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THE MANIPULATION OF COMMODITY FUTURES PRICES

WILLIAM D. HARRINGTON*

The spectacular growth of commodity futures trading on the eleven national exchanges during the past decade¹ has culminated in a sharp increase in reported incidents of manipulation of markets and prices.² Although the most cursory examination of the law in this area makes clear that there is little law to look at,³ what does exist offers much more than often is recognized in the way of developing and articulating coherent legal principles which may be used to distinguish legitimate business activity from manipulation.

The sparsity of case law is anomalous, however, when it is borne in mind that one of the principal goals of the Commodity Exchange Act⁴ (the Act), and of its legislative predecessors,⁵ was

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¹ See FUTURES INDUSTRY ASSOCIATION, INC., Bull. Nos. 3884 & 3903 (1980). The growth in commodity futures trading since 1970 is startling. Although 11.5 million futures contracts were reported in 1970, this figure had grown to 77 million contracts by 1979, a 700% increase. *Id.*; Wall St. J., Jan. 2, 1980, at 20, col. 2. In 1980, the trading volume exceeded 90 million contracts valued at nearly 5 trillion dollars. *Forbes*, Jan. 19, 1981, at 65-66.

² In 1979 alone, there were five reported incidents of manipulation: the March Maine potato default on the New York Mercantile Exchange, the March wheat squeeze on the Chicago Board of Trade, and the December coffee, copper, and silver squeezes in New York and Chicago. See Prinsky, *Decade Saw Substantial Industry Growth and Difficulties in Dealing With Success*, Wall St. J., Jan. 2, 1980, at 20, col. 2. See also Shao, *Coffee Exchange Curbs Futures Trading; Step Is Tied to Producing Nations' Role*, Wall St. J., Nov. 23, 1979, at 26, col. 2.

Publicity of manipulation in the domestic markets in 1980 was dominated by controversy over the purported Hunt Silver Squeeze. See Bernstein, *Engelhard's Not-So-Sterling Deal with the Hunts*, *Fortune*, May 19, 1980, at 84-88; Rowan, *A Talkfest with the Hunts*, *Fortune*, Aug. 11, 1980, at 162-68; Trustman, *The Silver-Scam: How the Hunts Were Outfoxed*, *Atlantic*, Sept. 1980, at 70-81; Commodity Exchange, Inc. & Comex Clearing Association, Inc., *Chronology of Activities Relating to the Silver Market from September 1979 through March 1980* (Apr. 14, 1980).

³ See David G. Henner, 30 *Agric. Dec.* 1151, 1275 (1971). In *Henner*, Judicial Officer Campbell concluded that, at the time, no more than 650 cases of record could be found relating to domestic futures transactions. *Id.* Although that figure is somewhat higher today, fewer than 50 cases have been found which concern manipulation and, of these, fewer than 10 may be viewed as significant in terms of their predictive value.

⁴ 7 U.S.C. §§ 1-22 (1976 & Supp. III 1979).

⁵ The Grain Futures Act of 1922, ch. 369, 42 Stat. 998 (1922), was amended in 1936 and

the prevention of, and punishment for, market manipulation.⁶ Since neither the statute nor the pertinent rules promulgated by the various exchanges⁷ define manipulation, the only legal guidelines to be found are those few judicial and administrative precedents in which particular activities associated with specific price movements have been held to constitute or fall short of manipulation.⁸ Yet, because many of the cases either involve the most egregious examples of manipulation,⁹ or yield results and articulate standards different from their predecessors, some commentators have urged the adoption of inflexible, elliptic, and incautious definitions of the term. It is this writer's view that, while the case law is still in its formative stages, it provides a sound basis for analysis and continues to delineate the boundaries of manipulative trading behavior.

With a view toward developing a working definition of "market manipulation," this Article begins with a brief and necessarily simplified overview of the economic background of exchange trading¹⁰ and manipulation.¹¹ The Article then summarizes and analyzes the relevant legal developments in the area.¹² Finally, it sug-

renamed the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936). An earlier statute, the Futures Trading Act, ch. 86, 42 Stat. 187 (1921), previously had been declared an unconstitutional exercise of the taxing power. See *Hill v. Wallace*, 259 U.S. 44 (1922). See generally Rainbolt, *Regulating the Grain Gambler and His Successors*, 6 HOFSTRA L. REV. 14-17 (1977); Schneider & Santo, *Commodity Futures Trading Commission: A Review of the 1978 Legislation*, 34 BUS. LAW. 1755 (1979).

⁶ See Commodity Exchange Act § 3, 7 U.S.C. § 5 (1976); 80 CONG. REC. 6161, 6164 (1936) (remarks of Sen. Pope); 62 CONG. REC. 9406, 9414 (1922). See generally Hieronymus, *Manipulation in Commodity Futures Trading: Toward a Definition*, 6 HOFSTRA L. REV. 41 (1977); Comment, *Manipulation of Commodity Futures Prices*, 21 U. CHI. L. REV. 94, 103 n.54 (1953).

⁷ The first exchange in the United States to recognize futures trading was the Chicago Board of Trade, which was organized in 1848. Campbell, *Trading in Futures Under the Commodity Exchange Act*, 26 GEO. WASH. L. REV. 215, 216 (1958). Commodity futures trading is presently regulated by the Commodity Futures Trading Commission in accordance with the Commodity Exchange Act. See 7 U.S.C. § 4a (1976 & Supp. III 1979).

⁸ See Hieronymus, *supra* note 6, at 42. There have been attempts at a statutory definition. See notes 199-201 and accompanying text *infra*.

⁹ See, e.g., *Cargill, Inc. v. Hardin*, 452 F.2d 1154 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); *Volkart Bros. v. Freeman*, 311 F.2d 52 (5th Cir. 1962).

¹⁰ For the better treatments in the area of commodity futures trading, see J. BAER & O. SAXON, *COMMODITY EXCHANGES AND FUTURES TRADING* (1949); T. HIERONYMUS, *ECONOMICS OF FUTURES TRADING* (2d ed. 1977); S. KROLL & I. SHISHKO, *THE COMMODITY FUTURES MARKET GUIDE* (1973); R. TEWELES, C. HARLOW & H. STONE, *THE COMMODITY FUTURES GAME* (2d ed. 1974).

¹¹ See notes 14-63 and accompanying text *infra*.

¹² See notes 64-165 and accompanying text *infra*.

gests a path which the law of price manipulation of commodity futures should follow and the modes of analysis which should and should not be applied in that development.¹³

THE MECHANICS OF EXCHANGE TRADING

To understand the behavior which constitutes futures market manipulation, it is essential to appreciate the fundamental mechanics of futures trading itself, the relationship of the futures market to the actuals market with which it coexists and, finally, the nature and function of a commodity futures exchange. A commodity futures transaction¹⁴ is basically a simple sales contract—standardized pursuant to the rules of a particular commodity exchange¹⁵—wherein a seller (“short”) agrees to sell and deliver a specified quantity of a commodity in a future month (“delivery month”) to the purchaser (“long”) at a specified price.¹⁶ While the futures market will necessarily attract “speculators,” who seek only to profit from price fluctuations,¹⁷ the futures contract originally emerged as a device designed to protect commercial traders in the actuals or “cash” market from the severe financial loss they could incur as a result of even slight shifts in commodity prices by enabling them to “hedge” their positions.¹⁸ Thus, speculators bear the

¹³ See notes 166-201 and accompanying text *infra*.

¹⁴ Commodity futures contracts are commonly distinguished from “forward” contracts, a term which refers generally to that class of commercially motivated cash commodity sales which contemplate actual delivery of the commodity, but in which delivery is deferred for purposes of commercial convenience or necessity. See C.F.T.C., Office of the General Counsel, Memorandum dated Sept. 5, 1978, as amended Sept. 11, 1978, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,772. The distinction is grounded in section 2(a)(1) of the Act, 7 U.S.C. § 2 (1976 & Supp. III 1979), which provides, in pertinent part, that “[t]he term ‘future delivery’ as used herein shall not include any sale of any cash commodity for deferred shipment or delivery.” *Id.* Such contracts are thus excluded from the prohibitions of section 4h, 7 U.S.C. § 6h (1976 & Supp. III 1979).

¹⁵ See CHICAGO BOARD OF TRADE, COMMODITY TRADING MANUAL 26 (1971) [hereinafter cited as CBT MANUAL]; GENERAL ACCOUNTING OFFICE, REGULATION OF THE COMMODITY FUTURES MARKETS — WHAT NEEDS TO BE DONE 5 (1978) [hereinafter cited as GAO REPORT]. The only element of the futures contract which is negotiated by the parties is the price. CBT MANUAL, *supra*, at 26. Thus, the exchange standardizes the size of the lots to be contained in each contract, the specified grade acceptable for delivery, and the delivery points. *Id.*

¹⁶ T. HIERONYMUS, *supra* note 6, at 31. See Campbell, *supra* note 7, at 216.

¹⁷ See generally *General Guide*, COMM. FUT. L. REP. (CCH) ¶ 311.

¹⁸ Bianco, *The Mechanics of Futures Trading: Speculation and Manipulation*, 6 HORSTRA L. REV. 27, 27 (1977); see Wolff, *Comparative Federal Regulation of the Commodities Exchanges and the National Securities Exchanges*, 38 GEO. WASH. L. REV. 223, 224 (1969). The futures market was conceived to aid farmers and food processors by protecting them

risks of sharp price variations¹⁹ by being on the opposite end of a hedger's contract and provide the market with the liquidity necessary to attract hedgers.²⁰

Whereas the futures market is concerned with obligations coming due at some future time, the actuals market may be equated with immediate or forward physical requirements. Buyers in the actuals market purchase physical commodities in accordance with their anticipated needs, and sellers make available only what inventories they have in storage or what they know they expect to produce or secure.²¹ Consequently, spot prices in the actuals market fluctuate with the influences of supply and demand and, at any given moment, will represent those conditions.²² Prices in the futures market, however, are based on anticipated supply and demand and, therefore, will shift along with actual trends in production and consumption or predictions of those trends as reflected on

from the potentially devastating "risks inherent in the production and distribution of perishable food products." Bianco, *supra*, at 27.

¹⁹ GAO REPORT, *supra* note 15, at 5; S. ANGRIST, SENSIBLE SPECULATION IN COMMODITIES 205 (1972). Speculators traditionally look for two conditions before entering a particular market. First, the market must be "perfect or semi-perfect" and, secondly, the carrying cost of the commodity must be low. Kaldor, *Speculation and Economic Stability* in B. GROSS & B. YAMEY, THE ECONOMICS OF FUTURES TRADING 113 (1976). Absent these conditions, speculation can be both too expensive and too risky. Once they enter a market, speculators serve to increase the volume of trading dramatically, thus enabling the market to operate smoothly. See Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 172 (1963).

²⁰ See Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 173 (1963). See also Melamed, *The Mechanics of a Commodity Futures Exchange: A Critique of Automation of the Transaction Process*, 6 HOFSTRA L. REV. 149, 156-57 (1977). Hedging has been defined as a form of arbitrage between a position in both the actuals market and the futures market. CBT MANUAL, *supra* note 15, at 31.

Hedging is not used to make a profit, either speculative or otherwise, but to insure one already existing or to limit a loss already threatened. . . . Its object is not to return a speculative profit, for the reason that any profit derived on the futures merely equalizes or offsets a loss which has been incurred on a transaction or market position in the physical market or vice versa

J. BAER & O. SAXON, *supra* note 10, at 203-04. Other writers contend that "the interest of the hedger is centered entirely in the relative changes occurring between cash and futures prices," G. HOFFMAN, FUTURES TRADING UPON ORGANIZED COMMODITY MARKETS 418-19 (1932), and that it is employed with "the expectation of a favorable change in the relation between spot and futures prices," Working, *Futures Trading and Hedging*, 43 AM. ECON. REV. 236 (1953). The view which is adopted, however, is significant in determining whether a hedger can be guilty of manipulation. See *Indiana Farm Bureau Coop. Ass'n, Inc.*, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,964, at 23,868-69 (C.F.T.C. 1979).

²¹ CBT MANUAL, *supra* note 15, at 5.

²² *Id.* at 8.

the trading floor.²³

Despite the distinctions between contracts negotiated in the actuals and futures markets,²⁴ prices in the two markets tend to follow parallel paths.²⁵ Hence, the "basis,"²⁶ or relationship between the futures and cash prices of a given commodity tends, under normal market activity, to remain fairly constant, but not without variation.²⁷ The preservation of the basis may be explained by the delivery requirement of the futures contract and the function of the exchange in alleviating that obligation. Because of the desires of speculators and hedgers, virtually all futures contracts are undertaken without any intention by the short of making, or of the long of taking, physical delivery of the commodity.²⁸ Rather, the expectation is that, prior to maturity of the contract obligation, each side will offset its obligation by taking an equal and opposite position in the identical commodity future.²⁹ Thus, a short in a particular future will cover by purchasing an equal long position to avoid having to make delivery of the commodity and will sustain a profit or loss equal to the difference between the

²³ Due to the possibility of dramatic shifts in production and, of equal importance, in consumption, the predictability of a commodity's future value is highly speculative. See Melamed, *supra* note 20, at 166. Consequently, reliance on a futures price trend can be risky since "large price gyrations are the rule rather than the exception." *Id.* at 166-67.

²⁴ See generally CBT MANUAL, *supra* note 15, at 18.

²⁵ Wolff, *supra* note 18, at 226.

²⁶ The "basis" is also commonly known as the "spread," although technically the latter properly refers to the price differences among futures contracts in the same commodity with differing maturities. The spread may be accounted for in part by the costs of storing inventories, insurance, and interest costs, known aggregately as carrying charges. If the difference between futures prices reflects more than a multiple of the carrying charges, which generally remain constant, speculators may engage in spreading. See S. KROLL & I. SHISHKO, *supra* note 10, at 69-70.

²⁷ See Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 172 & n.9 (1963).

²⁸ See Working, *Futures Trading and Hedging*, 43 AM. ECON. REV. 314, 315-17 (1953); Comment, *Federal Regulation of Commodity Futures Trading*, 60 YALE L.J. 822, 839 (1951). One commentator observed that "[a] speculator would be hard put to meet a delivery requirement, and he is totally unprepared to take delivery. A hedger selling futures will doubtless prefer using the stocks in his possession for processing or a sale on the spot market to delivering them on the futures exchange." Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 173 (1963). In fact, it has been noted that a perfect futures market would entail no deliveries at all. J. BAER & O. SAXON, *supra* note 10, at 210.

²⁹ See T. HIERONYMUS, *supra* note 10, at 204; S. KROLL & I. SHISHKO, *supra* note 10, at 67; R. TEWELES, C. HARLOW & H. STONE, *supra* note 10, at 21. Offsetting, also known as "liquidating," "closing out," or "canceling" is recognized as good delivery. See Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236, 236-38, 246-50 (1905).

price at which he sold and the price at which he offsets. A long, on the other hand, will profit if he liquidates at a higher price than the cost of his original purchase contract of the future, and lose if the opposite occurs. To facilitate liquidation of traders' contractual obligations, each exchange has a clearing organization³⁰ whose members incur the increased risks of clearing in return for the right to trade at reduced fees.³¹ Thus, the exchange clearing house substitutes itself as both buyer and seller to a particular transaction.³² By according traders this method of dispensing with delivery, both speculators, who otherwise would be totally unsuited to participate, and hedgers, who rely on the presence of speculators to offset their own obligations, are drawn into the market.³³ This constant activity, enhanced by the price discovery and dissemination services of the market itself, provides the liquidity necessary for the futures market to function.³⁴ Provided this liquidity remains uninterrupted, bidding gaps in the futures market should remain small and variance between the actuals market and the futures market prices relatively constant.³⁵

Notwithstanding the typical market behavior of futures traders to offset their positions, it is fundamental that such activity is

³⁰ A clearing organization has been defined as "the person or organization which acts as a medium for clearing transactions in commodities for future delivery, or for effecting settlements of contracts for future delivery, for and between members of any board of trade." 17 C.F.R. § 1.3 (d) (1980). *But see* T. HIERONYMUS, *supra* note 10, at 43-47. The lack of such a clearing system is one of the principal criticisms leveled at the London Metal Exchange (L.M.E.), which employs a principal-to-principal system, where a buyer at the Ring may look only to his seller to offset, and not to a substitute clearing organization. Although one seller's creditworthiness will be different from another's, the rule of trading "by open outcry" precludes selectivity. *See* The London Metal Market & Exchange Co. Ltd., Rules and Regulations, Part 2, Rule A (members "responsible to and entitled to claim against one another, and one another only. . .").

The L.M.E. should not be confused with the so-called London Gold Market, which refers to the twice-daily meetings of five major London bullion dealers at the Rothschild offices to arrive at the "fixing" price for transactions concluded during each such session. A new gold trading exchange is being organized to open in 1981 and will consist of the five bullion dealers and the 31 L.M.E. Ring Dealers. *Metals Week*, Aug. 24, 1980, at 4, col. 2; *Wall St. J.*, Sept. 29, 1980, at 40, cols. 3-4.

³¹ *See* *Seligson v. New York Produce Exchange*, 378 F. Supp. 1076, 1081 (S.D.N.Y. 1974); CBT MANUAL, *supra* note 15, at 27.

³² *Id.*

³³ It is essential to speculators that actual delivery obligations need not be met. *See* Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 *YALE L.J.* 171, 173-74 (1963).

³⁴ *See* Melamed, *supra* note 20, at 155-60.

³⁵ *See* T. HIERONYMUS, *supra* note 10, ch. 9.

nowhere required. In fact, many commentators contend that actual delivery of the contracted for commodity is at the option of the short³⁶ since he can send out delivery notices to buyers of his intention to make physical delivery by tender of a negotiable warehouse receipt.³⁷ In reality, however, a long also can require delivery merely by failing to offset his interest before the last delivery date in a trading month.³⁸ In a normal market, future prices will exceed spot prices, evidencing an available supply of the deliverable commodity.³⁹ If, due to a substantial supply increase, the spread widens by the future price rising significantly over or in relation to spot prices, traders will "spread" by buying actuals at the low spot price while simultaneously contracting to sell the commodity at some future time at the higher price. These shorts may subsequently cover their positions by delivering their cheaply bought actuals or, if the normal basis has been restored, offset their short positions in the futures market and sell their physical commodities in the actuals market for a profit.⁴⁰ Conversely, if the commodity is in tight supply, the futures price will drop significantly below the spot price causing "backwardation" or inversion.⁴¹ Under these circumstances, traders will sell actuals at the premium spot price, take long positions in the future, and stand for delivery during the final days of the delivery month. By refusing to offset their positions, the longs force the shorts to bid up the liquidating price or else encounter the cost and inconvenience of making physical delivery.⁴²

This self-correcting tendency of the markets maintains a true price relationship between actuals and futures markets and may be

³⁶ See, e.g., S. KROLL & T. SHISHKO, *supra* note 10, at 202.

³⁷ See 7 U.S.C. § 7a(5) (1976); 17 C.F.R. § 100.1 (1980). A written notice issued by a short through an exchange clearing house stating that he intends to deliver the physical commodity in satisfaction of the contract will satisfy the "notice of delivery" prerequisite to delivery. Hohenberg Bros., [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,271, at 21,474 n.15 (C.F.T.C., 1977).

³⁸ *Accord*, Commodity Futures Trading Comm'n v. U.S. Metals Depository Co., 468 F. Supp. 1149 (S.D.N.Y. 1979); see Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 175 n.24 (1963).

³⁹ CBT MANUAL, *supra* note 15, at 19.

⁴⁰ See T. HIERONYMOUS, *supra* note 10, ch. 9; Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 174 (1963).

⁴¹ Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 174 (1963).

⁴² *Id.*

attributed to the delivery risk attendant to trading in futures. Similarly, the delivery requirement accounts for the tendency of expiring futures and cash prices to merge as the final day for delivery nears.⁴³ Because shorts can fulfill their obligations by purchasing and delivering actuals, longs are prevented from demanding an offset price higher than the spot price. So too, easy availability of deliverable supplies will threaten purchasers with delivery and, hence, depress the futures price to a point where sellers find it as economical to offset as to deliver. Consequently, spot and futures prices converge as the markets respond to the influences of the delivery requirement.

THE MECHANICS OF MANIPULATION

Despite the self-correcting tendency of the markets to restore a normal basis, disruptions in the price basis are occurring with increasing frequency.⁴⁴ These disruptions impair the utility of both markets by frustrating and necessarily discouraging successful hedging,⁴⁵ thereby distorting the normal flow of actuals delivered in commerce. Speculators, too, are subjected to risks unrelated to normal supply and demand and, consequently, their participation is threatened. As a result, artificial prices emerge which burden trade consumers in the actuals market.⁴⁶ Although these disruptions often are caused by factors beyond the control of traders, such as threats of war or events of *force majeure*,⁴⁷ other price movements result from the deliberate activities of traders calculated to force a price up or down and upset the natural or unavoidable forces of supply and demand. It is these intentionally caused price disruptions which are the subject of the antimanipulation prohibitions of the Commodity Exchange Act.⁴⁸

⁴³ See CBT MANUAL, *supra* note 15, at 19; T. HIERONYMOUS, *supra* note 10, at 154.

⁴⁴ See MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., HOW TO HEDGE COMMODITIES 18 (1961); *see, e.g.*, Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 284 (9th Cir. 1979).

⁴⁵ See Board of Trade v. Olsen, 262 U.S. 1 (1923).

⁴⁶ See G. HOFFMAN, FUTURE TRADING UPON ORGANIZED COMMODITY MARKETS IN THE UNITED STATES 30 (1932); Comment, *Commodities: Futures Control: Manipulation Under the Commodity Exchange Act*, 57 MINN. L. REV. 1243, 1247 n.13 (1973); Comment, *Manipulation of Commodity Futures Prices—The Great Western Case*, 21 U. CHI. L. REV. 94, 102 (1953).

⁴⁷ For a discussion of some of these factors, see MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *supra* note 44.

⁴⁸ 7 U.S.C. § 5 (1976); *see* Board of Trade v. Milligan, 90 F.2d 855, 857 (8th Cir.), *cert. denied*, 302 U.S. 710 (1937). *See also* H. REP. NO. 421, 74th Cong., 1st Sess. 1-3 (1935).

There are two significant methods of manipulating commodity futures prices. The first is the creation and dissemination of market misinformation intended to lead other traders to act in a manner which improves the manipulator's position.⁴⁹ Reminiscent of manipulation in securities trading,⁵⁰ this method can range from the simple spreading of rumors and unfounded information⁵¹ to complex fictitious transactions which generate false impressions of market activity and cause the registration of prices unreflective of

⁴⁹ See, e.g., David G. Henner, 30 Agric. Dec. 1151 (1971); Reuben E. McGuigan, 5 Agric. Dec. 249 (1946). See generally J. SMITH, ORGANISED PRODUCE MARKETS 109-10 (1922). Since traders do not have perfect knowledge of the futures market, "they must constantly search for new information which will give them some indication of future changes in supply and demand." David G. Henner, 30 Agric. Dec. at 1205. To the extent, therefore, that commodity price manipulation generates informational signals which disrupt "the current expectancy of traders in the market as to the value of the commodity," *id.*, it jeopardizes the integrity of the exchange.

⁵⁰ See generally Frey, *Federal Regulation of the Over-the-Counter Securities Market*, 106 U. PA. L. REV. 1, 19-28 (1957). While comparisons between commodities and securities trading law are frequently drawn, see, e.g., Wolff, *Comparative Federal Regulation of the Commodities Exchanges and the National Securities Exchanges*, 38 GEO. WASH. L. REV. 223 (1969), Congress has recognized that such analogies can be counterproductive. See generally Russo & Lyon, *The Exclusive Jurisdiction of the Commodity Futures Trading Commission*, 6 HOFSTRA L. REV. 57 (1977). In fact, the many differences between these areas eclipse any similarities, and justify the existence of independent regulatory agencies. GAO REPORT, *supra* note 15, at 11-15. Unlike a securities trader, a commodities speculator cannot simply retain a position, since contracts expire. Each futures delivery month eventually becomes spot, raising the risk of delivery. Additionally, futures margins are much lower than stock margins, and function as performance bonds or security deposits, rather than as a limitation on the credit which a broker may advance. Finally, since shorts and longs are always equal, the same amount of money is won and lost in the commodities market. See S. KROLL & T. SHISHKO, *supra* note 10, at 202-04.

⁵¹ See Comment, *Manipulation of Commodity Futures Prices—The Great Western Case*, 21 U. CHI. L. REV. 94, 96-97 (1953). One traditional disseminator of unfounded information is the "scalper." See T. HIERONYMUS, *supra* note 10, at 47-48; cf. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) (securities); Zweig v. Hearst Corp., 594 F.2d 1261 (9th Cir. 1979) (securities). In the lexicon of commodities trading, "scalpers" are floor traders—those who trade for their own accounts. See generally S. KROLL & T. SHISHKO, *supra* note 10, at 211-12; Johnson, *The Changing Face of Commodity Regulation*, 8 PRAC. LAW. 27, 31-32 (1974). "Locals" behave similarly, but confine themselves to one "pit," or commodity. This type of activity may best be characterized by the "Lard Case," Ralph W. Moore, 9 Agric. Dec. 1299 (1950), *aff'd*, 191 F.2d 775 (D.C. Cir.), *cert. denied*, 342 U.S. 860 (1951). Moore, who had a large long position in lard, issued a false press release and memorandum, purportedly endorsed by the Department of Agriculture, in which he contended that the government was about to make huge lard purchases for export. *Id.* at 1301. This was found to constitute market manipulation. *Id.* at 1315. See also Landon V. Butler, 14 Agric. Dec. 429 (1955); Reuben E. McGuigan, 5 Agric. Dec. 249 (1946) (respondent market advisor took position and then sent out telegrams to his clients advising purchases and sales which would favorably affect this position).

underlying economic realities.⁵² The schemes of this "misinformation manipulation" are well defined judicially, administratively, and in the rules of the various exchanges.⁵³

The other basic method of manipulation is the "corner" and its wide range of variations. The term "corner" has been loosely used to characterize an agglomeration of factually diverse situations, but it typically refers to the acquisition of a dominant long position in both the expiring future and in the supply of actuals deliverable against the future.⁵⁴ Such conditions will enable the cornerer to force the shorts to offset at a price which may be characterized as arbitrarily high.⁵⁵ Holders of long positions may stand

⁵² See, e.g., *Landon v. Butler*, 14 Agric. Dec. 429 (1955).

⁵³ All contract markets are required to maintain a program to insure compliance with the Act. 17 C.F.R. § 1.51(a) (1980). The program must include examinations of market activity and trading practices, as well as the investigation of customer complaints. *Id.*; see CBT MANUAL, *supra* note 15, at 14. See generally GAO REPORT, *supra* note 15, ch. 4.

Although misinformation manipulation is clearly unlawful, courts and commentators nonetheless have had analytical and interpretive problems identifying such schemes. For example, section 4c of the Act outlaws the wash sale. 7 U.S.C. § 6c (1976 & Supp. III 1979); see *CFTC v. Savage*, 611 F.2d 270, 284 (9th Cir. 1979); *Robert E. O'Grady*, 30 Agric. Dec. 1635 (1971); *Willard E. Platt*, 24 Agric. Dec. 97 (1965). Wash trading is "entering into or purporting to enter into transactions for the purpose of giving the appearance that purchases and sales are being or have been made but without actually taking a position in the market." U.S. Commodity Exchange Authority, Memorandum on Definitions of Certain Trade Practices Prohibited by the Commodity Exchange Act (May 25, 1966). In fact, individuals who have attempted wash trading have been criminally prosecuted pursuant to section 4c(a) of the Act. 7 U.S.C. §§ 6c(a) & 13(c) (1976 & Supp. III 1979); see, e.g., *United States v. Siegel*, 472 F. Supp. 440 (N.D. Ill. 1979); *United States v. La Mantia*, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,667 (N.D. Ill. 1978).

Another example of manipulative trading is the butterfly straddle, commonly defined as "an investment position in which an investor is 'long' or buys futures contracts for one delivery month and is 'short' or sells half such number of futures contracts in both a prior and subsequent delivery month in relation to the long position, or the reverse." *Siegel Trading Co.*, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,452, at 21,831 (C.F.T.C. 1977). Employed primarily for tax purposes, the butterfly straddle is violative of the Act due to its artificial nature and the resultant distortion on normal patterns of supply and demand. This is so notwithstanding the absence of manipulative intent. *Id.* at 21,843-44. See also *Selig & Schmittberger, Tax Aspects of Commodity Futures Trading*, 6 HOFSTRA L. REV. 93 (1977); *Wall St. J.*, Dec. 28, 1979, at 14, col. 2. Other well-defined examples of manipulative activity proscribed by section 4c of the Act include cross trading and accommodation trading, both of which are variations of the wash sale. 7 U.S.C. § 6c(a) (1976 & Supp. III 1979); see U.S. Commodity Exchange Authority, Memorandum on Definitions of Certain Trade Practices Prohibited by the Commodity Exchange Act (May 25, 1966).

⁵⁴ See *Great W. Food Distribs., Inc. v. Brannan*, 201 F.2d 476 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953); *G.H. Miller & Co.*, 15 Agric. Dec. 1015 (1956), *aff'd*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *Campbell, Trading in Futures Under the Commodity Exchange Act*, 26 GEO. WASH. L. REV. 215, 236-42 (1958).

⁵⁵ See *J. BAER & O. SAXON*, *supra* note 10, at 82-83.

pat, fail to offset their dominant positions during the last days of trading, and thereby obtain a substantial percentage of the commodity's "open interest."⁵⁶ Since the shorts initially do not expect to have to make delivery, they will bid up the offset price in order to induce the cornering long to liquidate at a profit as the possibility of being forced to make delivery, with the associated expense and inconvenience, becomes increasingly likely. The most dramatic example of a "corner" occurred where a trader on the Chicago Board of Trade took a vast long position in July 1931 Chicago corn and, by the delivery date, wound up with ninety-seven percent of the deliverable supply⁵⁷ and ninety percent of the visible supply in the United States while maintaining his dominant futures position.⁵⁸

Where a purchaser has a dominant position in the futures market alone, without any concomitant controlling position in the actual commodity, the position of the long is properly referred to as a "squeeze."⁵⁹ Typically longs take advantage of a squeeze by offering offsets at successively higher prices because of a shortage of sufficient immediately deliverable material. They will not push the prices high enough, however, to cause shorts to acquire actuals outside the exchange's stocks because if sellers were to respond in

⁵⁶ The term "open interest" is "the accumulated total of all outstanding long or short contracts" of a particular future commodity. Melamed, *supra* note 20, at 166 n.38. Thus, the open interest will comprise the total number of long contracts—which equals the total number of short contracts—that have not been offset or that have not yet been delivered.

⁵⁷ The concept of "deliverable supply" is critical to the law of manipulation. See notes 176-182 and accompanying text *infra*. Under one definition, deliverable supply is technically that supply which "is the certificated and registered amount in delivery position during the delivery month." Hieronymus, *supra* note 6, at 48. It is a known quantity published by the exchanges, which is kept in registered warehouses and inspected regularly for quality. Thus, a "corner" does not necessarily imply control of all cash material in the country, but only of that which is then deliverable and stored in the relevant exchange-licensed warehouses. See *Great W. Food Distribs., Inc. v. Brannan*, 201 F.2d 476, 481 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953).

⁵⁸ *Peto v. Howell*, 101 F.2d 353 (7th Cir. 1938). See also *G.H. Miller & Co. v. United States*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959) (corner in eggs); *United States v. Patten*, 187 F. 664 (C.C.S.D.N.Y. 1911), *rev'd*, 226 U.S. 525 (1913) (cotton corner); *Wright v. Cudahy*, 168 Ill. 86, 48 N.E. 39 (1897) (corner in pork ribs); T. HIERONYMUS, *supra* note 10, at 321-24.

⁵⁹ See Note, *The Delivery Requirement: An Illusory Bar to Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 176 (1963). Squeezes have been labeled "small corners" and analyzed as such. J. BAER & O. SAXON, *supra* note 10, at 83. Characterizing a squeeze as a small corner, however, hardly advances analysis, since virtually all reported squeezes involve no element of even small control of the actuals market. Yet a squeeze, like a corner, can have a devastating effect on the futures market.

this fashion, the market could become flooded with outside supplies, prices would be driven down, and the longs would be presented with the problem of disposing of the delivered commodity.⁶⁰ One method whereby a long could avert this problem would be to hedge the squeeze by spreading. Due to the artificially high spot prices, the long may correctly predict that the squeeze will result in backwardation.⁶¹ Consequently, he may secure an equal short position in a futures contract which is due to mature after his long contract. If he effects this prior to facing the risk of delivery on his maturing long contract, he will not only assure himself of an outlet for the actuals he may acquire, but also may profit on the offset of his short position once the basis is restored. This, of course, only supplements his expected profit on the squeeze.

Although manipulation on the short end is a far rarer event than a squeeze, its occurrence is made possible—particularly on the first days of the delivery month in question—when sellers issue delivery notices in unusually large quantities.⁶² Anxious to avoid having to take physical delivery, longs will commence panic selling, and spot prices will be pushed downward in relation to the futures price. Shorts then will be able to fulfill their contractual obligations by purchasing and delivering cheaply bought actuals or by offsetting at favorable prices.⁶³

THE ELEMENTS OF MANIPULATION

Due to the potential for substantial harm, manipulation of prices on the commodity exchanges is subject not only to the civil⁶⁴

⁶⁰ See Campbell, *supra* note 54, at 239. The problem of "burying the corpse" arises where the successful corner is unable to dispose of the cash commodity which he has cornered. *Id.*; see G. HUBBARD, *COTTON AND THE COTTON MARKET* 393 (2d ed. 1927).

⁶¹ B. GROSS & B. YAMEY, *supra* note 19, at 13. Backwardation occurs when the spot price rises above the futures price; that is, the basis becomes negative. *Id.*

⁶² See T. HIERONYMUS, *supra* note 10, at 325; note 37 *supra*.

⁶³ T. HIERONYMUS, *supra* note 10, at 325.

⁶⁴ See Commodity Exchange Act § 6(b), 7 U.S.C. § 9 (1976 & Supp. III 1979); Cargill, Inc. v. Hardin, 452 F.2d 1154 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); G.H. Miller & Co. v. United States, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959). Under section 6(b), if the Commodity Futures Trading Commission has reason to believe that a person has engaged in manipulation, it may prohibit such person from trading on any contract market. Moreover, if the person is registered as a futures commission merchant, commodity trading advisor, commodity pool operator, or floor broker, the Commission has the authority to impose civil penalties of up to \$100,000 and to revoke or suspend the person's registration, 7 U.S.C. § 9 (1976 & Supp. III 1979).

and criminal sanctions⁶⁵ of the Commodity Exchange Act, but also to the rules of the various exchanges.⁶⁶ In fact, it is clear that the prohibition of manipulation was the principal motivation and purpose of Congress in enacting the Act.⁶⁷ Yet neither the Act nor the exchange rules have attempted to define manipulation. Consequently, uncertainty and imprecision have resulted as courts and administrative agencies have sought to distinguish between legitimate trading activity and manipulation. Indeed, one authority in the area has concluded that "the definition changes as cases are tried and decisions rendered."⁶⁸ Even the Commodity Futures Trading Commission (CFTC) has acknowledged "the apparent lack of objective standards for identifying and preventing potentially disruptive situations in futures markets."⁶⁹

The Case Law: Neither Inadequate Nor Inaccurate—Just Incomplete

The little case law that does exist makes clear that three elements must be established to warrant a finding of manipulation: a distorted price, a dominant or controlling position in the future, and manipulative intent.⁷⁰ It has been asserted by some courts⁷¹ and commentators that a dominant or controlling position in deliverable supplies is also an essential element.⁷² Although this latter factor is present in the classic corner,⁷³ its inclusion would cause

⁶⁵ Commodity Exchange Act § 9(b), 7 U.S.C. § 13(b) (1976 & Supp. III 1979). Section 9(b) provides in pertinent part:

It shall be a felony punishable by a fine of not more than \$500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market

Id. See also Commodity Exchange Act § 6(c), 7 U.S.C. § 13b (1976 & Supp. III 1979) (misdemeanor for violation of cease and desist order issued for manipulative activity).

⁶⁶ See, e.g., Chicago Board of Trade, Reg. 150(c) (1977); Commodity Exchange, Inc. § 210(a)(x) (1979); N.Y. Coca Exchange, Inc., Trade Rule 1 and Bylaws § 158 (1977); N.Y. Cotton Exchange, Rule 5.08(i) (1975); N.Y. Mercantile Exchange, General Rule 51.03 (1977).

⁶⁷ 7 U.S.C. § 5 (1976); see 80 CONG. REC. 8089 (1936) (remarks of Sen. Pope).

⁶⁸ Hieronymus, *supra* note 6, at 55.

⁶⁹ Proposed limits on "Positions Exceeding 25 Percent of the Open Interest in the Delivery Month of a Commodity Future," 43 Fed. Reg. 15,438, 15,439 (1978) (subsequently withdrawn).

⁷⁰ See notes 127-28 and accompanying text *infra*.

⁷¹ E.g., *Volkart Bros. v. Freeman*, 311 F.2d 52 (5th Cir. 1962).

⁷² Hieronymus, *supra* note 6, at 45.

⁷³ See notes 54-58 and accompanying text *supra*.

numerous squeezes to be deemed permissible and, therefore, is not supported by the case law⁷⁴ or by analysis of the economic realities of market behavior.⁷⁵ Nevertheless, the view demonstrates at least one inconsistency in defining manipulation. Additionally, the elusive nature of proving intent from circumstantial and conflicting evidence of purpose and motive has created as many difficulties in structuring commodity futures law as in other areas. This requirement has resulted in an enormous and perhaps irreconcilable tension between the conclusion that an act is a normal and desirable market response and that it is "intentionally manipulative." The problem of the "inadvertent manipulator," however, is not fictive.⁷⁶

The question whether an inadvertent squeeze should constitute manipulation first arose in the highly controversial case of *Volkart Bros. v. Freeman*.⁷⁷ The case is, therefore, a logical point of departure for undertaking an analysis of the definitional guidelines that do exist. Volkart, a large and experienced cotton broker and merchant, held a large long position in October 1957 cotton on the New York Exchange.⁷⁸ During normal liquidation by the other longs in mid-October, Volkart not only held its position, but made a large purchase on the New Orleans Cotton Exchange.⁷⁹ By mid-month, it was aware that the deliverable supply was less than half its combined interest, yet it retained its position throughout the month and announced offers to sell only at prices slightly above the market price.⁸⁰ Ultimately, it required the shorts to liquidate at substantial premiums.⁸¹ The Fifth Circuit, apparently fearful that the difficulty of articulating a clear standard made it impossible or impracticable to characterize this squeeze as manipulative,

⁷⁴ See *Cargill, Inc. v. Hardin*, 452 F.2d 1154 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); *Great W. Food Distribs., Inc. v. Brannan*, 201 F.2d 476 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953); *Fox Deluxe Foods, Inc.*, 18 Agric. Dec. 582 (1959).

⁷⁵ See generally *David G. Henner*, 30 Agric. Dec. 1151, 1264-74 (1971).

⁷⁶ See *Volkart Bros. v. Freeman*, 311 F.2d 52 (5th Cir. 1962); *Vincent W. Kosuga*, 19 Agric. Dec. 603 (1960). See also *J. BAER & O. SAXON*, *supra* note 10, at 82-83.

⁷⁷ 311 F.2d 52 (5th Cir. 1962), *rev'g* 20 Agric. Dec. 306 (1961).

⁷⁸ 20 Agric. Dec. at 317.

⁷⁹ *Id.*

⁸⁰ *Id.* at 318-27. Volkart argued that the maintenance of its controlling long position in the October futures was merely a hedge against its forward sales commitments. *Id.* at 308. The judicial officer found, however, that "the changes in [Volkart's] short futures position varied erratically from changes in its long futures position and did not indicate a pattern characteristic of a hedging operation." *Id.* at 326.

⁸¹ See 311 F.2d at 58. As a result of its behavior, Volkart, on the last day of trading on the October 1957 future, realized a profit in excess of \$21,000. *Id.*

refused to find Volkart guilty of manipulation.⁸² The decision has been interpreted to hold, therefore, that there cannot be a finding of manipulation without a trader's concurrent control of the cash commodity.⁸³

Central to the *Volkart* court's ruling was its determination of what constitutes "deliverable supply." The court found that "uncertificated" cotton stocks which would not have been acceptable for delivery, nevertheless, had to be considered as part of the available stocks, reasoning that "smarter shorts" could have arranged for certification at an earlier point in time.⁸⁴ Thus *Volkart* must logically stand for the principle that there can be no manipulation where there is a sufficient deliverable supply, presuming of course, that the term deliverable supply takes on a very broad definition.

Similar facts in *Cargill, Inc. v. Hardin*,⁸⁵ however, led to a different result as the Eighth Circuit concluded that contribution to and exploitation of a squeeze is manipulation within the meaning of the Act.⁸⁶ The Government's complaint charged manipulation in the Chicago Board of Trade's May 1963 wheat future by Cargill, one of the world's largest grain traders.⁸⁷ Between mid-April and May 15, 1963, Cargill built up a long position of 1,930,000 bushels,

⁸² *Id.* at 60. The Fifth Circuit explained that Volkart allegedly manipulated the price of the October 1957 cotton future "by means of (1) their controlling 'long' position on the cotton exchanges, (2) the insufficient supply of cotton eligible and available . . . for delivery . . . by [Volkart] in liquidation of their futures contracts . . ." *Id.* at 57. Reasoning that Volkart did not control the spot commodity, which according to the *Volkart* court was essential to a finding of manipulation, the court found Volkart innocent of the charges. *Id.* at 58-60.

⁸³ See Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 178-80 (1963); Comment, *Commodities: Futures Control: Manipulation Under the Commodity Exchange Act*, 57 MINN. L. REV. 1243, 1249-50 (1973). One student author has gone so far as to assert that, under the *Volkart* rationale, judicial and governmental regulation of squeezes is precluded. Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 178, 180 (1963). As a matter of strict construction, however, the *Volkart* court merely ruled that, even as of the commencement of the last day of trading, the shorts could have increased the supply. See 311 F.2d at 59-60.

⁸⁴ See 311 F.2d at 59-60. The *Volkart* court failed, however, to highlight adequately one critical fact. Under exchange rules, the short still had 5 more days to purchase cotton of a specified grade in the actuals market, have it certificated, and make delivery. See Comment, *Commodities: Futures Control: Manipulation Under the Commodity Exchange Act*, 57 MINN. L. REV. 1243, 1281 (1973). Under those circumstances, it was not manipulation for the longs to liquidate at higher prices. It is the broad language which the court used in dictum, however, which is so upsetting.

⁸⁵ 452 F.2d 1154 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972).

⁸⁶ *Id.* at 1173.

⁸⁷ *Id.* at 1156.

which was only slightly short of the speculative limit.⁸⁸ During May, Cargill also made two profitable cash sales to Spain, leaving only 50,000 bushels of soft red winter wheat—the cheapest grade deliverable at par—in the Chicago market, most of which was in its own warehouses.⁸⁹ At the end of the final day of trading on the May future, while owning sixty-two percent of the long interest, and with no significant quantities of wheat available other than from itself, Cargill offered to liquidate at a premium eight cents over the then-current trading price.⁹⁰ The result was that 420,000 bushels of the future remained open after trading.⁹¹

The *Cargill* court adopted the Commodity Exchange Authority's suggestion that, in addition to scienter, three elements are necessary for a squeeze to constitute manipulation: a controlling position in the future, insufficient deliverable supplies, and the extraction of an artificial price in liquidation.⁹² Finding that sixty-two percent of the open interest satisfied the controlling position requirement, the court rejected Cargill's logically irrefutable contention that the last long out of the market must by definition control 100% of the long open interest.⁹³ The court also rejected the *Volkart* court's broad interpretation of deliverable supply, following an earlier Seventh Circuit case,⁹⁴ and ruled that hard wheat

⁸⁸ *Id.* at 1159.

⁸⁹ *Id.* at 1159-60.

⁹⁰ *Id.* at 1160.

⁹¹ *Id.* Of the 420,000 bushels of the wheat futures which remained open, Cargill had unliquidated holdings of 365,000 bushels. *Id.* Primarily through a series of paper transactions, Cargill liquidated its position at a premium of approximately fifteen cents per bushel above the spot price. *Id.* at 1160-61.

⁹² *Id.* at 1164-72.

⁹³ *Id.* at 1164; see note 56 *supra*.

⁹⁴ *Great W. Food Distribs., Inc. v. Brannan*, 201 F.2d 476 (7th Cir.), cert. denied, 345 U.S. 997 (1953). As of the commencement of the last day of trading in December 1947 egg futures on the Chicago Mercantile Exchange, the Great Western respondents held 73.9% of the open long interest in the future and 50% of the deliverable supply of refrigerator eggs in Chicago warehouses. 201 F.2d at 480-81. The Seventh Circuit found that the respondents, who also held a short position in January 1948 eggs, had violated 7 U.S.C. §§ 9, 13 (1976) by widening the spread between the December and January futures in an attempt to profit from their "straddle operation." 201 F.2d at 478, 483. In particular, the court found that the combination of the respondents' dominant long position in the December future and its controlling interest in the available supply was used to keep the price of the December future high in relation to the price of the January future. *Id.* at 483.

The *Great Western* case is most significant, however, for its conclusions as to what is includable in "deliverable supply." Under the rules of the Chicago Mercantile Exchange, shorts could satisfy their contractual obligations by delivery of refrigerator eggs stored in Chicago warehouses, fresh eggs, or refrigerator eggs stored in out-of-town warehouses. *Id.* at

was properly excluded from available deliverable supply for three reasons. While hard wheat cost more than soft, it received no premium when delivered against a futures contract; it was all located outside Chicago, so that shipping costs would be substantial; and trade practice showed that it was not considered available.⁹⁵ Finally, as to exaction of an artificial liquidation price, the court looked to the four tests proposed by the Department of Agriculture: whether the sharp price rise in the last 2 days of trading had any precedent in the previous 9 years; whether the distortion in the spread or basis between the May and nearby July future similarly had any historical analog; whether the current and historical price of the May future in Chicago was out of line with that experienced in Kansas City; and whether the price of the maturing future was skewed in its normal relationship to the cash commodity.⁹⁶ Applying these factors, the *Cargill* court found that the May 1963 prices were clearly abnormal.⁹⁷

In examining Cargill's market activity, the court found that the Act prohibited neither Cargill's acquisition of the dominant long position nor Cargill's contemporaneous Spanish cash sales.⁹⁸ While these activities created the capacity to squeeze, the crux of the squeeze was Cargill's decision to await the last minutes of trading to liquidate its large long interest at an unusually high price.⁹⁹

It has been urged that *Volkart* is distinguishable from *Cargill* in that the defendant in the latter case had greater control of both

482. The *Great Western* court, nonetheless, excluded the latter two alternatives from "deliverable supply," since fresh eggs, although more expensive than refrigerator eggs received no premium when used to satisfy the shorts' obligations, and since out-of-town eggs generally were not resorted to because of "economic impediments." *Id.* at 480-81.

The Seventh Circuit reached a similar conclusion in *G.H. Miller & Co. v. United States*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959). In *Miller*, the petitioners were held to have cornered and manipulated the market for December 1959 egg futures on the Chicago Mercantile Exchange. 260 F.2d at 288. In affirming the order of the Secretary of Agriculture, the *Miller* court found that, during the last 3 days of trading on the future, the petitioners had not only increased their holdings of refrigerator eggs in Chicago warehouses from 19% to 72% of the available supply, but also had increased their long position in the future from 14% to 78% of the open interest. *Id.* at 289. In fact, as a group, the petitioners held during the last 2 days of trading 100% of the open long interest in December 1952 egg futures. *Id.* Asking an actual price in excess of the closing price of the expiring future was held to be sufficient evidence of an intent to corner. *Id.* As in *Great Western*, the Seventh Circuit refused to include out-of-town refrigerator eggs in deliverable supply. *Id.* at 288.

⁹⁵ 452 F.2d at 1165-67.

⁹⁶ *Id.* at 1167-68.

⁹⁷ *Id.* at 1169.

⁹⁸ *See id.* at 1167, 1171-72.

⁹⁹ *Id.* at 1171.

the open and the actual interest.¹⁰⁰ But this is incorrect as to the open interest, since Volkart held almost ninety percent of that variable.¹⁰¹ Moreover, the distinction is irrelevant in the cash market because actuals should not be counted as part of deliverable supply where it is impossible or impracticable for the shorts to purchase and deliver them.¹⁰² In *Volkart* the shorts' only alternative to liquidation was to arrange for the delivery of uncertificated cotton, issue transferable delivery notices estimating the grade of the cotton, and to have the material certificated within 5 business days of issuing the notices.¹⁰³ By the final days of trading, however, when the squeeze became apparent, the risks of covering with offgrade cotton coupled with the strict time constraints made this approach commercially unfeasible—as the Cotton Exchange admitted in its brief—even if already certificated stock were to be delivered.¹⁰⁴ Although the *Volkart* court attached little importance to these practicalities, they comprised the essence of the *Cargill* analysis and demonstrate the basic flaw in the *Volkart* court's reasoning. A squeeze in law does not require control of physicals any more than it does in economics.¹⁰⁵ It requires only intentional market activity in taking advantage of a shortage. This is where the manipulation lies.

One of the most interesting manipulation cases and, in some respects, one of the most important, *David G. Henner*,¹⁰⁶ involved a manipulation in egg futures¹⁰⁷ that occurred within a few

¹⁰⁰ Bianco, *supra* note 18, at 36-37.

¹⁰¹ See *Volkart Bros. v. Freeman*, 311 F.2d at 56; see text accompanying notes 77-79 *supra*.

¹⁰² See note 94 *supra*.

¹⁰³ *Volkart Bros.*, 20 Agric. Dec. 306, 316-17 (1961).

¹⁰⁴ Brief for Respondents at 36, *Volkart Bros. v. Freeman*, 311 F.2d 52 (5th Cir. 1962).

¹⁰⁵ Accord, Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 175-76 (1963); Comment, *Commodities: Futures Control: Manipulation Under the Commodity Exchange Act*, 57 MINN. L. REV. 1243, 1248 (1973).

¹⁰⁶ 30 Agric. Dec. 1151 (1971).

¹⁰⁷ The *Henner* case is but one of a line of cases involving the manipulation of the price of egg futures. See *G.H. Miller & Co. v. United States*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *Great W. Food Distribs., Inc. v. Brannan*, 201 F.2d 476 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953); *Fox Deluxe Foods, Inc.*, 18 Agric. Dec. 582 (1959). In *Fox Deluxe*, the respondents were found to have manipulated upward the price of egg futures on the Chicago Mercantile Exchange on two separate occasions. *Id.* at 611-12. The respondents, who purchased for their own and for their customers' accounts, accomplished the scheme by purchasing and maintaining long positions which were far in excess of deliverable supply as the time for delivery came due. *Id.* In fact, in the later manipulation, their long position was, at all times, 550% greater than the deliverable supply of eggs in Chicago.

seconds, and whose price effect was erased by the next day's opening.¹⁰⁸ As the trading day in question commenced, the respondent in *Henner* held fifty-nine long contracts for November 1968 shell egg futures on the Chicago Mercantile Exchange.¹⁰⁹ Seconds before the close of trading on that day, Henner "bought the board," tallying eight contracts.¹¹⁰ He additionally bid for one further contract at a substantially higher price, which was accepted by another broker within the permissible 1-minute extension after closing.¹¹¹ The Agricultural Board found that Henner's motive, which was viewed as dispositive circumstantial evidence of intent in the absence of any reasonable rebuttal, could only have been to drive up the settlement price to attract buyers on the succeeding day, thus, enabling him to liquidate at higher prices.¹¹²

When read closely, *Henner* is significant in five respects. First, it is a most painstaking synthesis of the literature on manipulation.¹¹³ Second, it clearly demonstrates that an actuals position, let alone a controlling one, is not an essential element to a finding of manipulation.¹¹⁴ Thus, it refutes the *Volkart* decision with respect to the requirement of a dominant actuals position.¹¹⁵ Furthermore, it attacks that court's suggestion that a wide definition of deliverable supplies has dispositive legal significance.¹¹⁶ Moreover, the *Henner* decision holds that a low percentage of open interest is not

Id. at 612.

¹⁰⁸ 30 Agric. Dec. at 1151.

¹⁰⁹ *Id.* at 1175.

¹¹⁰ *Id.* at 1152. "Buying the board" refers to the acceptance of all offers to sell as posted on the "offer board." *Id.* The eight contracts which Henner offered to buy ranged in price from 40.20 cents per dozen to 41.30 cents per dozen, *id.* at 1161, each contract consisting of 18,000 dozen eggs, *id.* at 1158.

¹¹¹ *Id.* at 1161. Henner's final bid was 1.55 cents per dozen higher than any other trader's bid on the day in question. *Id.* at 1162.

¹¹² *Id.* at 1174. Basically, Henner was trying to "bull the market" in an effort "to generate a more favorable market in which to dispose of at a profit futures that were bought in during a preceding period when prices were lower." *Id.* at 1191, quoting F. THOMSEN, AGRICULTURAL PRICES 292-93 (1936). By merely raising the price of the future by one cent over the average price paid for the 59 contracts, Henner stood to make a profit in excess of \$10,000. 30 Agric. Dec. at 1175 & n.8.

¹¹³ Judicial Officer Campbell's well-researched opinion in *Henner* is nearly 150 pages in length.

¹¹⁴ 30 Agric. Dec. at 1233. In effect, Henner's behavior was no different than the issuance of a false press release which, even without control of the market, constitutes manipulation. *Id.* at 1234; see Ralph W. Moore, 9 Agric. Dec. 1299, 1313 (1950), *aff'd*, 191 F.2d 775 (D.C. Cir.), *cert. denied*, 342 U.S. 860 (1951); notes 49-53 and accompanying text *supra*.

¹¹⁵ See notes 77-84 and accompanying text *supra*.

¹¹⁶ See 30 Agric. Dec. at 1264-68.

always a defense to manipulation since Henner held only twelve percent of the open contracts.¹¹⁷ Finally, *Henner* establishes clearly that stabilization is not something wholly different from manipulation.¹¹⁸

Although *Henner* gives a broad construction to the term "manipulation," manipulation has been found in less likely circumstances. *In re Vincent W. Kosuga*¹¹⁹ involved, *inter alia*, a disciplinary proceeding against an onion grower-trader and two others who, in November and December 1955, allegedly attempted to manipulate upward the prices of cash onions and onion futures on the Chicago Mercantile Exchange and, thereafter, attempted to manipulate downward the prices of March 1956 onion futures and cash onions.¹²⁰ The upward price manipulation charge was sustained as the evidence established that the respondents—the owners of virtually all the deliverable supply—convinced several shipper-growers to agree to purchase a substantial portion of the respondents' cash holdings and to ship them out of the terminal market, thereby restricting the availability of onions for delivery on the Chicago Mercantile contracts.¹²¹

The interesting element of *Kosuga*, however, lies in the fact that it is one of only three reported cases which reaches a finding of downward manipulation.¹²² The *Kosuga* respondents held a virtual monopoly on cold storage onions deliverable in Chicago, and simultaneously, during the final two weeks in February 1956, main-

¹¹⁷ See *id.* at 1190.

¹¹⁸ *Id.* at 1228-32. But see *General Foods Corp. v. Brannan*, 170 F.2d 220 (7th Cir. 1948), wherein the Seventh Circuit held that stabilized, pegged, or preserved prices are not "manipulated prices." *Id.* at 230. The precedential value of the rule in *General Foods*, however, appears lost in the wake of *Henner*. See also *Vincent W. Kosuga*, 19 Agric. Dec. 603, 616-18 (1960).

¹¹⁹ 19 Agric. Dec. 603 (1960).

¹²⁰ *Id.* at 604. The complaint additionally alleged that the respondent attempted, in November 1955, to manipulate upward the prices of cash onions and onion futures. *Id.* The court, however, dismissed this charge because the evidence adduced was ambiguous and, therefore, did not "warrant an inference of manipulative intent." *Id.* at 616.

¹²¹ *Id.* at 616-17. In considering the upward manipulation issue, the hearing officer in *Kosuga* initially noted that it is often "a very difficult task" to distinguish "between legitimate trading and trading with manipulative intent." *Id.* at 615. In this regard, several indicia of attempted manipulation were enunciated: the acquisition of a large long position in the future; adding thereto while the open interest is declining; carrying the long position into the delivery month; failing to reduce this position at a rate comparable to other traders similarly situated; and accepting beneficial delivery of an extraordinarily large quantity. *Id.*

¹²² See *Leist v. Simplot*, [Current Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,051 (2d Cir. 1980), *cert. granted*, 49 U.S.L.W. 3596 (U.S. Feb. 23, 1981); *Hohenberg Bros.*, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,271 (C.F.T.C. 1977).

tained their short position in the March 1956 onion future.¹²³ As a result, they increased their combined percentage of the open short interest from 25% to 46% and entered the delivery month with 650 short contracts.¹²⁴ The possibility that the respondents might satisfy their substantial short obligations out of their holdings of cold storage onions "clearly constituted a price-depressing factor."¹²⁵ The essential elements which may be culled from the *Kosuga* tribunal's finding of short side manipulation appear to be the establishment of a dominant short position; the maintenance of that position while other shorts were liquidating; carrying the large short interest into the delivery month; a virtual monopoly of cash supplies in deliverable position; and initial heavy deliveries at the beginning of the delivery month.¹²⁶

A similar allegation of downward manipulation occurred in *In re Hohenberg Bros. Co.*,¹²⁷ an administrative decision which points out the importance of the intent element.¹²⁸ The respondent in *Hohenberg*, a cotton merchandising firm, was charged with attempting to manipulate downward the price of December 1971 cotton on the New York Cotton Exchange.¹²⁹ The complaint was dis-

¹²³ 19 Agric. Dec. at 620-21.

¹²⁴ *Id.* at 612.

¹²⁵ *Id.* at 621. Reasoning that the trade was unaware that the bulk of respondents' cold storage onions had deteriorated so as to be undeliverable, the hearing officer concluded that respondents' virtual monopoly was a "potential threat" to the market since the end of the marketing season for cold storage onions was drawing near. *Id.* at 620-21.

¹²⁶ *Id.* at 622.

¹²⁷ [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,271 (C.F.T.C. 1977). With the exception of *Moore v. Brannan*, 191 F.2d 775 (D.C. Cir.), *cert. denied*, 342 U.S. 860 (1951), *Hohenberg* is the only litigated case in the area which alleged an attempted manipulation without an allegation of an effected manipulation. In contrast to an effected manipulation, an attempted manipulation requires only an intent, and action thereupon, to affect the market price of a commodity. *Hohenberg Bros.*, [1975-1977 Transfer Binder] COMM. FUT. L. REP. ¶ 20,271, at 21,477. Indeed, the Commission has defined an attempted manipulation as "simply a manipulation that has not succeeded—that is, the conduct engaged in has failed to create an artificial price." *Id.*

¹²⁸ It is not uncommon for a party's actions to unintentionally cause an artificial price. *G. H. Miller & Co.*, 15 Agric. Dec. 1015, 1019 (1956), *aff'd*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959). In order to establish a violation of the Commodity Exchange Act, therefore, it is necessary to demonstrate manipulative intent. *Hohenberg Bros.*, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,271, at 21,477. Intent, a subjective element, is established by an inference from the objective facts and the totality of the circumstances surrounding a transaction. *Id.* Thus, the credibility of witnesses is frequently the determinative factor since it is "[o]ften the 'most telling part' of the evidence." *Great W. Food Distribs., Inc. v. Brannan*, 201 F.2d 476, 479 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953).

¹²⁹ [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,271, at 21,473.

missed, however, because the evidence on intent was ambiguous.¹³⁰ The facts showed that the respondent was a large commercial hedger who, during the months leading up to November 23, 1971, steadily increased its short December position from 6.6% to 46.3% of the open interest in short contracts.¹³¹ These increases corresponded with increases in its inventory and forward commitments.¹³² On the first notice day for December contracts, it tendered, against its open short December position, delivery notices covering 18% of the total open interest and 42.9% of the certified stocks.¹³³ It subsequently tendered additional notices, and the balance of its short position was rolled forward to March.¹³⁴

The Commodity Futures Trading Commission's Division of Enforcement alleged that the initial tender constituted the attempted manipulation.¹³⁵ Conversely, the respondent argued that it held its position because prior to the first notice day, it reasonably believed that the spread between the December future and the March future would reach full carrying charges, permitting an economic rollover.¹³⁶ When this did not develop, and since its short position exceeded its certified stocks, Hohenberg tendered.¹³⁷

In dismissing the complaint, the Commission concluded that there was insufficient evidence of manipulative intent, noting that the respondent was less than 60% hedged and that its net commodity position was long.¹³⁸ Critical to the intent issue, however, was the determination of whether Hohenberg believed that there were sufficient "strong hands" in the market to stand for the delivery, since if delivery notices were "issued and allowed to circulate,

¹³⁰ *Id.* at 21,479.

¹³¹ *Id.* at 21,474.

¹³² *Id.*

¹³³ *Id.* at 21,477 & n.34.

¹³⁴ *Id.* at 21,475.

¹³⁵ *Id.* The Division of Enforcement also argued that the respondents' prospective financial gain constituted additional evidence of intent. *Id.* at 21,476. The Commission, however, rejected the contention, stating that profit motive is "not requisite to a finding of attempted manipulation." *Id.* at 21,478. This position is premised on the belief that it would be anomalous to infer an intent to manipulate from a profit motive, since one always attempts to attain the best price available for one's goods. *See id.*

¹³⁶ *Id.* at 21,476. When switching a futures contract forward, a party incurs additional storage and insurance costs, due to the extended period of warehouse storage. *Id.* at 21,476 n.30. To be commercially reasonable to rollover, therefore, it is necessary to expect to recover the carrying charges from the difference between the pre- and post-rollover prices of the commodity. *Id.* at 21,476.

¹³⁷ *Id.* at 21,476-77.

¹³⁸ *Id.* at 21,478.

it is likely that the futures price [would] go down."¹³⁹ While the Commission answered in the affirmative, the opinion implies that the requisite intent would have been found had Hohenberg believed that there were insufficient strong hands, because the essence of a short manipulation is an actual or threatened delivery of a greater quantity than the cash market can absorb. This causes longs to panic, particularly where, in Professor Hieronymus' words, "[t]he deliveries fall into weak, unsuspecting hands who must not only redeliver but must sell long positions as well"¹⁴⁰ Consequently, the longs are forced to liquidate their positions at increasingly lower prices under threats of delivery. The Commission emphasized, however, that this price depressant is attenuated when there are substantial longs in the market who are willing to stand for delivery.¹⁴¹ A short manipulator's knowledge of the longs and their ability to stand for delivery, therefore, is a critical factor in determining whether an attempt to manipulate has occurred.¹⁴²

The Division of Enforcement suffered another setback in the recently decided case of *In re Indiana Farm Bureau Cooperative Ass'n (IFB)*.¹⁴³ In *IFB*, the respondent, a large agricultural cooperative, was alleged to have manipulated upward the price of the July 1973 corn future on the Chicago Board of Trade.¹⁴⁴ The manipulative scheme purportedly began as the final day of trading on the future opened with the respondent, the largest long then in the market, holding a long position of 4.7 million bushels or 27.5% of the open interest.¹⁴⁵ At the same time the respondent held 228,000 bushels of deliverable corn.¹⁴⁶ With 35 minutes of trading remaining, the respondent had increased its long position to 61.8% of the open interest and stood for delivery of 2 million bushels.¹⁴⁷ Shortly thereafter, it liquidated 500,000 bushels at a price which, on the basis of the four *Cargill* factors,¹⁴⁸ was found to be "artificially"

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 21,476 n.27 (quoting T. HIERONYMUS, *ECONOMICS OF FUTURES TRADING* 309 (1971)).

¹⁴¹ [1975-1977 Transfer Binder] *COMM. FUT. L. REP. (CCH)* ¶ 20,271, at 21,478.

¹⁴² *Id.*

¹⁴³ *Indiana Farm Bureau Coop. Ass'n*, [1977-1980 Transfer Binder] *COMM. FUT. L. REP. (CCH)* ¶ 20,964 (C.F.T.C. 1979), *notice of appeal filed*, C.F.T.C., Dec. 16, 1979.

¹⁴⁴ *Id.* at 23,858.

¹⁴⁵ *Id.* at 23,861.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 23,859. See note 92 and accompanying text *supra*.

high.¹⁴⁹ Nevertheless, Judge Shipe dismissed the charges against the respondent.¹⁵⁰

Three factors are critical in explaining the *IFB* conclusion. First, Judge Shipe rejected the argument that deliverable supply should be narrowly defined, notwithstanding the Division of Enforcement's contention that the respondent probably was aware that much of the available stocks "could very well have been committed to export."¹⁵¹ Rather, the Judge explained, the information actually available to the respondent at the time must be controlling in arriving at a determination of the available stocks.¹⁵² Once this figure was determined, deliverable supply was computed by subtracting the respondent's cash holdings and by adding in newly arrived stocks not shown as committed to other buyers.¹⁵³ Although Judge Shipe excluded uncertificated stocks from deliverable supply, he included premium grade corn stocks notwithstanding the decision in *Cargill*.¹⁵⁴ Presumably, this was due to the fact that published data at the time did not distinguish between the various grades of deliverable corn. Second, based on his determination of deliverable supply, Judge Shipe concluded that the degree of dominance possessed by the respondent over the combined futures and cash position was considerably less than that which existed in the major cases where a finding of manipulation was made.¹⁵⁵ Finally, the *IFB* tribunal observed that "[i]f a trader's

¹⁴⁹ Indiana Farm Bureau Coop. Ass'n, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,964, at 23,860-61. Judge Shipe observed that prices created by time constraints incident to the liquidation of futures contracts are not reflective of the basic forces of supply and demand and, therefore, indicate the existence of artificiality. *Id.* at 23,859. He noted, however, that the existence of artificiality in conjunction with a trader's contributory conduct should not necessarily evidence impropriety. *Id.* at 23,860. Recognizing that attributing culpability to a trader's reaction to a volatile futures market would constitute error, Judge Shipe pointed out that "[w]hen a futures market tapers toward expiration . . . it necessarily becomes oligopolistic and oligopsonistic since the actions of any participant affect price." *Id.*

¹⁵⁰ *Id.* at 23,872.

¹⁵¹ *Id.* at 23,861.

¹⁵² *Id.* at 23,862. Judge Shipe found little support for the Division of Enforcement's contention that the respondent had knowledge of unpublished export commitments purportedly diminishing the available supply in Chicago at the time in question. *Id.* at 23,861.

¹⁵³ *Id.* at 23,862.

¹⁵⁴ *Id.*; see notes 94-95 and accompanying text *supra*.

¹⁵⁵ Indiana Farm Bureau Coop. Ass'n, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,964, at 23,863. Acknowledging that market dominance must be determined by a consideration of both cash supply and futures position, Judge Shipe found that the respondents' alleged dominance fell short of the more pervasive market influence exercised in cases where manipulation was found. *Id.* In *Cargill, Inc. v. Hardin*, 452 F.2d 1154 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972), the respondent held virtually all the deliverable cash com-

prolonged refusal to offset holdings can reasonably be characterized as a hedge for a spot sale covered by a corresponding spot purchase until late in the delivery month, a court should not infer an intent to manipulate."¹⁵⁶ In so ruling, it gave great weight to the respondent's contention that taking delivery in this instance as a hedge against current cash commitments, which were in fact honored, militated strongly against a finding of intent.¹⁵⁷

Although the result in *IFB* was correct, the case should have been decided more narrowly on the ground that the respondent had no actual control over deliverable supply. According to the Division of Enforcement's interpretation of that term, the respondent would have had to have taken delivery of four times the available stocks.¹⁵⁸ This is impenetrable logic. Moreover, by excluding premium grade stocks, and deliverable grade stocks which had been committed for export from deliverable supply, the Division, in effect, would require traders to ignore published statistics and, instead, to guess as to the quantities either committed or of premium value.

Clearly, there are cases which deal with commodity futures price manipulation other than those which have been discussed in this Article.¹⁵⁹ For purposes of this analysis, however, such cases are more significant for their extensions of the principles established by the leading cases. For example, principles of exchange

modity and 62% of the open futures position near the close of the last day of trading. 452 F.2d at 1160. Similarly, in *G.H. Miller & Co. v. United States*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959), the respondent was found to have exercised dominance by holding 100% of the open futures position and 72% of the cash commodity on the last day of trading. *Id.* at 289.

In *IFB*, the respondent held 61.8% of the open interest and approximately 4.9% of the deliverable supply with 35 minutes of trading remaining. *Indiana Farm Bureau Coop. Ass'n*, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,964, at 23,861. After reviewing the above-mentioned decisions, Judge Shipe concluded that "the leading cases, where manipulation has been found, differ materially from the instant proceeding in the degree of domination over the combined futures positions, and cash supplies not controlled by the alleged manipulators." *Id.* at 23,863.

¹⁵⁶ *Indiana Farm Bureau Coop. Ass'n*, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,964, at 23,865 (quoting Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 184 (1963)).

¹⁵⁷ [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,964, at 23,865-67.

¹⁵⁸ See *Indiana Farm Bureau Coop. Ass'n*, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,964, at 23,862.

¹⁵⁹ Recently, the CFTC has disposed of several alleged manipulation cases by consent decree. See, e.g., *Tyson Foods, Inc.*, C.F.T.C. No. 75-13 (Aug. 16, 1977); *Plains Cotton Coop. Ass'n*, C.F.T.C. No. 75-11 (July 15, 1977); *Hugh P. King*, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,211 (C.F.T.C. 1976).

price manipulation have been held applicable to dealings in cash markets where exchange prices have been inflated artificially in order to increase the price realizable for the same¹⁶⁰ or an allied cash commodity.¹⁶¹

The Principles

If it is a desideratum that cases be founded on principles, it is similarly hoped that they articulate principles as well. While the principles which may be extracted from the manipulation cases basically outline what elements are not necessary to a finding of manipulation, the cases do establish emergent principles. For example, while dominance in a position typically is associated with a manipulative corner or squeeze and, therefore, is an evidentiary factor to be weighed, a finding of manipulation does not require dominance over either the open interest or deliverable stocks. *Volkart's* suggestion to the contrary no longer retains its validity in light of *Henner*, *Hohenberg*, and the market misinformation cases.¹⁶² As dominance has lost its indispensable character, the need to construe accurately the term "deliverable supplies" has gained importance. Consequently, courts and agencies have forsaken the wooden contracts clause type of formalism of *Volkart*, and have devoted careful attention to giving the concept of deliverable supplies a realistic interpretation. The squeezed short need not resort to the upgrading of low-grade material, nor to the purchase of premium high-grade material, in order to satisfy his obligation to deliver. Moreover, the cases make clear that a corner can exist in a terminal market even though there are ample supplies available nationally or regionally.¹⁶³

Similarly, the courts have rejected the notion that stabilization is something different from manipulation. It has been determined, moreover, that the manipulation of a spot or future on an exchange for the purpose of affecting the price or sale of a cash commodity is prohibited.¹⁶⁴ Finally, and perhaps most crucially, the courts will not deal with intent lightly. Ambiguous evidence will

¹⁶⁰ See Howard Randolph, 21 Agric. Dec. 219 (1962).

¹⁶¹ See Zenith-Godley Co., 6 Agric. Dec. 900 (1947).

¹⁶² See notes 49-53 and accompanying text *supra*.

¹⁶³ See, e.g., *G.H. Miller & Co. v. United States*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *Great W. Food Distribs., Inc. v. Brannan*, 201 F.2d 476 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953).

¹⁶⁴ See notes 160-161 and accompanying text *supra*.

not sustain a finding of manipulation, and absent clear and preponderant evidence of intent, charges of manipulation will be dismissed.¹⁶⁵

THE INTERPRETATIONS: NEW DIRECTIONS OR OLD?

Review of the handful of commodity manipulation cases has led several commentators to search for order and to suggest that clearer lines than those which have been drawn are a requirement for rational development in this area. The two most significant contributions are Professor Hieronymus'¹⁶⁶ contention that the criterion of manipulation should shift from the effect of behavior on futures prices to its effect on cash markets,¹⁶⁷ and E.T. McDermott's proposal¹⁶⁸ that a squeeze be analyzed as nothing more than a trader's buying or threatening to take delivery of what it has already bought or owns.¹⁶⁹ Both theses are flawed: Hieronymus' in its substance, since its adoption would speedily erode and ultimately eradicate the economic utility of domestic futures markets; McDermott's in its scope, since the squeeze is merely a species—not the paradigm—of manipulation.

The Hieronymus Thesis

Professor Hieronymus characterizes most attempted definitions of manipulation as irreconcilable and oversimplified, and proposes that the focus of a legal definition of manipulation should shift away from the effect of market behavior on futures prices towards its effect on cash prices.¹⁷⁰ Adoption of this approach, he argues, would restore the integrity of futures contracts and, consequently, would result in a reduction of distorted futures prices.¹⁷¹ Additionally, Hieronymus contends that this proposal would not only improve contract delivery terms, but also would avoid the necessity of attempting to determine when the utilization of an ad-

¹⁶⁵ See, e.g., *Indiana Farm Bureau Coop. Ass'n*, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,964 (C.F.T.C. 1979); Vincent W. Kosuga, 19 Agric. Dec. 603 (1960).

¹⁶⁶ Hieronymus, *Manipulation in Commodity Futures Trading: Toward a Definition*, 6 HOFSTRA L. REV. 41 (1977).

¹⁶⁷ *Id.* at 53.

¹⁶⁸ McDermott, *Defining Manipulation in Commodity Futures Trading: The Futures "Squeeze"*, 74 NW. U.L. REV. 202 (1979)

¹⁶⁹ *Id.* at 204.

¹⁷⁰ Hieronymus, *supra* note 166, at 53.

¹⁷¹ *Id.* at 54.

vantageous position will be termed "manipulation."¹⁷² To achieve these results, he urges that "the judgment whether a price was distorted [should] go to the cash price of the commodity and to the flow of the commodity to and from the delivery point. . . . The principle would tolerate the free interplay of forces in futures with their accompanying gains and losses, as long as the cash price was not disturbed."¹⁷³

It appears that Hieronymus' theory derives from an emphasis on the need to strike a balance between contract delivery terms which must be narrow enough to be comprehended, yet broad enough to guarantee that prices reflect true commercial value.¹⁷⁴ Only when the exchange setting the delivery terms successfully strikes this balance may futures traders deal with the assurance that they will neither be required to take nor to make delivery. Thus, to avoid the cessation of futures trading attributable to this lack of confidence, delivery terms must be as narrow as feasible.¹⁷⁵ To this end, he urges a broad definition of deliverable supply. Thus, "technically deliverable supply," which is "the certificated and registered amount in the delivery position during the delivery month," should not be reduced by committed supply; rather, it should include "the amounts of supply that are committed for processing or shipment by commercial traders," all actuals in the deliverable position "that could be," but have not yet been certificated, and those stocks "in normal tributary position which can be put into delivery position without incurring abnormal marketing costs."¹⁷⁶ In advancing the argument that deliverable supply must be broadly construed, Hieronymus explicitly leveled an attack on the emerging case law as giving too narrow a construction to the term.

One hesitates to take issue with so prominent and rightly

¹⁷² *Id.* Since futures traders are competitive by nature, Hieronymus notes that it would be uncharacteristic for a long to minimize his profits, especially where the short is the one bidding up the price. *Id.* at 54-55.

¹⁷³ *Id.* at 53-54.

¹⁷⁴ When the delivery terms are broad enough to include several delivery specifications and locations, it becomes difficult to ascertain just what is traded. *Id.* at 47. Conversely, if delivery terms are too narrow, manipulation becomes easier because arbitraging between various key prices becomes possible. *Id.* at 47-48.

¹⁷⁵ *Id.* at 48.

¹⁷⁶ *Id.* at 48-49. In support of his argument that deliverable supply should be broadly construed, Professor Hieronymus points to section 5a of the Commodity Exchange Act, 7 U.S.C. § 7a(4) (1976 & Supp. III 1979), which allows a 10-day grace period for delivery after trading ceases on a particular contract. Hieronymus, *supra* note 166, at 49.

respected an authority as Professor Hieronymus. His premises are, however, so wrong and his proposals so unsound and potentially disastrous for the markets that they should not be left to stand unchallenged. Indeed, he himself gracefully concedes that "there is a place for the thinking of people of more moderate persuasion."¹⁷⁷

The Hieronymus position is subject to five major objections. First, it addresses only long-side manipulations and, even then, it assumes the importance of dominance of deliverable supplies. Second, far from discouraging them, adoption of his position would give free license to the scalpers in futures to fleece the lambs. In the third place, his arguments to expand the scope of "deliverable supplies" at once miss the point of the decisions—which he does not discuss—and beg the question. Fourth, his contention that only the cash market impact should count does away entirely with the jurisprudence of attempt and fraud. Fifth, and most seriously, literal application of Hieronymus' thesis would lead, in the writer's view, to the equally literal demise of viable futures markets.

Overemphasizing the occurrence of manipulation in long-side corners, Hieronymus implicitly invites short-side manipulation. Moreover, in addressing long-side manipulations, his theory erroneously assumes the need for dominance of deliverable supplies to effect a manipulation. If the long does not dominate the supply of deliverable commodities, but the price nonetheless remains distorted because actuals are otherwise unavailable, Hieronymus' broad definition of deliverable supply would place the liability for the price distortion on the short "who has acted irresponsibly toward his contractual obligations."¹⁷⁸ Additionally, while the short must pay the inflated price demanded by the long, the cornering purchaser may simply sit back and receive his spoils.

Hieronymus' arguments in favor of an expansive interpretation of deliverable supply are both illogical and unrealistic. The courts have sought to define the term in the context of market realities by determining what supplies were truly available, under the time and place constraints of the market.¹⁷⁹ Hieronymus, however, proposes a fictional presumption that supplies are deliverable

¹⁷⁷ See Hieronymus, *supra* note 166, at 44. Fortunately, perhaps, for the writer, Dr. Hieronymus does not specify just where this place might be.

¹⁷⁸ See Hieronymus, *supra* note 166, at 55.

¹⁷⁹ See, e.g., *Cargill, Inc. v. Hardin*, 452 F.2d 1154 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); *G.H. Miller & Co. v. United States*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959).

if they "could be, but [have] not been, certificated."¹⁸⁰ These supplies, in fact, are often denied to the shorts due to an exchange rule. Yet, failure of the shorts to certify on time, in Hieronymus' view, would constitute manipulation.

Hieronymus' contention that supplies should include material already committed by commercials, and hence available for delivery,¹⁸¹ extends too far. The only material relevant to the deliverable supply is that which is available to the shorts. Hieronymus unrealistically includes these committed actuals in his measure of supply, reasoning that "[e]verything is available at a price."¹⁸² His third extension of these stocks is to include tributary supplies which could be put into delivery position without incurring abnormal marketing costs. This is nothing more than a restatement of the "could be certificated" extension, and thus suffers the same infirmity. Inherently, there cannot be a corner if there are supplies which could be delivered. Indeed, the cases evidence a careful analysis of whether deliverable supplies are *practically* available to the shorts in time to meet the contract closing. In no reported instance has any court or agency adopted the narrow definition of technically deliverable supplies which excludes consideration of market realities.

In Hieronymus' focus on the effects on the cash commodity market, he expressly assumes that the case require a dominant or controlling position in deliverable supplies. Although this admittedly is an element of the classic corner,¹⁸³ recent case law has explicitly rejected dominance as a necessary element of manipulation.¹⁸⁴ Because dominance of deliverable supplies and price distortion in the cash markets are central elements of Hieronymus' position, it is imperative to demonstrate the fallacies in this line of reasoning, as well as its dangers, in order to refute the entire position. To allow control of deliverable supplies to reemerge as a necessary element of manipulation would give free rein to the "Henners" of the world¹⁸⁵ by permitting them to dominate thinly traded

¹⁸⁰ Hieronymus, *supra* note 166, at 48.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See, e.g., *G.H. Miller & Co. v. United States*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *Great W. Food Distribs., Inc. v. Brannan*, 201 F.2d 476 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953); *Peto v. Howell*, 101 F.2d 353 (7th Cir. 1938).

¹⁸⁴ See *Hohenberg Bros.*, [1975-1977] *COMM. FUT. L. REP. (CCH)* ¶ 20,271 (C.F.T.C. 1977); *David G. Henner*, 30 *Agric. Dec.* 1151, 1281 (1971).

¹⁸⁵ See *David G. Henner*, 30 *Agric. Dec.* 1151 (1971); notes 106-12 and accompanying

futures to their own advantage, with no impact on the cash commodity. Such behavior could instantaneously wipe out small traders, who lack the advantage of physical presence in the trading pit. A more effective means of driving small speculative traders out of the market, thereby reducing its depth and liquidity, is unimaginable. Moreover, where the deliverable supply is broadly defined, it becomes difficult if not impossible to establish a case of manipulation, should a showing of control over deliverable supply be required.

Hieronimus' confinement of "manipulation" to situations in which the cash market has been affected seems to eliminate the inchoate offenses,¹⁸⁶ as well as the type of manipulation which is grounded in misinformation.¹⁸⁷ Punishing only a successful offense, while excusing the failing attempt, hardly constitutes sound jurisprudence.¹⁸⁸ It also is difficult to understand why Hieronimus believes that the exculpation of outright fraudulent misstatements and scalping can be justified as either good economics or sound policy. Further, by focusing exclusively on cash market effects, he fails to acknowledge that it is not necessary to deal in actuals in order to distort futures prices.¹⁸⁹

The most serious flaw in Hieronimus' thesis, however, lies in the consequences of its application. Manipulative trading conduct, if characterized as "manipulation" only when cash markets are affected, could potentially run rampant in futures trading, and thereby result in a significant drying up of the futures market as small, nondominant speculators wisely get out. One might have felt more sympathetic to, or at least tolerant of, this *caveat emptor* approach when participation in the markets was limited to commercials and professional speculators. In this past decade, how-

text *supra*.

¹⁸⁶ Section 6(b) of the Act, 7 U.S.C. § 9 (1976), authorizes the CFTC to institute disciplinary proceedings against any person whom the Commission reasonably believes to be "manipulating or attempting to manipulate . . . the market price of any commodity." *Id.* See also *Moore v. Brannan*, 191 F.2d 775 (D.C. Cir.), *cert. denied*, 342 U.S. 860 (1951); *Indiana Farm Bureau Coop. Ass'n*, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,964 (C.F.T.C. 1979).

¹⁸⁷ See 7 U.S.C. § 6c (1976 & Supp. III 1979); notes 51-53 and accompanying text *supra*.

¹⁸⁸ See generally W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW §§ 59-60, at 423-53 (1972); Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571 (1961).

¹⁸⁹ *Accord*, Bianco, *supra* note 18, at 37.

ever, exhaustive efforts by both exchanges and their members have resulted in intensified public speculative participation. This has enhanced the depth, liquidity, and utility of these markets enormously. Accordingly, a "breaks of the game" attitude, solicitous of the professional interests, is especially ill-becoming, and, on a more pragmatic level, also self-destructive. The loss of public confidence in these markets must lead to a concomitant decline in public participation. The ensuing illiquidity and loss of speculative depth would rapidly erode the value of the futures markets for commercial hedgers and ultimately lead to the demise of these markets. These consequences are neither necessary nor desirable and, on these grounds alone, Professor Hieronymus' thesis should be rejected.

The McDermott Thesis

In a thoughtful analysis of squeezes, Edward T. McDermott has suggested that a squeeze may occur when a long trader "simultaneously buys the same commodity more than once; . . . threatens to take delivery of the same commodity more than once; or . . . buys what he already owns."¹⁹⁰ McDermott argues that this area of the law has become "an embarrassment—confusing, contradictory, complex, and unsophisticated," due to the courts' failure to recognize the significance of the merger of the expiring futures and actuals markets.¹⁹¹ The paradigm of a squeeze occurs at this point, as the long buys or threatens to take delivery on what it has already bought or owns. Since the long seeks only to prevent the shorts' performance and to inflate prices for his own benefit on resale, the eventual offset is not a bona fide transaction.¹⁹² McDermott analogizes to the wash sale, and refers to the common-law rule that a party is excused from contractual obligations if the other contracting party prevents or hinders performance.¹⁹³

Once a long learns that his position exceeds deliverable supplies, McDermott continues, he must affirmatively sell offsetting contracts or cash material. McDermott concludes that to the extent a long maintains a position in excess of deliverable supply, he

¹⁹⁰ McDermott, *supra* note 167, at 204-05.

¹⁹¹ *Id.* at 205.

¹⁹² *Id.* at 214.

¹⁹³ *Id.* at 215.

manipulates the futures, and possibly the actuals, market.¹⁹⁴ It is not improper to penalize the long for two reasons. First, the rationale underlying the long's maintenance of his position is to raise prices, rather than to obtain delivery of a product that does not exist. Second, the long has exclusive knowledge of the size of his position vis-a-vis the quantity of deliverable supplies.

In substance, McDermott's analysis is not inconsistent with the judicial precedent of which he is so critical. For example, if McDermott's theory were applied in the *Cargill* case, it follows that the case would have been decided without any substantively different rationale.¹⁹⁵ While McDermott's limited analysis does parallel the judicial approach, his exclusive focus on deliverable supplies, without postulating an adequate analysis of what should constitute stocks, suffers the same flaws as the Hieronymus model. This unequivocal focus inevitably must detract from an adequate analysis of the issues of intent and price distortion.

An emphasis which is devoted primarily to deliverable supplies is too narrow, however, and cannot explain inadvertent squeezes.¹⁹⁶ At the same time, even though McDermott's approach is confined to squeezes and, therefore, is of limited utility in analyzing short-side manipulations,¹⁹⁷ market-misinformation manipu-

¹⁹⁴ *Id.* at 218.

¹⁹⁵ *Accord*, 1 A. BROMBERG, SECURITIES LAW: FRAUD § 4.6, at 82.330 (1975) (where all "the shorts" can satisfy their obligations by dealing with the independents who hold longs or cash supplies, there can be no corner).

¹⁹⁶ See notes 76-84 and accompanying text *supra*.

¹⁹⁷ See notes 122-126 and accompanying text *supra*. McDermott's analysis would not cover the alleged short manipulation involved in *Leist v. Simplot*, [Current Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,051, at 24,157 (2d Cir. 1980), *cert. granted*, 49 U.S.L.W. 3596 (U.S. Feb. 23, 1981), which is now before the Supreme Court. *Leist* arose out of the May, 1976 Simplot potato default, which was the largest in the history of commodity futures trading in this country. *Id.* at 24,158. Simplot companies, the largest group in the west, processed roughly 50% of all Idaho potatoes. *Id.* at 24,160. Producers with whom the Simplot group was negotiating seasonal purchase contracts believed the prices of Maine potatoes on the Merc would rise. *Id.* at 24,161. To counter, and thus be able to buy at a cheaper price, the Simplot group allegedly took a huge short position in the May, 1976 potato contract. *Id.* At the same time, a group of "long conspirators" heard of this maneuver and tried to squeeze the Simplot group by tying up all available railroad cars which could transport Maine potatoes. *Id.* Each group refused to liquidate and, at the expiration of the contract on May 7, 1976, the Simplot group controlled 1983 open short positions and the "long conspirators" controlled 911 open longs. *Id.* at 24,162. Usually, there were only 200 open contracts at the end of trading on that future. *Id.* The shorts were unable to deliver and the plaintiffs, who "were caught in the middle of the two competing conspiracies," commenced this suit. *Id.*

lations,¹⁹⁸ and manipulations occurring in non-expiring, distant futures, it remains a genuine contribution which should not be ignored in future adjudications and analyses.

In Search of the Talisman: An Interpretation

It cannot be denied that there are only a handful of cases which give content to the definition of commodity futures price manipulation. Yet, those who would demand brightline rules for defining manipulative conduct, are too impatient in their quest for certainty and too intolerant of a case-by-case development in an area where economic realities have shifted so quickly. To be sure, a black-letter definition of manipulation would resolve the uncertainty in the case law. Although such an approach has its attractions, it is not, however, without its deficiencies. Legal scholars and traders cannot divorce the recurrent shifts in economic reality from the law of commodity futures price manipulation. Any attempt at a precise definition of manipulation—as with other social judgments—must, therefore, suffer from either overbreadth or underinclusion. A case-by-case approach on the other hand offers flexibility, especially when attempting to give substance to a legal concept which, although still undeveloped, is inherently expansive. This explains why the common-law incremental approach has been so successful in the areas of civil fraud, securities fraud, and even negligence. In addition, that the incremental approach is contributing positively to the development of the law of commodities manipulation. Allegations of manipulation are relatively rare, and have been made only in rather clear cases. Rarer still are those cases in which the allegations have been sustained, or in which serious sanctions have been imposed.

Apparently, Congress also believes that the jurisprudence of commodity futures price manipulation should develop in the common-law tradition. The Commodity Exchange Act has undergone major amendment twice in the past decade, and no serious attempt has been made to define the term “manipulation.” In connection with the 1968 amendments, the Assistant Secretary of Agriculture specifically advised Congress: “We do not ask—as we did before the 89th Congress— . . . to define the term ‘manipulate.’”¹⁹⁹ A

¹⁹⁸ See notes 49-53 and accompanying text *supra*.

¹⁹⁹ *Hearings on H.R. 11930 and H.R. 12317 Before the House Committee on Agriculture*, 90th Cong., 1st Sess. 42 (1968).

contemporaneous bill did contain such a definition but, at the Department of Agriculture's request, it was not introduced.²⁰⁰ Furthermore, in earlier sessions of Congress, the Department had suggested both general and specific definitions which apparently were intended to enact the existing administrative construction and to overrule, in part, the elements of the *Volkart* decision which foreclosed criminal liability for unintentional "manipulative" acts.²⁰¹ Both Congress and the Department, however, thought better of these attempted definitions. Although it is dangerous to rely on inferences drawn from legislative silence, in this instance it appears safe to conclude that Congress—after numerous hearings and efforts to amend the Commodity Exchange Act—thought it best to leave the development of the law of commodity futures price manipulation to the CFTC and the courts.

The foregoing is not to suggest that the case law should not be criticized for failing to articulate comprehensive standards. Such criticism is valid and necessary, but generally it has been exaggerated. To the extent, however, that such criticism suggests the replacement of careful economic analysis with talismanic black-letter rules, it does little to advance the cause of legal certainty. Commodities manipulation is too complex an area of the law for facile rules. Admittedly, numerical tests of manipulation possess the virtues of clarity, simplicity, ease of administration, and economy. Nevertheless, it is too easy to succumb to the temptation of using statistics the way a drunk uses a lamp post—not to shed light, but to prop up a body that has difficulty standing on its own. Minimization of uncertainty is an important jurisprudential consideration, but frequently it must give way to other considerations. The very integrity of the futures markets is threatened by simplistic and inflexible rules for manipulation. If the rules are too broad, every trader who makes a decision with a view toward an economic gain could be characterized as a manipulator. On the other hand, rules which are underinclusive would allow manipulation to run rampant.

It is true that an analysis of the law of commodities manipulation is not an easy task. The circumstances of each case are to a certain degree unique. It does not follow, however, nor is it accurate to assert, that each new case has required the drawing of a

²⁰⁰ H.R. 9178, 90th Cong., 1st Sess. (1968).

²⁰¹ See S. 2807, 86th Cong., 1st Sess. (1950).

new line between manipulative and non-manipulative behavior. The lines which have been drawn are clearer, more consistent, and more principled than generally is recognized. The rational development that has occurred thus far should not, therefore, give way to simplistic black-letter formulas.