SECURITIES—TRANSANATIONAL APPLICATION OF ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS EXPANDED—*SEC v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

Churchill Forest Industries (CFI), a Canadian corporation with an office in New Jersey, and River Sawmills Company (River), a Delaware corporation, entered into investment contracts with the Manitoba Development Fund (the Fund).[1] In *Securities and Exchange Commission v. Kasser*[2] these agreements became the basis of an action seeking injunctive and ancillary relief[3] for alleged violations of the anti-fraud provisions of the federal securities laws.[4] Alexander Kasser, a United States citizen, owned and controlled both CFI and River.[5] The Securities and Exchange Commission (SEC) alleged that Kasser, along with other individual and corporate defendants, had induced the Fund to enter into agreements with the two corporations on the basis of false representations in violation of section 17(a) of the Securities Act of 1933 (1933 Act)[6] and section 10(b) of the Securities Exchange Act of 1934 (1934 Act).[7] In accordance with the agreements,

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[1] SEC v. Kasser, 548 F.2d 109, 111 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977). The Fund was "wholly owned by the Province of Manitoba, Canada." 548 F.2d at 111. Its purpose was to encourage the private sector to "creat[e] . . . a forestry development in that province." *Id.* Accordingly, the proceeds derived from the investment contracts with CFI and River were to be used "to establish the forestry development." *Id.*

[2] 548 F.2d 109, 111–12, 112 n.7 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

[3] 548 F.2d at 112. The injunction was sought to prevent further violations of the federal securities laws. *Id.* The requested ancillary relief included an accounting and restitution. SEC v. Kasser, 391 F. Supp. 1167, 1169 (D.N.J. 1975), *rev'd*, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

[4] 548 F.2d at 111–12, 112 n.7.

[5] SEC v. Kasser, 391 F. Supp. 1167, 1169 (D.N.J. 1975), *rev'd*, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977). Alexander Kasser also "owned and dominated" other corporate defendants through which the defrauded funds were filtered. 548 F.2d at 111.

[6] 15 U.S.C. § 77q(a) (1976); 548 F.2d at 111, 112 & n.7.

[7] 15 U.S.C. § 78j(b) (1976); 548 F.2d at 111, 112 & n.7. The SEC also alleged a violation of SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1977). 548 F.2d at 111, 112 & n.7. Kasser and his associates had represented that they would make equity investments in both CFI and River when, in fact, they never intended to do so. *Id.* at 111. Furthermore, after the initial investment, the defendants continued to falsely represent that the monies were being used to finance the development of a forestry when in fact they were being converted to their personal use. *Id.* It was alleged that this was a material misrepresentation in violation of SEC Rule 10b-5. *Id.* at 112 n.7. The rule states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interestate [*sic*] commerce, or of the mails or of any facility of any national securities exchange,
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> (a) To employ any device, scheme, or artifice to defraud,

the Fund, upon being informed that the defendants had made the requisite equity investments in each corporation, advanced loans to CFI and River in exchange for their debentures.[8] However, contrary to the agreements, the proceeds of each loan were used to make the necessary equity investments for subsequent loans.[9] The complaint further alleged that Kasser and the other defendants had converted the proceeds of the loans to their personal use, thereby bankrupting both CFI and River.[10]

The SEC recognized that neither corporation had stock registered or traded on an organized American securities exchange and that there was minimal, if any, impact upon the United States securities markets since the sole defrauded party was a foreign corporation.[11] Nevertheless, in support of their contention that the federal district court had subject matter jurisdiction, the SEC alleged that substantial activity in furtherance of the fraud had been conducted within the United States.[12] These activities included various negotiations, the execution of at least one investment contract, the use of interstate commerce and the processing of the fraudulently obtained money through the New York branch of a Swiss bank.[13]

The district court, upon motion by the defendants, dismissed the action stating that subject matter jurisdiction could not be based upon "conduct without *effect* in the United States."[14] The Court of Appeals

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(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1977).

Section 17(a) of the 1933 Act, 15 U.S.C. § 77q(a) (1976), proscribes similar conduct in connection with the initial offering of securities.

[8] 548 F.2d at 111.

[9] *Id.* By employing this " 'ponzi'-like scheme," *id.*, the defendants were able to induce the Fund to advance approximately $38 million to CFI and eight million dollars to River. SEC v. Kasser, 391 F. Supp. 1167, 1171, 1172 (D.N.J. 1975), *rev'd*, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

[10] 548 F.2d at 111.

[11] *Id.* at 112.

[12] *See id.* at 111–12.

[13] *Id.* at 111. The complaint also alleged the following contacts with the United States: the corporate defendants either had an office in this country or were incorporated here; some of the agreements were drafted in the United States but executed elsewhere; the business records relating to the fraudulent transactions were maintained in this country; and the monies received were passed through United States banks. *Id.*

[14] *Id.* at 112 (emphasis added). The district court stated that there may be "a legitimate governmental interest in applying the securities legislation to Americans who

for the Third Circuit reversed, holding that the acts of the defendants in the United States were sufficient to establish subject matter jurisdiction.[15]

The language of the 1934 Act leaves open the issue of whether the Act's protective powers apply to the claims of individuals victimized by a transnational securities fraud.[16] Nowhere in the legislative history of the 1934 Act, nor in its jurisdictional provision, is there a limitation of subject matter jurisdiction.[17] One purpose of the 1934

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fraudulently issue securities in essentially foreign transactions." SEC v. Kasser, 391 F. Supp. 1167, 1177 (D.N.J. 1975), *rev'd*, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977). Nonetheless, it found jurisdiction to be lacking in *Kasser* since the conduct within the United States only amounted to " 'miscellaneous acts.' " 548 F.2d at 112. The court added that it "was not the proper forum for adjudication of th[at] controversy." 391 F. Supp. at 1177. Interestingly, the court of appeals read the district court's opinion as assuming that certain conditions could give rise to jurisdiction but that the miscellaneous character of the acts in *Kasser* were insufficient for subject matter jurisdiction in that case. *See* 548 F.2d at 112.

[15] 548 F.2d at 111–12.

[16] The 1934 Act's jurisdictional provision, section 27, 15 U.S.C. § 78aa (1976), provides that

> [t]he district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of [the 1934 Act] or the rules and regulations thereunder, and of all suits . . . brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder . . . . Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business. . . .

[17] *See id.* There has been ample discussion of this issue both in case law and commentary. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir.) (court unable to cite any statutory language concerning jurisdiction), *cert. denied*, 423 U.S. 1018 (1975); Venture Fund (Int'l) N.V. v. Wilkie Farr & Gallagher, 418 F. Supp. 550, 554 (S.D.N.Y. 1976) ("no explicit Congressional learning on the subject" of jurisdiction); SEC v. Gulf Intercontinental Fin. Corp., 223 F. Supp. 987, 995 (S.D. Fla. 1963) (there is no provision in either the 1933 or 1934 Act which would restrict the protection of their anti-fraud provisions to American residents only); Ferraioli v. Cantor, [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,615, at 95,310, 95,310–11 (S.D.N.Y. 1965) (neither the legislative history nor the statute itself suggests a congressional intent concerning its extraterritorial application). *See also* Comment, *The Transnational Reach of Rule 10b–5*, 121 U. PA. L. REV. 1363, 1364 (1973); Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553, 553 & n.4 (1976); 34 OHIO ST. L. J. 342, 342 (1973); 20 WAYNE L. REV. 167, 168–69 (1973).

It can be inferred that there was in fact some congressional concern with fraudulent transnational transactions which resulted in the enactment of section 30(b) of the 1934 Act, 15 U.S.C. § 78dd(b) (1976). Comment, *Subject Matter Jurisdiction in Transnational Securities Fraud*, 3 OHIO N.U.L. REV. 1305, 1314 (1976). This provision provides that

> [t]he provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contraven-

Act, as stated in the title, is the prevention of "inequitable and unfair practices on [securities] exchanges and markets" through the use of interstate or foreign commerce.[18] Interstate commerce, as defined by the statute, includes "trade, commerce, transportation, or communication . . . between any foreign country and any State."[19] Furthermore, the anti-fraud provision of section 10(b) of the 1934 Act expressly forbids the use, by any person, of the instruments of interstate commerce in furtherance of a scheme to defraud.[20] In the absence of a specific statutory reference, the responsibility for determining the transnational scope of the securities acts has been left to the courts.[21]

The Second Circuit has provided the leading case law concerning the transnational application of the anti-fraud provisions of the se-

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tion of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.

The decision of Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960), interpreted the statute as exempting from the 1934 Act those transactions outside of the United States which are done pursuant to a business in securities. *Id.* at 390–91. Although section 30(b) of the 1934 Act specifically addresses the issue of a person who conducts a securities business, one court has interpreted this also to exempt the isolated transaction since it reasoned that if Congress had intended to exempt a business it must also have intended to exempt the isolated transaction. Ferraioli v. Cantor, [1964–1966 Transfer *Binder*] FED. SEC. L. REP. (CCH) ¶ 91,615 at 95,310, 95,311 (S.D.N.Y. 1965). *See also* Note, *Extraterritorial Application of the Securities Exchange Act of 1934*, 69 COLUM. L. REV. 94,106 (1969). This view was rejected by the Second Circuit. Schoebaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir. 1968). The *Schoenbaum* court did not read the statute as exempting all transactions outside the United States since Congress expressly exempted only those persons who transact a business in securities. *Id.* For a discussion of section 30(b) of the 1934 Act, see 3 A. BROMBERG, SECURITIES LAW § 11.2 (570), at 246.11–.12 (1975); 5 A. JACOBS, THE IMPACT OF RULE 10b-5 § 37.02, at 2-24 to -25 (1977); Comment, *supra*, 121 U. PA. L. REV. at 1390–91.

[18] Securities Exchange Act of 1934, ch. 404, title, 48 Stat. 881. The statement of purpose in the 1934 Act would seem to contemplate extraterritorial application since it was "[t]o provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and *foreign commerce* and through the mails, to prevent inequitable and unfair practices on such exchanges and markets." *Id.* (emphasis added); *accord*, Securities Act of 1933, ch. 38, title, 48 Stat. 74 (purpose of 1933 Act "full and fair disclosure of the character of securities sold in interstate and foreign commerce"); *see* Investment Properties Int'l, Ltd. v. I.O.S., Ltd., [1970–1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,011, at 90,726, 90,736 (S.D.N.Y. 1971); S. REP. NO. 47, 73d Cong., 1st Sess. 1 (1933).

[19] 15 U.S.C. § 78c(a) (17) (1976). Although the 1933 Act similarly defines " 'interstate commerce,' " *id.* § 77b(7), neither Act provides a definition of "foreign commerce." *See* 1933 Act, 15 U.S.C. §§ 77a to 77bbbb (1976); 1934 Act, *id.* §§ 78a to 78kk.

[20] *Id.* 78j(b) (1976).

[21] *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) (in the absence of specific statutory mandate the court relied on prior law and commentary).

curities laws.[22] In the first of these cases, *Schoenbaum v. Firstbrook*,[23] the court held that the congressional interest in protecting domestic investors and the domestic securities market warranted a finding in favor of extraterritorial application.[24] The plaintiff, an American citizen who held stock in a Canadian corporation, alleged damages due to the insider trading of defendant directors.[25] The court found that all of the fraudulent activities had occurred outside the United States.[26] However, the facts that the stock was registered with the SEC, traded on a domestic securities exchange and the transaction was detrimental to an American investor were considered to be of "a sufficiently serious *effect* upon United States commerce to" warrant subject matter jurisdiction.[27] The *Schoenbaum* decision was,

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[22] *See* 548 F.2d at 113; Note, *supra* note 17, 89 HARV. L. REV. at 571. Justice Blackmun has referred to the Second Circuit as the " 'Mother Court' " of securities law. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).

[23] 405 F.2d 200 (2d Cir.), *rev'd in part and remanded in part on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969).

[24] 405 F.2d at 206. The district court had been of the opinion that the anti-fraud provisions of the securities laws had no extraterritorial application and therefore held that no liability existed because of the foreign character of the transaction. Shoenbaum v. Firstbrook, 268 F. Supp. 385, 392 (S.D.N.Y. 1967), *aff'd on other grounds*, 405 F.2d 200 (2d Cir.), *rev'd in part and remanded in part on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969).

[25] 405 F.2d at 204. It was alleged that the insider trading caused the corporation to lose approximately $10 million upon the sale of its treasury stock. *Id.* at 205. Although the district court had found the sole injured party to be the foreign corporation, Judge Lumbard, writing for the court of appeals, found that the loss had caused a reduction in the equity of the corporation resulting in lower offers for the plaintiff's stock. *Id.* at 208.

[26] *Id.* at 206.

[27] *Id.* at 208–09 (emphasis added).

The RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(a) (1965) states that

> [a] state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . .
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> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems. . . .

Cf. id., Reporters' Notes, n.2 at 53 (anti-trust violations). For a discussion of an "effect" within the United States as the basis of jurisdiction see 5 A. JACOBS, *supra* note 17, § 37.02, at 2-21 to -22; Mizrack, *Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities and Exchange Act of 1934*, 30 BUS. LAW. 367, 367–72 (1975); Comment, *An Interest Analysis Approach to Extraterritorial Application of Rule 10b–5*, 52 TEXAS L. REV. 983 (1974); Comment, *supra* note 17, 30 U. PA. L. REV. at 1378–86; 34 OHIO ST. L.J. 342 (1973).

The *Schoenbaum* court rejected the argument that section 30(b) of the 1934 Act, 15 U.S.C. § 78dd(b) (1976), exempted an isolated securities transaction from the jurisdiction of the federal district courts. 405 F.2d at 207–08. For a discussion of section 30(b), see note 17 *supra*.

nonetheless, unclear as to whether subject matter jurisdiction would attach only when *both* American investors *and* securities listed on a domestic exchange were involved or whether either element, standing alone, would be sufficient.[28]

Four years later in *Leasco Data Processing Equipment Corp. v. Maxwell*,[29] the Second Circuit held that it had subject matter jurisdiction over an action brought by an American investor since there was substantial activity within the United States.[30] The court reached this conclusion despite the fact that the foreign securities were not registered with the SEC or traded on an American exchange.[31] Judge Friendly, in dicta, expressed doubt as to whether Congress intended that jurisdiction should attach solely on the basis that the defrauded party was an American where the stock was neither registered nor listed on a national securities exchange.[32] However, where

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[28] *See* 405 F.2d at 208. The court held that the federal district courts have jurisdiction "*at least* when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors." *Id.* (emphasis added); 7 VAND. J. TRANSNAT'L L. 770, 774 (1974).

In Finch v. Marathon Sec. Corp., 316 F. Supp. 1345 (S.D.N.Y. 1970), neither of the *Schoenbaum* elements were present. The district court, relying upon the *Schoenbaum* decision, dismissed the action due to a lack of subject matter jurisdiction. The court reached this conclusion since the fraudulent conduct occurred outside this country, the plaintiff and defendants were foreigners, the securities were neither registered nor traded on an American securities exchange and no injury was shown to have occurred in the United States. *Id.* at 1349.

Many courts have relied on the *Schoenbaum* decision for guidance. *E.g.*, Selzer v. Bank of Bermuda, Ltd., 385 F. Supp. 415, 418 (S.D.N.Y. 1974); Manus v. Bank of Bermuda, Ltd., [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,299, at 91,648, 91,650 (S.D.N.Y. 1971); Investment Properties Int'l, Ltd. v. I.O.S., Ltd., [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,011, at 90,726, 90,735 (S.D.N.Y. 1971).

[29] 468 F.2d 1326 (2d Cir. 1972).

[30] *Id.* at 1335, 1336, 1337–38. The activities within this country consisted primarily of meetings and the use of telephones and the mails. *Id.* at 1335. The Court of Appeals for the Second Circuit opined that if all the fraudulent acts had occurred outside the United States, as was the case in *Schoenbaum*, it "would entertain [a] most serious doubt whether" the federal securities laws would apply. *Id.* at 1334. The court held this view since the defrauded party was a foreign subsidiary of an American corporation purchasing foreign securities which were neither registered nor traded on any organized domestic market. *Id.* at 1334, 1337–38; *see* SEC v. United Financial Group, Inc., 474 F.2d 354, 357 (9th Cir. 1973) (jurisdiction exists where there is substantial activity within the United States despite the fact that mainly foreigners were defrauded); Madonick v. Denison Mines, Ltd., [Current Volume] FED. SEC. L. REP. (CCH) ¶ 94,550, at 95,907, 95,908 (S.D.N.Y. 1974) (subject matter jurisdiction exists when substantial activity occurs within the United States); 3 A. BROMBERG, *supra* note 17, § 11.2 (570), at 246.13.

[31] 468 F.2d at 1336. One author has interpreted *Leasco* as both going beyond *Schoenbaum* and limiting *Schoenbaum* to its facts. *See* 20 WAYNE L. REV. 167, 175 (1973).

[32] 468 F.2d at 1334; *accord*, SEC v. Capital Growth Co., S.A., 391 F. Supp. 593, 596–97 (S.D.N.Y. 1974) (jurisdiction exists when there has been significant conduct

fraudulent activity did occur within the United States and an American was defrauded, the fact that the foreign securities were not registered or listed on a domestic securities exchange would not, standing alone, defeat subject matter jurisdiction.[33]

Shortly after *Leasco*, the Second Circuit rendered two major transnational securities fraud decisions on the same day. *Bersch v. Drexel Firestone, Inc.*,[34] and *IIT v. Vencap, Ltd.*,[35] have been characterized as "clarifying and expanding the basis for rule 10b-5 liability predicated on acts in the United States."[36] At the time of these deci-

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within this country or conduct "was harmful to and . . . had an impact upon United States investors"); Selzer v. Bank of Bermuda, Ltd., 385 F. Supp. 415, 418 (S.D.N.Y. 1974) (jurisdiction may exist where stock is listed on a national exchange, or where there are misrepresentations made in the United States, or when American investors, in general, are defrauded); Madonick v. Denison Mines, Ltd., [Current Volume] FED. SEC. L. REP. (CCH) ¶ 94,550, at 95,907, 95,909 (S.D.N.Y. 1974) (subject matter jurisdiction can exist despite fact that foreign securities are not registered or traded on American securities exchanges).

The RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (a) (1965) states that a nation has the power "to prescribe a rule of law . . . attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory." The Restatement also provides the following example:

> X and Y are in state A. X makes a misrepresentation to Y. X and Y go to state B. Solely because of the prior misrepresentation, Y delivers money to X. A has jurisdiction to prescribe a criminal penalty for obtaining money by false pretenses.

Id. § 17, Comment a, Illustration 2.

[33] *See* 468 F.2d at 1335–36. Judge Friendly, in suggesting this line of reasoning, phrased this question: "[I]f Congress had thought about the point . . . would [it] have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad." *Id.* at 1337. The Second Circuit subsequently held that substantial fraudulent activity within this country "tips the scales in favor of" jurisdiction when an American corporation and its shareholders are injured by a fraudulent scheme. *Id.*

The *Leasco* court found no reason to characterize "making telephone calls and sending mail to the United States" as conduct not within this country. *Id.* at 1335; *see* SEC v. Gulf Intercontinental Fin. Corp., 223 F. Supp. 987, 995 (S.D. Fla. 1963) (where scheme requires use of interstate commerce, even though offer is outside the United States, "the remedial protection of [the 1933 and 1934 Acts] may be invoked"). *See also* Mizrack, *supra* note 27, at 384 (use of mails or interstate commerce to further fraudulent scheme would be a sufficient basis for subject matter jurisdiction); Comment, *supra* note 17, 30 OHIO N.U.L. REV. at 1307 (fraudulent representations made through instrumentalities of interstate commerce sufficient for jurisdiction); 34 OHIO ST. L. J. 342, 348–49, 351 (1973) (use of mails constituting conduct will "significantly expand the" jurisdictional scope of 10(b)). *But see* SEC v. United Financial Group, Inc., 474 F.2d 354, 357 (9th Cir. 1973) (court declined to rule on the "soundness" of the use of interstate commerce as the basis for jurisdiction).

[34] 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

[35] 519 F.2d 1001 (2d Cir. 1975).

[36] Note, *supra* note 17, 89 HARV. L. REV. at 557; *accord*, Comment, *supra* note 17, 30 OHIO N.U.L. REV. at 1310; Note, *Extraterritorial Application of § 10(b) of the Se-*

sions, there was little doubt that the anti-fraud provisions of the securities laws could apply to transactions involving securities that were neither registered nor traded on domestic securities exchanges when there has been activity within the United States.[37]

In *Bersch*, the court considered the justification for subject matter jurisdiction with respect to the claims of three distinct classes of plaintiffs—American residents,[38] Americans residing abroad[39] and foreigners.[40] The complaint alleged that I.O.S., Ltd., "an international sales and financial service" corporation, made certain offerings based on a misleading prospectus.[41] Several aspects of the transaction occurred in the United States including the drafting of a portion of the prospectus, the opening of bank accounts and numerous meetings "to initiate, organize and structure the offering."[42]

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curities Exchange Act of 1934—The Implications of Bersch v. Drexel Firestone, Inc. *and* IIT v. Vencap, Ltd., 23 WASH. & LEE L. REV. 397, 409 (1976).

[37] 519 F.2d at 986. Judge Friendly had stated that "[i]t [was] *elementary* that the anti-fraud provisions of the federal securities laws apply to many transactions" which are not subject to registration nor traded on a domestic exchange. *Id.* (emphasis added); *see* Recaman v. Barish, 408 F. Supp. 1189, 1194 (E.D. Pa. 1975) ("the usual presumption against extra-territorial application of legislation," does not prevent application of the securities laws to conduct "occurring outside the United States"); Investment Properties Int'l, Ltd. v. I.O.S., Ltd., [1970–1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,011, at 90,726, 90,734–35 (S.D.N.Y. 1971) (same).

[38] 519 F.2d at 990–93. The court held that when American residents are defrauded, no activity within this country is necessary for the federal district courts to have subject matter jurisdiction over the action. *Id.* at 993.

[39] *Id.* at 992–93. The standard for subject matter jurisdiction over the claims of Americans residing abroad is that at least some activity, including "merely preparatory" acts, occur within the United States. *Id.*

[40] *Id.* at 996–97. The class action was instituted by a United States citizen. The members of the class included all individuals, both Americans and foreigners, who had purchased the securities of the defendant Canadian corporation. *Id.* at 977–78, 981. There were an estimated 100,000 members in the class most of whom were "citizens and residents of Canada, Australia, England, France, Germany, Switzerland, and many other countries in Europe, Asia, Africa, and South America." *Id.*

In order for the federal district courts to have subject matter jurisdiction over the claim of the foreign plaintiffs, the court of appeals set forth a standard requiring activity in the United States which directly causes the loss. *Id.* at 993.

[41] *Id.* at 978, 981. Plaintiffs alleged that the defendants had falsely implied I.O.S.'s suitability for public ownership when they should have been aware that this was incorrect; that the prospectus did not disclose the illegal activity of directors which had a detrimental effect on I.O.S.; that the records of the company were maintained in a "chaotic condition" so that an accurate financial picture of the corporation was unattainable; that there was a lack of due diligence by the underwriters with respect to the prospectus; and that the accountants "had failed to observe generally accepted accounting principles with the result that the financial statements were false and misleading." *Id.* at 981.

[42] *Id.* at 985 n.24. Although there was no dispute concerning the presence of these

In determining the existence of subject matter jurisdiction the court separately examined each class of plaintiffs to determine the quantity and quality of the acts within the United States which would "trigger" the applicability of the anti-fraud provisions of the securities laws.[43] As to resident Americans, the Second Circuit held that the securities laws were applicable regardless of where the fraudulent acts occurred.[44] However, the statutes' protection would extend to non-resident Americans only when activity in furtherance of the fraud occurred within the United States.[45] The court then stated, without further explanation, that the anti-fraud provisions of the securities laws would not apply to transactions involving foreign plaintiffs outside the United States in the absence of significant acts occurring within the United States which "directly caused [the] losses."[46] The rationale for treating Americans differently than foreigners[47] was based upon the policy consideration that there should be subject matter jurisdiction

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activities, the defendants asserted that these acts were merely "preliminary or ancillary" in character while the majority of the acts were accomplished outside the United States. *Id.*

[43] *See id.* at 984–93. Judge Friendly noted that the absence of factors "which led to [a] finding [of] subject matter jurisdiction in [prior decisions] does not necessarily preclude a similar conclusion on the different facts presented" in *Bersch*. *Id.* at 986; *see* Venture Fund (Int'l) N.V. v. Wilkie Farr & Gallagher, 418 F. Supp. 550, 555 (S.D.N.Y. 1976). *See also* SEC v. United Financial Group, Inc., 474 F.2d 354, 356 (9th Cir. 1973) ("jurisdiction may not be resolved by a mere tallying of domiciles of" plaintiffs).

[44] 519 F.2d at 991, 993.

[45] *Id.* at 993. Judge Friendly was of the opinion that while "merely preparatory" acts within the United States were insufficient to exert jurisdiction over the claims of foreigners, they would be sufficient to establish subject matter jurisdiction for nonresident Americans. *Id.* at 992. The requirement that at least some activity occur within the United States was based on a belief that Congress did not have a sufficient interest in protecting Americans who go abroad and are defrauded, so long as no fraudulent activities had taken place within this country. *Id.*

[46] *Id.* at 993; *see* Note, *supra* note 17, 89 HARV. L. REV. at 560. The Second Circuit summarized its holdings by stating

> that the anti-fraud provisions of the federal securities laws:
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> (1) Apply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country; and
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> (2) Apply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but
>
> (3) Do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.

519 F.2d at 993.

[47] Many of the foreign governments had indicated an intent not to recognize a United States judgment as a bar to an action commenced by their citizens in their country. 519 F.2d at 996–97.

only when the "injury [is] to purchasers or sellers . . . in whom the United States has an interest."[48]

In the *IIT* case, the Second Circuit expanded the extraterritorial scope of the securities laws beyond any previous decision.[49] IIT, an international investment trust,[50] had been fraudulently induced to purchase the preferred securities of Vencap, a Bahamian venture capital firm.[51] After dismissing the possibility of jurisdiction pursuant to either diversity of citizenship,[52] pendent jurisdiction,[53] or "actions arising under an Act of Congress" which does not have its own jurisdictional provisions,[54] Judge Friendly examined the possibility of jurisdiction under both the 1933 and 1934 Acts.[55] While acknowledging that the Restatement (Second) of Foreign Relations Law of the United States supports the proposition that a nation may regulate the conduct of its citizens wherever that conduct may occur,[56] the court

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[48] *Id.* at 989 (footnote omitted). The court held that when fraudulent conduct occurring outside the United States has only a general detrimental "affect [*sic*] on the American economy or American investors," subject matter jurisdiction would not exist. *Id.* In Recaman v. Barish, 408 F. Supp. 1189 (E.D. Pa. 1975), the court stated that the antifraud provisions of the federal securities laws have been "limited . . . to transactions with which the United States ha[d] a significant connection or interest." *Id.* at 1194. *See also* Note, *supra* note 36, 23 WASH. & LEE L. REV. at 408–09.

[49] 519 F.2d at 1018; *accord*, Bersch v. Drexel Firestone, Inc., 519 F.2d at 987. Although the *IIT* court noted that its expansion of the extraterritorial application of the securities laws was based on a fine distinction, it stated that "the line has to be drawn somewhere." *IIT*, 519 F.2d at 1018.

[50] *See IIT*, 519 F.2d at 1003.

[51] *See id.* at 1005–14. The defendants were the organizers of Vencap and had purchased 5000 shares of its common stock for $5,000. IIT was induced to purchase Vencap's preferred stock at a cost of $3,000,000. *Id.* at 1005–06. Although IIT contributed over 99% of Vencap's capital, it had only limited rights. The defendants controlled the payment of dividends to IIT through a board of directors whom they had elected. Additionally, one of the defendants had encumbered over 20% of Vencap's capital to secure a personal loan. *Id.* at 1012, 1013.

[52] *Id.* at 1015. The requirement of complete diversity pursuant to 28 U.S.C. § 1332 (1970) was defeated due to the fact that plaintiffs and defendants both included some foreigners. 519 F.2d at 1015.

[53] *Id.* Pendent jurisdiction was defeated because it exists "only when there is a claim conferring federal jurisdiction that will survive a motion to dismiss." *Id.*

[54] *Id.* When an Act of Congress has its own jurisdictional provision, 28 U.S.C. § 1337 (1970) will not create jurisdiction over an action arising under that Act. 519 F.2d at 1015. Since the 1934 Act has its own jurisdictional provision, § 1337 will not apply. For the jurisdictional provision of the 1934 Act, see note 16 *supra*.

[55] 519 F.2d at 1015.

[56] *Id.* at 1016. The RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(1)(a) (1965) states that a nation may "prescribe a rule of law (a) attaching legal consequences to conduct of a national of the state wherever the conduct occurs." *But cf.* Recaman v. Barish, 408 F. Supp. 1189, 1199 (E.D. Pa. 1975) (fact that American defendants are involved in the fraud is not a sufficient "effect" within the United States for jurisdiction to attach).

stated that it was unable to find an adequate congressional interest in applying the federal securities laws to every situation where an American defendant defrauds foreigners.[57]

The Second Circuit did not find the *Schoenbaum* "effects" test applicable to the *IIT* facts due to the lack of any evidence to indicate that the fraudulent scheme "had a significant effect in the United States."[58] Therefore, since the only remaining basis for subject matter jurisdiction was activity within this country,[59] the court reviewed the various acts which had occurred within the United States.[60] These acts included the use of a New York City office as a base of operations wherein records were maintained and the drafting of agreements between IIT and Vencap by the defendants' New York attorneys in that city.[61] Judge Friendly held that when the acts of fraud themselves occur within the United States, the federal district courts have subject matter jurisdiction.[62] This result was primarily based upon the court's belief that Congress had not "intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when the[y] are peddled only to foreigners."[63]

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[57] 519 F.2d at 1016; *see, e.g.*, Venture Fund (Int'l) N.V. v. Wilkie Farr & Gallagher, 418 F. Supp. 550, 555 (S.D.N.Y. 1976) (insufficient for jurisdiction that some defendants are American citizens); F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Co., 400 F. Supp. 1219, 1223 (S.D.N.Y. 1975)(same); Garner v. Pearson, [Current Volume] FED. SEC. L. REP. (CCH) ¶ 94,549, at 95,901, 95,905 (M.D. Fla. 1974) (the intent underlying section 10(b) of the 1934 Act was not that of imposing liability simply because the seller or purchaser is a United States citizen).

[58] 519 F.2d at 1016–17. Judge Friendly did not believe that the *Schoenbaum* "effects" test could be met simply because one half of one percent of the foreign investment fund's assets represented the portion held by Americans. *Id.* He further stated that a sufficient congressional interest in applying the federal securities laws could not be shown since "acts simply hav[ing] an adverse affect [*sic*] on the American economy or American investors generally" were insufficient. 519 F.2d at 989; IIT v. Vencap, Ltd., 519 F.2d at 1017.

[59] 519 F.2d at 1017. Acknowledging that the *IIT* facts failed to meet the *Schoenbaum* "effects" test and that there was no direct effect upon an American citizen as in *Leasco*, the court stated that " 'the absence of certain . . . elements which led to finding subject matter jurisdiction in those cases does not necessarily preclude a similar conclusion on the different facts presented here.' " *Id.* (quoting from *Bersch*).

[60] *Id.* at 1018.

[61] *Id.* The lower court found that the defendants' New York City office was used both to formulate a great number of transactions and to initiate and receive mail that was relevant to Vencap's business. *Id.*

[62] *Id.* at 1018. The *IIT* court attempted to limit its holding to the fine distinction between merely preparatory acts and fraudulent acts themselves. Thus, the court stated that subject matter jurisdiction would exist only when fraudulent acts have occurred within the United States. *Id.*; *see* notes 58–60 *supra*.

[63] 519 F.2d at 1017. The Second Circuit was of the opinion that Congress had not "meant to prohibit the SEC from policing [fraudulent] activities within this country."

Thus the action was remanded for additional hearings in district court as to whether the activities within the United States amounted to actual fraudulent conduct or were merely preparatory acts.[64]

When the Eighth Circuit was confronted with a transnational securities fraud it looked to the *Leasco* decision for guidance.[65] In *Travis v. Antes Imperial, Ltd.*,[66] American shareholders of a Canadian corporation, whose stock was neither traded nor listed on a domestic exchange, were fraudulently induced to refrain from selling their shares of stock.[67] The activity within the United States primarily consisted of telephone conversations and mailings, most of which were initiated by the plaintiffs.[68] The only other act which occurred within the United States was the actual transfer of the stock at a time when the plaintiffs were already aware of the fraud[69] but had apparently decided that such action would minimize their losses.[70] The Court of Appeals for the Eighth Circuit held that when "significant conduct" relevant to the fraud occurs within the United States the federal district courts have subject matter jurisdiction.[71] The court, relying upon the *Leasco* decision, stated that jurisdiction would not be destroyed simply because some of the fraudulent acts had occurred outside the United States or because the securities were not registered or traded on an American securities exchange.[72] The Eighth Circuit,

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Id. The court further justified its holding upon the policy consideration that this country would desire that foreign nations prevent fraudulent securities from being exported to the United States. *Id.*

[64] *Id.* at 1019. The Second Circuit, however, retained jurisdiction over the appeal pursuant to 28 U.S.C. § 2106 (1970). 519 F.2d at 1019.

One commentator has attacked the court's attempt to distinguish fraudulent acts from preparatory conduct stating that such a distinction "cannot be defended where [the] preparation is essential for the ultimate consummation of the fraud." Comment, *supra* note 17, 30 OHIO N.U.L. REV. at 1327.

[65] Travis v. Antes Imperial, Ltd., 473 F.2d 515, 526 (8th Cir. 1973).

[66] 473 F.2d 515 (8th Cir. 1973).

[67] *Id.* at 518–19, 521. It was alleged that the defendants had agreed to make a separate tender offer to the American shareholders so that the after tax result would be equal to that received by the Canadian shareholders. *Id.* at 519. Because of this promise the plaintiffs did not sell their stock at a time when a market existed. *Id.* at 521. Once all the Canadians had been bought out, the defendants informed the plaintiffs that no acceptable tender offers would be forthcoming. *Id.* at 522–23.

[68] *Id.* at 526; *see id.* at 524–26.

[69] *Id.* at 521. The court held that even though the plaintiffs already knew of the fraud when they sold their stock it would not alone be sufficient to defeat an action for an alleged violation of the anti-fraud provisions of the federal securities laws. *Id.*

[70] *See id.* at 522–23.

[71] *Id.* at 524. The *Travis* court was then faced with the determination of whether the defendants' activity within the United States amounted to "significant conduct." *Id.*

[72] *Id.* at 526.

finding that the telephone calls and mailings were essential to the defendants' fraudulent scheme, held that subject matter jurisidiction did exist.[73]

The Third Circuit, when confronted with transnational securities frauds, has also looked to the Second Circuit's decisions for guidance.[74] For example, in *Straub v. Vaisman & Co.*,[75] an American securities broker allegedly defrauded a European investor.[76] The fraudulent transaction was initiated and executed by the American broker in the United States.[77] Additionally, the fraud involved stock registered with the SEC and traded on an American securities exchange.[78] In light of these significant contacts with the United States, the court viewed the transaction as not being "predominantly foreign" in character.[79] The *Straub* court reviewed the *IIT*, *Bersch* and *Leasco* decisions as well as the Restatement (Second) of Foreign Relations Law of the United States, and had little difficulty justifying subject matter jurisdiction.[80]

Within a year of the *Straub* decision, the Third Circuit was again presented with the problem of extraterritorial application of the anti-fraud provisions of the securities laws in *SEC v. Kasser*.[81] The facts

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[73] *Id.* at 527.

[74] *See* SEC v. Kasser, 548 F.2d 109, 113 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977); Straub v. Vaisman & Co., 540 F.2d 591, 595 (3d Cir. 1976).

[75] 540 F.2d 591 (3d Cir. 1976).

[76] *Id.* at 594.

[77] *Id.* at 594, 595. The American broker employed a Mr. Charles Erb because of his numerous contacts in Europe. Mr. Erb was subsequently held out to be the international operations director for Vaisman & Co. *Id.* at 594. The plaintiff purchased the securities of Mark I upon the advice of Mr. Erb. *Id.* The defendants had failed to reveal material information in violation of the anti-fraud provisions of the federal securities laws. *Id.* The omissions included Mark I's imminent bankruptcy; that Vaisman & Co. "was a market maker [for] Mark I"; and that Vaisman was an officer and financial consultant of the selling corporation. *Id.* Based upon these facts, the Third Circuit found the defendants' conduct " 'shocking to [its] conscience.' " *Id.*

[78] *Id.* at 595. The securities involved were "traded on [the] American over-the-counter exchange." *Id.*

[79] *Id.*

[80] *Id.* The RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES supports the proposition that conduct within the United States is sufficient for jurisdictional purposes. *See* note 32 *supra*. The court was left with the question of "whether, on policy grounds, [it] should apply the securities legislation." 540 F.2d at 595; *accord, Leasco*, 468 F.2d at 1334–35. The *Straub* court was certain that it was proper to apply the federal securities laws due to the substantial contacts with the United States. 540 F.2d at 595. Since the court did not view the facts of the case as presenting "a predominantly foreign transaction," it saw no reason to insulate the defendants for purely jurisdictional reasons. *Id.*; *see* notes 75–77 *supra* and accompanying text.

[81] 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

indicate that there was less contact with the United States than in *Straub*.[82] Furthermore, the action in *Kasser* was instituted by the SEC primarily seeking injunctive relief.[83] The *Kasser* court acknowledged these factual differences, but held that *Straub* supported a finding of jurisdiction because in that case the court had "flatly proclaimed that conduct in this country, standing alone, is enough for jurisdiction to attach under the federal securities laws."[84]

Judge Adams, writing for the court, stated that in *Kasser*, as in *IIT*, there was little evidence indicating that the fraud had a detrimental impact upon the United States.[85] Acknowledging the special expertise of the Second Circuit,[86] he relied upon the *IIT* decision to support the court's rejection of the *Schoenbaum* analysis that "effect" within the United States is a prerequisite to a finding of subject matter jurisdiction.[87] The Third Circuit then adopted Judge Friendly's *IIT* dictum that " 'it is hard to believe that Congress meant to prohibit the SEC from policing [fraudulent] activities within this country' " even when the sole defrauded party is a nonresident foreigner.[88] Following this approach, the court refused "to immunize, for strictly jurisdictional reasons, defendants who" use the United States as their base for transnational securities frauds.[89] The Third Circuit found that

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[82] 548 F.2d at 113.

[83] *Id.* at 112; *see* note 3 *supra* .

[84] 548 F.2d at 113. The *Straub* court had stated that "[c]onduct within the United States is alone sufficient from a jurisdictional standpoint to apply the federal [securities] statutes." 540 F.2d at 595. Although *Kasser* was arguably more foreign in nature than *Straub*, the *Kasser* court found subject matter jurisdiction to exist under the 1933 and 1934 Acts. *See* 548 F.2d at 110–16; note 81 *supra* and accompanying text. *See also* Mizrack, *supra* note 27, at 368 ("no matter how 'foreign' a transaction might appear, there may be elements within it, including conduct within the U.S. . . . which will" support a finding of subject matter jurisdiction).

[85] *Compare Straub*, 548 F.2d at 112 (court stating "it is questionable whether any effect in the United States was wrought") *with IIT*, 519 F.2d at 1016 (court found "little factual support . . . that . . . activities had a significant effect in the United States").

[86] 548 F.2d at 115; *see* note 22 *supra*.

[87] 548 F.2d at 113. Commentators have expressed their belief that *Leasco* was the first case to limit the *Schoenbaum* analysis and that *Bersch* and *IIT* furthered the "effects" test rejection. *See* Mizrack, *supra* note 27, at 380; Note, *supra* note 17, 89 HARV. L. REV. at 557; 20 WAYNE L. REV. 167, 174–75 (1973).

[88] 548 F.2d at 114 (quoting from IIT v. Vencap, 519 F.2d at 1017). Judge Adams agreed with Judge Friendly, in that they did not believe that Congress had intended for the United States to become the center for fraudulent transnational securities schemes. 548 F.2d at 116; *accord*, IIT v. Vencap, Ltd., 519 F.2d at 1017.

[89] 548 F.2d at 114. The Third Circuit was confronted with a similar situation as was posed in the *IIT* dicta. The *Kasser* court therefore readily admitted that it was "skeptical that Congress wished to preclude all SEC suits for injunctive relief where the victim of a fraudulent scheme happens to be foreign." *Id.* Such relief was held to be appropriate since the defrauded foreign corporation was owned by a neighboring nation. *Id.*; *see* text accompanying note 92 *infra*.

the activities within the United States had been an essential part of the fraudulent scheme,[90] thus clearly bringing the facts within the *IIT* holding which was limited to situations where "fraudulent acts" themselves occurred within the United States.[91]

The *Kasser* court held that when "at least some activity" in furtherance of the fraud occurs within this country, subject matter jurisdiction exists under the federal securities laws.[92] This result was deemed "to be especially appropriate" because the defrauded corporation was "owned by a . . . governmental subdivision of a neighboring nation."[93] However, the court attempted to reconcile its decision with *Bersch*[94] which had held that jurisdiction exists over the claims of foreigners only when acts within the United States directly cause the loss.[95] Although the activity within the United States in both cases appeared to be substantially the same,[96] Judge Adams stated that there was "much more United States-based activity" in *Kasser*

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[90] 548 F.2d at 115; *see* notes 13–15 *supra* and accompanying text. In SEC v. Capital Growth Co., S.A., 391 F. Supp. 593 (S.D.N.Y. 1974), the court held that when acts which constitute "an essential part of the frau[d]" occur within the United States, subject matter jurisdiction exists. *Id.* at 597–98.

[91] 548 F.2d at 115. The district court, holding that the defendants had conducted merely miscellaneous acts within the United States, attempted to distinguish the *IIT* decison. *Id.* at 114. The Third Circuit, however, found the district court's interpretation to be "too restrictive," *id.* at 112, and held that the *IIT* decision supported jurisdiction in *Kasser* due to the substantiality of the activities within this country. *Id.* at 114–15; *see* notes 13–15 *supra* and accompanying text.

[92] 548 F.2d at 114; *see* Garner v. Pearson, [Current Volume] FED. SEC. L. REP. (CCH) ¶ 94,549, at 95,901, 95,905–06, (M.D. Fla. 1974); *see* Note, *supra* note 17, 69 COLUM. L. REV. at 111 ("[i]solated transactions . . . should be subject to the [1934] Act whenever there are sufficient minimal contacts with" the United States). *But see* Bersch v. Drexel Firestone, Inc., 519 F.2d at 993. (securities laws apply to foreigners only when acts within the United States directly cause loss).

[93] 548 F.2d at 114; *see* note 1 *supra*. *See also* notes 103–09 *infra* and accompanying text.

[94] 548 F.2d at 115. Although the *IIT* decision was more on point, the Third Circuit did not want to be in conflict with the *Bersch* decision. *See id.* The court, by making factual distinctions, stated that there was nothing in *Bersch* to prohibit a finding of jurisdiction in *Kasser*. *Id.*

[95] 519 F.2d at 993. In *Bersch*, the court had held that jurisdiction over the claims of foreigners did not exist because the preparatory nature of the activities within the United States. *See id.* at 993–97.

[96] Compare the facts of *Kasser*, 548 F.2d at 111 (negotiations, execution of a contract, use of interstate commerce, incorporation of defendants or maintenance of a corporate office, use of a New York branch of a Swiss bank, maintenance of records, drafting of agreements and transmittal of proceeds through the United States) with the facts of *Bersch*, 519 F.2d at 985 n.24, 990–91 (meetings, mailing of misleading prospectuses, use of interstate commerce, incorporation of defendants, maintenance of some workpapers, drafting of documents and processing money through a New York bank). *See also* Petitioners' Reply Memorandum at 3–5, Churchill Forest Indus. (Manitoba), Ltd. v. SEC, 431 U.S. 938 (1977) *denying cert. to* SEC v. Kasser, 548 F.2d 109 (3d Cir.).

and classified these acts as being essential to the fraud.[97] He "question[ed] whether it [could] be convincingly maintained that such acts within the United States did not directly cause any extraterritorial losses."[98] Viewing the facts of *Kasser* in this light, the court was able to state that there was nothing in *Bersch* which precluded a finding of subject matter jurisdiction.[99]

The Third Circuit also looked to the purposes underlying the anti-fraud provisions of the federal securities laws and the rules promulgated thereunder.[100] Judge Adams found that they were designed to regulate conduct, there being no requirement that the attempted fraud be completed as "a precondition to statutory liability."[101] In addition, the securities laws were made expressly applicable to foreign commerce, indicating a congressional intent that the acts have "a broad jurisdictional scope."[102] The court concluded that regardless of where the actual loss occurred, if there were activities within the United States which furthered the fraudulent scheme, the federal district courts should have subject matter jurisdiction.[103]

The *Kasser* court buttressed its finding of jurisdiction with three policy considerations.[104] First, a failure to find jurisdiction would encourage individuals to use the United States as a base from which to defraud nonresident foreigners.[105] The court did not believe "that Congress intended . . . the United States to become a 'Barbary Coast' . . . harboring international securities 'pirates.' "[106] A second consid-

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[97] 548 F.2d at 115. The court noted that the additional American activity included "*inter alia*, the execution of a key investment contract in New York as well as the maintenance of records in this country." *Id.* (italics in original).

[98] *Id.* at 115; *see* note 89 *supra* and accompanying text.

[99] 548 F.2d at 115. The court so held despite the fact that in *Bersch* no jurisdiction was found to exist over the claims of nonresident foreigners. *Id.*

[100] *Id.* at 114.

[101] *Id.* The Third Circuit was unable to find any section in the anti-fraud provisions of the federal securities laws that would prohibit a finding of a jurisdiction "when the actual locus of the harm is outside the . . . United States." *Id.* & n.22; *see* SEC v. Gulf Intercontinental Fin. Corp., 223 F. Supp. 987, 994–95 (S.D. Fla. 1963) (fraudulent offers within the United States are sufficient for purposes of subject matter jurisdiction even though no sale occurred); notes 16–21 *supra* and accompanying text.

[102] 548 F.2d at 114; *see* note 18 *supra* and accompanying text.

[103] 548 F.2d at 114.

[104] *Id.* at 116. The Third Circuit, recognizing its expansion of jurisdiction pursuant to the federal securities laws offered policy considerations in justification of its holding. *Id.*

[105] *Id.*

[106] *Id.* If subject matter jurisdiction was found not to exist, the Third Circuit feared that they "would, in effect, create a haven for . . . defrauders and manipulators" in the United States. *Id.*; *see* 5 A. JACOBS, *supra* note 17, § 37.02, at 2-23; Comment, *supra* note

eration was the possibility that a refusal to assume jurisdiction would prompt "reciprocal responses on the part of other nations."[107] The court expressed the hope that a finding of jurisdiction in *Kasser* would influence other nations to protect American investors who might be victimized by fraudulent schemes which are based overseas.[108] The third justification was that the anti-fraud provisions of the federal securities laws "were designed to insure high standards of conduct in securities transactions within" the United States.[109] Moreover, the court found that a broad approach to subject matter jurisdiction is required if the SEC is to more effectively supervise securities transactions within this country.[110] These policy considerations enumerated by the court, standing alone, appear to be sufficient justification for an expansive reading of the jurisdictional provision of the federal securities laws which would result in the application of the anti-fraud provisions.

The *Kasser* court, in arriving at a finding of subject matter jurisdiction, attempted to come within the *Bersch* standard for nonresident foreign plaintiffs.[111] In order to find the requisite activities within the United States which directly caused the losses, the court placed what appears to be an artificial emphasis upon the execution of an investment contract and the maintenance of records.[112] If this *Bersch* standard, which requires that activities within the United

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17, 30 OHIO N.U.L. REV. at 1319 (a finding against jurisdiction would encourage the use of the United States securities markets in fraudulent schemes directed toward foreigners).

[107] 548 F.2d at 116. The court was of the opinion that a dismissal for lack of subject matter jurisdiction might cause other nations to allow their countries to be used as a base for exporting fraudulent securities to the United States. *Id.* Judge Friendly stated in the *IIT* decision that "[t]his country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States." *IIT*, 519 F.2d at 1017.

[108] 548 F.2d at 116. *But see* Becker, *Extraterritorial Dimensions of the Securities Exchange Act*, 2 INT'L L. & POL. 233, 241 (1969) (possible retribution by other nations).

[109] 548 F.2d at 116. The *Straub* court had indicated that "on policy grounds the interest of the United States in regulating . . . conduct . . . in this country and enhancing world confidence in its securities market is ample justification for applying the [federal] securities laws." 540 F.2d at 595. *See also* SEC v. United Financial Group, Inc., 474 F.2d 354, 357 (9th Cir. 1973) (broad construction of federal securities laws to promote their "remedial purposes"); Comment, *supra* note 17, 30 OHIO N.U.L. REV. at 1317 ("purification of American securities markets can only be achieved if a forum is available to *all* investors") (emphasis in original).

[110] 548 F.2d at 116. Judge Adams believed that such an expansive reading of the federal securities legislation would enhance its "basic purpos[e]" of maintaining the high integrity of the United States securities markets. *Id.*

[111] *See id.* at 115; notes 94–97 *supra* and accompanying text.

[112] *See* 548 F.2d at 115.

States be the direct cause of the loss, is to remain meaningful, then it is questionable whether the reliance upon such tenuous factual distinctions is wise.

A distinguishing characteristic of the *Kasser* litigation was the fact that the action was instituted by the SEC.[113] The SEC has both the special expertise and duty to insure the integrity of the United States securities markets. This responsibility is an adequate justification for expanding subject matter jurisdiction under the federal securities laws beyond that ordinarily exercised on behalf of a private plaintiff. The individual plaintiff normally seeks damages; the SEC usually requests injunctive relief in order to prevent actions which threaten the integrity of the United States securities exchanges. In light of this, the *Kasser* court should not have been so concerned with meeting established jurisdictional standards, but rather, should have recognized that a different situation was involved, justifying an expansion of subject matter jurisdiction pursuant to the federal securities laws.

Glenn Carl Guritzky

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[113] *Id.* at 112.