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COMMENTS

THE MEASURE OF DISGORGEMENT IN SEC ENFORCEMENT ACTIONS AGAINST INSIDE TRADERS UNDER RULE 10b-5

As used in federal securities laws, disgorgement describes the act of restoring unlawful profits.¹ Although the term is of modern vintage, it is akin to the ancient principle of restitution whereby an unjustly enriched party must restore benefits received to an aggrieved party.² The goal of both disgorgement and restitution is to make wrongdoing unprofitable. The critical distinction between the two remedies, however, is the extent to which that goal is pursued and accomplished.³

Traditionally, restitution is a private remedy sought by a defrauded party seeking restoration of a personal loss caused by the wrongdoing of another

1. One definition provides:

Disgorgement is an equitable remedy designed to deprive defendants of all gains flowing from their wrong, rather than to compensate the victims of the fraud. The purpose of disgorgement is to deter violations by making them unprofitable, not to make investors whole (which can only be effectuated through a private action for damages).

11A E. GADSBY, *BUSINESS ORGANIZATIONS*, pt. 1A, § 9.03(2), 9-57 to 9-58 (1984) (footnotes omitted). Although the word disgorgement means simply the act of giving up money, Gadsby's definition, which is founded on the notion that the remedy is not designed to make private parties whole and includes a deterrent factor, is directly applicable to suits by the Securities and Exchange Commission (SEC). See *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC v. Shapiro*, 494 F.2d 1301, 1309 (2d Cir. 1974); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972); *SEC v. Penn Central Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976); *SEC v. Golconda Mining*, 327 F. Supp. 257, 259-260 (S.D.N.Y. 1971). See *infra* notes 11-13, 122, 129-32 and accompanying text.

2. See generally *Cheney & Sibears, Disgorgement in SEC Insider Trading Cases*, 26 B.B.J. No. 10, 7-8 (1982); Ellsworth, *Disgorgement In Securities Fraud Actions Brought By the SEC*, 1977 DUKE L.J. 641, 651-52 (authors discuss the inherent equitable distinctions between restitution and disgorgement).

3. See *SEC v. Commonwealth Chemical Sec., Inc.*, 574 F.2d 90 (2d Cir. 1978). The court noted that restitution is an equitable remedy "by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives." *Id.* at 95. In comparison, when disgorgement is employed "the court is not awarding damages to which plaintiff is legally entitled but is exercising the chancellor's discretion to prevent unjust enrichment." *Id.*

party.⁴ This remedy prevents an aggrieved party from suffering an unjust loss while precluding a wrongdoer from retaining the fruits of misconduct.⁵ If private parties traded securities as they do common articles of merchandise, courts would generally have no need to fashion remedies for securities violations in a manner different from traditional restitutional decrees.⁶

The complex machinery of the securities marketplace, however, precludes broad application of basic restitutional principles in all instances of securities fraud.⁷ This is so because securities are typically bought and sold in an impersonal market where buyers and sellers generally do not transact "face-to-face."⁸ Securities trading is generally carried out through geographically disperse secondary market systems and transactions are completed through a web of third parties including issuers, underwriters, brokers, and investors.⁹ This elaborate trading machinery creates ample opportunity for un-

4. At common law, restitution denoted the return or restoration of a specific thing or condition. *Holloway v. People's Water Co.*, 100 Kan. 414, 423, 167 P. 265, 270 (1917). In modern use, however, restitution is not necessarily confined to the return of something of which one has been deprived, but may include compensation for loss, damages or injury to another. *See, e.g., Basile v. United States*, 38 A.2d 620 (D.C. 1944).

5. *See generally* D. DOBBS, *HANDBOOK ON THE LAWS OF REMEDIES* § 9.3, at 617 (1973) (restitution requires that both parties be placed in status quo ante as though the fraudulent transaction never occurred).

6. *See Galigher v. Jones*, 129 U.S. 193, 200 (1889):

Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence, with regard to them, the ordinary measure of damages is their value at the time of the conversion, or, in the case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust.

Id. *Accord* *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 194 (1963):

There has also been a growing recognition by common law courts that the doctrines of fraud and deceit, which developed around transactions involving land and other tangible items of wealth, are ill suited to the sale of such intangibles as advice and securities, and that, accordingly, the doctrines must be adapted to the merchandise in issue.

Id. (footnote omitted)

7. *See* H.R. REP. NO. 85, 73d Cong., 1st Sess. 8 (1933) (Congress noting that securities are "intricate merchandise" and that the securities market is a "complex mechanism").

8. In *Diamond v. Dreamuno*, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969), the New York Court of Appeals noted the inherent difficulty faced by a private litigant when seeking restitution for securities fraud because securities are characteristically traded through "anonymous transactions, usually handled through brokers, and the matching of the buyer with the ultimate seller presents virtually insurmountable obstacles." *Id.* at 85, 248 N.E.2d at 915.

9. The secondary market system refers to the trading of securities on "exchanges" and "over-the-counter markets." "The Intermarket Trading System (ITS) links seven stock exchanges and enables brokers and "market makers" to interact with one another in their respective efforts to obtain the best current price for particular securities. The ITS is comprised of the New York, American, Boston, Cincinnati, Midwest, Philadelphia, and Pacific exchanges, as well as the National Association of Securities Dealers Quotation System (NASDAQ) (a computerized pricing mechanism used for certain widely traded over-the-counter securities).

scrupulous investors to defraud the marketplace often leaving aggrieved parties unaware of their dupery, its extent, or its antecedent.¹⁰ Under circumstances where impersonal fraud is conducted through "market transactions," as opposed to private face-to-face transactions, the aggrieved parties are unable to identify the perpetrator of the fraud if indeed they are aware that they have been wronged.

Because restitution requires both an identifiable wrongdoer and an aggrieved party it is an inappropriate, if not impossible, remedy to apply in many instances of securities fraud. Certainly, a defrauded party cannot seek restitution against an unknown perpetrator. Moreover, it is often difficult, given the nature of the securities industry, to identify a single investor as having suffered a calculable loss.¹¹

As a result of the limitations on restitution as a remedy in cases of securities fraud, some courts have developed the disgorgement remedy, a form of redress designed primarily to deprive securities law violators of ill-gotten gains and to deter future violations rather than to compensate aggrieved private parties.¹² Disgorgement's remedial breadth is founded upon goals un-

"Over-the-counter" refers to the trading of securities not conducted on an exchange. See B. WHEELER, *THE NEW YORK STOCK EXCHANGE FACT BOOK*, 11, 18 (1983).

10. See generally *SEC v. Certain Unknown Purchasers of the Common Stock and Call Options of Santa Fe Int'l. Corp.*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,323 (S.D.N.Y. 1981). In that case, the SEC sought to freeze profits derived from allegedly fraudulent trading practices. Purchases of 3,000 call options and 35,000 shares of Santa Fe common stock were effected by unknown persons through various brokerage accounts shortly before merger negotiations were announced between Santa Fe and Kuwait Petroleum Corp. All of the shares and most of the options were sold at an increased aggregate value of over \$5 million within the two week period following the announcement. Corporate entities through which the transactions were effected were named as nominal defendants but the identities of the fraudulent investors were never ascertained.

11. See *Diamond*, 248 N.E.2d at 915; see also *Golconda Mining*, 327 F. Supp. 257 (S.D.N.Y. 1971). In *Golconda Mining* the defendants unsuccessfully contended that a portion of their tainted profits should be returned to them because some of the claimants could not be identified or located. The district court stated:

[In a suit] commenced by the SEC as a law enforcement agency, . . . to permit the return of the unclaimed funds, a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if the adequate enforcement of the securities acts is to be achieved.

Id. at 259.

12. See, e.g., *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (noting that the purpose of disgorgement is to divest the wrongdoer of ill-gotten gains rather than to compensate the victims of fraud); *Commonwealth Chemical*, 574 F.2d at 102 (disgorgment "is a method of forcing a defendant to give up the amount by which he was unjustly enriched"); *Cheney & Sibears*, *supra* note 2, at 12 ("A court in ordering disgorgement is exercising its equitable power to provide relief suited to the myriad situations presented to it."); see generally *Commodity Futures Trading Comm. v. Hunt*, 591 F.2d 1211, 1221-23, (7th Cir.), *cert. denied*, 442 U.S. 921 (1979) (disgorgement under Commodity Exchange Act); *SEC v. Galaxy Foods, Inc.*, 417 F. Supp. 1225, 1250 (E.D.N.Y. 1976) (disgorgement of value of franchise which corporate officer

restricted by limitations applicable to cases of pure restitution.¹³

The disgorgement remedy has been applied in suits to compel restoration of illicit profits gained through "insider trading."¹⁴ Insider trading is a broad term used to describe the unlawful trading of securities on the basis of material information that is not generally available to the investing public.¹⁵ By using material, nonpublic information to purchase or sell publicly traded securities, the inside trader defrauds anonymous investors who are concurrently making investment decisions without the benefit of that same information.¹⁶ Private parties who become aware that they have been duped by insider trading may bring suit to compel the inside trader to disgorge wrongful profits derived through use of the nonpublic information.¹⁷

Alternatively, or in addition to private suits, the Securities and Exchange Commission (SEC or Commission) may seek disgorgement of illicit gains in order to redress wrongdoing and deter securities fraud.¹⁸ As statutory

had received free of charge during fraudulent scheme), *aff'd*, 556 F.2d 559 (2d Cir.), *cert. denied*, 434 U.S. 855 (1977); *SEC v. Jet Travel Serv.*, 1975-76 Fed. Sec. L. Rep. ¶ 95,317, at 98,609 (M.D. Fla. 1975) (disgorgement of proceeds from fraudulent offering of securities).

13. *SEC v. Penn. Central Co.*, 425 F. Supp. at 599 ("Disgorgement contemplates total recovery from the wrongdoer, not recovery that may be partial or limited to a few of the total number injured or subject to a compromise of actual damages."). *Accord* *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975); *Myzel v. Fields*, 386 F.2d 718, 747-49 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435, 441 (D. Md. 1977); .

14. *See, e.g.*, *SEC v. MacDonald*, 699 F.2d 47 (1st Cir. 1983); *SEC v. Shapiro*, 494 F.2d 1301 (2d Cir. 1974). *See also infra* notes 123-33, 146-75 and accompanying text.

15. *See generally* III L. LOSS, *SECURITIES REGULATION*, 1445-74 (2d ed. 1961); Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1 (1980).

16. *See*, Brudney, *Insiders, Outsiders and Informational Advantages under the Federal Securities Law*, 93 HARV. L. REV. 322 (1979). Commenting on the insiders' advantage, Brudney stated:

The inability of a public investor with whom an insider transacts on inside information ever lawfully to erode the insider's informational advantage generates a sense of unfairness. . . .

The unfairness is not a function merely of possessing more information—outsiders may possess more information than other outsiders by reason of their diligence or zeal—but of the fact that it is an advantage which cannot be completed away since it depends upon lawful privilege to which [other investors] cannot acquire access.

Id. at 346.

17. *See, e.g.*, *Janigan v. Taylor*, 344 F.2d 781 (1st Cir.) *cert. denied*, 382 U.S. 879 (1965); *see also*, *Elkind v. Liggett & Myers Inc.*, 635 F.2d 156 (2d Cir. 1980); *Fridrich v. Bradford*, 542 F.2d 307 (6th Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977); *Dolgow v. Anderson*, 464 F.2d 437 (2d Cir. 1972); *Matarese v. Aero-Chatillon Corp.*, 1971-72 Fed. Sec. L. Rep. (CCH) ¶ 93,322 (S.D.N.Y. 1971); *Bubolz v. Burke*, 266 F. Supp. 686 (E.D. Mo. 1967).

18. The SEC first won the right to compel disgorgement of ill-gotten gains in 1970. *See* *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 92-94 (S.D.N.Y. 1970). Prior to 1970, however, the Commission had achieved consensual restitution in a number of cases by means of "friendly persuasion." *See, e.g.*, *Ward La France Truck Corp.*, 13 S.E.C. 373 (1943) (Commission dropped enforcement action when violators agreed to make restitution); *see also* SEC

guardian of the federal securities laws, the SEC may act as a "public plaintiff" and seek disgorgement of all tainted profits to prevent the wrongdoer from retaining unjust enrichment.¹⁹ The Commission's power to seek disgorgement of insider profits was established over a decade ago;²⁰ yet, the appropriate measure of disgorgement in these public enforcement actions remains unsettled.²¹

The early SEC disgorgement cases involving insider trading under rule 10b-5 were primarily concerned with the question of whether the Commission had the requisite power to seek ancillary relief in the form of disgorgement of profits, rather than the question of measuring the liability itself.²² Although the measure of disgorgement was not initially the major issue in SEC insider trading actions,²³ the first federal circuit court to apply the disgorgement remedy did so in a private suit and required disgorgement of the

v. Skagit Valley Tel. Co., SEC Litigation Release No. 3393 (Dec. 21, 1965); SEC v. First Inv. Co., SEC Litigation Release No. 281 (June 20, 1945); The Commission's policy of friendly persuasion was sharply criticized by securities law expert professor Louis Loss. Professor Loss argued that the general equity powers of federal courts gave the SEC the requisite legal power to compel disgorgement and that the Commission had been overly cautious in not pursuing this form of ancillary relief. See 3 L. LOSS, SECURITIES REGULATION 1827-29 (2d ed. 1961).

19. See *Commonwealth Chemical*, 574 F.2d at 95 (noting that in SEC suits the court is not awarding damages to which a plaintiff is entitled but is exercising its discretion to prevent unjust enrichment). See also 41 SEC ANN. REP. 97-98 (1975). In its annual report to Congress, the SEC expressed its major objectives:

The SEC's primary function is to protect the public from fraudulent and other unlawful practices and not to obtain damages for injured individuals. Thus, a request that disgorgement be required is predicated on the need to deprive defendants of profits derived by their unlawful conduct and to protect the public by deterring such conduct by others.

Id. See also SEC v. Petrofunds, Inc., 420 F. Supp. 958 (S.D.N.Y. 1976). In *Petrofunds*, denying the defendants plea for a jury trial, the United States District Court for the Southern District of New York noted:

[There is a] critical distinction between actions brought by the SEC and actions brought by private litigants. Regardless of the fact that the defendants may be required to disgorge profits, the SEC in no way stands in the shoes of a private litigant with respect to its claims for ancillary relief. Indeed, the entire thrust and purpose of an SEC enforcement action is to expeditiously safeguard the public interest The claims for relief asserted in such an action stem from, and are colored by, the intense public interest in SEC enforcement of these laws.

Id. at 960.

20. See *supra* note 18.

21. See SEC v. MacDonald, 699 F.2d 47 (1st Cir 1983) (en banc); see also *infra* notes 146-75 and accompanying text.

22. See *Mitchell v. Texas Gulf Sulphur*, 446 F.2d 90 (10th Cir.), *cert. denied*, 404 U.S. 1004 (1971); SEC v. Texas Gulf Sulphur, 446 F.2d 1301 (2d Cir), *cert. denied*, 404 U.S. 1005 (1971). See also *infra* notes 84-108 and accompanying text.

23. Before the measure of insider profit is determined, liability for insider trading must be established. This is a highly complex issue and beyond the scope of this article. It involves establishing, at a minimum, that the insider acted with "scienter," that the information was

insider's entire profit.²⁴ Thus, the inside trader disgorged all the gains that accrued from the time of purchase to the time of the sale of the tainted stock.²⁵

In SEC enforcement actions, however, federal courts began assessing liability based upon profits accrued as of the date that the inside information used by the wrongdoer became generally disseminated to the public, thus requiring only partial restoration of insider trading profits.²⁶ The approach terminating liability at the time the information becomes public has been termed "equal footing," and was utilized in subsequent cases by the United States Court of Appeals for the Second Circuit where the fraudulent traders failed to unload tainted securities in a timely fashion and thus, eventually sold at a net loss.²⁷ Application of equal footing in these cases required disgorgement of "paper profits"—money never realized by the wrongdoers—to compensate for the lost investment opportunity created by holding securities prior to the date that the material information became publicly disseminated.²⁸ These holdings extended the disgorgement remedy in furtherance of the SEC's public law enforcement role because the sum of disgorgement was not equated with actual gains of the perpetrators or losses suffered by specific investors.

Recently, in *SEC v. MacDonald*,²⁹ the United States Court of Appeals for the First Circuit applied and adopted the equal footing principle in a decision that allowed the inside trader to retain speculative gains accruing beyond the public disclosure period. In *MacDonald*, three members of an en banc panel held equal footing to be the proper measure of the inside trader's liability, reasoning that public disclosure breaks the causal link between the act of insider trading and subsequent stock value accretion.³⁰ In other words, the court permitted the inside trader to keep profits resulting after the disclosure of the nonpublic information because, at that point, the securities

"material," and that the trader was an "insider." See generally *Dirks v. SEC*, 103 S. Ct. 3255 (1983); *Chiarella v. United States*, 445 U.S. 222 (1980).

24. See *Janigan v. Taylor*, 344 F.2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965); see also *infra* notes 67-72 and accompanying text.

25. See *Janigan*, 786 F.2d at 786.

26. See *Mitchell*, 446 F.2d at 105; *Texas Gulf Sulphur*, 446 F.2d at 1308-09.

27. See *Shapiro*, 494 F.2d at 1309; *Commonwealth Chemical*, 574 F.2d at 102; see also *infra* notes 124-33, 134-43 and accompanying text.

28. See *Shapiro*, 494 F.2d at 1309. The Second Circuit noted that insider trading deprives other traders of not only actual profits made by the insider "but also of the opportunity to sell when the price was much higher. We see no reason why the injured shareholders should not be compensated for this 'lost opportunity.'" *Id.*

29. 699 F.2d 47 (1st Cir. 1983) (en banc).

30. *Id.* at 52-55.

were no longer held on the basis of inside information.³¹

In dissent, two justices called for disgorgement of all profits, contending that the SEC's presence as statutory law enforcer requires full disgorgement to promote fair play in the marketplace and to deter fraud.³² The dissent argued that the measure of insider liability in a Commission suit should be commensurate with what would make society whole, rather than damages to which a private party would be entitled.³³ *MacDonald* was the first federal circuit court case to explore fully the role of disgorgement in the context of an SEC enforcement action brought against rule 10b-5 inside traders. The court's holding and dissent represent the dichotomy of approaches to measuring insider liability in Commission suits and to date, the case stands as the most extensive judicial discussion of this issue.

This Comment will explore the issue of measuring insider liability in the context of actions in which the SEC, rather than a private plaintiff, seeks redress through federal courts under rule 10b-5. Specifically, this Comment will consider whether the measure of disgorgement should include a concept of public equity to account for damage done to investor confidence and to provide a deterrent mechanism against insider trading. This Comment will adopt the view recently set forth in the *MacDonald* dissenting opinion and argue that the SEC's presence as a "public plaintiff" requires full disgorge-

31. "When a fraudulent buyer has reached the point of his full gain from the fraud, viz., the market price a reasonable time after the undisclosed information has become public, any consequence of a subsequent decision, be it to sell or retain the stock, is . . . not causally related to the fraud."

699 F.2d at 54. Cf. *Bamel v. Rosen*, 412 F.2d 571, 574-76 (4th Cir.) (failure to act promptly precluded defrauded sellers of securities from receiving benefits of a stock split occurring after they had learned of the fraud), *cert. denied*, 396 U.S. 1037 (1969).

32. *MacDonald*, 699 F.2d at 55-58 (Coffin, C.J. & Bownes, J., dissenting).

33. The dissenting judges stated:

Unlike a private plaintiff, the SEC does not sue for injury to itself; nor does it sue solely for the losses of sellers immediately injured by the defendant's fraud. Rather, it sues for the whole injury inflicted by the fraud. That injury includes the damage done to investor confidence and the integrity of the nation's capital markets, and is necessarily greater than the profits at issue in a private suit. I agree that the SEC in a civil enforcement action may seek only 'remedial' and not punitive relief. But even if disgorgement must be strictly 'compensatory' to be 'remedial' (and I believe it need not be), society simply is not made whole by the court's measure of disgorgement.

Id. at 55. Other courts have consistently recognized significant differences between an SEC enforcement action and a private damages suit under securities laws. See, e.g., *Parklane Hosiery Co. v. Shore*, 539 U.S. 322 (1979) (jury trial unavailable in SEC suit for disgorgement of profits); *SEC v. Management Dynamics*, 515 F.2d 801, 808 (2d Cir. 1975) (noting that the SEC appears in litigation as a "statutory guardian" seeking to enforce federal securities laws); *SEC v. Lum's Inc.*, 365 F. Supp. 1046, 1059 (S.D.N.Y. 1973) (showing of reliance unnecessary in SEC enforcement action); *In re National Student Mktg. Litig.*, 368 F. Supp. 1311, 1319 (J.P.M.D.L. 1973) (Weinfeld, J., dissenting) (noting that the SEC's "sole purpose" is the efficacious safeguarding of the public interest).

ment, both to make wrongdoing unprofitable and to assist the Commission in its ongoing war against insider trading. Most importantly, this Comment will conclude that the *MacDonald* majority erred in treating the SEC as a private plaintiff by implicitly resorting to principles of restitution in fashioning its equal footing remedy. In so doing, the majority ignored the policy underlying the disgorgement remedy, the SEC's role as guardian of the securities industry, and the Commission's interest in reproaching the inside trader in a manner that achieves the maximum prophylactic effect.

I. HISTORICAL UNDERPINNINGS OF RULE 10b-5 INSIDER TRADING

In the era of economic turmoil following the stock market crash of 1929 and the great depression of the 1930's, Congress enacted the first comprehensive federal securities laws designed to promote fair play and curb fraudulent practices in the securities industry.³⁴ Codified primarily in the Securities Act of 1933³⁵ and the Securities Exchange Act of 1934,³⁶ these laws were promulgated in the wake of congressional findings of widespread abuse of power and trust in the marketplace.³⁷ To eliminate opportunities for such abuses the Acts were premised on the principle of full disclosure, a philosophy now inherent in modern securities laws.³⁸ Under this principle

34. *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963) (Modern securities laws were "a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's") (footnote omitted).

35. Securities Act of 1933, 15 U.S.C. §§ 77a to 77bfff (1982). The Securities Act regulates the initial distribution of securities to the investing public.

The basic purpose behind this bill is to protect the fair and honest public. The basic policy is that of informing the investor of the facts concerning the securities to be offered for sale in the interstate and foreign commerce and providing protection against fraud and misrepresentation.

S. REP. NO. 85, 73d Cong., 1st Sess. 1 (1933).

36. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78lll (1982). The Securities Exchange Act regulates the purchase and sale of securities after the initial distribution in what is known as the "secondary market" or public markets. *See also* Investment Company Act of 1940, 15 U.S.C. §§ 80 a-1 to a-64 (1982); Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to b-21 (1982).

37. The 1934 report of the Senate Banking and Currency Committee, the committee charged with investigating corrupt activities within the marketplace, stated:

Among the most vicious practices unearthed at the hearings before the subcommittee was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who used their positions, to aid them in their market activities. Closely allied to this type of abuse was the unscrupulous employment of inside information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others.

S. REP. NO. 1455, 73d Cong., 2d Sess. 55 (1934).

38. The basic purpose of the securities acts is "to protect investors by promoting full

Congress sought to achieve adequate investor protection by requiring complete and accurate disclosure of material information relating to the distribution and sale of securities in order to promote informed and intelligent investment decisions.³⁹

Full disclosure, of course, could not eliminate all fraudulent practices, and recognizing this, Congress enacted a number of antifraud provisions designed to eliminate cunning and deceitful practices.⁴⁰ Additionally, Congress enacted a specific statutory prohibition, section 16(b)⁴¹ of the 1934

disclosure of information thought necessary to informed investment decisions." *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953). To achieve this objective the 1933 Act makes it illegal to offer or sell to the investing public unless the shares have been registered with the Securities and Exchange Commission. What constitutes the "investing public," however, depends upon the facts and circumstances of a particular case. "The focus of inquiry should be on the need of the offerees for the protection afforded by registration." *Id.* at 127. Accordingly, courts look to factors such as publicity surrounding the offering, size of the offering, number of offerees, offeree's degree of investing sophistication, and whether offerees had access to the kind of information normally disclosed in a registration statement. *See, e.g., Mary S. Krech Trust v. Lakes Apartments*, 642 F.2d 98 (5th Cir. 1981); *Hill York Corp. v. American Int'l Franchises*, 448 F.2d 680 (5th Cir. 1971).

39. *See* H.R. REP. NO. 85, 73d Cong., 1st Sess. 2 (1933). In a message to Congress, President Franklin Delano Roosevelt stated:

There is, however, an obligation upon us to insist the every issue of new securities to be sold in the interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue be concealed from the buying public.

Id. Full disclosure is considered a means of achieving a variety of beneficial policies. *See, e.g., Capital Gains*, 375 U.S. at 201 (ensuring that investment advisors make full and frank disclosure to their clients); *Fridich v. Bradford*, 542 F.2d 307, 324 (6th Cir. 1976) (detering fraud and compensating investors), *cert. denied*, 429 U.S. 1053 (1977); SEC Release No. 3230 (May 21, 1942) (protecting investors); 5 A. JACOBS, LITIGATION AND PRACTICE UNDER RULE 10B-5 § 6.00-6.09 (2d. ed. 1981) (maintaining free securities markets, ensuring equal bargaining strength, building investor confidence, equalizing access to information). *But see* Douglas & Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171 (1933):

But even the whole truth cannot be told in such simple and direct terms as to make investors discriminating. A slow educational process must precede that. Those who need investment guidance will receive small comfort in the balance sheets, statistics, contracts, and details which the prospectus reveals. . . . [T]o expect that the judgment of investors as respects these imponderable factors will improve perceptibly in this generation is baseless optimism.

Id. at 171-72.

40. Antifraud provisions are generalized prohibitions against "fraud or deceit" or "manipulative or deceptive devices or contrivances". *See, e.g., Securities Act of 1933*, § 17(A), 15 U.S.C. § 77q(A) (1982); *Securities Exchange Act of 1934*, § 10(b) and rule 10b-5, 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5 (1984); *see infra* notes 44-45; § 15(c), 15 U.S.C. § 78(o)(C) (1982); *Investment Advisers Act of 1940*, § 206, 15 U.S.C. 80b-6 (1982).

41. 15 U.S.C. 78p(b) (1982). Section 16(b) provides in part:

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and

Act, which was aimed directly at insider trading. Section 16(b) mandates restoration of all profits realized by an officer, director, or ten percent beneficial shareholder of a corporation who buys and sells that corporation's stock within any six month period.⁴² This provision operates irrespective of whether the use of material, nonpublic information can be demonstrated.

Although Congress hoped that section 16(b) would have a broad prophylactic effect, by virtue of the mechanical nature of its provisions, its utility is limited to those transactions its language specifically covers.⁴³ Obviously, not all insider trading is carried out by corporate insiders trading within a six month period. To capture insider trading that eludes the dragnet of section 16(b), courts began using the general antifraud provision of the 1934 Act, section 10(b)⁴⁴ and rule 10b-5⁴⁵ promulgated thereunder.⁴⁶

Rule 10b-5 insider trading occurs when securities are traded on the basis

purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for the period exceeding six months.

Id. Section 16(b) suits are normally instituted by the corporation to which the insider owes a fiduciary duty; however, any stockholder, after making formal demand on the corporation, may institute the action in a derivative suit. *See* R. FROME & V. ROSENZWEIG, SALES OF SECURITIES BY CORPORATE INSIDERS 229-230 (2d ed. 1975).

42. *See, e.g.,* Blau v. Lehman, 286 F.2d 786, 791 (2d Cir. 1960) (section 16(b) liability attaches to corporate insider irrespective of any waiver or disclaimer of profits); Adler v. Klawans, 267 F.2d 840, 847 (2d Cir. 1959) (prohibition operates even though the insider involved was a director only at the time of the sale and not at the time of the purchase); Smolowe v. Delendo, 136 F.2d 231, 239 (2d Cir. 1943) (section 16(b) does not require matching of stock sales with purchases; lowest price in, highest price out measures the wrongful profit).

43. In *Altamil Corp. v. Pryor*, the court noted that § 16(b) demarcates clear unambiguous liability, irrespective of good faith considerations, in order to create a "prophylactic effect." 405 F. Supp. 1222, 1224 (S.D. Ind. 1975).

In *Adler*, however, the court noted that § 16(b) "let many fish out of the net" and that "[i]ts bite is sharp only in the limited area of transactions it covers . . . but for the insider who waits six months and one day after purchase to avoid a short term gain there is no 'bite' at all." 267 F.2d at 845. Section 16(b), nevertheless, did have an impact on insider trading. A four-year study beginning in 1935 indicated that insiders did not consistently buy at low prices and sell at high, and generally they did not make exceptional trading profits. *See* Smith, *Management-Trading and Stock Market Profits*, 13 J. BUS. L. 103 (1940). For an exhaustive discussion of § 16(b), see Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385 (1953). *See also* Meeker & Cooney, *The Problem of Definition in Determining Insider Liabilities under Section 16(b)*, 45 VA. L. REV. 949 (1949); Rubin & Feldman, *Statutory Inhibitions upon Unfair Use of Corporate Information by Insiders*, 95 U. PA. L. REV. 468 (1947).

44. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982), is the general authorizing statute under which the SEC is empowered to prescribe rules and regulations necessary to protect investors from deceptive practices. It provides:

of material nonpublic information.⁴⁷ Such trading is deemed unlawful because it contravenes the principle of full disclosure by leaving "outside" investors at an unfair informational disadvantage in the marketplace.⁴⁸ As it relates to rule 10b-5 insider trading, the disclosure principle requires that insiders possessing inside information either disclose that information or abstain from trading.⁴⁹ Thus, under rule 10b-5, it is the act of trading that

It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 10(b) received very little attention during the House debates concerning the enactment of the securities acts, and its draftsman, Thomas Corcoran, casually described it as meaning "Thou shalt not devise any other cunning devices." *Hearings Before the Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 21 (1934).

45. Rule 10b-5, 17 CFR § 240.10b-5 (1982) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (1) To employ any device, scheme, or artifice to defraud,
- (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

46. Insider trading was first captured under § 10(b) in *Kardon v. National Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa. 1947). In *Speed v. Transamerica Corp.*, the district court stated:

The rule is clear. It is unlawful for an insider, such as a majority stockholder, to purchase the stock of minority stockholders without disclosing material facts affecting the value of the stock, known to the majority stockholder by virtue of his inside position but not known to the selling minority stockholders, which information would have affected the judgment of the sellers. The duty of disclosure stems from the necessity of preventing a corporate insider from utilizing his position to take unfair advantage of the uninformed minority stockholders. It is an attempt to provide some degree of equalization of bargaining position in order that the minority may exercise an informed judgment in any such transaction.

99 F. Supp. 808, 848 (D. Del. 1951).

47. The early cases applying rule 10b-5 involved instances of "direct transactions", where a corporation or its officers transacted with others without disclosing material information. See, e.g., *Speed*, 99 F. Supp. at 812; *Kardon*, 73 F. Supp. at 800-01. Beginning in 1961 the SEC successfully extended the rule beyond face-to-face transactions to the trading on inside information in anonymous stock exchange transactions. See *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961).

48. See Brudney, *supra* note 16.

49. The "disclose or obtain" doctrine was first formally announced in *SEC v. Texas Gulf*

violates the disclosure doctrine and triggers the available sanctions.

The most widely used enforcement tool in insider trading cases has been section 21(d) of the 1934 Act, which provides the SEC with authority to bring suit in federal courts to enjoin violations of the securities laws.⁵⁰ Under this section, the SEC may seek injunctive relief “[w]herever it shall appear to the Commission that any person is engaged or about to engage in acts or practices constituting a violation” of securities laws or regulations.⁵¹ In turn, federal courts may grant a temporary or permanent injunction or restraining order upon a “proper showing” of a reasonable likelihood of future violations.⁵² However, injunctions and restraining orders only help to prevent future violations and do not correct the pecuniary consequences of insider trading. To make insider trading unprofitable in SEC enforcement actions, courts have developed the disgorgement remedy, an implied enforcement measure not provided by the federal securities laws.⁵³

The issue of the proper measurement of insider liability under rule 10b-5 has been confused. The early rule 10b-5 insider trading cases involved defendants who traded directly with the parties they defrauded.⁵⁴ Because the parties were in privity, courts applied remedies ranging from rescission⁵⁵ to monetary restitution⁵⁶ to damages.⁵⁷ In the case of “market” transactions, however, none of these remedies may be appropriate as there is generally no

Sulphur, 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). See also *Fridrich v. Bradford*, 542 F.2d 307 (6th Cir. 1977). In *Fridrich*, the court noted that the duty to disclose material information is not absolute. The insider may either disclose or refrain from trading, and it is the act of trading that violates rule 10b-5. *Id.* at 324-25.

50. 15 U.S.C. § 78u(d) (1982).

51. *Id.*

52. A “proper showing” requires proof of a past violation and a reasonable likelihood of future violations. *SEC v. Culpepper*, 270 F.2d 241, 249-50 (2d Cir. 1959).

53. In *Golconda Mining*, the court stated: “The injunction against future violations, while of some deterrent force, is only a partial remedy since it does not correct the consequences of past conduct.” 327 F. Supp. at 259. See also *MacDonald*, 699 F.2d at 52-55; *Commonwealth Chemical*, 574 F.2d at 102-03; *Shapiro*, 494 F.2d at 1309.

54. See *supra* note 47.

55. Rescission, also called equitable replevin, repudiates the sale of the stock and the parties are returned to the status quo. In other words, the defrauded seller regains the stock and the consideration paid is returned to the buyer. Many of the reported cases are not formally denominated rescission. See *Crist v. United Underwriters, Ltd.*, 343 F.2d 902 (10th Cir. 1965); *Stevens v. Vowell*, 343 F.2d 374 (10th Cir. 1965); *Royal Air Properties, Inc. v. Smith*, 312 F.2d 210 (9th Cir. 1962). Obviously, where the defendant has sold the stock prior to the judgment, this remedy cannot be applied.

56. This remedy has been referred to as rescissional or restitutional damages. See *Myzel v. Fields*, 386 F.2d 718, 741-43 (8th Cir. 1967). In *Myzel*, the Eighth Circuit stated that where it is impossible to return the parties to the status quo, then the “equivalent value of the stock at the time of resale or at the time of judgment should be the proper measure of damage.” *Id.* at 742 (footnotes omitted). The court further noted that where there is no longer an existing market value for the stock and there clearly has been a fluctuation in value since the fraudulent

single investor or class of investors who can be identified as having been damaged by the insider's fraud.⁵⁸ Rather, this form of insider trading leaves little chance of detection and defrauds the entire marketplace by subverting its integrity.⁵⁹ Thus, disgorgement evolved as a way to redress the public investment community by removing all profit from the defendant without the limitations applied in traditional private restitutional decrees.⁶⁰ The disgorgement remedy, having been the subject of judicial disagreement, has not resolved the issue of the proper measure of insider liability in SEC insider trading actions.⁶¹ Nonetheless, in applying disgorgement, courts have established certain principles from which inferences may be drawn as to what

sale, "then what restitutional damages are to be awarded must depend upon the facts of the particular case." *Id.* at 743.

57. Two types of damages can be awarded: (1) compensation for loss of anticipated profits, sometimes called "bargain damages" or "benefit of bargain damages," or (2) compensation for losses actually incurred, usually referred to as "out of pocket" losses. Under bargain damages, the plaintiff may recover when the property is not as it was represented to be, irrespective of whether it was worth more or less than its price. *See Corder v. Laws*, 148 Colo. 310, 366 P.2d 369 (1961). Out of pocket losses, however, entitle the plaintiff only to the consideration given that is greater than the actual value received. *Levine v. Seilon, Inc.*, 439 F.2d 328 (2d Cir. 1971). Thus, if the securities were worth what the plaintiff paid there can be no recovery, regardless of what representations were made.

58. *See Diamond v. Oreamuno*, 248 N.E.2d 910, 915 (N.Y. App. Div. 1969). *See also Fridrich*, where the court noted that:

Since there is no practical method for matching purchases and sales in the open market, requiring privity in the common law sense as an element of rule 10b-5 would create an insurmountable obstacle for plaintiffs. Reliance also has little relevance to trading in the open market where there are no face-to-face negotiations as a rule, and where non-disclosure of a material fact is often the gravamen of the complaint.

542 F.2d at 325.

59. *See, e.g., Certain Unknown Purchasers*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,323 n.10 (S.D.N.Y. 1981). The insider trading problem has become more widespread in recent years with the increase in mergers and tender offers, which often result in immediate and dramatic price movements in the stock of a target company. *See, e.g., SEC v. Banca Della Svizzera Italiana*, [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,346 (S.D.N.Y. 1981) (overnight profit of nearly \$2 million where securities were purchased one day before announcement of tender offer). Additional incentive for insider trading has been provided by the growth of the options market (the purchase of the option to buy shares at a fixed price anytime before expiration of the option contract) where a small investment in options can yield proportionally enormous profits if the underlying stock increases in value.

60. Cheney and Sibears note the sharp distinction between SEC actions for disgorgement and private suits because, unlike a private plaintiff, the Commission acts as a representative of the public interest seeking "to redress a wrong that has harmed the entire marketplace. Abusive trading has the potential to visit damage beyond the persons involved in specific trades in that it undermines investor confidence in the integrity and fairness of the public securities markets." Cheney & Sibears, *supra* note 2, at 7.

61. *Id.* "[A] lack of clarity as to the proper measure of the amount to be disgorged has arisen from the failure of courts to fully appreciate the distinction between a commission and a private action and consequently to articulate a rationale for disgorgement independent of private theories." *Id.*

should be the proper measure of insider liability in these public law enforcement actions.

II. ALTERNATIVE THEORIES FOR MEASURING DISGORGEMENT IN RULE 10b-5 INSIDER TRADING CASES

A. *Janigan v. Taylor: First Circuit Lays the Foundation for Measuring Disgorgement in Rule 10b-5 Insider Trading Actions*

Janigan v. Taylor,⁶² a private action, was the first case in which a federal circuit court directly addressed the issue of measuring disgorgement in a rule 10b-5 insider trading suit.⁶³ In *Janigan*, the plaintiffs, some of whom were former shareholders of Boston Steel Casting, Inc. (BESCO), successfully contended that BESCO's president had induced them to sell virtually all of the company's stock by withholding material inside information.⁶⁴ The district court found that the defendant had withheld knowledge of spawning business developments at the time of his stock purchases.⁶⁵ Based on the undisclosed information, the defendant purchased the BESCO securities for approximately \$40,000 and sold them two years later for over \$700,000.⁶⁶ The United States Court of Appeals for the First Circuit affirmed the district court's order requiring the defendant to disgorge his entire profit from the purchase and sale, reasoning that simple equity requires wrongdoers to restore all benefits unlawfully obtained.⁶⁷ Thus, *Janigan* enunciated the proposition that doubts are to be resolved against the inside trader where the nature of the securities fraud makes the amount of unjust enrichment uncertain.⁶⁸

The significance of *Janigan* rests in the court's finding that the proper

62. 344 F.2d 781 (1st. Cir), *cert. denied*, 382 U.S. 879 (1965).

63. See *MacDonald*, 699 F.2d at 53. The majority noted that analyzing the measure of disgorgement requires the court "to start at the beginning, in our earlier case of *Janigan v. Taylor* . . ." *Id.*

64. *Taylor v. Janigan*, 212 F. Supp. 794 (D. Mass. 1962). Specifically, the defendant was found to have withheld knowledge of the firming of prices and the increased backing of unfilled orders at a special shareholders meeting. The district court found these omissions to be material and concluded that they would have affected BESCO shareholders' decisions to sell their stock to the defendant. *Id.* at 799-800.

65. *Id.* at 799.

66. *Id.* at 798.

67. *Janigan*, 344 F.2d at 786.

68. For other support of this principle, see *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) (the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created). *Accord* E. GADSBY, *supra* note 1. *Cf. Blatt*, 583 F.2d at 1335; *Blau*, 286 F.2d at 791; *Adler*, 267 F.2d at 847; *Smolowe*, 136 F.2d at 239; *Penn Central*, 425 F. Supp. at 599; *Golconda Mining*, 327 F. Supp. at 259.

measure of disgorgement should be the inside trader's entire profit, as opposed to limiting liability to the defrauded parties' actual or foreseeable loss.⁶⁹ The court reasoned that this application of the disgorgement remedy was consistent with the definitional purpose of disgorgement, as well as other equitable concepts inherent in this form of relief.⁷⁰ Speaking for the panel, Chief Judge Aldrich stated in a near-famous quote: "It is more appropriate to give the plaintiff the benefit of windfalls [speculative gains] than to let the fraudulent party keep them."⁷¹ Hence, the *Janigan* court required complete disgorgement of insider profits regardless of whether all profits were attributable to the inside information upon which the defendant traded.⁷²

Janigan, however, must be distinguished from the typical insider trading case for two principal reasons. First, the defendant purchased virtually all of BESCO's stock and, thus, the plaintiffs could not have mitigated their losses by reinvesting in the securities.⁷³ Second, there was no public disclosure of the inside information that had been withheld from the plaintiffs.⁷⁴ Thus, there was no date at which the defendant and plaintiffs possessed equivalent material information, thereby precluding application of any equal footing concept.⁷⁵ Moreover, the fraud was not conducted impersonally over an exchange, but rather, it was perpetrated at a Board of Directors meeting at

69. See *Janigan*, 344 F.2d at 786. Cf. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155 (damages are the defendant's entire profit where defendant received more than seller's actual loss). *Accord* *Rochez v. Rhoades*, 491 F.2d 402 (3d Cir. 1973), cert. denied, 425 U.S. 993 (1976). In *Rochez*, the defendant purchased a co-owner's 50% interest in a business while withholding material information. Citing *Janigan* and *Affiliated Ute*, the court ordered full disgorgement, stating that the defrauded seller of securities is entitled to the greater of either "the difference between the sale price of stock in the fraudulent transaction and its fair market value at that time or the fraudulent buyer's profit on resale." *Id.* at 417.

70. *Janigan*, 344 F.2d at 786.

71. *Id.* at 786; see also *Cheney & Sibears*, *supra* note 2, at 11 ("This statement arguably lends support to disgorgement measured by the entire profit realized by one trading on inside information.")

72. *Janigan*, 344 F.2d at 786. The First Circuit did note, however, that the full disgorgement principle would be limited if the inside trader had increased the value of the company's securities by "personal efforts" unrelated to the fraud. *Id.* at 787. The court illustrated this limitation by presenting a hypothetical where an artist acquires paints by fraud and uses them to produce a valuable portrait. In such a case, the defrauded party would not be entitled to either the portrait or to the proceeds of its sale. *Id.*

73. See *MacDonald*, 699 F.2d at 53; *Cheney & Sibears*, *supra* note 2, at 11-12.

74. See *supra* note 73.

75. The nature and extent of the fraud was not revealed until two years after the BESCO securities were sold to the defendant. At that time, the defendant contacted an attorney who was a member of BESCO's Board of Directors, informing him of the plan to sell BESCO for \$700,000 and requesting his aid as counsel. The attorney declined and requested and received permission to examine BESCO's records. Following the examination, a complaint was filed charging the defendant with willful violation of rule 10b-5. *Taylor v. Janigan*, 212 F. Supp. at 798-99.

which the defendant made material misrepresentations directly to other members of the Board in order to induce them to sell their shares.⁷⁶ All director-shareholders agreed to the defendant's tender offer and recommended acceptance of the defendant's offer to other shareholders.⁷⁷ As a result, by utilizing inside information gained through his position as BESCO's president, the defendant actually effectuated the purchase of an entire business by virtue of rule 10b-5 insider trading.⁷⁸

Nevertheless, *Janigan* established full disgorgement as the proper focus of insider liability in rule 10b-5 actions. Yet, because *Janigan* was founded upon an atypical fact pattern, it could not stand as clear precedent for the full disgorgement measure of insider liability. Instead, other circuit courts adopted a standard termed "equal footing", a measure of insider trading liability that requires only partial disgorgement of profits resulting from insider trading.

B. *Origins of the Equal Footing Principle Under Rule 10b-5: The Texas Gulf Sulphur Cases*

The first step taken by federal circuit courts in the development of the disgorgement remedy in rule 10b-5 insider trading actions involving "market transactions" is rooted in two cases stemming from the infamous Texas Gulf Sulphur calamity of 1964.⁷⁹ On April 11, 1964 the *Herald Tribune* and the *New York Times* both carried stories of a rumored mineral strike by the Texas Gulf Sulphur Company (TGS).⁸⁰ The next day, the company's president issued a press release substantially denying the rumored ore strike or any other unusual degree of success in the company's drilling projects.⁸¹ The statement was, in fact, highly misleading and many investors sold TGS stock based on this false report.⁸² Four days later, the company released a corrective report indicating that TGS had indeed uncovered a potential bo-

76. *Id.* at 795-98.

77. *Id.* at 798.

78. *Id.* Some courts have held that where a purchase of an entire business is effectuated by way of purchasing all of the business' outstanding securities, such a transaction is "commercial" rather than "investment" in nature, and therefore, does not involve the sale of "securities" within the meaning of the securities acts. Thus, the sale is not protected by the antifraud provisions of the Acts. See e.g., *Frederiksen v. Poloway*, 637 F.2d 1147 (7th Cir.), *cert. denied*, 451 U.S. 1017 (1981); see generally *Seldin, When Stock is Not a Security: The "Sale of Business" Doctrine Under the Federal Securities Laws*, 37 BUS. L. 637 (1982).

79. See *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90 (10th Cir.), *cert. denied.*, 404 U.S. 1004 (1971); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2nd Cir.), *cert denied*, 404 U.S. 1005 (1971).

80. *Mitchell*, 446 F.2d at 94.

81. *Id.*

82. *Id.* at 97, 102-03.

nanza in copper, zinc, and silver in the Timmins area of Ontario, Canada. Consequently, investors who had sold their TGS stock based on the initial misleading press release brought suit for damages.⁸³

One case resulting from these events was *Mitchell v. Texas Gulf Sulphur Company*.⁸⁴ In *Mitchell*, a consolidated civil action brought under rule 10b-5, the plaintiffs alleged that the deceptive public statement caused them to sell TGS stock prior to its dramatic rise in market value following the curative release.⁸⁵ The United States Court of Appeals for the Tenth Circuit held, inter alia, that the defrauded parties were entitled to recover only those profits that could have been realized as of the date that they reasonably should have been aware of the corrective press release.⁸⁶ The court reasoned that after the curative release all parties stood equally apprised of the material facts concerning the market value of TGS stock, and the deceived sellers could have taken the remedial action of reinvesting in the stock.⁸⁷

Thus, *Mitchell* stands for the proposition that plaintiffs should not be entitled to profits accrued after the date that knowledge of the material information is imputed to them.⁸⁸ By holding that the wrongdoers' liability was cut off by the availability of all material information concerning the security at issue, the Tenth Circuit implicitly advanced the equal footing concept of partial disgorgement.⁸⁹ *Mitchell*, however, for a number of reasons, should not be interpreted as controlling precedent for measuring disgorgement in SEC rule 10b-5 insider trading actions.

First, *Mitchell* was not an insider trading action.⁹⁰ The court was not reproaching the trading of securities on the basis of inside information.⁹¹

83. *Id.* at 95. On April 12, the day TGS officially denied the rumored ore strike, its stock closed at \$30 $\frac{7}{8}$ per share. Following the curative press release on April 16 the stock jumped to \$37 per share and closed at \$36 $\frac{3}{8}$ on that day. Approximately one month later TGS stock was priced at \$58 $\frac{1}{4}$. Thus, shareholders who sold because of the April 12 press release lost a minimum of \$5 $\frac{1}{2}$ per share provided they reinvested immediately after the April 16 release. *SEC v. Texas Gulf Sulphur*, 401 F.2d 833, 847 (2nd Cir. 1968).

84. 446 F.2d 90 (10th Cir.), *cert. denied*, 404 U.S. 1004 (1971).

85. *Mitchell* was the culmination of four cases originally consolidated in *Reynolds v. Texas Gulf Sulphur Co.*, 309 F. Supp. 548 (D. Utah 1970).

86. *Mitchell*, 446 F.2d at 105.

87. *Id.* at 105-06.

88. *Id.*

89. *Id.* at 106. The court described its remedy as a compromise "between the restitution rule and the actual damage approach." *Id.*

90. *Id.* at 100 n.10. The court noted: "Although considerable trading had been done by corporate 'insiders' and 'tippees,' it was stipulated at trial that there was no illegal trading by the instant parties at or after the time of the [misleading] April 12 press release." *Id.*

91. *Id.* In *Mitchell* the court's duty was to ascertain whether the release was materially deceptive within the meaning of the securities laws, and to assess the liability that should be attached to the release. *Id.* at 97-107. It should be noted that courts will sometimes find

Rather, the court reproved defendants who had issued a false and misleading statement resulting in losses to investors who sold their stock based on that public release.⁹² Thus, liability was not assessed in order to restore illicit profits derived through the use of nonpublic information, but to impose sanctions for the dissemination of false and misleading information. Therefore, although *Mitchell* utilized the equal footing concept, the holding did not allow any defendant to retain the fruits of a securities fraud because the wrongdoing at issue did not produce illicit profits.

Additionally, *Mitchell* was a private action, not a public law enforcement action. Certainly, different values are at stake when actions are brought by the SEC on behalf of public equity.⁹³ Moreover, the court did not refer to its remedy as disgorgement, and arguably, the case has little precedential value for measuring disgorgement when a court specifically applies that remedy. Indeed, the United States Court of Appeals for the Tenth Circuit clearly indicated that its holding should not be interpreted as controlling precedent for measuring liability in rule 10b-5 actions, specifically stating that "because of the uniqueness of the litigation, it would be unwise to set forth a uniform rule with broad applications to all securities cases."⁹⁴

Although *Mitchell* was not an insider trading suit, in a case based on the same fact pattern as *Mitchell*, the SEC successfully compelled disgorgement of insider profits made by certain officers, directors, and employees of TGS.⁹⁵ In *SEC v. Texas Gulf Sulphur*,⁹⁶ the Commission persuasively argued that the defendants traded TGS stock based on the same misleading press release at issue in *Mitchell* and that the SEC had the requisite power to seek disgorgement of profits resulting from their trading. However, the Second Circuit restricted liability to those profits accruing up to the time of

omissions not materially false or misleading because the omissions at issue are speculative in nature. *See, e.g., Sundray Dx Oil Co. v. Helmerich and Payne, Inc.*, 398 F.2d 447 (10th Cir. 1968) (proxy statement omitting that developer of adjacent lease had announced a major oil discovery held not to be false or misleading because the average investor cannot distinguish between "probable" and "proved" oil reserves; therefore, only omissions of proved oil reserves would be materially misleading).

92. An action for disgorgement of profits made by corporate insiders trading in violation rule 10b-5 culminated in *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301. *See infra* notes 95-108 and accompanying text.

93. *See MacDonald*, 699 F.2d 55-58 (Coffin, C.S. & Browner, J., dissenting); *Commonwealth Chemical*, 574 F.2d at 95; *Manor Nursing*, 458 F.2d at 1104; *Petrofunds*, 420 F. Supp. at 960; *Golconda Mining*, 327 F. Supp. at 258-59; *see also, Cheney & Sibears, supra* note 2, at 7-8.

94. *Mitchell*, 446 F.2d at 105.

95. 446 F.2d 1301 (2d Cir.), *cert denied*, 404 U.S. 1005 (1971). This was the first federal circuit case in which equitable relief in the form of monetary restitution was applied in an SEC enforcement action.

96. *Id.*

public disclosure of the mineral strike.⁹⁷ The court rationalized its measure of insider trading liability by noting that it served to deprive the violators of gains accruing before the mineral strike became "general knowledge."⁹⁸ In other words, dissemination of the previously nonpublic information ended the causal relation between the fraud and post-disclosure profits.⁹⁹ Effectively, this measure of damages attempted to correct the wrongdoing by moving the dates of the illicit stock purchases up to the day following the curative press release.¹⁰⁰ On that date, damages ceased to be attributable to insider trading apparently because the defendants no longer held TGS stock based on inside information.¹⁰¹

In discussing the insiders' liability, the court referred to the equitable relief it rendered as "restitution of profits" and consistently applied the principles of restitution in fashioning its remedy.¹⁰² As in *Mitchell*, nowhere in the opinion does the court state that it is fashioning a remedy premised upon the concept of disgorgement. Thus, because the Second Circuit was applying a different remedy, arguably similar to the Tenth Circuit holding in *Mitchell*, this case has only tenuous precedential value for federal courts now struggling with the measure of disgorgement in SEC insider trading actions.¹⁰³ Furthermore, in assessing its precedential value, it is noteworthy that the starting point of the liability analysis was not the defendants' entire profit, which had been established by *Janigan* as the focus of the disgorge-

97. *Id.* at 1307-08.

98. The Second Circuit stated:

Restitution of the profits on these transactions merely deprives the appellants of the gains of their wrongful conduct. Nor does restitution impose a hardship in this case. . . . The court's order requires only restitution of the profits made by the violators prior to general knowledge of the ore strike on April 17, 1964, and, in effect, leaves the appellant all the profits accrued after that date. It would severely defeat the purposes of the Act if the violator of Rule 10b-5 were allowed to retain the profits from his violation. The district court's order corrects this by effectively moving the purchase dates of the violators' purchases up to April 17, 1964.

Id. at 1308.

99. *Id.*

100. *Id.* Judge Friendly outlined the rationale underlying this theory of relief in a private action. In *Gerstle v. Gamble-Skogmo*, Judge Friendly wrote:

The reason for this, in the case of marketable securities, is obvious. Once the seller has discovered the fraud, he can protect against further damage by replacing the securities and should not be allowed to profit from a further appreciation, while being protected against depreciation by his right to recover at least the difference in value at the time of his sale.

478 F.2d 1281, 1306 n.27 (2d Cir. 1973).

101. SEC v. Texas Gulf Sulphur, 446 F.2d at 1308. *But see Affiliated Ute*, 406 U.S. at 156 (all investors are not equally informed); *cf. Mitchell*, 446 F.2d at 105 (equal footing concept applied to plaintiffs possessing "ample sophistication").

102. SEC v. Texas Gulf Sulphur, 446 F.2d at 1307-09.

103. *See Mitchell*, 446 F.2d at 105-06.

ment remedy.¹⁰⁴

While noting that the SEC was not restricted to injunctive relief,¹⁰⁵ the court nonetheless fashioned a remedy that did not depart from the traditional restitutional concepts utilized in private actions.¹⁰⁶ The court limited liability to those profits accrued as of the date on which a reasonable investor should have known of the mineral strike.¹⁰⁷ In shaping the remedy, the court did not discuss whether the SEC's presence as plaintiff should create special considerations or whether liability should be equivalent to that to which a private party would have been entitled under the same circumstances.¹⁰⁸

At the time of the the Texas Gulf Sulphur litigation, however, the power of the Commission to seek equitable relief in the form of monetary damages was still a novel issue.¹⁰⁹ Insider liability was but one of many issues intertwined in the complex TGS litigation, and the court could not have fully explored the distinctions between SEC actions and private suits. Nevertheless, the Second Circuit's holding in *SEC v. Texas Gulf Sulphur* was the first time a federal circuit court utilized the concept of "equal footing" in an SEC insider trading action, thereby permitting inside traders to retain a portion of the profits derived from trading on the basis of nonpublic information.

104. See *supra* notes 67-78 and accompanying text.

105. *SEC v. Texas Gulf Sulphur*, 446 F.2d at 1307.

106. *Id.* at 1307-08. The court did enter a somewhat novel decree by ordering one defendant to restore profits made by "tippees" who were not involved in the proceeding despite there being no evidence that the defendant himself actually profited. Finding that this did not constitute an "unjust penalty," the court noted that this portion of the remedy was necessary to deter insider trading that could be conducted through "implied understandings" and "reciprocal tips." *Id.* at 1308.

107. *Id.* at 1308.

108. *Cf. supra* notes 19, 32-33, 60-61, and accompanying text. It must be noted, however, that TGS was already under intense litigious assault from private plaintiffs. The trial court noted that 49 private actions, comprising at least 475 plaintiffs, were pending against TGS. Even though many of the complaints did not specify the damages sought, those already alleged were in excess of \$80 million. *SEC v. Texas Gulf Sulphur*, 258 F. Supp. 262, 267 n.1 (S.D.N.Y. 1966). Thus, application of basic restitutional principles was necessary to avoid what would otherwise be virtually unlimited liability if every party were granted the relief they sought.

109. See *supra* note 18. For further discussions of the impact and implications of the Texas Gulf Sulphur litigation, see Fleischer, *Securities Trading and Corporate Information Practices: The Implication of the Texas Gulf Sulphur Proceedings*, 51 VA. L. REV. 127 (1965); Ruder, *Corporate Disclosures Required By The Federal Securities Laws: The Codification Implications Of Texas Gulf Sulphur*, 61 NW. U.L. REV. 872 (1967); Note, *SEC v. Texas Gulf Sulphur Co.: The Inside And Outside Of Rule 10b-5*, 46 B.U.L. REV. 205 (1966); Note, *Texas Gulf Sulphur And The Duty Of Disclosure, Another View*, 55 GEO. L. REV. 664 (1967).

C. *The Second Circuit Further Develops The Equal Footing Concept*

Since the seminal decision in *SEC v. Texas Gulf Sulphur*, in which the Commission first successfully obtained money damages, the Second Circuit has used the equal footing concept in three major SEC actions.¹¹⁰ In each instance, however, application of this principle did not allow the defendants to retain any portion of profits derived from securities fraud. *SEC v. Manor Nursing Centers*¹¹¹ was the first federal circuit case following *SEC v. Texas Gulf Sulphur* in which the Second Circuit applied equal footing in the context of a Commission suit. Like *Mitchell*, *Manor Nursing* did not involve insider trading.

In *Manor Nursing*, the SEC charged the defendants with violating antifraud provisions and prospectus delivery requirements of the Securities Act of 1933 and the Securities Exchange Act of 1934.¹¹² The defendants had engaged in a public offering of stock and induced investors to part with funds by promising that the invested monies would be placed in escrow and returned to them if all shares of the stock were not sold by a certain date.¹¹³ In contravention of the agreement, the defendants retained the funds for personal use.¹¹⁴ The United States District Court for the Southern District of New York ordered the defendants to disgorge all proceeds, profits, and income garnered by virtue of the public offering.¹¹⁵

The United States Court of Appeals for the Second Circuit affirmed the district court's judgment in all respects except to the extent that the lower court had ordered disgorgement of income earned by the defendants as a result of investing the fraudulently obtained proceeds.¹¹⁶ Implicitly applying the notion of equal footing, the court reversed that portion of the judgment, finding that disgorgement of profits earned after the fraud had been completed constituted an unjust penalty exceeding the "remedial" purposes of federal securities laws.¹¹⁷ This was so, the court reasoned, because order-

110. See *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90 (2d Cir. 1978); *SEC v. Shapiro*, 494 F.2d 1301 (2d Cir. 1974); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972).

111. 458 F.2d 1082 (2d Cir. 1972).

112. The defendants violated antifraud provisions § 17(a) of the 1933 Act, 15 U.S.C. § 77q(a) (1982); § 10(b) of the 1934 Act, 15 U.S.C. § 78(b) (1982); and rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. Additionally, the defendants violated the prospectus delivery provision in § 5(b)(2) of the 1933 Act, 15 U.S.C. § 77e(b) (1982).

113. *Manor Nursing*, 458 F.2d at 1092-93.

114. *Id.*

115. *SEC v. Manor Nursing Centers Inc.*, 340 F. Supp. 913, 936 (S.D.N.Y. 1971).

116. *Manor Nursing*, 458 F.2d at 1104-05.

117. *Id.* Prior to the enactment of The Insider Trading Sanctions Act of 1984, it was well-established that courts were confined to remedial relief when fashioning remedies for securities law violations and, therefore, could not make penalty assessments. See *infra* notes 176-87 and

ing such post-fraud disgorgement would require defendants who invested the fraudulent proceeds wisely to disgorge substantially more than other defendants.¹¹⁸

However, the court stated that full disgorgement could be justified if its deterrent impact is necessary to effectuate enforcement of securities laws.¹¹⁹ Yet, the court found that under the facts of the case, injunctive relief, coupled with the restoration of proceeds received in connection with the fraudulent stock offering plus interest, was sufficient remedial redress.¹²⁰

Although *Manor Nursing* did not involve disgorgement in the context of insider trading, the case is a significant contribution to the development of the disgorgement remedy. By reversing a full disgorgement order that had included "secondary profits," the Second Circuit implicitly applied a form of equal footing because the court used a causation analysis in limiting liability.¹²¹ However, by noting that full disgorgement could be justified if its deterrent impact were essential to the effective enforcement of the federal securities laws, the court advanced the concept of deterrence as a factor in assessing liability.¹²² Indeed, the court stated, "The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits" and that "effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable."¹²³

In the next major disgorgement case, *SEC v. Shapiro*,¹²⁴ the Second Cir-

accompanying text. See *Capital Gains*, 375 U.S. at 195 (noting that securities laws were enacted for the purpose of avoiding fraud and are to be construed flexibly to effectuate their underlying remedial purposes); *SEC v. Texas Gulf Sulphur*, 446 F.2d at 1310 (SEC may seek other than injunctive relief "so long as such relief is remedial relief and is not a penalty assessment"); cf. *Beck v. SEC*, 430 F.2d 673 (6th Cir 1970) (suspension of broker's license held to be an unjust penalty where broker was inexperienced in the securities business and under the supervision of men who were later adjudged guilty of criminal fraud).

118. *Manor Nursing*, 458 F.2d at 1104-05.

119. *Id.* at 1104.

120. *Id.* The Second Circuit used a balancing test. The potential deterrent effect of full disgorgement was weighed against "requiring those appellants who invested wisely to refund substantially more than other appellants." *Id.* at 1104-05. Seemingly, this could be interpreted as an application of the disgorgement limitation noted in *Janigan* where the court stated that a defendant should not be required to disgorge profits derived from "personal efforts" unrelated to an act of wrongdoing. See *supra* note 72.

121. *Manor Nursing*, 458 F.2d at 1104.

122. *Id.* *Accord Golconda Mining*, 327 F. Supp. at 259. See *supra* note 11.

123. *Manor Nursing*, 458 F.2d at 1104. For in-depth discussions of the *Manor Nursing* case, see Note, *Truth Up to the Date of Use as a Requirement for Section 10(a) Prospectus: The Implications of SEC v. Manor Nursing Centers, Inc.*, 24 CASE W. RES. L. REV. 771 (1973); Note, *Prospectus Liability for Failure to Disclose Post-Effective Developments: A New Duty and its Implications*, 48 IND. L.J. 464 (1972).

124. 494 F.2d 1301 (2d Cir. 1974).

cuit applied the equal footing principle to an inside trader. *Shapiro* was the first case in which a federal circuit court specifically applied both the disgorgement remedy and the equal footing principle to an inside trader.

In *Shapiro*, after having traded on the basis of nonpublic information, the defendant retained a portion of the illegally purchased securities after the dissemination of the nonpublic information upon which he traded.¹²⁵ The defendant's decision proved unwise, however, as merger negotiations, which constituted the inside information, fell through, and the stock's market value fell.¹²⁶ The defendant contended that subsequent losses wiped out prior gains and because no unjust enrichment was retained, disgorgement was not an appropriate remedy.

The *Shapiro* court, however, uniquely applied equal footing by ordering the defendant to disgorge "paper profits," money he could have realized had he sold the stock at the time the nonpublic information upon which he traded became generally disseminated.¹²⁷ The court reasoned that the defendant should be liable for the lost investment opportunity created by the fraudulent purchase and retention of the securities during the nondisclosure period.¹²⁸ Thereafter, he held the securities at his own risk and the fact that his decision proved imprudent, the court reasoned, did not negate the liability that had already accrued.¹²⁹

Thus, *Shapiro*, like *Manor Nursing*, furthered the role of deterrence in measuring disgorgement, because the court required restoration of profits never realized by the inside trader.¹³⁰ Circuit Judge Hays noted that a con-

125. *Shapiro*, 494 F.2d at 1304-05.

126. *Id.* *Shapiro* was a partner in a firm that specialized in arranging corporate mergers and acquisitions. While engaged in merger negotiations between Ridge Manor Development Corp. and Harvey's Stores, Inc., *Shapiro's* partner purchased and sold stocks and options of Harvey's, then a publicly traded stock on the American Stock Exchange (AMEX). The defendants unsuccessfully contended that they did not trade based on "material" information because they believed the possibility of a merger was remote and because they were routinely engaged in such negotiations. The court concluded that the merger negotiations were material because a "reasonable investor might have considered them important in the making of [an investment] decision." *Id.* at 1305 (citing *Affiliated Ute*, 406 U.S. at 154); see also *Mills v. Electric Auto-Lite Co.*, 390 U.S. 375, 385 (1970) (test of materiality is one of balancing the indicated probability of the event or consequence against its magnitude upon occurrence).

127. *Shapiro*, 494 F.2d at 1309. In responding to the defendant's contention that disgorgement of profits never realized constituted an unjust penalty, the court found that the losses suffered by the defendant were the result of an unwise investment decision to keep the stock after the previously nonpublic information was disclosed. *Id.*

128. *Id.*

129. *Id.* *Accord* *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946); *SEC v. Commonwealth Chemical Sec. Inc.*, 574 F.2d 90, 95 (2d Cir. 1978).

130. See *Cheney & Sibears*, *supra* note 2 ("[T]he *Shapiro* court continued to apply the rationale . . . explicit in *Manor Nursing Centers* that deterrence is a justification for fashioning an order of disgorgement most likely to prevent further violative conduct."). *Id.* at 8.

trary holding would create a "serious anomaly" that could encourage insider trading.¹³¹ That is, ordering disgorgement only of profits realized would create a "heads-I-win-tails-you-lose opportunity for the violator" because the inside trader would be allowed to keep subsequent profits but not be required to disgorge subsequent losses.¹³² Such an outcome would undermine the deterrent effect of rule 10b-5 because the violator would never stand to lose more than might be gained by retention of the tainted securities.¹³³ Obviously, because the *Shapiro* application of equal footing requires disgorgement of any form of unjust enrichment, the *Shapiro* remedy differs significantly from cases like *MacDonald* where the decision to retain the securities produces windfall profits.¹³⁴

In *SEC v. Commonwealth Chemical Securities*¹³⁵ the Second Circuit again applied the equal footing principle so as to effectuate deterrence by ordering disgorgement of money never realized. The defendants in *Commonwealth Chemical*, some of whom were distributors of an original offering of securities, engaged in a successful scheme designed to drive the market value of those securities upward.¹³⁶ This was done by embarking on a campaign of buying and selling the securities in large transactions causing the stock price to rise astronomically during a period when no earnings were reported.¹³⁷ The SEC uncovered the scheme and suspended trading in the stock, thus precluding the defendants from selling their shares for approximately eight months.¹³⁸ After the SEC lifted the suspension, the stock's value tumbled

131. *Shapiro*, 494 F.2d at 1309.

132. *Id.* Cf. Ellsworth, *supra* note 2, at 656 (noting that the court's "coin-toss" characterization suggests that the Second Circuit was not abandoning the position it maintained in *Manor Nursing*, where it held that wrongdoers who profitably invest ill-gotten gains must not be required to disgorge such secondary profits). *Shapiro*, however, did not involve the issue of whether the violator should be allowed to keep actual profits resulting from the securities fraud. See *MacDonald*, 699 F.2d at 56 (Coffin, C.J. & Bownes, J., dissenting) ("As for *Shapiro*, ignoring losses after disclosure of the inside information does not require that gains after disclosure also be ignored.").

133. See *MacDonald*, 699 F.2d at 56; *Shapiro*, 494 F.2d at 1309; see also *SEC v. R.J. Allen Assoc.*, 386 F. Supp. 866, 881 (S.D. Fla. 1974) ("The deterrent effect of Commission enforcement actions would be greatly undermined if securities law violators were not required to disgorge illicit gains.").

134. See, e.g., *SEC v. MacDonald*, 568 F. Supp. 111, 114 (D.R.I. 1983). In applying the equal footing principle on remand, the district court's remedy allowed the defendant to retain nearly \$40,000 and disgorge only about \$18,000 of the profits accrued on securities bought on inside information.

135. 574 F.2d 90 (2d Cir. 1978).

136. *Id.* at 92-94.

137. *Id.* The Commission's principal evidence was an SEC analyst who testified that the defendants had participated in an "extraordinarily large percentage of all transactions." *Id.* at 93.

138. *Id.* at 102.

and the defendants sold at a net loss.¹³⁹

Notwithstanding that the defendants did not profit from their hoax, the Second Circuit again ordered disgorgement of all "paper profits" that would have been realized had they sold prior to the suspension of trading.¹⁴⁰ Writing for the bench, Judge Friendly reasoned that "the court must [not] give [the defendants] credit for the fact that they had not succeeded in unloading all their purchases at the time when the scheme collapsed."¹⁴¹

Although *Commonwealth Chemical* was not an insider trading case, the court's specific usage of the disgorgement remedy under these facts provides guidance for fashioning the remedy in SEC insider trading actions. As in *Shapiro*, the Second Circuit applied the equal footing concept so as to effectuate deterrence by removing all unjust enrichment from the wrongdoers, including profits never realized. The court noted that unlike damages, which serve primarily to compensate investors, the disgorgement remedy is applied in order to divest the wrongdoer of any form of wrongful profit.¹⁴² The court further noted that in exercising its discretion to prevent unjust enrichment, it is immaterial to the measure of disgorgement where the profit came from, or to whom it will be restored.¹⁴³

In *Manor Nursing*, *Shapiro*, and *Commonwealth Chemical* the Second Circuit advanced the deterrence concept that the disgorgement remedy is designed to effectuate. All three cases imputed the notion of equal footing into the measure of disgorgement; yet, each decision removed all profit resulting from the securities violations. In both *Shapiro* and *Commonwealth Chemical*, application of the equal footing principle actually caused the defendants to lose money as a result of their wrongdoing because they were forced to disgorge "paper profits," monies never realized. Clearly, the economic outcome in such cases makes them unpersuasive precedent for application of equal footing when the inside trader gains windfall profits by retaining securities beyond the equal footing date and application of the principle would allow the wrongdoer to keep fruits of misconduct.¹⁴⁴

139. *Id.*

140. *Id.* The court gave no weight to the defendants' contention that because they still held substantial amounts of securities at the time of suspension, "that losses after trading resumed wiped out any profits." *Id.* Cf. RESTATEMENT (SECOND) OF TRUSTS § 213 (1959) (trustees who breach fiduciary duty may not balance losses incurred in such breaches against gains in order to reduce personal liability).

141. *Commonwealth Chemical*, 574 F.2d at 102.

142. *Id.* at 95.

143. *Id.* *Accord Blatt*, 583 F.2d at 1325; *Janigan*, 344 F.2d at 781; *Penn Central*, 425 F. Supp. at 593; *Golconda Mining*, 327 F. Supp. at 257; E. GADSBY, *supra* note 1.

144. The *MacDonald* court noted:

As for *Shapiro*, ignoring losses after disclosure of the inside information does not require that gains after disclosure also be ignored. To the extent [*Manor Nursing*] is

The Second Circuit's application of equal footing in *Shapiro* and *Commonwealth Chemical* served as a way to measure the adverse financial consequences the defendants would have to bear because in both cases the stock value fell after the equal footing period. In *Manor Nursing*, equal footing meant simply that the court refrained from applying disgorgement to income earned on the defendants' wrongful profits because under the facts, such an order would constitute an unjust and inconsistent penalty depending on the post-fraud activities of the individual defendants. *Manor Nursing* clearly espoused the view that deterrence alone could be sufficient justification for full disgorgement, even though under the facts of the case that court applied only partial disgorgement.¹⁴⁵ All three cases specifically used the disgorgement remedy and each stands for the proposition that the measure of disgorgement should be shaped in a manner that effectuates deterrence and removes all profits derived from a securities fraud.¹⁴⁶ Individually, none of these cases supports the notion that equal footing should be applied in a context where it would permit the retention of profits directly resulting from a securities fraud. In *SEC v. MacDonald*, however, the United States Court of Appeals for the First Circuit, under a holding premised on the equal footing concept, applied "disgorgement" so as to permit an inside trader to retain windfall profits that accrued after the equal footing period.

III. THE *MACDONALD* CASE: CONFLICTING APPROACHES TO MEASURING DISGORGEMENT IN SEC PUBLIC LAW ENFORCEMENT ACTIONS

A. *The Majority Applies Equal Footing*

Continuing its effort to promote fairness within the securities industry, the SEC brought suit against James MacDonald, charging him with violating section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 promulgated thereunder.¹⁴⁷ MacDonald had purchased 9,500 shares of the publicly traded stock of Realty Investment Trust (RIT), a corporation in which he served as Chairman of the Board of Trustees. The Commission successfully

persuasive . . . it supports full disgorgement here, for it is premised on a measure of disgorgement adequate to provide 'sufficient deterrence to future violations.'

699 F.2d at 56-57 (Coffin, C.J. & Bownes, J., dissenting) (footnote omitted).

145. *Manor Nursing*, 458 F.2d at 1104.

146. See *Commonwealth Chemical*, 574 F.2d at 102 ("[Disgorgement] is a method of forcing a defendant to give up the amount by which he was unjustly enriched."); *Shapiro*, 494 F.2d at 1309 ("A violator of the securities laws should disgorge profits earned by trading on nonpublic information."); *Manor Nursing*, 458 F.2d at 1104; see also *Cheney & Sibears*, *supra* note 2, at 8-11.

147. *SEC v. MacDonald*, [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,009 (D.R.I. 1981).

contended that MacDonald violated rule 10b-5 by purchasing RIT securities based on his personal knowledge of fruitful, nonpublic business activities that were unfolding at the time of his purchases.¹⁴⁸

The United States District Court for the District of Rhode Island ordered MacDonald to disgorge the entire profit derived by virtue of the illicit transactions.¹⁴⁹ The court neither applied nor discussed the equal footing principle. Apparently, the district court judge was simply equating the measure of disgorgement with all gains of the wrongdoer to ensure that all unjust enrichment was removed, a notion that the First Circuit had initially espoused in *Janigan*.

On appeal, however, the United States Court of Appeals for the First Circuit reversed the district court's full disgorgement order.¹⁵⁰ A two-justice majority adopted the equal footing principle, thereby limiting disgorgement to profits realized between the time of the fraudulent purchases and the time of general dissemination of the nonpublic information upon which MacDonald traded.¹⁵¹ In lone dissent, Chief Judge Coffin urged that the district court's full disgorgement order be upheld.¹⁵²

The SEC sought and obtained a rehearing en banc on the issue of the measure of disgorgement, maintaining that in a federal enforcement action, an inside trader's entire profit must be disgorged in order to effectuate deterrence and to promote fair play in the marketplace.¹⁵³ By a three-to-two margin, however, the en banc majority embraced the equal footing principle, thus allowing defendant MacDonald to retain profits approximating \$40,000 and requiring disgorgement of only about \$18,000.¹⁵⁴

The majority premised its holding on a causation analysis. The court reasoned that public disclosure of the inside information utilized by the defendant broke the causal nexus between the fraudulent purchase and subsequent sale of the securities.¹⁵⁵ Thus, in the majority's view, the full extent of unjust enrichment attributable to the act of inside trading is realized when the

148. *Id.* at ¶ 91,231-91,234.

149. *Id.* at ¶ 91,234. Although the court ordered full disgorgement, it denied the SEC's request for an injunction restraining the defendant from trading. The court found "not the slightest suggestion that he has or will enter the market." *Id.*

150. *SEC v. MacDonald*, No. 81-1356 (May 13, 1982), *vacated*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,672 (1st Cir. 1982).

151. *Id.*

152. *Id.*

153. *SEC v. MacDonald*, [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,672 (1st Cir. 1982) (order to rehear en banc issue of the measure of disgorgement).

154. *SEC v. MacDonald*, 699 F.2d at 47, 52-55, *on remand*, 568 F. Supp. 111, 114 (D.R.I. 1983).

155. *See supra* note 31. *But see Janigan*, 344 F.2d at 786 ("[T]here can be no speculation but that the defendant actually made the profit and, once it is found that he acquired the

inside information becomes public, and thereafter, the insider's retention and subsequent sale of the securities is lawful because the trader is no longer utilizing inside information.¹⁵⁶

Writing for the majority, Circuit Judge Aldrich noted a limitation on the measure of disgorgement, that "defrauded sellers can recover only those accretions occurring up to a reasonable time after they discovered the truth."¹⁵⁷ Insiders' profits accruing after public disclosure should not be subject to disgorgement, he maintained, because investors have the opportunity to assess their damages and decide whether to reinvest based on the new information.¹⁵⁸

The majority did not explain why the ability of individuals to act upon new information either limits or is relevant to the extent of disgorgement that may be sought by the SEC.¹⁵⁹ Instead, the majority saw no legal or equitable reason to assess liability in an SEC law enforcement action in a manner different from a private suit.¹⁶⁰ To do so, the majority reasoned, would unfairly charge one class of inside traders more than others who committed the same fraudulent act.¹⁶¹ Moreover, the majority rejected the minority's contention that the measure of disgorgement should include "damage done to investor confidence and the integrity of the nation's capital markets."¹⁶² In short, the majority measured disgorgement by the lost in-

property by fraud, that the fraud was the proximate consequence of the profit, whether foreseeable or not.").

156. The American Law Institute's proposed Federal Securities Code defines "ill-gotten gains" as the excess over the insider's purchase price of the "value of the security as of the end of the reasonable period after . . . the time when all material facts . . . became generally available." FEDERAL SECURITIES CODE § 1708(b)(4) comment 2 (Proposed Official Draft 1978 & Supp. 1981). However, these provisions deal with private actions and do not contemplate equitable enforcement actions brought by the SEC. See *MacDonald*, 699 F.2d at 57 (Coffin, C.J. & Bownes, J., dissenting). Moreover, the code authorizes a district court, in its discretion, to award 150% of the ill-gotten gains as determined under § 1708(b)(4) to provide deterrence against securities fraud.

157. *MacDonald*, 699 F.2d at 53. Cf. *Baumel v. Rosen*, 412 F.2d at 574-76.

158. *MacDonald*, 699 F.2d at 53.

159. *Id.* at 52-55. The dissent noted:

[T]o analyze this case in terms of a seller's ability to repurchase securities after the public disclosure of inside information seems to me to assume that the public instrumentality created to monitor the securities markets for the good of all stands in shoes no larger than those of a defrauded individual.

Id. at 55.

160. *MacDonald*, 699 F.2d at 54. But see *Commonwealth Chemical*, 574 F.2d at 95; *Management Dynamics*, 515 F.2d at 808; *Petrofunds*, 420 F. Supp. at 960; *National Student Mktg. Litig.*, 368 F. Supp. at 1317; *Lum's*, 365 F. Supp. at 1046; see also *supra* notes 19, 33 and accompanying text.

161. *MacDonald*, 699 F.2d at 54.

162. *Id.* at 52.

vestment opportunity suffered by a hypothetical investor as of the equal footing date without imputing the SEC's presence and purpose as a public plaintiff into the measure of disgorgement.

B. The MacDonald Dissent: SEC's Presence as Securities Law Enforcer Mandates Full Disgorgement Under Principles of Public Equity

In dissent, two members of the en banc panel contended that full disgorgement is the proper measure of liability in an SEC insider trading action.¹⁶³ Stressing the critical distinction created by the SEC's presence as a public law enforcer, the dissent argued that the measure of disgorgement must account for damage done to investor confidence and the integrity of the marketplace.¹⁶⁴ To accomplish these goals, full disgorgement of insider profits is necessary to effectuate the SEC's role in deterring securities fraud and promoting fairness in the securities industry.¹⁶⁵

Dissenting for the second time on the measure of disgorgement, Chief Judge Coffin noted the markedly inadequate deterrent effect of the majority's holding.¹⁶⁶ The insider's risk of being detected is always less than 100%, and under equal footing, the insider could "never stand to lose more than he stands to gain."¹⁶⁷ Expounding on the SEC's role as securities law enforcer, Chief Judge Coffin asserted that the measure of disgorgement must be different from the amount a private plaintiff would be entitled to receive.¹⁶⁸ He emphasized that the economic outcome under the majority's holding is contrary to the underlying purpose of disgorgement—restoration of all ill-gotten gains.¹⁶⁹ Therefore, he concluded, neither the court nor the SEC should be precluded from exercising discretion to compel disgorgement of any amount up to the full measure of profits derived from insider trading as a way to provide deterrence and promote the Commission's enforcement role.¹⁷⁰

Moreover, Chief Judge Coffin argued that the majority had departed from

163. *Id.* at 55-58 (Coffin, C.J. & Bownes, J., dissenting).

164. *Id.* at 55. See notes 19, 60-61 and accompanying text.

165. *MacDonald*, 699 F.2d at 56-57 (Coffin, C.J. & Bownes, J., dissenting).

166. *Id.* at 56.

167. *Id.* Cf. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 25 (1980) (noting that in most instances, the effective sanction for violating insider trading laws will be "less than the offender's expected utility in violating the law").

168. See *supra* note 33.

169. *MacDonald*, 699 F.2d at 56 (Coffin, C.J. & Bownes, J., dissenting). The dissent noted that while certain limitations on disgorgement may be appropriate in private actions so as not to give the plaintiff the benefit of an undue windfall, "an artificial limit on disgorgement is wholly inappropriate in a public enforcement action by the SEC, where the policy against windfall awards is absent." *Id.* See also Blatt, 583 F.2d at 1335; *Commonwealth Chemical*, 574 F.2d at 90; *Penn Central*, 425 F. Supp. at 599; E. GADSBY, *supra* note 1.

170. *MacDonald*, 699 F.2d at 55-56 (Coffin, C.J. & Bownes, J., dissenting).

the essential principle of *Janigan*—that it is more appropriate to require disgorgement of windfall profits flowing from a securities fraud than to allow the wrongdoer to keep them.¹⁷¹ He noted that even in private suits, it is settled law that where the nature of a fraud makes liability uncertain, doubts are to be resolved against the wrongdoer.¹⁷² In the dissent's view, this basic principle has even greater vitality in an SEC enforcement action because the Commission is a public plaintiff advancing broad societal interests as opposed to a private plaintiff seeking personal pecuniary gains.¹⁷³

While conceding the lack of case law directly supporting its view, the dissent pointed out the lack of direct support for the majority opinion as well. The only Commission actions where federal circuit courts applied equal footing to inside traders were *SEC v. Texas Gulf Sulphur* and *SEC v. Shapiro*.¹⁷⁴ The dissent noted that in *Texas Gulf Sulphur* the measure of disgorgement was not an issue.¹⁷⁵ Additionally, the dissent interpreted the purpose of equal footing as applied in *Shapiro* to be a disincentive to insider trading—"to avoid giving him a 'heads-I-win-tails-you-lose' opportunity by allowing him to 'keep subsequent profits but not suffer subsequent losses.'"¹⁷⁶

In sum, then, the en banc panel differed sharply on the principles underlying the nature of the disgorgement remedy, principally over the issue of whether the SEC's presence as a public plaintiff mandates that a concept of public equity be imputed into the measure of disgorgement. The pivotal question raised by these contrasting opinions is whether compelling disgorgement of only predisclosure profits in SEC enforcement actions is sufficient redress and adequate deterrence against rule 10b-5 insider trading. With this backdrop of judicial uncertainty over the measure of disgorgement in SEC insider trading actions, Congress took the issue into its own hands by enacting the Insider Trading Sanctions Act of 1984.

IV. THE INSIDER TRADING SANCTIONS ACT OF 1984

Responding to the SEC's call for help in its war against insider trading,

171. See *Janigan* 344 F.2d at 786.

172. *MacDonald*, 699 F.2d at 55-56 (Coffin, C.J. & Brownes, J., dissenting); see also *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155 (1972) (citing *Janigan*); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. at 251, 264 (1946); *supra* note 68.

173. *MacDonald*, 699 F.2d at 57-58.

174. See *Shapiro*, 494 F.2d at 1301; *Texas Gulf Sulfur*, 446 F.2d at 1301. See also *supra* notes 95-107, 123-33 and accompanying text.

175. *MacDonald*, 699 F.2d at 56 (Coffin, C.J. & Brownes, J., dissenting).

176. *Id.*

Congress enacted the Insider Trading Sanctions Act of 1984 (ITSA).¹⁷⁷ Premised largely upon the inadequate deterrent force of present usage of the disgorgement remedy,¹⁷⁸ the ITSA's major provision provides the Commission with the power to seek an assessment of treble damages against persons who trade on the basis of material nonpublic information.¹⁷⁹ Additionally, the ITSA amends section 32 of the Securities Exchange Act of 1934 by increasing from \$10,000 to \$100,000, the maximum penalty that may be imposed for willful violations of any provision of the 1934 Act.¹⁸⁰ In providing the SEC with these two powerful tools of enforcement, Congress has clearly reasserted its intent to preserve the integrity of the nation's capital markets and maintain the confidence of the investing public.¹⁸¹

To effectuate passage of the ITSA, the Commission was asked to consider and respond to several changes not included in the original bill submitted by the SEC.¹⁸² One of these changes, now adopted by Congress, defines treble damages as three times the "profit gained" or "loss avoided" as measured between the time of the purchase or sale of the securities and a reasonable time after disclosure of the nonpublic information.¹⁸³ Although this provision is an implicit codification of the equal footing concept, the definition was framed only for purposes of computing treble damages. By adopting this definition, Congress did not endorse the First Circuit's holding in *SEC v. MacDonald*¹⁸⁴ because the Commission may seek treble damages "instead

177. Pub. L. No. 98-376, 98 Stat. 1264, § 1 (1984) (amending 15 U.S.C. §§ 78c, 78o, 78t, 78u, 78ff (1982)).

178. See 129 CONG. REC. H7011 (daily ed. Sept. 19, 1983) (statement of Rep. Wirth) ("Disgorgement of profits simply puts [the inside trader] . . . back in the position he would have been if he had obeyed the law in the first place."); see also 130 CONG. REC. S8912-13, (Daily ed. June 29, 1984) (statement of Sen. D'Amato) ("It is evident that current law lacks any real deterrence to engaging in insider trading There is little disincentive to engage in insider trading since the punishment, if caught, is merely being restored to the monetary position from which you began.").

179. Insider Trading Sanctions Act of 1984, *supra* note 177, amending 15 U.S.C. § 78u(d).

180. Insider Trading Sanctions Act of 1984, *supra* note 177, § 78ff.

181. "Insider trading threatens our capital markets by undermining the public's expectations of fair and honest securities markets where all participants play by the same rules." 129 CONG. REC. at H7012 (statement of Rep. Wirth).

182. *Id.* at 7013.

183. Insider Trading Sanctions Act of 1984, *supra* note 177, § (2)(C) (amending 15 U.S.C.A. § 78u(d)).

184. See CONFERENCE REPORT OF THE SUBCOMMITTEE ON TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FINANCE at 8 (1983) [hereinafter cited as CONFERENCE REPORT]. CONF. REP. NO. 355, 98th Cong., 1st Sess. 8 (1983) ("By adopting a definition of 'profit gained or loss avoided' for purposes of this legislation, however, the Committee does not endorse the court's holding in *SEC v. MacDonald*."). The Subcommittee noted that the issue of post-disclosure windfall profits rarely arises because inside traders seldom hold securities long after disclosure of the nonpublic information upon which they traded. *Id.* at 29.

of, or in addition to," any other remedy it is presently empowered to seek.¹⁸⁵

The ITSA's treble damages enforcement provision is intended to serve as the SEC's principal enforcement tool to combat insider trading.¹⁸⁶ Clearly, by promulgating this remedy, Congress evinced its dissatisfaction with the efficacy of the disgorgement remedy and the limits placed on it by modern federal courts.¹⁸⁷ Nonetheless, it remains for the courts to determine both the usage and construction of the equal footing principle codified within the treble damages clause of the ITSA. It is noteworthy that treble damages under the ITSA will remove all insider profits only where the inside trader's profits are no more than three times the equal footing measure. Where the inside trader's profits are more than three times the equal footing measure, as in *Janigan*, treble damages will not remove all profit from the wrongdoer. In such cases, though, it would seem inappropriate to construe this provision as precluding the Commission's right to exercise its discretion to seek full disgorgement in order to prevent unjust enrichment.¹⁸⁸ The ITSA evinces congressional intent to increase the enforcement powers of the SEC, and it would appear to circumvent the bill's underlying purpose to construe any of its provisions as limiting the Commission's power to redress insider trading.

On the other hand, it is arguable that the ITSA codified the maximum profit that an inside trader may be required to disgorge, and that a further assessment would constitute an unjust penalty. Certainly this point will be argued by the inside trader whose fraud is revealed and whose profits exceed treble damages under the ITSA. Although it remains for the courts to construe and apply the ITSA, by analyzing the origin, purpose, and development of both the disgorgement remedy and the equal footing concept, certain postulations as to the remedial impact of the ITSA may be set forth.

185. Congress noted that passage of the ITSA now vests the SEC with three remedies with which to combat insider trading. "[F]irst, an order enjoining the violator from breaking the law again; second, disgorgement of illicit profits; and third, a civil penalty of up to three times the profit gained or loss avoided." CONFERENCE REPORT, *supra* note 183, at 8.

186. "Because of the inadequate deterrent provided by present enforcement remedies for insider trading, the Commission, in September 1982, requested Congress to enact legislation to provide a civil penalty of an amount up to three times the profit gained or loss avoided from insider trading. This legislation embodies that request." CONFERENCE REPORT, *supra* note 183, at 8. "The Committee believes that providing the Commission the power to seek a civil penalty is the best way to accomplish the goal of deterring inside trading." *Id.* at 13.

187. See *supra* note 178.

188. See *R.J. Allen*, 386 F. Supp. at 881 ("The effective enforcement of of the federal securities laws requires that the Commission be able to make violations unprofitable."); *Cf. Blatt*, 583 F.2d at 1325; *Commonwealth Chemical.*, 574 F.2d at 90; *Penn Central*, 425 F. Supp. at 593; *Golconda Mining*, 327 F. Supp. at 259; SEC ANNUAL REPORT, *supra* note 19; E. GADSBY, *supra* note 1.

V. THE DISGORGEMENT REMEDY IN SEC RULE 10b-5 INSIDER TRADING SUITS: PERSPECTIVE AND DIRECTION

On balance, it appears that bare application of equal footing in SEC rule 10b-5 insider trading actions controverts case law interpretation of the purpose of disgorgement,¹⁸⁹ the SEC's objectives in bringing such suits,¹⁹⁰ and recently expressed congressional intent.¹⁹¹ The *MacDonald* dissent and the enactment of the ITSA reflect the inadequacies of, and disenchantment with, modern application of the disgorgement remedy in SEC insider trading actions.¹⁹² While the *MacDonald* dissent conceded a lack of case law directly supporting its position, a careful reading of prior law demonstrates the absence of case law supporting the majority view as well.

Initially, federal courts applied the notion of equal footing under rule 10b-5 in cases resulting from the infamous *Texas Gulf Sulphur* litigation.¹⁹³ The remedies applied in those cases, however, were the culmination of the most complex securities litigation in history and arose from a spectacular fact pattern surrounding the misleading press release in which Texas Gulf Sulphur falsely dispelled rumors of its now legendary precious metal strike. Indeed, in *Mitchell v. Texas Gulf Sulphur*, the first federal circuit case to answer the question of remedy in the *Texas Gulf Sulphur* litigation, the Tenth Circuit clearly stated that the uniqueness of the litigation required that its remedy not be reviewed as controlling precedent beyond the facts of the case because "the rule styled by this court is fashioned for these unprecedented circumstances."¹⁹⁴ Further, *Mitchell* was a private suit and public equity could not have been an issue as it is in SEC enforcement actions.¹⁹⁵

Moreover, both *Mitchell* and *SEC v. Texas Gulf Sulphur* framed remedies premised essentially upon restitutional principles and did not apply disgorgement.¹⁹⁶ Restitution is designed to make private parties whole, a concept

189. See, e.g., *Blatt*, 583 F.2d at 1325; *Commonwealth Chemical*, 574 F.2d at 90; *Janigan*, 344 F.2d at 786; *Penn. Central*, 425 F. Supp. at 593. See *supra* notes 3, 12, 19, 62-72, 139-42 and accompanying text.

190. See *supra* notes 19, 33, 60-61, 145, and accompanying text. Cf., *Golconda Mining*, 327 F. Supp. at 259 ("To permit . . . the return of . . . illicit profits would impair the full impact of the deterrent force that is essential if adequate enforcement of the securities acts is to be achieved.").

191. See Insider Trading Sanctions Act of 1984, *supra* notes 177-88 and accompanying text.

192. See *supra* notes 162-75, 177, 185 and accompanying text.

193. See *Mitchell*, 466 F.2d at 90; *Texas Gulf Sulphur*, 446 F.2d at 1301; *supra* notes 84-108 and accompanying text.

194. See *Mitchell*, 446 F.2d at 105.

195. See *R.J. Allen*, 386 F. Supp. at 881; *supra* notes 19, 33, 60-61 and accompanying text.

196. Although *Mitchell* did not refer to its remedy as restitution and indeed claimed it was not applying that remedy, the remedy it did apply is founded upon notions of mitigation,

inapplicable to Commission suits where the SEC has no direct pecuniary interest and appears as a "public plaintiff" on behalf of public equity.¹⁹⁷ By applying restitution in the guise of equal footing in *SEC v. Texas Gulf Sulphur*, the Second Circuit refrained from exploring the scope of its remedial powers because it did not factor the SEC's enforcement role into its remedial equation.¹⁹⁸ The court applied equal footing apparently to preclude the virtually limitless liability that would otherwise have been assessed had the court attempted to apply full disgorgement.¹⁹⁹ Still, by applying this measure of liability, the court permitted the defendants to retain a portion of the fruits of illicit conduct, a result that provides no deterrence against rule 10b-5 insider trading.

In both *SEC v. Shapiro* and *SEC v. Commonwealth Chemical*, however, the Second Circuit broke new ground and broadened its remedial breadth by applying equal footing to effectuate disgorgement of "paper profits," gains in market value lost when the post-disclosure retention of tainted securities proved unprofitable.²⁰⁰ The *MacDonald* dissent appropriately noted that requiring full disgorgement of phantom profits in such cases should not be read as precedent for permitting the retention of actual profits realized by an inside trader after the equal footing date.²⁰¹ Yet, relying on *Shapiro* as well as the *Texas Gulf Sulphur Cases*, the *MacDonald* majority rendered that interpretation in an instance where the market value of the illegally purchased stock rose after the equal footing period. By using equal footing, the majority allowed the wrongdoer to keep windfall profits resulting from his post-disclosure retention of the tainted securities.²⁰²

Because it is premised primarily on a causation analysis, the *MacDonald* holding and conclusion appear shallow. First, the nature of the marketplace itself is speculative, and because of the risk of market fluctuations, the inside trader's retention of stock after the material information utilized has been

which are akin to restitution. See *Mitchell*, 446 F.2d at 106 (relief would be denied from point where plaintiffs did not exercise due diligence). In *SEC v. Texas Gulf Sulphur*, on the other hand, the Court specifically applied restitution. 446 F.2d at 1307-09.

197. See also *MacDonald*, 699 F.2d at 55-58; *Commonwealth Chemical*, 574 F.2d at 95; *Petrofunds*, 420 F. Supp. at 960; *supra* notes 19, 33, 60-61 and accompanying text.

198. In both *Mitchell* and *SEC v. Texas Gulf Sulphur*, however, the Commission was first establishing its right to seek any form of money damages and was well satisfied with any form of monetary restoration. See *supra* note 18 and accompanying text.

199. See *supra* note 107 (referencing the nature and extent of liability faced by the Texas Gulf Sulphur Company if all the plaintiffs were granted the relief they sought).

200. See *Commonwealth Chemical*, 574 F.2d at 90; *Shapiro*, 494 F.2d at 301; see also *supra* notes 123-42 and accompanying text.

201. See *MacDonald*, 699 F.2d at 56 (Coffin, C.J. & Bownes, J., dissenting); see also *supra* note 145 and accompanying text.

202. *MacDonald*, 699 F.2d at 52-55.

revealed is also a gamble. The Supreme Court has clearly stated that equity requires the wrongdoer to bear the risk where the nature of the wrong creates speculative damages.²⁰³ This concept should apply with full vigor to insider trading because market value fluctuations resulting from disclosure of material information make the extent of insider liability an uncertain and highly contested issue.²⁰⁴ The measure of insider liability is further clouded in SEC suits where damages are sought on behalf of public equity, as opposed to remedies designed to make private parties whole.²⁰⁵ In measuring disgorgement in Commission actions, courts must shape the remedy to effectuate the SEC's duty to deter violations and promote fair play in the marketplace because the capital formation necessary to effectuate economic growth is largely dependent on investor confidence in the fairness and integrity of the securities industry.²⁰⁶ Clearly, there is now substantial doubt whether bare application of the equal footing concept is appropriate in the context of a Commission suit.²⁰⁷ Consequently, it would comport with Supreme Court decisional law to resolve this doubt against the inside trader.²⁰⁸

While the equal footing concept is not without merit,²⁰⁹ in the context of SEC suits it effectively undermines the deterrent force needed to combat insider trading.²¹⁰ Damage done to investor confidence and other societal harm are not considered under this measure of insider liability.²¹¹ Using equal footing in a context that allows the inside trader to retain profits controverts *Janigan v. Taylor*, which held that equity requires the inside trader

203. See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265. (1945); see also *Affiliated Ute*, 406 U.S. at 155; *Janigan*, 344 F.2d at 786; *supra* notes 62-72 and accompanying text.

204. See *supra* notes 54-59 and accompanying text. See, e.g., *Janigan*, 344 F.2d at 786; *Blau*, 286 F.2d at 786; *Adler*, 267 F.2d at 840; *Smolowe*, 136 F.2d at 231.

205. See *Commonwealth Chemical*, 574 F.2d at 95; see also *supra* note 3.

206. See CONF. REP., *supra* note 183, at 2; see also *supra* note 181.

207. See *MacDonald*, 699 F.2d at 55-58; Insider Trading Sanctions Act of 1984, *supra* note 177, § 2(a); see also *supra* notes 177-88 and accompanying text.

208. See *Bigelow*, 327 U.S. at 265; accord *Affiliated Ute*, 406 U.S. at 155. See also *MacDonald*, 699 F.2d at 55 (majority noting that "although we have distinguished *Janigan* on the facts, we do not depart from the principle that doubts are to be resolved against the defrauding party").

209. See *MacDonald*, 699 F.2d at 55 (dissent noting that the majority's view would be "unanswerable" in insider trading cases involving "private individuals, one defrauded and the other defrauding").

210. See *id.* Accord *Shapiro*, 494 F.2d at 1309; see also *supra* note 178 (Congress noting that even full disgorgement merely restores the inside trader to the monetary position he would have been in if he had not violated the law in the first place). Cf. *Management Dynamics*, 515 F.2d at 808 ("crucial error" for dependants to assume that SEC enforcement actions are governed by same criteria as private suits).

211. See *MacDonald*, 699 F.2d at 55 (Coffin, C.J. & Bownes, J., dissenting); see also *supra* notes 33, 60, 180 and accompanying text.

to disgorge speculative, unforeseeable profits.²¹² In *MacDonald*, the defendant's post-disclosure retention of securities was speculative and the profits resulting were unforeseeable. By applying equal footing, the First Circuit Court of Appeals permitted the defendant to retain windfall profits. Further, a decision to retain the securities may be directly related to the actual fraud as where the inside trader keeps the securities in order to make the violation less obvious. In such a case, application of equal footing would permit the insider to retain the unforeseeable fruits of the act of concealing a securities fraud.

Although *Janigan* was a private suit in which the court could not have applied equal footing because there was no disclosure date, the spirit of the holding should logically apply with even greater vitality to SEC public law enforcement actions.²¹³ In Commission suits it cannot be argued that the plaintiff could have invested upon disclosure of the previously nonpublic information and mitigated losses. Rather, the plaintiff is a public servant protecting broad societal interests and federal courts should account for those interests by applying the remedy that achieves the maximum deterrent effect.²¹⁴ Otherwise, the remedy equates the Commission with a private plaintiff, thereby undermining the SEC's role as statutory enforcer of federal securities laws.²¹⁵

Additionally, equal footing places the SEC in the remedial shoes of a private plaintiff, a result that is contrary to case law,²¹⁶ and now, contrary to express congressional intent.²¹⁷ The enactment of the Insider Trading Sanctions Act of 1984 expressly places the SEC in greater stead than private parties by empowering the Commission with the discretionary authority to seek three times equal footing profits in addition to any other relief it is presently entitled to request.²¹⁸ By ensuring that the Commission's remedial

212. *Janigan*, 344 F.2d at 786.

213. See *MacDonald*, 699 F.2d at 57-58 (Coffin, C.J. & Bownes, J., dissenting) (finding more "vitality" in *Janigan*, noting that although some courts have refused to apply *Janigan* in private suits where the fraudulently purchased securities are publicly traded "the SEC's remedial powers are not so restricted").

214. See *Shapiro*, 494 F.2d at 1309; *Manor Nursing*, 458 F.2d at 1104; *Golconda Mining*, 327 F. Supp. at 259.

215. See *supra* notes 196, 212 and accompanying text; see also *Petrofunds*, 420 F. Supp. at 960 ("[R]elief sought by the SEC . . . cannot fairly be analogized to any form of relief available at common law . . . [but] springs out of the policy of public enforcement of the provisions of the securities laws and exists as an exercise of the equity powers of the federal courts.").

216. See *Petrofunds*, 420 F. Supp. at 960 ("[T]he SEC in no way stands in the shoes of a private plaintiff with respect to its claims for ancillary relief"); see also *supra* notes 33, 196 and accompanying text.

217. See generally Insider Trading Sanctions Act of 1984, *supra* notes 177-88 and accompanying text.

218. See *supra* note 185 and accompanying text.

relief is not limited by traditional principles of restitution, Congress clearly evinced its intent to assist the SEC in combating insider trading.²¹⁹ Restitutional principles are generally appropriate in private actions where the remedy is intended to protect investors by making them whole.²²⁰ Such concepts, however, have little relevance in SEC suits where the measure of disgorgement should be all tainted profits so that the remedy removes any unjust enrichment and serves as a deterrent mechanism.²²¹

With the passage of the Insider Trading Sanction Act, federal courts are now vested with discretion to shape any one of several forms of remedial relief in instances of SEC rule 10b-5 insider trading actions. At a minimum, federal courts will require restoration of profits as measured under the equal footing principle.²²² Secondly, under section 2 of the ITSA, courts may compel disgorgement of up to three times the profit gained or loss avoided as of the equal footing date.²²³ Third, under general principles of equity, where insider profits exceed three times equal footing, federal courts may compel full disgorgement to ensure restoration of all unjust enrichment.²²⁴

Although the *MacDonald* majority refused to apply full disgorgement, the ITSA supports the minority's view that the SEC may seek relief sufficient to account for damage done to investor confidence and the integrity of the marketplace.²²⁵ Furthermore, under the updated version of Section 32 of the 1934 Act, a \$100,000 penalty fee may also be assessed for willful violations.²²⁶ Thus, in a proper case, to account for these broad societal interests, the Commission may seek full disgorgement as well as a penalty assessment to accomplish express congressional objectives.

219. *Id.* See also 129 CONG. REC., *supra* note 178, at H7012 (statement of Rep. Wirth) (the ITSA "gives the Securities and Exchange Commission the tools it needs to combat insider trading and other abuses in the securities markets.").

220. See D. DOBBS, *supra* note 5.

221. See generally *MacDonald*, 699 F.2d at 55-58 (Coffin, C.J. & Bownes, J., dissenting); *Blatt*, 583 F.2d at 1335; *Penn Central*, 425 F. Supp. at 599; E. GADSBY, *supra* note 1; see also *supra* notes 12-13, 162-75 and accompanying text.

222. See, e.g., *MacDonald*, 699 F.2d at 52-55; *SEC v. Texas Gulf Sulphur*, 446 F.2d at 1307-08; *supra* notes 96-107, 153-61 and accompanying text.

223. Insider Trading Sanctions Act of 1984, *supra* note 177 § 2(a) (amending 15 U.S.C. § 78u(d)).

224. Although the Act limits the measure of disgorgement to three times equal footing profits when the Commission proceeds under § 2(a), it does not thereby prohibit the SEC from seeking full disgorgement where inside profits exceed treble damages under the ITSA. Congress specifically noted that § 2(a) may be used instead of, or in addition to, any remedies presently available to the Commission. See Conference Report, *supra* note 183 and accompanying text. "Enactment of this legislation would have no effect on the Commission's existing independent authority to bring civil actions for injunctions and ancillary relief." *Id.* at 9.

225. See *supra* notes 178, 181 and accompanying text.

226. Insider Trading Sanctions Act, *supra* note 177, § 3 (amending 15 U.S.C. § 78ff). This provision is not limited to insider trading.

Federal courts have yet to face the issue of the proper measure of disgorgement in light of the recent enactment of the ITSA, and at this point how they will rule on this issue is a matter of speculation. Which measure of disgorgement is appropriate will doubtless depend on the facts and circumstances of each case. It is likely, though, that federal courts will shift away from equal footing as the sole measure of insider trading liability in SEC suits,²²⁷ particularly in light of the ITSA and the congressional intent surrounding its passage. Federal courts that continue to use the equal footing measure of disgorgement must now consider adding up to three times that amount onto the profits that must be restored under rudimentary equal footing. Furthermore, where the civil treble damages penalty provision is insufficient to capture all insider profits, full disgorgement appears to be the only remedy that will serve as an adequate deterrent mechanism and remove all unjust enrichment.²²⁸

Under the language of the ITSA, it is clear that the SEC can seek greater monetary relief than may a private party.²²⁹ It would appear, then, that contrary to the *MacDonald* holding, federal courts are entitled to compel full disgorgement whenever necessary to ensure the restoration of all unjust enrichment and account for the public equity interests at stake in SEC enforcement suits. Congress has now established that such societal interests should be factored into the measure of disgorgement. Therefore, *MacDonald's* precedential value is tenuous at best, because the majority rationale has now been subverted by express congressional intent. Thus, armed with the ITSA treble damages clause and the amendment of section 32 of the 1934 Act providing for fines of up to \$100,000, the SEC may now seek disgorgement that serves as a true disincentive to insider trading. It appears, then, that federal courts must now observe congressional intent and find that the SEC is entitled to a measure of disgorgement that is greater than that available to a private plaintiff.

VI. CONCLUSION

Since the seminal decision in *SEC v. Texas Gulf Sulphur*, equal footing—the restoration of insider profits accruing before disclosure of material, non-

227. See *supra* note 177. See also *Cheney & Sibears*, *supra* note 2, at 12:

The cases reflect a transition from reliance on the law of damages and restitution to a consideration of disgorgement, not only as a way to deprive wrongdoers of ill-gotten gains, but as a means to deter future violations . . . and to prevent injury to the public interest defined as preserving capital markets that are equitable and fair

228. See, e.g., *Janigan*, 344 F.2d at 786; *supra* notes 62-72.

229. See *supra* note 185.

public information—has emerged as the minimum measure of disgorgement in SEC insider trading actions under rule 10b-5. The principle is well-suited to private actions where defrauded parties can mitigate losses by investing in securities upon learning of the previously nonpublic information. But, where there is no subsequent disclosure or no public market for the stock, as in *Janigan*, full disgorgement is the appropriate measure of liability because private parties do not have the opportunity to mitigate their losses.

In SEC enforcement actions, however, full disgorgement may always be the proper remedy because application of equal footing raises significant problems. First, equal footing places the SEC in the shoes of a private plaintiff, a result that is contrary to both case law and congressional intent in creating the SEC to serve as statutory guardian of federal securities laws. Second, equal footing does not account for diffuse societal harm, which includes damage to investor confidence and violation of the integrity of the securities marketplace. It is the Commission's duty to protect these societal interests as well as reproach transgressions of those interests. Third, equal footing is based on a causal relation analysis that is largely flawed. In a private suit, such an analysis is appropriate because disclosure gives rise to the ability to mitigate losses. But an analysis premised on the concept of mitigation has no place in a Commission action where the SEC has no direct pecuniary interest in the outcome of the litigation. Rather, the Commission sues on behalf of public equity to ensure that wrongdoing is made unprofitable and to deter future violations.

In addition, Congress evinced dissatisfaction with the use of equal footing in Commission suits by enacting the Insider Trading Sanctions Act of 1984, which vests the SEC with the power to seek three times equal footing profits. The Act formally establishes the Commission's power to seek monetary relief greater than that to which a private plaintiff is entitled, and thus, effectively vitiates the rationale of *MacDonald* because the majority placed the SEC in the same remedial shoes as a private plaintiff. Although the breadth of treble damages under the Insider Trading Sanctions Act will usually be sufficient to capture all insider profits, instances will arise where the insider's profits exceed the scope of this remedy. In such cases, principles of public equity, deterrence, and unjust enrichment, as espoused by the *MacDonald* dissent, should guide courts in fashioning a remedy that removes all tainted profit from the wrongdoer. The only remedy that accomplishes this is full disgorgement.

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