory L.J. 119, 161 (1981) (SEC has power to request administrative hearings before administrative judges and to make criminal references to Justice Department where appropriate). *Cf.* Freeman, *Administrative Procedures*, 22 Bus. Law. 891, 893 (1967) (since it is nearly impossible for SEC to hold hearings for every case, investigator's recommendations for procedural actions are given great weight).

[24] *See* 15 U.S.C. 8u(d) (1987) (Commission may bring action in proper district court to enjoin or permanently restrain violative acts); 15 U.S.C. § 78u-1(a) (1988) (when it appears to Commission that violation was made, Commission may bring an action for civil penalty). *Cf.* Jaeger & Yadley, *Equitable Uncertainties in SEC Injunctive Actions*, 24 Emory L.J. 639, 639-44 (1975) (expressing concern over broad and varied considerations of enforcement aim of SEC and unpredictable decisions espoused by courts).

[25] *See* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (federal courts have power to grant all necessary remedial relief). It is the duty of the court to be alert to provide a remedy as necessary to effectuate the congressional purpose of the Act. *Id.*; SEC v. Shapiro, 349 F. Supp. 46, 55 (S.D.N.Y. 1972) (court has power to fashion appropriate relief to effectuate purposes of securities laws), *aff'd*, 494 F.2d 1301 (2d Cir. 1974). *See also* SEC v. Washington County Util. Dist., 676 F.2d 218, 227 (6th Cir. 1982) (district court may determine amount of remedy); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307-08 (2d Cir. 1971) (SEC may properly request ancillary relief from court of equity to afford complete relief), *cert. denied*, 404 U.S. 1005 (1971); SEC v. Keller Corp., 323 F.2d 397, 402 (7th Cir. 1963) (injunction not unreasonable abuse of discretion where defendants showed reasonable likelihood of future violations). *See generally* Jacobs, *Judicial and Administrative Remedies Available to the SEC for Breaches of Rule 10(b)-5*, 53 St. John's L. Rev. 397, 400 (trial court has discretion to fashion equitable remedy so long as it is meant to deter and not punish).

[26] *See* 15 U.S.C. § 78aa (1987). "The district courts . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder . . .". *Id. See also* FSLIC v. Proud Excelsior Ltd., 664 F. Supp. 1405, 1421 (D. Utah 1987) (jurisdiction under 15 U.S.C. § 78aa is proper where defendant had minimum contacts with United States); Security Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1318 (9th Cir. 1985) (jurisdiction exists under Securities Exchange Act if defendant had sufficient minimum contacts with United States); Semegen v. Weidner, 780 F.2d 727, 730 (9th Cir. 1985) (same). *See generally* Hazen, *Allocation of Jurisdiction Between the State and Federal Courts for Private Remedies Under the Federal Securities Laws*, 25 Corp. Prac. Comment. 49, 50-66 (analyzing tensions between federal and state governments concerning jurisdictional questions).

cise its broad discretionary power to fashion its own appropriate remedy in accordance with SEC policy.[27]

II. The Court of Appeals Decision in *Levine*

The district court treated the income from Levine's alleged misconduct as though it were misappropriated or embezzled funds; however, the court of appeals concluded that since the consent judgment neither admitted nor denied the allegations made by the SEC, there was no basis upon which the district court could categorize it as such.[28] Moreover, the court stated in dictum that even if the allegations of the complaint were established, the district court's determination that Levine did not have property rights in the disgorged funds was patently incorrect.[29] The court held that despite the language of section 29(b) of the Act, which states that transactions that violate the Act are "void,"[30] judicial gloss has rendered them voidable at the option of the innocent party.[31] Furthermore, once a securities transaction is found to be

[27] *See* Hecht Co. v. Bowles, 321 U.S. 321, 328-30 (1943) ("[T]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case."); *Shapiro*, 349 F. Supp. at 55, (court has power to fashion appropriate relief to effectuate purposes of securities law). *See also Washington County Util. Dist.*, 676 F.2d at 227 (on remand, district court may determine amount defendant must disgorge); *Texas Gulf Sulphur Co.*, 446 F.2d at 1307-08 (proper for SEC to request ancillary relief from court of equity to afford complete relief). *Cf.* SEC v. Harwyn Indus. Corp., 326 F. Supp. 943, 957 (S.D.N.Y. 1971) ("adverse effect" of injunction remedy should be considered by district court in erasing its discretion); SEC v. Culpepper, 270 F.2d 241, 250 (2d Cir. 1959) ("Public interest, when in conflict with private, is paramount").

Where a defendant has wrongfully obtained funds, the district court's application of disgorgement was clearly within the equity power of the district court. SEC v. Manor Nursing Centers, 458 F.2d 1082, 1104 (2d Cir. 1972). When a court determines that a specific statutory provision has been violated and frames an injunction in those terms, there is no misuse of discretion. *Id.* at 1103. "It is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded." SEC v. Levine, 881 F.2d 1165, 1174 (2d Cir. 1989) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

[28] *Levine*, 881 F.2d at 1174. "[T]here was neither an adjudication nor a concession to ground the district court's premise that the disgorged assets were obtained as a result of the unlawful conduct alleged in the SEC complaints." *Id.*

[29] *Id.* at 1176-78.

[30] *See* 15 U.S.C. § 78cc(b) (1982). "[E]very contract made in violation of any provision of this chapter or any rule or regulation thereunder . . . shall be *void* . . . ." *Id.* (emphasis added). *Cf.* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring) (look to construction of statute to begin interpretation); SEC v. Blatt, 583 F.2d 1325, 1332 (5th Cir. 1978) (language of statute may evince clear congressional intent).

[31] *Levine*, 881 F.2d at 1176. *See* Mills v. Electric Auto-Lite, 396 U.S. 375, 381 (1970) (simply because contract is unenforceable does not compel conclusion that contract is null);

voidable, the federal court must then look to state law to determine the nature of the property rights, if any, acquired by the actor;[32] the court therefore looked to New York law.[33]

Under New York law, the equitable title necessary for a federal tax lien to attach remains with a party who acquired property through a voidable transaction.[34] In the court of appeals' view, this provided the basis for granting priority over the disgorged assets to the IRS.[35]

III. Challenging the Court of Appeals Decision

When a federal statute is violated, both the legal consequences of the act and the available remedies must be ascertained through an interpretation of federal law.[36] Since the securities laws are applicable, it is posited that courts should look to the plain meaning[37] of section 29(b) and its underlying purpose[38] to construe the

Greater Iowa Corp. v. McLendon, 278 F.2d 783, 792 (8th Cir. 1967) (§ 29 (b) should be read as rendering contract voidable at option of innocent party).

[32] *See* United States v. Durham Lumber Co., 363 U.S. 522, 526 (1960) (must look to state law to determine property interest); Morgan v. Commissioner, 309 U.S. 78, 82 (1939) (state law controls in determining interest of taxpayer); Fidelity & Deposit Co. of Maryland v. New York City Hous. Auth., 241 F.2d 142, 144 (2d Cir. 1957) (same).

[33] *Levine*, 881 F.2d at 1176.

[34] N.Y. Civ. Prac. L. & R. § 5201(b) (McKinney 1978). *See* Alexander v. Chase Manhattan, 61 App. Div. 2d 537, 539, 403 N.Y.S.2d 21, 22 (1st Dep't 1978) (judgment creditor may only proceed against property which debtor maintains recognizable interest); M.F. Hickey Co. v. Port of New York Auth., 23 App. Div. 2d 739, 739-40, 258 N.Y.S.2d 129, 130 (1st Dep't 1965) (judgment debtor is only liable to amount of property interest debtor has in contract).

[35] *Levine*, 881 F.2d. at 1176.

[36] *See* Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176 (1942). State law is "inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Id.*; Prudence Realization Corp., v. Geist, 316 U.S. 89, 95 (1942) ("In the interpretation and application of federal statutes, federal not local law applies.").

[37] *See* Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166, 2172 (1989) (starting point for interpretation of statute is always its language); Caminetti v. United States, 242 U.S. 470, 485 (1917) (meaning of statute is sought first in language of act, and if its meaning is plain, and within constitutional authority, courts' function is to enforce it). *See also* Murphy, *Old Maxims Never Die: The Plain Meaning Rule and Statutory Interpretation in "Modern" Federal Courts* 75 Colum. L. Rev. 1299 *passim* (1975) (discussion of present state of plain meaning rule).

[38] *See* Commissioner v. Engle, 464 U.S. 206, 217 (1984) (duty of court is to find interpretation harmonious with congressional intent); Dickerson v. New Banner Inst., 460 U.S. 103, 118 (1983) (words and statute should be interpreted in light of congressional intent). "In the interpretation of statutes, the function of the courts is easily states. It is to construe

statute.[39] The court of appeals relied upon *Mills v. Electric Auto-Lite Co.*[40] in its decision to hold that Levine's transactions were voidable rather than void.[41] In *Mills*, a contract for a merger was declared voidable at the option of the innocent shareholders.[42] It is submitted that *Mills* should be distinguished from *Levine*. In *Mills*, the action was brought by minority shareholders. The *Mills* Court addressed their rights as innocent parties who were given misinformation in proxy statements,[43] whereas the *Levine* court addressed the rights of an alleged offender.[44] Although *Mills* holds that contracts in violation of section 29(b) of the Act should be voidable to protect the innocent party, *Mills* does not abrogate section 29(b) when contract rights of a securities law violator should be considered void.[45]

the language so as to give effect to the intent of Congress." United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1940). *See also* Foster v. United States, 303 U.S. 118, 120 (1938) (statute should be interpreted in accordance with legislative intent); Royal Indem. Co. v. American Bond & M. Co., 289 U.S. 165, 169 (1933) (same); White v. United States 191 U.S. 545, 551 (1903) (same). *See generally* Aleinkoff, *Symposium: Patterson v. McClean: Updating Statutory Interpretation*, 87 MICH. L. REV. 20, *passim* (1988) (compares modern and traditional methods of statutory interpretation).

[39] *See* SEC v. National Executive Planners, Ltd., 503 F. Supp. 1066, 1070 (M.D.N.C. 1980) (Supreme Court repeatedly reminds courts that securities legislation is construed flexibly to meet congressional purpose); J.I. Case Co., v. Borak, 377 U.S. 426, 433 (1964) (duty of courts to meet congressional purpose). *Cf.* SEC v. National Sec. Inc., 393 U.S. 453, 463-64 (1969) (where equity demands protection of innocent victim, all essential remedies should be made available).

[40] 396 U.S. 375 (1970).

[41] *Levine*, 881 F.2d at 1176.

[42] *Mills*, 396 U.S. at 375. In the initial determiniation as to whether the securities laws were violated, the court looked to the exact wording of the statute but determined that "void" has been judicially interpreted to "render the contract merely voidable at the option of the *innocent* party." *Id.* at 386-87 (emphasis added).

[43] *Mills*, 396 U.S. at 375. In this case minority shareholders brought a private action to set aside a merger. *Id.* The Court of Appeals for the Seventh Circuit held that the corporation and officials violated section 14(a) of the Securities Exchange Act of 1934 through non-disclosure and misrepresentation in a proxy statement that ultimately led to a corporate merger. *Id.*

[44] *See Levine*, 689 F. Supp. at 318-19 (Levine was permanently restrained and enjoined from engaging in fraud or deceit in connection with purchse and sale of securities). The court stated that in the final judgment, the disgorged assets were representative of illegal assets. *Id.*

[45] *See supra* note 31 and accompanying text; Greater Iowa Corp. v. McLendon, 278 F.2d 783, 792 (8th Cir. 1967) (§ 29(b) should be read as rendering contract voidable at option of innocent party, but violator cannot enforce own rights); Bankers Life and Casualty Co. v. Bellanca Corp., 288 F.2d 784, 787 (7th Cir. 1961) ("It is only the contract rights of the party in violation which are voided."); Kaminsky v. Abrams, 281 F. Supp. 501, 507 (S.D.N.Y. 1968) (§ 29(b) only voids rights of violator).

Significantly, the *Mills* decision upheld a court of equity's broad discretionary power to interpret a contract as either void or voidable in order to fashion appropriate equitable remedies.[46] It is submitted that the district court in *Levine* should therefore have been permitted to utilize broad discretionary power to uphold the SEC's distribution plan as an equitable remedy.[47]

A. Ascertaining Levine's Property Rights

For the federal government to assert a tax lien, it must first establish that there is a property interest to which it may attach at the time of the assessment.[48] Since state law is controlling when determining property rights,[49] *Levine* followed New York law, which directs that a judgment can only be asserted against an assignable or transferable property interest.[50] However, when Levine surrendered the assets to the fund established by the district court, he no longer had dominion or control over that money and therefore had no property interest.[51] Significantly, the IRS as-

[46] *Mills*, 396 U.S. at 386-87. The court concluded that "the guilty party is precluded from enforcing the contract against an unwilling party . . . ." *Id.* This result stemmed from "the court's power to grant appropriate remedies." *Id.* at 391.

A subsequent opinion of the Court of Appeals for the Second Circuit affirmed that "the SEC may seek other than injunctive relief in order to effectuate the purposes of the Act . . . ." SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1971). "[T]he role of equity is 'the instrument for nice adjustment and reconciliation between the public interest and private needs' . . . ." *Mills*, 396 U.S. at 386.

[47] *Levine*, 689 F. Supp. at 321-22. The remedy was both equitable and legally appropriate according to the district court judge. *Id.* The court also recognized that equity dictates such remedy. *Id.*

[48] *See Aquilino*, 363 U.S. at 512 (threshold question when federal government asserts tax lien is whether it had property interest to which a tax lien could attach); Metropolitan Life Insur. Co. v. United States, 107 F.2d 311, 313 (6th Cir. 1939) (taxes are liens upon all property, rights to property whether real or personal, *belonging* to taxpayer) (emphasis added); Ray E. Nelson Transp. Co. v. Tri-State Ins. Co., 231 F. Supp. 492, 494 (D.C. Neb. 1964) (general tax lien does not attach to property not owned by taxpayer).

[49] *See supra* note 32 and accompanying text.

[50] *See* Hanrahan v. Albany County Probation Dep't, 119 App. Div. 2d 334, 336, 508 N.Y.S.2d 283, 284 (3d Dep't 1986) (once defendant surrendered money to respondents, he lost property interest in money); Reich v. Speigel, 208 Misc. 2d 225, 230, 140 N.Y.S.2d 722, 727 (Sup. Ct. 1955) (property sought to be attached must belong to defendant); Gruenebaum v. Lissauer, 185 Misc. 2d 718, 729, 57 N.Y.S.2d 137, 146, (where creditor seeks to attach intangible property, it must be owned by debtor), *aff'd*, 270 App. Div. 836, 61 N.Y.S.2d 372 (Sup. Ct. 1945). *Cf.* Stuhler v. State, 127 Misc. 2d 390, 485 N.Y.S.2d 957, 958 (Sup. Ct. 1985) (corporation convicted of fraud had no interest in funds forfeited to state for restitution).

[51] *See* United States v. Kings County Iron Works, Inc., 224 F.2d 232, 234 (2d Cir. 1955)

sessed taxes against Levine for years 1980 through 1982 only *after* Levine had consented to a settlement agreement and had actually disgorged money into the fund.[52] Consequently, any subsequent IRS claim levied against Levine should have been ineffective as to those funds since Levine had no property interest in the disgorged money.[53]

B. Imposition of a Constructive Trust

A constructive trust is a legal fiction that imposes an obligation upon a person who wrongfully obtains property to reconvey it so as to prevent unjust enrichment.[54] Imposition of a constructive trust allows the rightful owner to retain the beneficial interest in the property that has been converted.[55] A court of equity has broad discretionary power to impose a constructive trust as a means of defining the extent of the relief afforded by a consent judgment.[56] Since the district court in *Levine* was sitting in equity,

(tax lien can be defeated if petitioner establishes that property which government seeks to attach is not property of taxpayer). *See also* City of New York v. United States, 283 F.2d 829, 832 (2d Cir. 1960) (statute can only reach property in which taxpayer has interest); United States v. Lester, 235 F. Supp. 115, 119 (S.D.N.Y. 1964) (it is elementary that government may not assert lien against property which taxpayer does not own).

[52] *See* Brief for Appellant Arden Way at 26, SEC v. Levine, 881 F.2d 1165 (2d Cir. 1989) (No. 88-6294) (IRS did not assess Levine's taxes for 1980-1982 until 18 months after freeze order was instituted by district court).

[53] *See* Slodov v. United States, 436 U.S. 238, 256 (1978) ("IRS is not given the power to levy on property in the hands of the taxpayer beyond the extent of the taxpayer's interest in the property. . . ."); Atlas, Inc. v. United States, 459 F. Supp. 1000, 1005 (D.N.D. 1978) (no property interest in embezzled funds to which a tax lien could attach); First Nat'l Bank of Cartersville v. Hill, 412 F. Supp. 422, 425 (N.D. Ga. 1976) (since no title is acquired by an embezzler, but rather remains with the victim, "it is clear that the federal tax lien . . . could not attach to any of the subject property . . ." which the embezzler holds as constructive trustee of owner).

[54] *See* Sharp v. Kosmalski, 40 N.Y.2d 119, 123, 351 N.E.2d 721, 724, 386 N.Y.S.2d 72, 76 (1976) (purpose of constructive trust is to prevent unjust enrichment); RESTATEMENT (SECOND) OF TRUSTS comment e (1957) (same).

[55] *See* Brand v. Brand, 811 F.2d 74, 81 (2d Cir. 1987) (constructive trust arises to prevent unjust enrichment when "under such circumstances that in equity and good conscience he ought not to retain it" (quoting Miller v. Schloss, 218 N.Y. 400, 407, 113 N.E. 337, 339 (1916))); Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919) (holder of legal title is transferred to trustee when he cannot legitimately retain beneficial interest). *See also* United States v. Fontana, 528 F. Supp. 137, 145-46 (S.D.N.Y. 1981) (interest in property always in person wronged); Simonds v. Simonds, 45 N.Y.2d 233, 242, 280 N.E.2d 189, 194, 408 N.Y.S.2d 359, 364 (1978) (court reached property wrongfully in hands of innocent party).

[56] *See* SCOTT ON TRUSTS § 462.3 at 3418 (3d ed. 1967) ("where property is held by one

it was not abusing its discretion in holding that Levine had "bare legal title" because he obtained the funds through allegedly violative transactions.[57] Therefore, the property interest to the assets never became vested in Levine because they were held, from the moment the transaction occurred, in a constructive trust with Levine acting as trustee.[58]

The district court's decision to apply a constructive trust provided proper equitable relief by placing the assets in trust for the satisfaction of investor claims and acted to prevent Levine from using the disgorged assets to pay his taxes.[59]

person upon constructive trust for another, a court of equity will specifically enforce the duty of the constructive trustee to convey the property to the other."); *see also* Dickinson v. Burnham, 197 F.2d 973, 980 (2d Cir. 1952) (in cases of fraud, court may employ use of specific performance or damages as grounds for relief), *cert. denied*, 344 U.S. 875 (1952).

[57] *Levine*, 689 F. Supp. at 322. The district court appropriately applied the law and held that "neither defendant ever had such property interests in the funds to which tax liens could have attached. *Id.* Instead, . . . they serve as trustees for the benefit of defrauded investors." *Id. See also* United States v. Fontana, 528 F. Supp. 137, 143-46 (S.D.N.Y. 1981) (title to funds was acquired under such circumstances that one may not claim title but must surrender it). *Cf.* SEC v. Paige, 1985 T.C. (CCH) ¶ 9588 (D.D.C. 1985), *aff'd*, 810 F.2d 307 (D.C. Cir. 1987) (victim, not embezzler retains rights to funds); Dennis v. United States, 372 F. Supp. 563, 567 (E.D. Va. 1974) (property taken from owner without consent results in legal ownership remaining unchanged). *See generally* Libin and Hadon, *Embezzled Funds As Taxable Income: A Study in Judicial Footwork*, 61 MICH. L. REV. 425, 439-40 (1963) (one who misappropriates funds retains no right, title, or interest in funds - funds continue to be property of victim).

The IRS argues that where, as here, the victim intended to pass legal and beneficial title to the taxpayer (Levine), a federal lien plainly attaches to the property. *See* Brief for Appellee at 32, SEC v. Levine, 881 F.2d 1165 (2d Cir. 1989) (No. 88-6294). The IRS further advances that courts of equity would, in essence, have absolute veto power over intervening federal tax liens if they could at their discretion impose a constructive trust upon the fraudulently obtained funds. *Id.*

[58] *See In re* General Coffee Corp., 828 F.2d 699, 702 (11th Cir. 1987) (court followed majority approach that constructive trust arises at time when fraudulent transactions occurred), *cert. denied*, 485 U.S. 1007 (1988); Capital Investors Co. v. Executors of Estate of Morrison, 800 F.2d 424, 427 n.5 (4th Cir. 1986) (constructive trust does not necessarily arise only at time court so decrees); United States v. Fontana, 528 F. Supp. 137, 143-45 (S.D.N.Y. 1981) (equitable principles urge that funds obtained be placed in constructive trust at time of wrongful action to provide restitution); SCOTT ON TRUSTS, § 462.4 (3d ed. 1967) ("there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court"). *See also* Brief for Appellant at 28, SEC v. Levine, 881 F.2d 1165 (2d Cir. 1989) (No. 88-6284) (Commission argues "constructive trust arises at the time of the wrongdoing, the defendants never obtained more than bare legal title; therefore, no tax lien could attach to their illegal profits").

[59] *See* Burgess v. Premier Corp., 727 F.2d 826, 838-39 (9th Cir. 1984) ("to simply subtract the tax benefit would place an unfair burden on taxpayers generally" and does not meet recessionary purpose of damages, as wrongdoer benefits); Greenman v. United States, 711 F. Supp. 1556, 1559 (S.D. Fla. 1989) (funds should not be used to satisfy tax obligation of wrongdoer).

C. *The Effect of a Consent Judgment*

A court of equity can fashion a remedy in the nature of disgorgement even though a case is not litigated.[60] A consent judgment is a judicial approval of the parties' agreement entered into after settlement negotiations.[61] Settlement agreements resulting in consent judgments present advantages to both parties because the order is both enforceable and expeditiously obtained.[62] These settlement agreements have been developed to avoid the great cost of SEC litigation at the public's expense.[63] Furthermore, the consent judgment, when entered, is considered a final judgment that

[60] *See* BOGERT, LAW OF TRUSTS, § 81, at 295 (5th ed. 1973) ("attitude of equity is the same where there is an appropriation of the property of another which does not amount to a crime but rather merely to the tort of conversion."); *cf.* Maryland Nat'l Bank v. Tower, 374 F.2d 381, 384 (4th Cir. 1967) ("equitable duty to convey depends not alone upon the enrichment of the one upon whom it is imposed, but also upon the equivalent detriment which would be suffered by the claimant"); Simonds v. Simonds, 45 N.Y.2d 233, 242, 380 N.E.2d 189, 194, 408 N.Y.S.2d 359, 364 (1978) (not necessary that person commit wrongful act in order to be unjustly enriched).

[61] BLACK'S LAW DICTIONARY 756 (5th ed. 1979). "A judgment, the provisions and terms of which are settled and agreed to by the parties to the action." *Id.* People v. Colorado City Lot Owners, 108 Ill. App. 3d 266, 276, 438 N.E.2d 1273, 1279-80 (1982) (consent judgment is result of an independent undertaking by parties to reach settlement agreements); *See* Matthews v. Looney, 132 Tex. 313, 317, 123 S.W.2d 871, 872 (1939) ("It is elementary that a judgment by consent is one the terms and provisions of which are settled and agreed upon by the parties.").

[62] *See* United States v. Armour & Co., 402 U.S. 673, 681 (1971) (consent decree is compromise in which each party loses an opportunity that might have been attained in litigation); Matthews, *Effective Defense of SEC Investigations: Laying the Foundation for Successful Disposition of Subsequent Civil, Administrative and Criminal Proceedings*, 24 EMORY L.J. 567, 584-85 (1975) (outlines investigative process and stipulates what is required before issuing a complaint). *See also* Ferrara, *SEC Division of Trading and Markets: Detection, Investigation and Enforcement of Selected Practices that Impair Investor Confidence in the Capital Markets*, 16 How. L.J. 950, 964-65 (1971) (allocation of SEC's resources in investigating violations and how SEC determines when violation exists). *See generally* Jacobs, *supra* note 25, at 413-17 (detailed discussion on judicial remedies available in both contested and uncontested SEC cases).

[63] *See* Thomforde, *supra* note 2, at 238 (consent decrees are less expensive and less time consuming for small SEC staff than litigation and respondent avoids disciplinary hearing); Matthews, *supra* note 63, at 623-24 (1975) (violations create numerous adverse effects on market); Brief of Appellant at 34, SEC v. Levine, 881 F.2d 1165 (2d Cir. 1989) (No. 88-6294) ("The agreement enabled Levine to settle his $35.4 million potential exposure for securities violations in the Commission's action, by disgorging less than $12 million."); *see also* Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 44-47 (1980) (insider trading adversely effects market); Report of the Securities and Exchange Commission's Advisory Committee on Enforcement Policies & Practices (SEC, June 1, 1972), *reprinted in* Matthews, Finkelstein & Milstein, ENFORCEMENT AND LITIGATION UNDER THE FEDERAL SECURITIES LAWS 275 et seq. (P.L.I.1973) (committee report expressly encouraged settlements).

bars relitigation under the doctrine of collateral estoppel.[64] Upon entry of a consent judgment, the court has a duty to construe the consent within the four corners of the parties' agreement.[65] Moreover, the entry of a consent judgment is a judicial act whereby the court adjudicates the plaintiff's right to relief and the extent of that relief.[66]

In *Levine*, by agreeing to enter into a judgment by consent, both Levine and the SEC waived their right to litigate the merits of the case.[67] Although the consent judgment was entered into without admitting or denying the allegations of the complaint, the district court had judicial power to fashion an appropriate remedy.[68] The

[64] *See* Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 742 (1975) (parties to consent decree are collaterally estopped in future proceeding); Nashville, Chattanooga & St. L. Ry. v. United States, 113 U.S. 261, 266 (1885) (consent decree is bar to suit by consenting parties); Burgess v. Seligman, 107 U.S. 20, 27 (1882) (judgment entered by consent is binding on parties); Corcoran v. Chesapeake & Ohio Canal Co., 94 U.S. 741, 744 (1876) (consent judgment which embodies parties' compromise becomes law that parties are bound by, and subsequent suit is precluded); Gilbert v. United States, 479 F.2d 1267, 1267 (2d Cir. 1973) (settlement agreed to by all parties and entered as judgment cannot be set aside even if one party claims he was coerced by his adviser); SEC v. Thermodynamics, Inc., 319 F. Supp. 1380, 1382 (D. Colo. 1970) (consent decree has same effect as any other decree). *See generally* Thomforde, *supra* note 2, at 273 (1977) (factors that influence parties to settle).

[65] *See* United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 (1975) (consent decree construed as contract without reference to legislation sought to be enforced); United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) (scope of consent decree must be discerned within its four corners, and not by reference to what might satisfy purpose of one of parties to it); Washington Asphalt Co. v. Harold Kaeser Co., 51 Wash. 2d 89, 91, 316 P.2d 126, 127 (1957) (consent judgment is construed as contract between parties).

In accordance with the contractual nature of the consent, both the district court and the court of appeals attempted to construe the consent within its four corners. *Levine*, 689 F. Supp. at 321.

[66] United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) (consent judgment is judicial function and act which carries legal obligation that court establishes on facts). *See Thermodynamics, Inc.*, 319 F. Supp. at 1382, *aff'd*, 464 F.2d 457 (10th Cir., 1972), *cert. denied*, 410 U.S. 927 (1973). The court is "adjudicating the plaintiff's rights to relief and its extent, both of which are essential elements of any judgment." *Id. Accord* Juliard & Co. v. Johnson, 166 F. Supp. 577, 585 (S.D.N.Y. 1957) (consent decree has same force as any judgment). *See also* United States v. Carter Prods., 211 F. Supp. 144, 148 (S.D.N.Y. 1962) ("if a consent decree will afford substantially the same relief that could be available after a hearing, . . . it should be adopted.").

[67] *Levine*, 689 F. Supp. at 321-23. *See also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975) (consent not enforceable directly or in collateral proceedings by those who are not parties to action even though they were intended to benefit by it). Foote v. Parsons Non-Skid Co., 196 F. 951, 954 (6th Cir. 1912) (settlement or compromise between original parties may upon discretion of court shut off any right of intervention by third party).

[68] *Levine*, 881 F.2d at 1169. *See supra* note 25 and accompanying text.

district court's exercise of discretion provided a means of deterring further actions such as those here alleged, prevented Levine from receiving the benefit of paying his taxes out of the disgorged assets and provided restitution to the investors.[69] It is submitted that the Court of Appeal's contrary holding undermines the settlement purpose and is more likely to fill the courts with unnecessary litigation at the taxpayer's expense.

Conclusion

The Court of Appeals' decision in *Levine* restricts the enforcement authority of the SEC to regulate markets by allowing the IRS to preempt the SEC's discretion. If the consent judgment to which Levine agreed is not afforded judicial deference, the benefits and purpose of the SEC's expedient negotiations will be lost. The district court's determination that property rights never vested in Levine and the imposition of a constructive trust were reasonable and appropriate remedies. The measures taken by the district court clearly satisfied the conscience of equity.

Maria Credle & Arnold F. Mascali

[69] *Id.* at 322. "Thus two goals are achieved: the first is restitution to injured investors and the second is preventing Levine . . . from enjoying personal gain in the form of payment of [his] tax liabilities. . . ." *Id.*