Application of Section 16(b) to Defensive Merger (American Standard, Inc. v. Crane Co.)

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Cognizant of widespread abuse of fiduciary positions by corporate insiders,1 Congress, in 1934, enacted section 16(b) of the Securities Exchange Act.2 To deter insiders from using inside information in trading their corporation's securities,3 section 16(b) makes recoverable by the corporate issuer any profit realized by a director, officer, or beneficial owner of more than 10 percent of any class of equity security through the purchase and sale or sale and purchase4 of any security of the issuer within a period of less than 6 months.5 The imposition of liability is facilitated by the section's conclusive presumption that any purchase followed by a sale within a 6-month period was made with the intention to speculate rather than invest.6 Thus, the need to prove the speculative intent of these statutory insiders is eliminated.

1 See, e.g., S. REP. No. 1455, 73d Cong., 2d Sess. 55 (1934): Among the most vicious practices unearthed at the hearings before the subcommittee was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities. Closely allied to this type of abuse was the unscrupulous employment of inside information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others.

2 15 U.S.C. § 78p(b) (1970). The stated purpose of § 16(b) is to protect the interest of the public by preventing directors, officers, and principal stockholders of a corporation, the stock of which is traded in on exchanges, from speculating in the stock on the basis of information not available to others.

S. REP. No. 792, 73d Cong., 2d Sess. 9 (1934).

3 Commenting upon the economic climate prior to the enactment of § 16(b), the Securities and Exchange Commission has said:

[P]rofits from "sure thing" speculation in the stocks of their corporations were more or less generally accepted by the financial community as part of the emolument for serving as a corporate officer or director notwithstanding the flagrantly inequitable character of such trading.

10 SEC ANN. REP. 50 (1944).

4 For the purposes of this Note, the term "purchase and sale" shall hereinafter be deemed to include both "purchase and sale" and "sale and purchase."


Mr. Corcoran. . . . You hold the director [liable], irrespective of any intention or expectation to sell the security within 6 months after, because it will be absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing.

Senator Gore. You infer the intent from the fact.

Mr. Corcoran. From the fact.
Recently, however, courts have become increasingly hesitant to apply the statute's conclusive presumption to transactions in which it was impossible to find any breach of fiduciary duty or use of inside information by the statutory insider. This judicial reluctance has been augmented as a result of the Second Circuit's decision in *American Standard, Inc. v. Crane Co.* In a unanimous opinion, the court reaffirmed the recently adopted policy that, absent the potential for speculative abuse, a defeated tender offeror's exchange of the securities of a target company for the securities of an acquiring corporation is neither a purchase nor a sale for purposes of section 16(b). Additionally, the court held that section 16(b) does not contemplate "matching the purchases of the shares of one 'issuer' against the [subsequent] sale of shares of another 'issuer.'" In so holding, the Second Circuit has added its voice to the growing indication that section 16(b) is largely inappropriate to combat possible offenses which do not involve a "garden-variety purchase and sale."

Initially, courts had few problems in applying the statutory presumption to traditional cash purchases and sales. As increased financial sophistication made "unorthodox" transactions a part of everyday financial dealings, however, the application of section 16(b) became more difficult. This is primarily due to difficulties encountered in efforts to fit within the statutory definitions of purchase and sale intricate financial undertakings, such as stock

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7 See notes 14-20 and accompanying text infra.
9 The opinion, authored by Judge Gurfein, was joined in by Judges Oakes and Moore.
10 510 F.2d at 1054-57.
11 Id. at 1057.
13 This term was coined by the then Chief Judge Friendly in *Abrams v. Occidental Petroleum Corp.*, 450 F.2d 157, 162 (2d Cir. 1971), *aff'd sub nom. Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973), to identify traditional cash purchases and sales.
14 See, e.g., Gratz v. Claughton, 187 F.2d 46, 49-50 (2d Cir.), cert. denied, 341 U.S. 920 (1951); Smolowe v. Delendo Corp., 136 F.2d 231, 236 (2d Cir.), cert. denied, 320 U.S. 751 (1943) ("Had Congress intended that only profits from an actual misuse of inside information should be recoverable, it would have been simple enough to say so.").
15 2 L. Loss, *Securities Regulation* 1069 (1961) [hereinafter cited as Loss]. The term "unorthodox" is commonly used to describe any transaction that is not a strictly cash purchase and sale.
Conversions, mergers, and corporate reorganizations. Consequently, resort to litigation has become common, and courts have become increasingly distressed with the inequitable effects of applying the statute to various transactions in which it was impossible to find any misuse of inside information.

In *American Standard*, Crane Co., desirous to broaden its corporate base, formulated a plan which would result in a merger with Westinghouse Air Brake Co. Crane therefore began acquiring Air Brake stock on the open market. Despite Air Brake's rejection of the merger proposal in late 1967, Crane continued to purchase Air Brake stock, ultimately becoming a statutory insider in early 1968. Alarmed by the growth of Crane's holdings, Air Brake arranged a defensive merger with American Standard, Inc. whereby Stan-

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17 Compare Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir.), cert. denied, 332 U.S. 761 (1947) (conversion of convertible preferred stock into common per se a purchase within meaning of § 16(b) with Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958), cert. denied, 359 U.S. 927 (1959) (conversion of preferred stock into common cannot be deemed a purchase where no opportunity for speculative abuse). In recent years, courts have adopted the pragmatic approach taken in *Ferraiolo*, discarding the objective standards of *Park & Tilford*. Thus, instead of imposing the statute's conclusive presumption of intention to speculate, the court will first inquire whether there was any possibility of the statutory insider acquiring access to inside information which could be used to reap short-swing profits. See, e.g., Petteys v. Butler, 367 F.2d 528 (8th Cir. 1966), cert. denied, 385 U.S. 1006 (1967); Blau v. Lamb, 363 F.2d 507 (2d Cir. 1966), cert. denied, 385 U.S. 1002 (1967); Blau v. Max Factor & Co., 342 F.2d 304 (9th Cir.), cert. denied, 382 U.S. 892 (1965). Contra, *Heli-Coil Corp. v. Webster*, 352 F.2d 156 (3d Cir. 1965) (en banc).

18 See, e.g., Newmark v. RKO Gen., Inc., 425 F.2d 348 (2d Cir.), cert. denied, 400 U.S. 854 (1970) (defendant's exchange of shares pursuant to merger deemed a 16(b) sale since its position as beneficial owner of target corporation created opportunity for access to inside information).

19 See, e.g., Blau v. Mission Corp., 212 F.2d 77, 80 (2d Cir.), cert. denied, 347 U.S. 1016 (1954) (transfer of stock between parent corporation and its newly organized subsidiary not a 16(b) sale since exchange was "a mere transfer between corporate pockets").

20 The first rumblings of dissatisfaction over the objective standards of section 16(b) were heard from the Second Circuit in Roberts v. Eaton, 212 F.2d 82 (2d Cir.), cert. denied, 348 U.S. 827 (1954). There, the court refused to find that a reclassification by the directors of a family-owned corporation of its $5 par value common stock into $1 par value common and $7 par value preferred, when followed by a cash sale of the newly converted stock within 6 months, was a purchase within the meaning of § 16(b). Realizing that the defendant's sole motivation in making the conversion was improvement of the stock's marketability, the court declined "at this juncture to attempt enunciation of a black-letter rubric." 212 F.2d at 85. It concluded, however, that based on the circumstances of the transactions, "[t]he reclassification at bar could not possibly lend itself to the speculation encompassed by § 16(b)." Id. at 85-86. See generally 2 Loss, supra note 15, at 1040-90; Deitz, *A Practical Look at Section 16(b) of the Securities Exchange Act*, 43 FORDHAM L. REV. 1 (1974); Hamilton, *Convertible Securities and Section 16(b): The End of an Era*, 44 TEXAS L. REV. 1447 (1966).

21 In a defensive merger the target company agrees to merge into a corporation, other than the initial offeror, to thwart the initial offeror's takeover bid. For a discussion of the means by which a reluctant target corporation can attempt to defeat an attempted takeover, see Schmults & Kelly, *Cash Take-Over Bids — Defense Tactics*, 23 BUS. LAW. 115 (1967). Defensive measures include raising the annual dividend, increasing the outstanding stock, communicating with shareholders, purchasing by the target company of its own stock, splitting the target's stock, and changing corporate bylaws to make it more difficult for the offeror to elect a director to the target's board. The authors question whether a defensive
standard would eventually absorb Air Brake by the exchange of 2½ shares of Standard for every 2 shares of Air Brake.  

Shortly after public disclosure of the proposed defensive merger, Crane made a tender offer designed to increase its holdings of Air Brake and thereby thwart the Air Brake-Standard plan. Crane’s attempt to contravene the merger failed, however, primarily as a result of both Standard’s fraudulent manipulation of the market price of Air Brake stock and the unwillingness of Air Brake’s management to merge with Crane. The Standard-Air Brake merger became effective on June 7, 1968, when “Standard convertible preference stock became available for exchange for Air Brake common.”

By this time Crane had acquired 32 percent of Air Brake common which it exchanged for Standard preferred stock pursuant to the terms of the merger. Crane thereupon found itself in the unenviable position of being not only the largest stockholder of its major competitor, but a statutory insider as well. Under threat of a divestiture order, Crane immediately disposed of its Standard holdings, reaping a profit of over $10 million. Thereafter, Stan-

merger is in reality a defense tactic, characterizing it instead as a “form of orderly retreat.” Id. at 132. See also 2 B. Fox & E. Fox, CORPORATE ACQUISITIONS AND MERGERS § 27.07, at 27-97 (1975).

The merger agreement consummated by Standard and Air Brake consisted of a two-step exchange offer. By its terms, every two shares of Air Brake common would be exchanged for a new class of Standard “$4.75 cumulative convertible preference stock.” 510 F.2d at 1048. The preferred stock was then immediately “convertible into 2½ shares of Standard common.” Id.

A tender offer is a public invitation to the shareholders of the target corporation to sell their shares to the offeror at a specified price. See generally E. Aranov & H. Einhorn, TENDER OFFERS FOR CORPORATE CONTROL I-61 (1973); Note, The Developing Meaning of “Tender Offer” Under the Securities Exchange Act of 1934, 86 HARV. L. REV. 1250, 1251-54 (1973).

In the course of the struggle for control of Air Brake, Standard was found to have violated the antimanipulative provisions of §§ 9 and 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i, 78j(b) (1970), as well as rule 10b-5, 17 C.F.R. § 240.10b-5 (1975). See Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970). To defeat any possibility that Crane’s tender would succeed, Standard purchased 367,000 shares of Air Brake on the New York Stock Exchange, thereby causing the price of Air Brake to rise nearly to the level of Crane’s tender offer. Following expiration of Crane’s offer, Standard privately disposed of its Air Brake shares, resulting in a decrease in the market price of Air Brake to its natural level. The result of Standard’s illegal market activities “was to create the appearance of an extraordinary demand for Air Brake stock and a dramatic rise in market price, as a result of which Air Brake shareholders were deterred from tendering to Crane.” 419 F.2d at 793.

In addition to negotiating the merger with Standard, Air Brake attempted to block Crane’s acquisition by amending its own bylaws to increase the percentage of stock ownership necessary to obtain a seat on its board of directors. Id. at 790.

Before the Standard-Air Brake merger had become effective Crane had extended its tender offer three times. The artificial demand for Air Brake created by Standard’s market manipulation, however, prevented Crane from obtaining a majority interest in Air Brake.

Crane was Standard’s largest competitor in the plumbing industry
standard brought the instant action against Crane alleging, primarily, that Crane's exchange of Air Brake common for Standard preferred constituted a 16(b) sale. 28

In granting summary judgment for Standard,29 the district court made the threshold determination that since opportunities for speculative abuse inhered to Crane by virtue of its position as a defeated tender offeror,30 application of section 16(b) was appropriate. It then concluded that Crane's exchange of Air Brake shares for Standard stock constituted a sale for purposes of section 16(b),31 notwithstanding Crane's objection that the terms of the

and acutely aware that its substantial holdings in Standard presented antitrust ramifications. Id. Cf. Gulf & W. Indus. v. Great A. & P. Tea Co., 476 F.2d 687 (2d Cir. 1973) (tender offer enjoined where director of tender offeror was largest shareholder in target company's competitor).

28 In the Second Circuit, Standard alleged three different theories of purchase and sale by Crane, as a beneficial owner, warranting the imposition of liability under § 16(b):

1. The initial acquisition of Air Brake common which made Crane a beneficial owner of Air Brake was the purchase: Crane's exchange of its Air Brake common for the Standard cumulative preferred was the sale.

2. Crane's exchange, pursuant to the merger, of Air Brake shares for Standard stock was the initial purchase: its disposal of Standard within 6 months was the sale.

3. Crane's initial cash purchase of Air Brake when coupled with its cash sale of Standard satisfied the purchase and sale requirements of § 16(b). 510 F.2d at 1051.

29 346 F. Supp. at 1165.

30 The district court relied heavily upon the Second Circuit's opinion in Newmark v. RKO Gen., Inc., 425 F.2d 348 (2d Cir.), cert. denied, 400 U.S. 854 (1970). There, the court used the speculative abuse test, see note 17 supra, to determine whether an exchange of shares pursuant to a merger lent itself to the type of abuse which § 16(b) is designed to prevent.

In 1967, the managements of Frontier Airlines and Central Airlines consented to a provisional merger agreement pursuant to which 3 1/2 shares of Central would be exchanged for each share of Frontier. Before public announcement of the merger, RKO, a 56% stockholder of Frontier, contracted to purchase 49% of the outstanding Central stock as well as convertible debentures for an additional 149,994 shares. Following acquisition of the Central stock pursuant to the contract, RKO exchanged these shares for those of Frontier.

Ruling that opportunities for speculation inhered to RKO, the Second Circuit noted:

RKO's success in fixing the purchase price before the proposed merger became public knowledge opened the door to possible speculative gains. Its ability to determine whether and when the merger would be consummated [by virtue of its position as controlling stockholder of Frontier] enabled it to maximize these gains

425 F.2d at 354. Having made the threshold determination that opportunities for speculative abuse inhered to RKO, the court concluded that RKO's exchange of Central stock for Frontier stock was a § 16(b) sale. See generally 84 HARV. L. REV. 1012 (1971).

In American Standard, the district court noted that although Crane "did not possess the array of control powers exercisable by RKO," 346 F. Supp. at 1161, there did exist opportunities for speculative abuse by virtue of the fact that Crane should have known that Air Brake would seek a defensive merger to thwart Crane's takeover bid. Id. Crane, a sophisticated corporation, knew it would profit from the consequent rise in the price of Air Brake stock when the terms of the merger were announced. Id. at 1159-61. The district court further reasoned that it was possible that Crane was in the position to affect the exchange ratio of the merger by the timing and terms of its tender offer. Id. at 1161.

31 346 F. Supp. at 1161. In reaching its decision, the district court relied on the conclusion that Crane, anticipating Air Brake's defensive merger, knew it would profit from its disposal of the stock it received pursuant to the merger even if its takeover bid was defeated.
"sale" were dictated by Standard.\textsuperscript{32} Shortly after the district court's decision, the Second Circuit rendered its opinion in Abrams v. Occidental Petroleum Corp.,\textsuperscript{33} prompting District Judge Lasker to withdraw his opinion in American Standard to consider how it would be affected thereby. In a supplemental opinion, the court reaffirmed its original decision and, in addition to its earlier reasoning, espoused an unprecedented, but tenuous, theory of liability: Crane's cash sales of Standard when coupled with its purchases of Air Brake, all within a 6-month period, satisfied the requirements of section 16(b).\textsuperscript{34}

In reversing the decision of the district court and dismissing the complaint,\textsuperscript{35} the Second Circuit utilized a pragmatic test to determine whether Crane's activities could have lent themselves to the type of speculative abuse contemplated by the statute. The court held that the Supreme Court's affirmance of Abrams in Kern County Land Co. v. Occidental Petroleum Corp.\textsuperscript{36} mandates that "the defensive merger situation . . . be sui generis in terms of § 16(b) liability."\textsuperscript{37} It interpreted Kern County as requiring the existence of concrete facts and circumstances demonstrating that the defeated tender offeror was likely to have access to inside information as a prerequisite for a court's conclusion that the defendant's activities furnish the potential for speculative abuse, a requisite element of a 16(b) cause of action.\textsuperscript{38}

Use of the pragmatic approach employed by the American Standard court is consistent with the views expressed by the Su-

\textsuperscript{32} Id. The court rejected Crane's contention that since the shares were economic equivalents § 16(b) should not apply. The "economic equivalence test" was first enunciated by the Second Circuit in Blau v. Lamb, 363 F.2d 507 (2d Cir. 1966), cert. denied, 385 U.S. 1002 (1967), wherein the court refused to impose liability on a corporate insider who had, after converting preferred stock into common of the same corporation, sold the common within 6 months. The court reasoned that since the preferred and the common were equivalent in value, "it would seem to be a cold fact of the market that the conversion could not afford [defendant] opportunities to realize a trading gain based on speculative judgment . . . ." 363 F.2d at 522. With respect to application of the economic equivalence test in American Standard, the district court relied upon Newmark, which had held that the test is applicable only to the shares of one issuer, not to the shares of two corporate entities. 425 F.2d at 354. Notably, the economic equivalence test with regard to the conversion of shares of the same issuer is now codified in 17 C.F.R. § 240.16b-5 (1975).

\textsuperscript{33} 450 F.2d 157 (2d Cir. 1971), aff'd sub nom. Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973), discussed in note 41 infra.

\textsuperscript{34} 450 F. Supp. at 1167-68 (supplemental opinion). The court reasoned that if Crane did not wish to expose itself to 16(b) liability, it could have waited the 6-month statutory period before disposing of its Standard holdings.

\textsuperscript{35} 411 U.S. 582 (1973), aff'g Abrams v. Occidental Petroleum Corp., 450 F.2d 157 (2d Cir. 1971).

\textsuperscript{36} 510 F.2d at 1035.

\textsuperscript{37} Id. at 1055.
The facts in that case bear a striking resemblance to those in *American Standard*. Occidental Petroleum Corp., desiring to merge with Kern County Land Co. (Old Kern), and finding Old Kern in opposition to its plans, announced a tender offer for Old Kern stock. Simultaneously with Old Kern's announcement of its plans to defensively merge into Tenneco, Inc., Occidental became a statutory insider as a result of this offer. Finding itself in a position analogous to that of Crane, Occidental, unlike Crane, capitulated and granted Tenneco an irrevocable option to purchase its Old Kern stock. After the merger was consummated and the option exercised, a 16(b) action was brought against Occidental by the management and shareholders of New Kern to recover the profit realized as a result of Occidental's "sale" of Old Kern pursuant to the merger. Plaintiffs contended, *inter alia*, that by granting Tenneco an irrevocable option, Occidental had sold its Old Kern shares within the meaning of section 16(b). In holding for Occidental, the Court declared: "[T]he involuntary nature of Occidental's exchange, when coupled with the absence of the possibility of speculative abuse of inside information, convinces us that § 16(b) should not apply to transactions such as this one." The Court noted that the hostility of the Old Kern management had made the chances that Occidental would gain access to inside information "extremely remote." With respect to Occidental's ability to control either the terms of the merger or the price paid by Tenneco for Old Kern shares, the Court regarded Occidental's impact as at best negligible. In light of the fact that Occidental did

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39 411 U.S. at 596-600. Notably, the Second Circuit was the first court to utilize the speculative abuse test to determine the likelihood of access to inside information in a merger setting. See Newmark v. RKO Gen., Inc., 425 F.2d 348 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970), discussed in note 30 *supra*.

40 411 U.S. at 590.

41 *Id.* at 600. Before *Kern County* reached the Supreme Court, the Second Circuit had held that, absent the potential for speculative abuse, the sale of securities pursuant to an option granted by a defeated tender offeror to the corporation which survived a defensive merger with the target company did not lend itself to the type of abuse which § 16(b) was designed to prevent. The *Abrams* court based its reasoning upon two factors: First, Occidental had no knowledge of the impending Old Kern-Tenneco merger when its tender offer was made; and second, even if Occidental did have knowledge of the impending defensive merger, it was in no position to exercise any control over its outcome. 450 F.2d at 163.

The Second Circuit contrasted the facts in *Abrams* with those of *Newmark*, wherein RKO was aware of the announcement of the imminent Central-Frontier merger and regulated its trading accordingly. See note 30 *supra*. The *Abrams* court held that absent actual knowledge of the impending defensive merger, Occidental's sale pursuant to the option could not be deemed a sale for § 16(b) purposes. As the court stated: "The idea that the person who pointed the company down the road to good fortune should be excluded from the profits realized by all the other stockholders is repugnant to our sense of equity." 450 F.2d at 164. See generally 47 N.Y.U.L. Rev. 373 (1972).

42 411 U.S. at 598.
not engineer the Old Kern-Tenneco merger and did not “participate in or control the negotiations or the agreement between Old Kern and Tenneco. . . . [o]nce agreement between those two companies crystallized, the course of subsequent events was out of Occidental’s hands.”

Thus the Court has apparently developed a two-part test to determine whether a defeated tender offeror’s activities rebut the statutory presumption of speculative abuse: (1) whether the tender offeror realistically had potential access to inside information; and (2) whether the tender offeror had the ability to manipulate either the timing of the merger or the exchange rate. Applying this test, the American Standard court found that no opportunity to gain access to inside information or ability to control the impending Air Brake-Standard merger had inured to Crane. In the eyes of the court, the fight for corporate control, with Air Brake and Standard on one side and Crane on the other, made it extremely unlikely that Crane would acquire any inside information by virtue of its position as a beneficial owner. Furthermore, the court noted, the fact that Crane had persisted in its efforts to frustrate the defensive merger, whereas Occidental had acquiesced, did not alter the conclusion that no opportunities for speculative abuse had inhered to Crane. Based on these findings, the Second Circuit held that the

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43 Id. at 599 (citation omitted). In addition, the Court implicitly rejected the theory earlier propounded by the district court in American Standard: that Crane’s activities were within the scope of § 16(b) because Crane knew that Air Brake would seek a defensive merger and that Crane would profit therefrom. See note 31 supra. The Supreme Court stated:

It is also wide of the mark to assert that Occidental, as a sophisticated corporation knowledgeable in matters of corporate affairs and finance, knew that its tender offer would either succeed or would be met with a “defensive merger.” If its takeover efforts failed, it is argued, Occidental knew it could sell its stock to the target company’s merger partner at a substantial profit. Calculations of this sort, however, . . . do not represent the kind of speculative abuse at which the statute is aimed . . . . Accepting both that Occidental made this very prediction and that it would recurrently be an accurate forecast in tender-offer situations, we nevertheless fail to perceive how the fruition of such anticipated events would require, or in any way depend upon, the receipt and use of inside information.

44 See generally Lang & Katz, Section 16(b) and “Extraordinary” Transactions: Corporate Reorganizations and Stock Options, 49 Notre Dame Law. 705, 712 (1974) [hereinafter cited as Lang & Katz]; The Supreme Court, 1972 Term, 87 Harv. L. Rev. 57, 291 (1973).

45 510 F.2d at 1055.

46 Id. at 1053-55. In Kern County, after Occidental had become aware of the impending Old Kern-Tenneco defensive merger it did not extend its tender offer. Instead, it negotiated with and later granted Tenneco an option for its Old Kern holdings. 411 U.S. at 587. Crane, on the other hand, persisted in its efforts to gain control of Air Brake, extending its tender offer three times. The American Standard court considered this factor insignificant, however, in view of its initial determination that Crane was not likely to receive inside information by virtue of its position. 510 F.2d at 1055-55.

The American Standard court parenthetically noted that battles for corporate control in which there have been both a tender offer extended to the stockholders of the target
exchange of stock was not a sale within the meaning of section 16(b). 47

American Standard indicates that a court's threshold determination that no potential for speculative abuse exists is dispositive of whether the exchange pursuant to the merger was a purchase or sale for purposes of section 16(b). 48 Had the Second Circuit, in that case, determined that Crane's activities rendered speculative abuse possible, however, a second inquiry would have been mandated, namely, whether the exchange was in fact a 16(b) purchase or sale. 49 Nevertheless, whichever determination the court makes on company and a proposed defensive merger actually benefit the target's stockholders, who "are given a chance to sell out at a price above the market, stay with a new management, or become the beneficiaries of a possibly higher offer in a defensive merger." Id. at 1053. Indeed, one study indicated that the median price offered shareholders of a target corporation by a tender offeror was 16% higher than the market price 2 days before the offer was announced. Hayes & Taussig, Tactics of Cash Takeover Bids, 45(2) HARV. Bus. REV. 135, 140 (1967).

47 The Second Circuit reasoned:

When the setting is not one of control, but of its antithesis, the very weakness of the tender offeror in being unable to thwart the merger is further evidence that he does not control the target company's directors or stockholders.

We thus have a tender offeror who does not have access to inside information about the target company by virtue of his position as a "beneficial owner", coupled with an inability . . . to affect the course of the target company. It is this combination of circumstances that dictated the result in Kern County and dictates the conclusion on this appeal that the exchange of stock pursuant to the merger terms was not a "sale" for § 16(b) purposes.

510 F.2d at 1055 (emphasis in original).

The American Standard court similarly dismissed Standard's second claim of liability: that Crane's exchange of stock pursuant to the merger had been a purchase. See note 28 supra. "[I]t would make no sense to treat a transaction held not to be a 'sale' to be a 'purchase.'" 510 F.2d at 1057.

48 See id. at 1055, 1057. Whereas the Second Circuit's threshold inquiry is whether there is the potential for speculative abuse, the Fourth Circuit takes the position that actual possession of inside information must be found before it will make any further inquiry into whether the insider's transaction constituted a 16(b) purchase and sale. In Gold v. Sloan, 486 F.2d 340 (4th Cir. 1973), cert. denied, 419 U.S. 873 (1974), two appellant directors of the Atlantic Research Corp. (ARC) received stock in the Susquehanna Corp. pursuant to ARC's merger into Susquehanna. When the insiders sold part of their Susquehanna stock within 6 months, a 16(b) action was brought, and the Fourth Circuit was called upon to determine whether the exchange of shares was a 16(b) purchase. Distinguishing between the director who had actual inside information and the second defendant who did not acquire any specific information about the impending ARC-Susquehanna merger, the court found that a 16(b) purchase was made only by the one director who had participated in the merger negotiations and hence "had knowledge of certain inside information that would have helped him to predict the future performance of Susquehanna stock . . . ." 486 F.2d at 352. The court refused to impose liability on the other director who "possessed no knowledge that might have helped him speculate in [the acquiring corporation's] stock." Id. at 346. The court reasoned that although all transactions were made by corporate insiders within a 6-month period, such transactions are not identical. The actual knowledge possessed by an insider at the time of a given "unorthodox transaction" is an essential element to be considered in determining whether a 16(b) "purchase" has occurred; the term "purchase" should be viewed as a legal concept and not strictly according to its dictionary definition.

Id. at 352-53 (emphasis added). See generally Lang & Katz, supra note 44, at 718-20.

49 The two-part inquiry to determine 16(b) liability in the merger setting was first
the issue of speculative abuse, it must be remembered that imposition of liability on an insider will not ipso facto be foreclosed. Thus, the *American Standard* court stated: "The . . . casual acquisition of inside information through personal friendship and its use could be a violation of Section 10(b) and Rule 10b-5, but the irrebuttable presumption of § 16(b) should not be applied." While a 16(b) action may be brought where inside information is acquired by means divorced from defendant's insider position, the Second Circuit seems to have given its imprimatur to the use of 10b-5 as the more appropriate remedy.

This seemingly anomalous conclusion that section 16(b) is an allowable, but inappropriate, remedy can be considered evidence of the judiciary's distaste for the use of section 16(b) to rectify possible abuses in unorthodox transactions. While the statute empowers the SEC to exclude given transactions from its opera-

utilized by the Second Circuit in Newmark v. RKO Gen., Inc., 425 F.2d 348 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970), wherein the court used the speculative abuse test not to resolve whether the transactions in question were purchases and sales, but to determine whether § 16(b) should even be applied at all. First addressing the "threshold issue" of whether the defendant's conduct "lent itself to the type of speculative abuse which section 16(b) was designed to prevent," 425 F.2d at 353, the *Newmark* court resolved the question of whether the exchange pursuant to the merger was a sale separately and only after it had decided that the defendant's activities had been imbued with the possibility of speculative abuse. *Id.* at 354-55.

Although *Newmark* and subsequent cases involving unorthodox transactions seem to apply this two-step analysis, in reality there appears to be only one critical determination. In each of the cases where the court has found potential for speculative abuse, it has also determined that the transaction in question constituted a purchase or sale. See Champion Home Builders Co. v. Jeffress, 490 F.2d 611 (6th Cir.), *cert. denied*, 416 U.S. 986 (1974); Newmark v. RKO Gen., Inc., 425 F.2d 348 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970). Where no such potential is found, the courts have found no purchase or sale. See Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973); American Standard, Inc. v. Crane Co., 510 F.2d 1043 (2d Cir. 1974); Morales v. Arlen Realty & Dev. Corp., 352 F. Supp. 941 (S.D.N.Y. 1973). Thus, it appears that resolution of the question of potential for speculative abuse will be dispositive of the issue of liability.

Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful to employ "in connection with the purchase or sale of any security . . . any manipulative or deceptive device . . . ." 15 U.S.C. § 78j(b) (1970). Rule 10b-5, 17 C.F.R. § 240.10b-5 (1975), makes it unlawful:

1. to employ a device or scheme intended to defraud a purchaser or seller; and
2. to make an untrue statement of a material fact; or

For a discussion of the rise of the pragmatic approach and the resultant increase of litigation under rule 10b-5, see Bateman, *The Pragmatic Interpretation of Section 16(b) and the Need for Clarification*, 45 St. John's L. Rev. 772 (1971).

52 *See*, e.g., Gold v. Sloan, 491 F.2d 729 (4th Cir.) (denying petition for rehearing en banc) (mem.), *cert. denied*, 419 U.S. 873 (1974), wherein Chief Judge Haynsworth, in dissent, opposed the utilization of § 16(b) in the merger setting, declaring: "The appropriate provision in a situation where a sale of stock follows closely upon a merger is Rule 10b-5, with its attendant requirement of actual use of inside information." 491 F.2d at 731 (Haynsworth, C.J., dissenting).
in practice it has been primarily the courts, faced with transactions not contemplated when the statute was drafted, who have redirected the thrust of the statute to circumvent the conclusiveness with which it was originally intended to operate.

It is suggested that the judiciary's desire to mitigate the statute's severity is so pervasive that it may even account for two ostensibly contradictory Supreme Court opinions rendered within 17 months of each other. In Reliance Electric Co. v. Emerson Electric Co., the Court utilized a strict, literal interpretation of section 16(b) to diminish the damages which would have resulted had a pragmatic test of statutory interpretation been used. In an attempt to acquire Dodge Manufacturing Co., and pursuant to a tender offer, Emerson Electric Co. had accumulated over 10 percent of Dodge. Dodge opposed the Emerson bid and agreed to merge with Reliance Electric Co. Faced with certain defeat, Emerson disposed of its Dodge holdings in two separate transactions within a period of less than 6 months after its acquisition of beneficial owner status.

The first sale reduced Emerson's holdings to just under 10 percent, and in the second sale Emerson disposed of its remaining Dodge securities. When Reliance sought to recover Emerson's profits on the second sale, a sharply divided Court held that the initial sale, which had brought Emerson's holdings to under 10 percent, had insulated it from further liability under the statute. Adopting an objective approach to section 16(b) the Court stated:

Among the "objective standards" contained in § 16(b) is the

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53 Section 16(b) excludes from its coverage "any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U.S.C. § 78p(b) (1970). Accordingly, the SEC has promulgated rules which exempt certain transactions from the statute's scope. For example, Rule 16b-7, 17 C.F.R. § 240.16b-7 (1975), exempts, inter alia, acquisitions in which a parent corporation, owning at least 85% of its subsidiary, absorbs its subsidiary incident to a merger.

54 404 U.S. 418 (1972).

55 Where the pragmatic test has been employed, courts have imposed 16(b) liability even though the defendant was not vested with insider status both at the time of purchase and sale. See Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969), cert. denied, 396 U.S. 1036 (1970) (deputized corporate director liable for short-swing profits after he had resigned his position on the corporate board); Adler v. Klawans, 267 F.2d 840 (2d Cir. 1959) (defendant, who at the time of purchase was not a corporate director, but was a director at time of sale less than 6 months later, liable for profits under § 16(b)).

56 Emerson did not contest its liability for the first sale which had brought its holdings in Dodge under 10%. Emerson Elec. Co. v. Reliance Elec. Co., 434 F.2d 918 (8th Cir. 1970), aff'd, 404 U.S. 418 (1972).

57 In a scathing dissent, Justice Douglas, joined by Justices Brennan and White, decrying the return to the objective approach, contended: "By the simple expedient of dividing what would ordinarily be a single transaction into two parts . . . a more-than-10% owner may reap windfall profits on 10% of his corporation's outstanding stock." 404 U.S. at 431 (dissenting opinion).
requirement that a 10% owner be such “both at the time of the purchase and sale . . . of the security involved.” Read literally, this language clearly contemplates that a statutory insider might sell enough shares to bring his holdings below 10%, and later — but still within six months — sell additional shares free from liability under the statute.58

Less than 2 years later, in Kern County, the Court, as noted above, rejected the objective test and instead applied the speculative abuse test. Endorsing the use of this test to determine liability in unorthodox transactions, the Court recognized:

[C]ourts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent — the realization of short-swing profits based upon access to inside information — thereby endeavoring to implement congressional objectives without extending the reach of the statute beyond its intended limits.59

The literal construction of the statute in Reliance and the pragmatic approach taken in Kern County evidence the Court’s preference not to permit the “arbitrary, some might say Draconian,”60 nature of section 16(b) to harm those investors who had no possibility of benefiting from, or even obtaining, inside information.

It was against this background of judicial dissatisfaction with the utilization of section 16(b) to redress possible abuses in defensive mergers that the Second Circuit faced the next issue. The court’s initial determination that Crane had not “sold” its Air Brake stock by exchanging it for Standard stock dictated review of the district court’s supplemental holding that Crane’s cash purchase of Air Brake could be matched against its subsequent sale of Standard in order to impose liability under section 16(b). Aware that this was a question of first impression,61 the Second Circuit drew upon both

58 Id. at 423 (emphasis added). See generally Note, Reliance Electric and 16(b) Litigation: A Return to the Objective Approach?, 58 VA. L. REV. 907 (1972).
59 411 U.S. at 594-95 (footnote omitted). The Kern County Court also considered § 16(b) an inappropriate remedy for abuses which may arise in the context of a defensive merger. Thus, the Court stated: “If there are evils to be redressed by way of deterring those who would make tender offers, § 16(b) does not appear to us to have been designed for this task.” Id. at 597-98.
61 510 F.2d at 1057. The court noted that the only decision which peripherally touched upon the issue of matching, Blau v. Oppenheim, 250 F. Supp. 881 (S.D.N.Y. 1966), “involved only a question of standing to sue.” 510 F.2d at 1057 n.22. In Blau, the court held that upon transfer by an issuer of all its assets to the corporation with which it had merged, the surviving corporation had standing to bring a § 16(b) action. 250 F. Supp. at 884.

Although the Second Circuit did not expressly reach the issue of standing, it did state that Standard could not bring a cause of action as successor in interest unless the action had already accrued while Air Brake was an independent entity. Since it was ultimately resolved that no cause of action had inured to Air Brake’s benefit and “[s]ection 16(b) is not a statute dealing with corporate assets whatever they may be,” 510 F.2d at 1052, in retrospect
the objective test of literal statutory interpretation utilized in *Reliance* and the speculative abuse test advanced in *Kern County* and found the proposed matching to be impermissible.\(^6\)

The court first noted that section 16(a), which lays the definitional groundwork for section 16(b), refers only to the "equity securities of such issuer"\(^6\) in discussing the predicates of 16(b) liability.\(^6\) Accordingly, the court opined that the statute contemplates the securities of only a single issuer. As the Second Circuit properly indicated, imposition of liability on Crane would, in effect, allow Standard to match the purchases of one issuer against the sales of another, thereby ignoring the clear language of the statute. Such a recovery, the court concluded, is outside the intended scope of section 16(b).\(^6\) It is submitted that it would be Standard's capacity to bring a cause of action against Crane may be questioned. See also *Western Auto Supply Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736, 739-40 (8th Cir. 1965), cert. denied, 382 U.S. 987 (1966).\(^6\)

\(^{62}\) 510 F.2d at 1057-63. By resolving both the purchase-sale issue and the matching issue in favor of Crane, the court never reached the question of whether Crane's sale of Standard was outside the ambit of § 16(b) because it was a forced sale. *Id.* at 1058. This issue would have posed an interesting problem since the weight of what little authority there is would appear to dictate resolution against Crane.

In *Western Auto Supply Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736 (8th Cir. 1965), cert. denied, 382 U.S. 987 (1966), the Eighth Circuit held that a corporate insider's divestiture of its holdings in a company pursuant to an antitrust consent decree was nevertheless a sale for § 16(b) purposes. Since the defendant had voluntarily entered into the consent decree with the Government, however, the question of what result would have ensued had the litigation culminated in a divestiture order was left open. 348 F.2d at 742. See also *Makofsky v. Ultra Dynamics Corp.*, 383 F. Supp. 631, 643 (S.D.N.Y. 1974) (mem.) (no forced sale where offeror's cash flow shortages compelled abandonment of takeover bid and offeror subsequently disposed of shares tendered); *Allis-Chalmers Mfg. Co. v. Gulf & W. Indus., Inc.*, 372 F. Supp. 570, 579 (N.D. Ill. 1974) (mem.), rev'd on other grounds, 527 F.2d 335 (7th Cir. 1975) (tender offeror's disposal of target company's stock because target company had slashed its quarterly dividend in order to thwart takeover bid not a forced sale).

It is interesting to note that in the earlier market manipulation action against Standard, *see* notes 24 & 26 supra, the Second Circuit suggested that Crane might become a forced seller, postulating that if Standard ultimately succeeded "in defeating Crane's tender offer and consummating the [defensive] merger, antitrust considerations would require sale by Crane . . . ." *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 794 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970). The court could not definitively resolve this issue, however, because the success of Crane's tender offer, absent Standard's manipulative tactics, was highly speculative. 419 F.2d at 803-04.

\(^{63}\) Section 16(a) defines the term "beneficial owner" and sets forth requirements for periodic disclosure to the SEC of such owner's interest in "the amount of all equity securities of such issuer of which he is beneficial owner." 15 U.S.C. § 78p(a) (1970).

\(^{64}\) 510 F.2d at 1058-59.

\(^{65}\) The statute speaks of "such issuer" in the singular. There is no room for a grammatical construction that would convert the singular into a plural. Nor does the internal construction of the section lend itself to such a free interpretation. For if the "issuer" is Air Brake, the insider profits "recoverable by the issuer" would not be the profits on the sale of its own stock but of the stock of a different "issuer" — Standard. If the "issuer" is Standard, "any profit realized by him from any purchase and sale . . . of any equity security of such issuer" does not cover the purchase of an equity security of another "issuer" — Air Brake.

510 F.2d at 1058 (emphasis in original). This wording parallels the language of the Supreme Court's literal reading of § 16(b) in *Reliance*. *See* text accompanying notes 54-58 supra.
especially inequitable to impose 16(b) liability on a defeated tender offeror by matching with the purchase of the target company's stock shares of another company whose subsequent participation in the transaction was not contemplated at the time the initial offer was made.

As previously noted, the court's reliance on the objective approach was supplemented by application of the pragmatic approach. The court rejected the district court's determination that Crane's cash sale of its Standard securities was an orthodox transaction not mandating utilization of the speculative abuse test. In the Second Circuit's opinion, the district court had erred in applying the statute's conclusive presumption. Noting that a defensive merger is by definition an unorthodox transaction, it concluded that scrutiny of any transactions pursuant to a merger similarly requires utilization of the speculative abuse test. In arriving at this conclusion, the court concentrated on what it termed "the judicial gloss on the statute by earlier judicial interpretation." The court reasoned that if Crane did have access to inside information, it could easily have been gleaned from the facts and circumstances of Crane's activities and liability could have been resolved by the use of more traditional concepts of purchase and sale.

The court further noted that the legislative history of the

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66 510 F.2d at 1059-60. The district court's view that "garden-variety purchases and sales" do not fall within the province of the speculative abuse test, 346 F. Supp. at 1167 (supplemental opinion), seems to be correct. See, e.g., Mouldings, Inc. v. Potter, 465 F.2d 1101, 1104 (5th Cir. 1972), cert. denied, 410 U.S. 929 (1973).
67 510 F.2d at 1059-60, citing Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973). In Kern County, the Court recognized that application of a subjective standard of liability would facilitate the workings of the statute. Id. at 594 n.26. It would appear to follow, a fortiori, that to further facilitate the workings of the statute any transaction pursuant to a merger should similarly be treated as unorthodox, thereby mandating application of the speculative abuse test. Id. at 599.
68 510 F.2d at 1059.
69 The Second Circuit's confidence in the competence of the courts to determine access to inside information is well founded. In this regard, the application of the speculative abuse test by the Sixth Circuit is instructive. In Champion Home Builders Co. v. Jeffress, 490 F.2d 611 (6th Cir.), cert. denied, 416 U.S. 986 (1974), the court, employing this test, determined that defendant had access to inside information prior to the time he became a statutory insider of the acquiring corporation. Jeffress, sole owner of Concord Mobile Homes, Inc., entered into an agreement with Champion, whereby Concord would merge into Champion and Jeffress would exchange his shares of Concord for 13% of the total Champion stock. When Jeffress subsequently sold part of the Champion stock within 6 months of the exchange, a 16(b) action was commenced. Jeffress claimed he was outside the ambit of the statute since he was not an insider of Champion at the time of the purchase (the exchange pursuant to the merger). Applying the speculative abuse test, the court noted that prior to the merger, although not an insider of Champion, Jeffress attended board meetings of Champion and knew in advance about an impending stock split. He was, therefore, found liable under § 16(b) since "[h]e took advantage of this information and participated in the timing of the sale to maximize profits in a rising market situation." 490 F.2d at 618.
statute evidences congressional desire to curb speculative abuses by those persons owing a fiduciary duty to their corporations or in a position to profit from inside information. The theory of section 16(b) is that the insider has profited by misuse of an asset of his corporation, viz, inside information, and that any gain thereby realized properly belongs to the corporation. Because Standard, as the successor corporation to the merger, had suffered no wrong, the court concluded, any recovery in this action would constitute an undeserved windfall. It would be particularly unjust, in the court's opinion, to allow Standard to reap a windfall as a result of a merger which it controlled. Furthermore, the court reasoned, it would be unduly harsh to force Crane to hold its Standard stock for 6 months and "compel it to subject itself to the vagaries of the market, and probably to the continued payment of interest to a lending institution as a penalty for losing the contest for control."\(^7\)

While it is possible that a defeated tender offeror might be in a position to gain access to inside information,\(^7\) by refusing to match the purchases of Air Brake against the sales of Standard the Second Circuit has closed the door to the use of attenuated theories of purchase and sale which seek to transform unorthodox transactions into traditional cash purchases and sales. Any possible abuse in a defensive merger situation can be discovered through utilization of the speculative abuse test without resort to theories of liability which seek to impose an objective standard of liability upon innocent tender offerors.

In view of the narrow thrust of section 16(b) and its inherent limitations, it is not surprising that the American Standard court has redirected the scope of the statute in order to ameliorate its "purposeless harshness."\(^7\) Since its enactment critics have denounced the means by which section 16(b) seeks to justify its ends, and as litigation has increased, the statute's critics have increased correspondingly.\(^7\) Thus, the Second Circuit's decision in American Stan-

\(^7\) 510 F.2d at 1062.

\(^7\) It is conceivable that a defensive merger situation would present opportunities for speculative abuse. For example, a tender offeror might have received inside information from a once receptive management which later became hostile and engineered a defensive merger or from an insider of the hostile target company who disagreed with management policy. It is submitted, however, that these abuses could be most effectively rectified by resort to other remedies such as rule 10b-5.

\(^7\) Blau v. Max Factor & Co., 342 F.2d 304, 307 (9th Cir.), cert. denied, 382 U.S. 892 (1965). In fact, immediately after the enactment of § 16(b), clarifying amendments were advocated to nip in the bud accurately predicted litigation problems. Seligman, Problems Under the Securities Exchange Act, 21 Va. L. Rev. 1, 2-25 (1935). Due to congressional and administrative inertia, for the most part these problems have been dealt with by judicial fiat rather than by those charged with the administration of the statute.

\(^7\) See authorities cited note 76 infra.
may be considered merely a reflection of the general dissatisfaction with section 16(b)'s application to situations where more appropriate remedies to deal with possible abuse exist. As one critic has remarked:

Everything that this section was designed to accomplish, and much more, is presently being accomplished under section 10(b) and rule 10b-5. Indeed, in recent years section 16(b) has become a trap and a snare . . . especially in connection with corporate mergers, reclassifications, conversions of securities and the like.\(^7\)

More importantly, the Second Circuit in *American Standard* has added its voice to the growing judicial outcry "that reliance on Section 16(b) as the key tool in merger situations may not necessarily be desirable."\(^7\) It is submitted that with the advent of stronger legislative and administrative control of tender offers\(^7\) and the development of rule 10b-5 to combat actual misuse of inside information, the utility of section 16(b) has been appreciably diminished.\(^7\) While section 16(b) may still be an effective tool in combating abuses by corporate directors and officers, the Second Circuit seems to have laid to rest the statute's conclusive presumption of speculative abuse in unorthodox transactions.

*Allen A. Hans*

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\(^7\) 510 F.2d at 1063.


\(^7\) See generally Davis, *Conversions as Purchases and Sales Under Section 16(b) of the Securities and [sic] Exchange Act of 1934*, 24 BUS. LAW. 1109 (1969). In commenting upon the changes which have taken place in the political and economic climates since the enactment of § 16(b), the author asserts:

It must be borne in mind that the Committee [Senate Committee on Banking and Currency] conducted its hearings during the time the country was still in the depths of a depression. The memory of the 1929 stock market crash was fresh in the minds of everyone and was compounded by the fact that the New York Stock Exchange suffered another severe decline in the summer of 1933, when the hearings were underway.

*Id.* at 1110-11.

Indeed, within the past 10 years there have been numerous public calls for repeal of § 16(b) as well as a flood of calls for amendment. See, e.g., H. Manne, *Insider Trading and the Stock Market* (1966); Wu, *An Economist Looks at Section 16 of the Securities Exchange Act of 1934*, 68 COLUM. L. REV. 260 (1968). The main thrust of Manne's argument is that insider trading actually leads to price stabilization. For a contrary view, see Schotland, *Unsafe at Any Price: A Reply to Manne*, Insider Trading and the Stock Market, 53 VA. L. REV. 1425 (1967). Other critics claim that from an equitable point of view, § 16(b) should not be invoked against those who have not in fact made use of inside information. See, e.g., Munter, *Section 16(b) of the Securities Exchange Act of 1934: An Alternative to "Burning Down the Barn in Order to Kill the Rats"*, 52 CORNELL L.Q. 69 (1966).