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SECURITIES LAW

GOING PRIVATE WITHOUT A BUSINESS PURPOSE—A RULE 10b-5 VIOLATION

Marshel v. AFW Fabric Corp.
Green v. Santa Fe Industries, Inc.

Section 10(b) of the Securities Exchange Act of 1934[1] and rule 10b-5,[2] promulgated thereunder, were designed to prevent fraudulent practices in the securities industry.[3] In light of the emphasis on disclosure which permeates the Act,[4] it has been generally accepted that to state a cause of action under these provisions it is necessary to allege a disclosure violation.[5] Unfortunately, this requirement has

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[1] 15 U.S.C. § 78j(b) (1970).

[2] Rule 10b-5 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,

(a) To employ any device, scheme, or artifice to defraud,

(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 deceipt upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1976).

[3] *See, e.g.*, S. REP. No. 1455, 73d Cong., 2d Sess. 55 (1934). *See generally* A. BROMBERG, SECURITIES LAW: FRAUD—SEC RULE 10B-5 (1973); A. JACOBS, THE IMPACT OF RULE 10B-5 (rev. ed. 1976).

[4] Numerous provisions within the Act impose heavy burdens of disclosure upon the corporation, persons controlling the corporation, and various participants in the securities industry. *See, e.g.*, Securities Exchange Act of 1934 § 13, 15 U.S.C. § 78m (1970), *as amended by* 15 U.S.C.A. § 78m (1976) (periodic filings); Securities Exchange Act of 1934 § 14, 15 U.S.C. § 78n (1970) (proxy rules); Securities Exchange Act of 1934 § 17, 15 U.S.C. § 78q (1970), *as amended by* 15 U.S.C.A. § 78q (1976) (exchange reports).

[5] *See, e.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972) (dicta); Hohmann v. Packard Instrument Co., 471 F.2d 815, 819 (7th Cir. 1973); Popkin v. Bishop, 464 F.2d 714, 719-20 (2d Cir. 1972); Kohn v. American Metal Climax, Inc., 458 F.2d 255, 269 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972); List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir.), *cert. denied*, 382 U.S. 811 (1965); Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 301 (1974) [hereinafter cited as Brudney]; Fleischer, *Federal Regulation of Internal Corporate Affairs*, 29 BUS. LAW. 179, 182 (1974 special issue). The emphasis on nondisclosure or misrepresentation in rule 10b-5 cases is due, in part, to the common understanding of the term "fraud." Fraud is generally viewed as involving the "intent to deceive, or the making of a statement without a belief in, or with reckless indifference towards, its truth." Painter, *Inside Information: Growing Pains for the Development of Federal Corporation Law Under Rule 10b-5*, 65 COLUM. L. REV. 1361, 1386 (1965). Thus, as one court has noted, "[t]he gravamen of a 10b-5 cause of action is decep-

posed an impenetrable bar to federal relief for minority shareholders whose investment interests in a corporation are extinguished by the majority shareholders' execution of a going private plan,[6] so long as full disclosure is made of the means and goals of the transaction.[7]

tion." Bailes v. Colonial Press, Inc., 444 F.2d 1241, 1246 (5th Cir. 1971). It has been recognized, however, that fraud can take many forms. As was noted by the Second Circuit in A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d. Cir. 1967):

> [Section] 10(b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.

Id. at 397 (emphasis in original); *accord,* Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied,* 395 U.S. 906 (1969), *discussed in* Patrick, *Rule 10b-5, Equitable Fraud and* Schoenbaum v. Firstbrook: *Another Step in the Continuing Development of Federal Corporation Law,* 21 ALA. L. REV. 457 (1969).

[6] Going private has been defined as the elimination of "public stock ownership in a corporation with the intention of continuing the corporation's life and business as a closely held company." Kerr, *Going Private: Adopting a Corporate Standard,* 3 SEC. REG. L.J. 33 (1975). There has been a plethora of discussion concerning state and federal remedies available for the protection of minority shareholders of a corporation which has decided to go private. *See, e.g.,* Borden, *Going Private—Old Tort, New Tort or No Tort?,* 49 N.Y.U.L. REV. 987 (1974) [hereinafter cited as Borden]; Brudney, *A Note on "Going Private,"* 61 VA. L. REV. 1019 (1975); Sommer, *"Going Private:" A Lesson in Corporate Responsibility,* [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,010; Note, *Going Private: An Analysis of Federal and State Remedies,* 44 FORDHAM L. REV. 796 (1976); Note, *Going Private: Who Shall Provide the Remedies?,* 51 ST. JOHN'S L. REV. 131 (1976); Note, *Going Private,* 84 YALE L.J. 903 (1975). *See generally* Brudney, *supra* note 5; Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking,* 57 CALIF. L. REV. 1 (1969).

Going private can be effected through a variety of means. Among the more common of these techniques is the "one-step acquisition" in which the company going private is merged into another corporation that already owns a large percentage of the outstanding stock of the company. The minority shareholders are then forced to accept cash for their shares in the company going private. *See, e.g.,* Note, *Going Private,* 84 YALE L.J. 903, 909-10 (1975). Another common means of going private involves a "two-step acquisition." This method entails an initial tender offer to public shareholders followed by a merger. *See, e.g.,* Borden, *supra,* at 988; Brudney, *supra* note 5, at 330-31. Reverse stock splits may also be employed to eliminate the public interest. *See, e.g.,* Borden, *supra,* at 988; Note, *Going Private: An Analysis of Federal and State Remedies,* 44 FORDHAM L. REV. 796, 798-99 (1976).

[7] In Kaufmann v. Lawrence, 386 F. Supp. 12 (S.D.N.Y. 1974), *aff'd per curiam,* 514 F.2d 283 (2d Cir. 1975), the court observed:

> While [§] 10(b) . . . must be read flexibly, and not technically or restrictively, . . . there is nothing invalid *per se* in a corporate effort to free itself from federal regulations, provided the means and the methods used to effectuate that objective are allowable under the law. Nor has the federal securities law placed profit-making or shrewd business tactics designed to benefit insiders, without more, beyond the pale. Those laws . . . are satisfied if a full and fair disclosure is made . . . .

386 F. Supp. at 17. *See* Popkin v. Bishop, 464 F.2d 714, 719-20 (2d Cir. 1972); Lessler v. Dominion Textile Ltd., 411 F. Supp. 40 (S.D.N.Y. 1975); Greenberg v. Institutional Investor Sys., Inc., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,231 (S.D.N.Y. 1975); Tanzer Economic Assocs. v. Haynie, 388 F. Supp. 365 (S.D.N.Y. 1974); Dreier v. Music Makers Group, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,406 (S.D.N.Y. 1974).

Several recent decisions in the Second Circuit, however, mark a significant departure from this restrictive interpretation.[8] Perhaps the most notable of these decisions is *Marshel v. AFW Fabric Corp.*,[9] in which the Second Circuit recognized that a federal cause of action under section 10(b) and rule 10b-5 may exist absent a disclosure violation where controlling shareholders seek to squeeze out minority interests by means of a merger not justified by any valid corporate purpose.[10]

The *Marshel* court was presented with a challenge to a going private plan typical of those used in recent years.[11] Until 1968, Concord Fabrics was a closely held corporation completely owned by members of the Weinstein family. Encouraged by the bull market of the late sixties, Concord "went public" with an initial offering of 300,000 shares of common stock at $15 per share. A year later, individual Weinstein family members offered and sold to the public an additional 200,000 shares at $20 per share. Despite these sales, the Weinsteins retained sixty-eight percent of Concord's outstanding stock.[12]

In the depressed economic climate of the early seventies, Concord's stock declined in value, reaching a low of $1 per share in 1974. Deciding to regain complete ownership of Concord, the Weinsteins organized AFW and transferred to it their Concord shares, receiving in return 100 percent of AFW's stock. They planned to merge Concord into AFW[13] and cancel the publicly owned shares of Concord stock. Each public shareholder was to receive $3 per share, at a cost of over $1.6 million to the corporate treasury.[14] Shareholder approval of the merger was certain since the Weinsteins themselves con-

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[8] *See* Marshel v. AFW Fabric Corp., 533 F.2d 1277 (2d Cir.), *remanded for determination of mootness,* 97 S. Ct. 228 (1976), *rev'g* 398 F. Supp. 734 (S.D.N.Y. 1975); Merrit v. Libby, McNeill & Libby, 533 F.2d 1310 (2d Cir. 1976); Green v. Santa Fe Indus., Inc., 533 F.2d 1283 (2d Cir.), *cert. granted,* 97 S. Ct. 54 (1976) (No. 75-1753), *rev'g* 391 F. Supp. 849 (S.D.N.Y. 1975).

[9] 533 F.2d 1277 (2d Cir.), *remanded for determination of mootness,* 97 S. Ct. 228 (1976), *rev'g* 398 F. Supp. 734 (S.D.N.Y. 1975).

[10] 533 F.2d at 1282.

[11] *See* Note, *Going Private,* 84 YALE L.J. 903 (1975) (discussion of the particulars of various going private plans); note 6 *supra.*

[12] 533 F.2d at 1278-79.

[13] Originally, the Weinsteins hoped to accomplish their objective through a two-step merger: First, a tender offer was to be made by AFW to Concord public shareholders; and second, AFW was to execute the merger. The tender offer plan was abandoned, however, when two public shareholders instituted actions seeking to enjoin the offer, and a one-step plan was adopted. *Id.* at 1279; *see* note 6 *supra.*

[14] 533 F.2d at 1279-80. This expenditure was to be financed through a bank loan to AFW which Concord would ultimately assume. *Id.* at 1279.

trolled more than two-thirds of the shares required by the applicable state long-form merger statute.[15] Those shareholders dissatisfied with the $3 per share valuation would be left with only the right to seek an appraisal pursuant to New York law.[16]

The proxy material accompanying the merger proposal clearly disclosed that the only objective of the merger was the return of the corporation to private ownership for the sole benefit of the Weinsteins.[17] Faced with these facts, the district court denied motions by public shareholders for a preliminary injunction to restrain the merger.[18] The court held that since there had been full disclosure, there had been no violation of section 10(b) and rule 10b-5.[19] In

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[15] *See* N.Y. Bus. Corp. Law § 903 (McKinney Supp. 1976-1977).

[16] *See id.* §§ 623, 910. The appraisal remedy is rarely satisfactory since the proceedings are lengthy, often taking as long as a year, the stockholder risks the assessment of costs against him, and rarely does it result in a substantial difference in valuation. *See generally* Brudney, *supra* note 5, at 304-07; Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 45 Harv. L. Rev. 233 (1931).

[17] The proxy statement declared:

> "The purpose of the proposed merger of AFW into the Company [Concord] is to return the Company to the status of a privately-held corporation owned by the Weinstein family. Upon consummation of the merger, the Weinsteins will be the sole stockholders and directors of the Company, and will thus be able to determine all policies of the Company, such as salaries for themselves and others, dividends and business activities, without public scrutiny and solely with regard to their own interests."

533 F.2d at 1279. It is difficult to imagine a more telling indication of the defendant's intent and purpose. The proxy material also stated:

> "The effect of the proposed merger will also be that without any additional investment on the part of the Weinstein family their interest in the stockholders' equity of the Company will be increased from approximately $9,494,000 (representing 68% of equity as of February 2, 1975) to approximately $12,285,000 (representing 100% of such equity on a pro forma basis" . . .) . . . .

Id. at 1280 n.4.

[18] 398 F. Supp. at 739. Injunctive relief was obtained, however, in a state court proceeding. Pursuant to the authority granted the attorney general by the New York blue sky law antifraud provision, N.Y. Gen. Bus. Law § 353 (McKinney 1963), the attorney general brought an action to enjoin the merger. The New York court granted the relief, finding "the fact that full disclosure of the aims of the Weinstein group have been articulated," overshadowed by the state policy of ensuring that "the small investor will not be prey to a self-interested majority either in going public or private." People v. Concord Fabrics, Inc., 83 Misc. 2d 120, 125, 371 N.Y.S.2d 550, 554 (Sup. Ct. N.Y. County), *aff'd*, 50 App. Div. 2d 787, 357 N.Y.S.2d 84 (1st Dep't 1975).

[19] 398 F. Supp. at 739. Judge MacMahon concluded that "rule 10b-5 simply does not encompass these alleged wrongs." *Id.* at 738. Support for the district court's conclusion can be culled from a number of previous nondisclosure cases in the Southern District of New York. *See, e.g.*, Tanzer Economic Assocs. v. Haynie, 388 F. Supp. 365 (S.D.N.Y. 1974); Kaufmann v. Lawrence, 386 F. Supp. 12 (S.D.N.Y. 1974), *aff'd per curiam*, 514 F.2d 283 (2d Cir. 1975); Dreier v. Music Makers Group, Inc., [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,406 (S.D.N.Y. 1974). *See also* Greenberg v. Institutional Investor Sys., Inc., [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,231 (S.D.N.Y. 1975); Lessler v. Dominion

reaching its decision, the district court relied on the Second Circuit's earlier language in *Popkin v. Bishop*,[20] wherein the court had noted that nondisclosure is a key issue in rule 10b-5 cases.[21] The *Popkin* court had concluded that "if federal law ensures that shareholder approval is fairly sought and freely given, the principal federal interest is at an end."[22]

On appeal, the *Marshel* court rejected the narrow and restrictive interpretation of the requisites of a rule 10b-5 cause of action adhered to by the district court. Rather than limiting application of the rule to situations involving nondisclosure or misrepresentation, the court held that in a going private case, where the transaction itself constitutes a fraud, a cause of action under 10b-5 may exist despite disclosure of all relevant facts.[23] Looking at the substance rather than the form of the challenged transaction, the Second Circuit found it to be a clear violation of rule 10b-5.

The *Marshel* court undoubtedly was influenced by the fact that the Weinsteins had reaped considerable benefits through their decision to go public in 1968, and now hoped to gain additional personal pecuniary benefits by going private.[24] The court viewed the merger as an attempt by the Weinsteins to squeeze out the minority shareholders at a price determined by the Weinsteins and at a cost to be borne by the corporate treasury,[25] in circumstances such that the minority was without the ability to effectively object.[26] Such conduct, the court declared, amounted to a breach of the fiduciary duty owed by the Weinsteins, as controlling shareholders, to the corpora-

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Textile Ltd., 411 F. Supp. 40 (S.D.N.Y. 1975). *Cf.* Broder v. Dane, 384 F. Supp. 1312 (S.D.N.Y. 1974), *and* Levine v. Biddle Sawyer Corp., 383 F. Supp. 618 (S.D.N.Y. 1974), wherein the courts recognized that a 10b-5 cause of action can exist in a going private transaction where a disclosure violation has occurred.

[20] 464 F.2d 714 (2d Cir. 1972).

[21] *Id.* at 719.

[22] *Id.* at 720.

[23] 533 F.2d at 1282.

[24] *See* note 17 *supra*.

[25] *See* 533 F.2d at 1280.

[26] The Second Circuit stated:

> Under these circumstances it would surely be anomalous to hold that a cause of action is stated under § 10(b) and Rule 10b-5 when the fraudulent conduct in connection with a purchase or sale of securities includes deception but that similarly fraudulent practices carried out with prior disclosure to the helpless victim do not give rise to a Rule 10b-5 claim.

Id. at 1282. In Marsh v. Armada Corp., 533 F.2d 978, 986 (6th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3011 (U.S. July 6, 1976) (No. 76-5), the Sixth Circuit emphasized the "helpless victim" aspect of *Marshel*, declaring that the *Marsh* plaintiffs "were not 'helpless victims' because they . . . had an opportunity to sell their shares at a premium." 533 F.2d at 986.

tion and the minority shareholders.[27] Characterizing the merger plan as "an attempt by the majority stockholders to utilize corporate funds for strictly personal benefit,"[28] the Second Circuit declared that although mere allegations of corporate mismanagement and self-dealing do not support a claim under the federal securities laws, such a claim does exist where this conduct is part of a fraudulent scheme involving the purchase and sale of securities,[29] even if there has been full disclosure.[30]

In reversing the district court's decision, the *Marshel* court was forced to reconcile the apparent conflict between its decision and the Second Circuit's earlier holding in *Popkin.*[31] In *Popkin,* a minority shareholder sought to enjoin a proposed merger on the grounds that the proposed exchange ratios were unfair, and that the proponents of the plan had breached their fiduciary obligations to the corporation and the minority shareholders.[32] The *Popkin* court held that since there had been full disclosure, there existed no basis for federal injunctive relief.[33] Noting that in *Popkin* it was merely the fairness of the exchange ratios and not the merger itself that was challenged,[34] the *Marshel* court declared *Popkin* to be "inapposite."[35] While the *Marshel* plaintiffs, like those in *Popkin,*

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[27] 533 F.2d at 1282. The principle that the majority owes a fiduciary duty to the minority is well established: "When a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders." Ervin v. Oregon Ry. & Navigation Co., 27 F. 625, 631 (C.C.S.D.N.Y. 1886). *See, e.g.,* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 11-12 (1971); Pepper v. Litton, 308 U.S. 295, 311 (1939); Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941), *cert. denied,* 316 U.S. 675 (1942). It is also well established that the corporation itself can be injured by the majority's breach of its fiduciary duties. *See, e.g.,* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 10 (1971).

[28] 533 F.2d at 1282.

[29] A merger involving an exchange of securities constitutes a purchase and sale within the meaning of rule 10b-5. Coffee v. Permian Corp., 434 F.2d 383, 386 (5th Cir. 1970); Dasho v. Susquehanna Corp., 380 F.2d 262, 266 (7th Cir.), *cert. denied,* 389 U.S. 977 (1967); Vine v. Beneficial Fin. Co., 374 F.2d 627, 634 (2d Cir.), *cert. denied,* 389 U.S. 970 (1967). *See* A. BROMBERG, SECURITIES LAW: FRAUD—SEC RULE 10B-5 § 4.7 (1973).

[30] 533 F.2d at 1282.

[31] *See* text accompanying notes 19-22 *supra.*

[32] 464 F.2d at 716.

[33] *Id.* at 718-20.

[34] 533 F.2d at 1282. In *Popkin,* the merger itself was beyond attack since its execution was required by the terms of a stipulation of settlement filed in an earlier suit. 464 F.2d at 716.

[35] 533 F.2d at 1282. Judge Smith, in his concurring opinion in *Marshel,* disagreed with this conclusion. He found it "difficult to reconcile the 10(b) basis of the holding with the opinion in *Popkin v. Bishop." Id.* (Smith, J., concurring) (citation omitted). He felt, however, that injunctive relief was "sustainable on the ground of breach of the fiduciary duty under

had complained of the inadequate compensation offered them for their shares, the *Marshel* plaintiffs focused their complaint on the merger itself as the act of actionable fraud.[36] Emphasizing the defendants' concession in *Marshel* that the merger was supported by no justifiable business purpose and was designed strictly for the Weinsteins' personal benefit,[37] the court found that the *Marshel* plaintiffs, unlike those in *Popkin,* had stated a valid cause of action.[38]

The emphasis in *Marshel* on the lack of a business purpose rather than on a disclosure violation as a determinative factor in recognizing a rule 10b-5 violation in a going private transaction was further elucidated by the Second Circuit in *Merrit v. Libby, McNeill & Libby.*[39] In *Merrit,* unlike *Marshel,* there was no clear substantiation of the allegation that the merger itself was fraudulent. The acquiring corporation was not a sham entity created solely for the purpose of effectuating the merger as was AFW.[40] Prior to the adoption of the going private plan, the parent of the acquiring corporation had gradually obtained majority control of the target corporation through a variety of means.[41] The merger plan itself entailed a further investment of fresh capital on the part of the acquiring corporation.[42] Thus, the merger was not to be effected through

New York law of the majority shareholders in their admitted self-dealing." *Id.*

[36] *See id.* This distinction between an allegation of a merger brought about by fraud and an allegation of fraudulent merger terms was recently applied by the Sixth Circuit in Marsh v. Armada Corp., 533 F.2d 978 (6th Cir. 1976), *petition for cert. filed,* 45 U.S.L.W. 3011 (U.S. July 6, 1976) (No. 76-5). *Marsh* involved a tender offer which disclosed that, if successful, the offeror would eliminate the dividends paid by the target corporation, thus reducing the cost of an eventual merger between them. A complaint filed by minority stockholders alleged that the plan to omit the dividend was for an improper purpose and was fraudulent per se, but did not attack the prospective merger itself. Disallowing the claim in the absence of a disclosure violation, the court declared:

> [W]e decline to equate a breach of fiduciary duty with fraud. . . . [A] breach of fiduciary duty in formulating the terms of a merger does not itself raise a Rule 10b-5 claim; to hold otherwise is to provide a federal forum for all shareholders dissatisfied with the terms of a proposed merger, which is not the intent of § 10(b) of the Exchange Act.

533 F.2d at 984.

[37] 533 F.2d at 1282. *See* note 17 and accompanying text *supra.*

[38] 533 F.2d at 1282.

[39] 533 F.2d 1310 (2d Cir. 1976).

[40] *Id.* at 1312.

[41] Control of the target corporation was acquired in part through purchases on the open market, and in part by a standby arrangement to pick up surplus shares on a subscription offer made by the target corporation to its shareholders. This investment totalled about $66 million. *Id.*

[42] The acquiring corporation offered the minority stockholders $8.125 per share under

a raid on the corporate treasury of the target for the personal advantage of a few.

More importantly, in *Merrit* the Second Circuit determined that there did appear to be valid corporate purposes for the merger, motives that would benefit not only the acquiring corporation and its parent, but also the target corporation.[43] Thus, although elimination of public shareholders was clearly an objective of the merger, it apparently was not the sole motivation for the scheme. In view of all this, the Second Circuit denied a preliminary injunction.[44] Significantly, however, the *Merrit* court refused to dismiss as frivolous the plaintiff's contention that the merger constituted a violation of rule 10b-5.[45] The court observed that if in fact the intention to freeze out the public was the dominant motivation for the merger, a cause of action under 10b-5 might lie.[46]

In adopting the view that, regardless of full disclosure, a cause of action may exist under rule 10b-5 where a merger serving no corporate purpose is employed as a method of going private, the Second Circuit appears to have moved dramatically away from the implications of its earlier decision in *Popkin.*[47] In so doing, the Second Circuit does not stand alone: a number of district courts[48] and

both the terms of the tender offer and the terms of the merger. To satisfy this offer, the acquiring corporation had to invest an additional $34 million. *Id.*

[43] *Id.* The acquiring corporation's motives were revealed in a confidential memorandum obtained through discovery. The acquiring corporation hoped to take advantage of the target's business contacts in expanding its markets, and was also attracted by the target corporation's healthy balance sheet. Less clear, however, are the benefits which the *Merrit* court foresaw accruing to the target corporation. The memorandum did refer to the financial benefits which would result from elimination of the minority shareholders. It indicated that by eliminating the minority, the allocation of development programs would be simplified and the collection of royalties would be expedited. Going private would also permit structural modifications which might otherwise involve a breach of duty towards the minority. Projected savings were estimated at about $4.3 million annually. *Id.* It would seem, however, that these benefits would exist in almost every squeezeout merger. Moreover, it is difficult to reconcile the *Merrit* court's position with the apparent rejection by the *Marshel* court of similar benefits as the basis of a valid corporate purpose for merger. *See* note 61 *infra.*

[44] Given the facts in *Merrit,* the court found neither probability of success on the merits nor the possibility of irreparable injury. Consequently, the injunction was denied. 533 F.2d at 1313.

[45] *Id.*

[46] *Id.*

[47] *See* cases cited note 19 *supra.*

[48] *See, e.g.,* Albright v. Bergendahl, 391 F. Supp. 754 (D. Utah 1974); Bryan v. Brock & Blevins Co., 343 F. Supp. 1062 (N.D. Ga. 1972), *aff'd,* 490 F.2d 563 (5th Cir.), *cert. denied,* 419 U.S. 844 (1974), *discussed in* Kessler, *Elimination of Minority Interests by Cash Merger: Two Recent Cases,* 30 BUS. LAW. 699 (1975). It should be noted that several state courts have held that a merger must be supported by a valid business purpose. *See, e.g.,* Paine v. Saulsbury, 200 Mich. 58, 65-66, 166 N.W. 1036, 1038-39 (1918); Matteson v. Ziebarth, 40 Wash.

several commentators[49] have adopted a similar position. Moreover, the implementation of a business purpose test also reflects the apparent position of the Securities and Exchange Commission as indicated by its proposed rules embodying such a standard.[50] Unfortunately, although the result reached in *Marshel* may be laudatory,[51] the language employed by the court[52] is susceptible to the interpretation that a merger without a justifiable corporate purpose is in itself a breach of fiduciary duty actionable under rule 10b-5. Indeed, in *Green v. Santa Fe Industries, Inc.*,[53] the Second Circuit construed *Marshel* as standing for just such a proposition.

The *Green* court was presented with a challenge to a merger planned under the Delaware short-form merger statute, whereby the owners of more than ninety percent of the outstanding shares can effectuate the merger without shareholder vote or notice. In *Green*, ninety-five percent of the capital stock of the target corporation was owned by a wholly owned subsidiary of Santa Fe Industries, Inc. In order to return the target corporation to private ownership, a fourth

2d 286, 301, 242 P.2d 1025, 1034-35 (1952). *But see* Berkowitz v. Power/Mate Corp., 135 N.J. Super. 36, 342 A.2d 566 (1975), where the court expressly discounted the absence of a business purpose in assessing the legality of a proposed going private merger.

[49] *See, e.g.*, Kerr, *Going Private: Adopting a Corporate Purpose Standard*, 3 SEC. REG. L.J. 33 (1975); Sommer, *"Going Private:" A Lesson in Corporate Responsibility*, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,010; Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1204 (1964). This view, however, has not been unanimously accepted. *See, e.g.*, Borden, *supra* note 6, at 1022-23.

[50] Proposed Rules 13e-3A, 13e-3B, SEC Exchange Act Release No. 11,231 (Feb. 6, 1975), *as appearing in* 2 FED. SEC. L. REP. (CCH) ¶¶ 23,704-05.

[51] By recognizing that in going private situations, fraud does not necessarily take the guise of nondisclosure or misrepresentation, the *Marshel* decision utilizes the often overlooked provisions of rule 10b-5 that are aimed at acts and devices that operate as a fraud. *See* 17 C.F.R. § 240.10b-5(a), (c) (1976), *quoted in* note 2 *supra*. It should be emphasized, however, that *Marshel* involved unusual facts that clearly indicated improper conduct and patent self-dealing. Such elements as the proximity in time between going public and going private, the substantial gains to be reaped by the creation of a shell corporation through which the merger scheme might be effected, the concentration of the majority interest in the hands of one family, and the helplessness of the public shareholders to forestall the plan clearly suggest the fraudulent practices which rule 10b-5 was designed to prevent. Given these facts, it is not surprising that the Second Circuit refused to apply the technical and ill-founded rule requiring nondisclosure or misrepresentation as a prerequisite to the granting of relief under rule 10b-5 in the going private situation.

[52] The *Marshel* court stated:

> The controlling shareholders of Concord have devised a scheme to defraud their corporation and the minority shareholders to whom they owe fiduciary obligations *by causing Concord to finance the liquidation of the minority's interest with no justification in the form of a valid corporate purpose.*

533 F.2d at 1282 (emphasis added).

[53] 533 F.2d 1283 (2d Cir.), *cert. granted*, 97 S. Ct. 54 (1976) (No. 75-1753), *rev'g* 391 F. Supp. 849 (S.D.N.Y. 1975).

corporation was organized to which this capital stock was transferred in exchange for the new corporation's capital stock. The plan of merger called for the new corporation to be merged into the target corporation, with the latter surviving. The shares were valued by an independent party on the basis of a thorough study of the target company's financial situation.[54] Thus, the facts in *Green*, unlike those in *Marshel*, did not suggest clearly fraudulent activities or patent self-dealing for the benefit of particular individuals.

Failing to discuss these distinctions, the Second Circuit held in *Green* that where the majority shareholders validly execute a Delaware short-form merger,[55] the majority commits a breach of its fiduciary duty to the minority if the merger lacks a justifiable business purpose. In holding that such conduct is actionable under rule 10b-5, the Second Circuit adopted a broad rule[56] based on the ambiguous language employed in *Marshel*.[57] The *Green* rule, however, creates several problems not raised by *Marshel*. While extending extraordinary protection to minority shareholders, it ignores the existence of the majority's interest in the corporation[58] and overlooks the fact that one of the risks assumed by every purchaser of a corporation's stock is that his investment may be extinguished through events beyond his control.[59] It also encroaches upon state corporate law by implicitly adding to state merger statutes the

[54] 533 F.2d at 1287-89.

[55] DEL. CODE ANN. tit. 8, § 253(a) (1974).

[56] The court stated:

> We hold that a complaint alleges a claim under Rule 10b-5 when it charges, in connection with a Delaware short-form merger, that the majority has committed a breach of its fiduciary duty to deal fairly with minority shareholders by effecting the merger without any justifiable business purpose.

533 F.2d at 1291.

[57] *See* note 52 *supra*.

[58] The power of the majority shareholders to control the corporation is a basic principle of corporate law. In Ervin v. Oregon Ry. & Navigation Co., 27 F. 625 (C.C.S.D.N.Y. 1886), the court observed:

> It cannot be denied that minority stockholders are bound hand and foot to the majority in all matters of legitimate administration of the corporate affairs; and the courts are powerless to redress many forms of oppression practiced upon the minority under the guise of legal sanction, which fall short of actual fraud. This is a consequence of the implied contract of association, by which it is agreed, in advance, that a majority shall bind the whole body as to all transactions within the scope of the corporate powers.

Id. at 630-31. *Accord*, Kaufmann v. Lawrence, 386 F. Supp. 12 (S.D.N.Y. 1974), *aff'd per curiam*, 514 F.2d 283 (2d Cir. 1975); Endicott Johnson Corp. v. Bade, 37 N.Y.2d 585, 338 N.E.2d 614, 376 N.Y.S.2d 103 (1975).

[59] *See, e.g.*, Endicott Johnson Corp. v. Bade, 37 N.Y.2d 585, 338 N.E.2d 614, 376 N.Y.S.2d 103 (1975).

requirement of a valid business purpose.[60] Moreover, it does so without clearly delineating the parameters of this business purpose criterion. The *Green* court did not indicate which corporation, acquiring, acquired, or both, must have the business purpose. Nor is the court instructive concerning what constitutes a valid corporate purpose sufficient to remove the merger from the reach of rule 10b-5.[61]

In light of these difficulties, it is submitted that the *Green* rule is an unnecessary and unfortunate extension of *Marshel*. Perhaps, the *Green* bench read the *Marshel* holding too simplistically,[62] and thus stretched the court's language beyond the meaning it was originally intended to convey.[63] Standing alone, *Marshel* holds simply that judicial inquiry into the legality of a going private merger under 10b-5 need not be foreclosed upon a finding that full disclosure has been made. By discarding the rule that nondisclosure is an essential prerequisite to a rule 10b-5 action, the *Marshel* holding permits a proper and flexible examination of the going private transaction

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[60] The effect of *Green* and *Marshel* on state law is illustrated by the recent opinion of a New York court in Schulwolf v. Cerro Corp., 86 Misc. 2d 292, 380 N.Y.S.2d 957 (Sup. Ct. N.Y. County 1976). There, the court noted that until recently appraisal rights was the exclusive remedy for dissenting shareholders under New York law. *Id.* at 295, 380 N.Y.S.2d at 960. But, considering the *Marshel* and *Green* decisions, the court concluded that a new rule had emerged. The *Schulwolf* court stated that

> there is no violation of the fiduciary duty owed by the dominant stockholders to the public stockholders if there is a proper corporate purpose for the merger and there has been neither fraud, self-dealing nor price manipulation and the alternatives afforded to the public shareholders are a fair price fairly determined or the statutory right to an appraisal.

Id. at 297, 380 N.Y.S.2d at 962.

[61] *Marshel* and *Green* would appear to indicate that relief from the reporting requirements of the SEC and the stock exchanges is an insufficient justification for going private. In *Merrit,* however, the Second Circuit seemed to suggest that a decrease in the cost of operating a business might constitute a valid corporate purpose. 533 F.2d at 1313.

One commentator has suggested that in the case of a parent corporation trying to eliminate public holdings in a subsidiary with which it has significant dealings, such an objective may in fact constitute a valid corporate purpose. Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right,* 77 HARV. L. REV. 1189, 1198 (1964). Another commentator has stated that the realization of corporate profit alone will normally be insufficient. Note, *Going Private,* 84 YALE L.J. 903, 922-23 (1975). That author suggests that the valid corporate purpose standard in the going private situation should require "a compelling corporate need to revert to a privately held status in order to function as a viable business entity." *Id.* at 931.

[62] The discussion of *Marshel* by the *Green* court is rather limited. *See* 533 F.2d at 1291.

[63] The exact language of the *Marshel* court is as follows:

> We hold that when controlling stockholders and directors of a publicly-held corporation cause it to expend corporate funds to force elimination of minority stockholders' equity participation for reasons not benefiting the corporation but rather serving only the interests of the controlling stockholders such conduct will be enjoined pursuant to Section 10(b) and Rule 10b-5 . . . .

533 F.2d at 1281.

attacked as fraudulent—an examination which includes, but is not necessarily limited to, the question of whether there exists a valid corporate purpose. So interpreted, the *Marshel* decision opens the way to a positive attack on the abuses rule 10b-5 was intended to prevent, without mandating the extreme position adopted by the *Green* court.

Thérèse M. Haberle

SHARES IN PRIVATE COOPERATIVE APARTMENT HELD NOT TO BE SECURITIES

Grenader v. Spitz

The Securities Act of 1933[1] and the Securities Exchange Act of 1934[2] represent the principal congressional attempts to curb serious abuses in a previously unregulated financial market.[3] In defining the term "security" as used within the Acts,[4] Congress included not only the more commonly known instruments traded for speculation or investment, such as stocks and bonds, but also instruments such as "investment contracts,"[5] which are capable of lending themselves to a more flexible interpretation.[6] In light of these rather adaptable

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[1] 15 U.S.C. §§ 77a to 77aa (1970 & Supp. V 1975).

[2] 15 U.S.C. §§ 78a to 78hh (1970 & Supp. V 1975).

[3] *See* S. REP. No. 1455, 73d Cong., 2d Sess. 9-77 (1934). Essentially, the Senate Committee on Banking and Currency listed the extensive use of credit in the markets, the manipulation of prices, short-swing trading by insiders, and inadequate financial disclosure by listed corporations as the major abuses sought to be remedied. *Id. See* Loomis, *The Securities Exchange Act of 1934 and The Investment Advisers Act of 1940,* 28 GEO. WASH. L. REV. 214, 216-17 (1959). *See also* Gadsby, *Historical Development of the S.E.C.—The Government View,* 28 GEO. WASH. L. REV. 6, 9 (1959).

[4] The definition of a "security" appears in the Securities Act as follows:

> [U]nless the context otherwise requires—(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security" . . . .

Securities Act § 2(1), 15 U.S.C. § 77b(1) (1970). The definition of a security in the Exchange Act § 3(a)(10), 15 U.S.C. § 78c(a)(10) (1970), is practically identical to that contained in the Securities Act. *See* Tcherepnin v. Knight, 389 U.S. 332, 335-36 (1967); S. REP. No. 792, 73d Cong., 2d Sess. 14 (1934).

[5] *See* note 4 *supra.*

[6] In SEC v. W.J. Howey Co., 328 U.S. 293 (1946), the Supreme Court was faced with the issue of whether offerings of small parcels of orchard land, coupled with service contracts