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STANDING TO SUE IN 10b-5 ACTIONS: EASON V. GMAC AND ITS IMPACT ON THE BIRNBAUM DOCTRINE

I. Introduction

In recent years there has been an increasing concern among judges, practitioners, and commentators over the tentacle-like expansion of the concept of securities “fraud” as developed in § 10(b) of the Securities Exchange Act of 1934. For, considered alone, its sweeping language portends of an “almost completely undefined liability.” In an effort to thwart this feared development, a variety of judicially imposed roadblocks to civil suit has been devised, the most enduring and, certainly, most controversial being the so-called “purchaser-seller” limitation on standing to sue first set down in Birnbaum v. Newport Steel Corp. In the wake of the seemingly inexorable march of § 10(b), however, most of these judicial talismans have crumbled so that today the Birnbaum rule stands virtually alone—a solitary sentinel guarding against what many fear is the potential metamorphosis of federal securities regulation into a far-reaching body of “federal corporate law.” Within this context, the Seventh Circuit Court of Appeals recently decided Eason v. GMAC, a case in which the continued viability of Birnbaum was squarely challenged.

This note will trace the approach taken by the Eason court in resolving the Birnbaum standing issue, analyze that resolution in terms of existing precedent, and evaluate its significance as a salutary rule in its own right as well as its impact upon Birnbaum and § 10(b).

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5 193 F.2d 461 (2d Cir. 1952).

II. Historical Framework

A. Statutory Origin

The Securities Act of 1933\(^7\) and the Securities Exchange Act of 1934\(^8\) were the central facets of a comprehensive scheme of federal securities legislation\(^9\) comprising the New Deal response to the financial debacle precipitated by the stock market crash in 1929.\(^10\) The basic thrust of both the 1933 and 1934 Acts was disclosure.\(^11\) The Securities Act sought to compel disclosure in the initial distribution of securities; the Exchange Act focused upon disclosure in the aftermarket. Additionally, the Securities Act contained a general anti-fraud provision, § 17(a).\(^12\) In 1934 a similar anti-fraud provision was added to the Exchange Act, § 10(b).\(^13\) A “catch-all” provision, § 10(b) was designed to provide the Securities and Exchange Commission (SEC) with a flexible means of closing loopholes which might arise in other provisions of the securities acts.\(^14\) As such, it was couched in terms of considerable breadth—auguring significant potential for judicial expansion.\(^15\)

Since it was not self-executing, § 10(b) lay dormant for nearly eight years, until 1942. In that year, Rule 10b-5\(^17\) was promulgated\(^18\) by the SEC pursuant

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\(^10\) Investigations of the stock market collapse revealed widespread fraud, manipulation, “insider” trading, concealment, and a general victimization of the public investor in the securities industry. See Hearings on S. Res. 84 and S. Res. 56 before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess. and 2d Sess. (1933-34) (Pecora Investigation).
\(^11\) SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963). In describing the legislative intent behind the securities acts, the Court noted: “A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.” Id. at 186. See also Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); Wilko v. Swan, 326 U.S. 427, 430 (1953).
\(^13\) Section 10(b) provides:

> It shall be unlawful for any person . . . [to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

\(^16\) 3 L. Loss, Securities Regulation 1424 & n.7 (2d ed. 1961).
\(^17\) Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentalities 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 deceit upon any person, in connection with the purchase or sale of any security.

\(^17\) C.F.R. § 240.10b-5 (1973).
\(^18\) Rule 10b-5 was originally numbered as X-10B-5 since, at that time, all rules promulgated by the SEC under the Exchange Act were prefixed with the designation “X.” This more exotic
to authority granted by § 23(a) of the Exchange Act and § 10(b) itself. Although originally intended merely to fill the loophole created by a legislative "gap" between § 17(a) of the Securities Act and § 15(c)(1) of the Exchange Act, Rule 10b-5 has been called the "focal point for a spectacular growth in the law governing civil liability for transactions in securities." Its promulgation opened a Pandora's Box. Today, "one can scarcely find an issue of the . . . Federal Supplement and Federal Reporter that does not contain an opinion on § 10(b)."

B. The Implied Civil Remedy Concept

_Kardon v. National Gypsum Co._, decided four years after Rule 10b-5 was issued, was the harbinger of this deluge of litigation. In _Kardon_ a shareholders' suit was brought under § 10(b) and Rule 10b-5 to recover damages from the corporate defendant and others for allegedly conspiring to induce, and inducing, the plaintiffs to sell their stock for less than its true value through fraudulent misrepresentations of certain facts. While conceding that no express provision in either § 10(b) or Rule 10b-5 allowed for private rights of action, the district court, per Judge Kirkpatrick, held that "in view of the general purpose of the [Exchange] Act, the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies." Although there have been occasional detractors, the _Kardon_ "implied civil remedy" concept in § 10(b) cases has never seriously been challenged. In 1971 the Supreme Court put to rest what lingering doubts remained clouding its use.

designation remained until a general renumbering was undertaken by the SEC in 1956. It still appears occasionally in the case law and commentaries.

21 SEC, Securities Exchange Act Release No. 3230 (May 21, 1942). Section 17(a) of the Securities Act prohibited the use of fraud in the "sale" of securities by "any person." Section 15(c)(1) of the Exchange Act prohibited the use of fraud in the "purchase" or "sale" of securities by "brokers" and "dealers." Hence, neither section covered the purchase of securities by any person and, therefore, a legislative "gap" was created. See generally Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967).
22 Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540, 543 (2d Cir. 1967).
28 Few quarreled with _Kardon_ because the action there was brought by sellers of securities against their purchasers, a cause of action unavailable under the Securities Act since its applicable remedial provision protected only "purchasers." _Fischman v. Raytheon Mfg. Co._, 188 F.2d 783 (2d Cir. 1951), expanded the coverage of the _Kardon_ principle to injured purchasers as well as sellers.
The emergence of the implied civil remedy, coupled with the omnipresent risk of perilously expensive liability under § 10(b), prompted many courts to fashion restraints on the class of persons eligible to recover in civil actions brought under Rule 10b-5 even though no such limitations are prescribed in the statutory or administrative language. The most formidable, most enduring, and most controversial of these judicial constructs was that first imposed in *Birnbaum v. Newport Steel Corp.*—the “purchaser-seller” rule. Hailed as the “landmark case concerning those who qualify as plaintiffs to sue under § 10(b)—Rule 10b-5,” *Birnbaum* is credited with being the “progenitor of much of the law and conventional wisdom in the 10b-5 area.” It arose in the context of a derivative suit filed by the minority interest shareholders of Newport Steel accusing its controlling shareholder of misrepresenting the circumstances of an attractive merger offer and then selling his shares in collusion with others to a third party at a substantial premium after rejecting the merger bid. The complaint was dismissed in the district court, the fatal disability being that the plaintiffs were neither purchasers nor sellers of securities in the complained of transaction. On appeal the judgment of the district court was affirmed. Judge Augustus Hand, speaking for the court of appeals, explained that, in its view, § 10(b) and Rule 10b-5 were directed “solely at that type of misrepresentation or fraudulent practice usually associated with the purchase or sale of securities rather than at fraudulent mismanagement of corporate affairs, and that Rule X-10B-5 extended protection only to the defrauded purchaser or seller.” In so holding, the *Birnbaum* court articulated two distinct and independent principles.

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30 The risk is twofold: (1) subjection to substantial defense costs and exorbitant judgments; (2) subjection to public opprobrium and obloquy. See Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1285 (2d Cir. 1969). Because the stakes are so high, very few claims involving Rule 10b-5 have reached the merits. If the plaintiff survives a dismissal motion, the corporate defendant will uniformly seek a settlement rather than risk a court fight. A. Bromberg, *Securities Law: Fraud—SEC Rule 10b-5 §§ 1.3(2), 9.1* (1969).


34 Rekant v. Desser, 425 F.2d 872, 877 (5th Cir. 1970). As the court vividly put it: “Birnbaum has been shot at by expert marksmen . . . . Bloody, but unbowed, Birnbaum still stands.” Id.


36 193 F.2d 461 (2d Cir. 1952).

37 Erling v. Powell, 429 F.2d 795, 797 (8th Cir. 1970).


interpreting the last crucial phase of Rule 10b-5—the “in connection with the purchase or sale of any security” terminology. The first principle, that only a “defrauded purchaser or seller” could bring a civil action under Rule 10b-5, has since been uniformly regarded as a standing requirement. Aside from this procedural roadblock, a second principle, termed the “substantive” ruling, foreclosed the redress of claims under Rule 10b-5 that only stated a cause of action involving “fraudulent mismanagement of corporate affairs.” Together, these dual postulates constituted the Birnbaum Doctrine, a proposition which, although subject to immediate criticism by commentators and caution in the courts, enjoyed practically uncontested application throughout the federal courts for over ten years.

Nevertheless, in the last decade the Birnbaum Doctrine has been stretched considerably by courts eager to bring within the purview of Rule 10b-5 additional types of misconduct and a wider variety of plaintiffs than that permitted under traditional definitions of “purchaser” or “seller” of securities. At increasingly frequent intervals, judges have fashioned “constructive” purchasers or sellers to elude the strict prescriptions of the Birnbaum rule. So, too, other courts have relied on a “forced” purchase or sale of securities fiction to accomplish a similar result. Moreover, where the relief sought is merely prophylactic or injunctive in nature, a number of courts have simply ignored Birnbaum. Finally, a cluster of recent decisions has stripped away layer upon layer of judicial insulation surrounding Birnbaum’s substantive holding, generating a coalescence of

47 These include:

(1) “Interstate instrumentalities” See, e.g., Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968) (intrastate use of telephone within prohibition of the Act); Stevens v. Vowell, 343 F.2d 374 (10th Cir. 1965) (manipulative device itself need not be transmitted through the mails).

(2) “Privity” see, e.g., Cochran v. Channing Corp., 211 F. Supp. 239, 245 (S.D.N.Y. 1962); see also 3 L. Loss, Securities Regulation 1767 (2d ed. 1961).

(3) “Deception” see, e.g., Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969); see also Note, 50 Tex. L. Rev. 1273, 1276-78 (1972).

(4) “Common law fraud”see, e.g., Stevens v. Vowell, 343 F.2d 374 (10th Cir. 1965).


(6) “In connection with” see, e.g., Supt. of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6
the state cause of action for breach of corporate fiduciary duty with the federal action for securities fraud under § 10(b). The overall result of these assaults on the Birnbaum Doctrine has been a merger of its dual postulates into a singular whole—the purchaser-seller standing limitation. This remnant of the Birnbaum Doctrine has continued to enjoy wide, if not unswerving, application in the federal courts at least with respect to actions for money damages notwithstanding occasional—and heretofore premature—judicial obituaries.

III. The Eason Decision

The most serious challenge to the continued vitality of the Birnbaum purchaser-seller limitation was issued recently by the Seventh Circuit Court of Appeals in Eason v. GMAC. Eason arose from an "ill-advised" corporate acquisition. In the fall of 1969 Dave Waite Pontiac, Inc. (Waite), an automobile agency, entered negotiations with the Bank Service Corporation (Bank Service) for the sale of its automobile leasing division, Waite Leasing, to Bank Service. General Motors Acceptance Corporation (GMAC), which financed the entire Waite operation, including Waite Leasing, participated in these negotiations and actively sought effectuation of the sale. An agreement was reached on October 31, 1969, whereby the assets of Waite Leasing were sold to Bank Service in exchange for 7,000 shares of Bank Service common stock and its assumption of various liabilities of Waite Leasing owing to GMAC. Additionally, at the insistence of GMAC, which desired further protection for its investment in Waite Leasing from among "persons of substantial financial worth," three shareholders of Bank Service—W. D. Eason (Eason), M. O. Satrom, and J. M. Satrom (Satrom)—executed personal guaranties to GMAC regarding payment of all liabilities assumed by Bank Service and owing to GMAC as well as any future indebtedness that might arise between the two corporations in connection with the leasing enterprise. Thereafter, Bank Service undertook operation of the leasing business in its own name and, eventually, in the name of a wholly owned subsidiary, General Auto Leasing and Rental Corporation (GAL).
The leasing venture was never profitable after acquisition despite repeated infusions of capital by Eason and Satrom in an unsuccessful effort to revive the faltering investment. After sustaining operating losses for nearly twenty consecutive months, the drain on working capital became such that GAL was forced into insolvency dragging with it the parent corporation, Bank Service. Subsequently, Bank Service defaulted on the obligations owing GMAC and the three guarantors were called upon for indemnification.\footnote{1137} Failing to recover the amount due, GMAC instituted a state action to enforce the guaranty agreements naming the three guarantors as codefendants. Eason and Satrom, individually and as representatives of GAL and Bank Service, filed a countersuit in the federal courts grounded upon \$ 10(b) naming Waite and GMAC as codefendants. The federal action alleged that fraudulent misrepresentations\footnote{57} and material omissions\footnote{58} had occurred in connection with the purchase and sale of securities in violation of Rule 10b-5. The three guarantors prayed for relief in the form of a rescission of the original purchase agreement, the guaranties, and all evidence of indebtedness related thereto; and additionally, sought recovery of money damages in an amount of at least $500,000.00 for themselves collectively and a like amount for the defunct corporations they represented.\footnote{59} The district court, citing Birnbaum, dismissed the guarantors' third amended complaint and denied leave to file a fourth, ruling that the guarantors in themselves had no standing to sue under Rule 10b-5 since they were neither "purchasers" nor "sellers" of securities in the complained-of transaction and that a derivative suit on behalf of the defunct corporations was likewise inappropriate.\footnote{60}

\footnote{56} The balance due on the obligations owing GMAC exceeded $300,000.00. \textit{Id.} at 2.
\footnote{57} The alleged fraudulent misrepresentations included, \textit{inter alia}, that:
   
   (1) Waite Leasing and the automobile leasing business generally were profitable and would continue to be so after acquisition.
   
   (2) The lease contracts provided sufficient cash flow to Waite Leasing so that, after deducting operating expenses, Bank Service and GAL could retire their financial obligations to GMAC.
   
   (3) In purchasing Waite Leasing, Bank Service was receiving approximately $120,000.00 in equity.
   
   (4) Waite Leasing was financially sound and therefore no further capital outlay would be required to operate the business.

\textit{Id.} at 6-A.

\footnote{58} The alleged fraudulent nondisclosures included, \textit{inter alia}, that:
   
   (1) The structure of the lease contracts was such that lease income did not and could not cover the expenses of operating the business.
   
   (2) Waite Leasing and Waite were in poor financial condition.
   
   (3) The expenses of operating Waite Leasing were "hidden" in other operations of Waite.
   
   (4) Waite Leasing was not and could not be independently profitable.
   
   (5) There was little or no equity in the Waite Leasing assets purchased.
   
   (6) In the fall of 1969, GM was changing its policy of giving fleet discounts and volume discounts to automobile leasing companies and that such discounts would soon be discontinued.
   
   (7) At the time of purchase, GM and GMAC were conducting a national program to have its dealers dispose of their leasing divisions and, in particular, were urging Waite to dispose of Waite Leasing because of its unprofitability.

\textit{Id.} at 6-A-8-A.

\footnote{59} GMAC and Waite successfully contended below that (1) under Birnbaum, a party must be either a purchaser or seller of a security in order to maintain a 10b-5 action; (2) although the notes guaranteed were admittedly securities, the guarantors were not technically purchasers thereof; and (3) even though the guarantors were sellers of the guaranty agreement, they were not sellers of a "security" for purposes of Rule 10b-5. Thus, the defendants-appellees
On appeal to the Seventh Circuit Court of Appeals, the guarantors presented four issues for review. The court of appeals, per Judge Stevens, chose to focus solely upon the third enumerated issue: whether the Birnbaum rule served to block the plaintiffs-appellants' action assuming they were neither purchasers nor sellers of a security in the complained-of transaction.

A. The Standing Question

The court of appeals conceded at the outset that the Birnbaum purchaser-seller limitation had consistently been described as a "standing" requirement. It cautioned against a too casual usage of that term, however, noting that it was subject to two quite dichotomous interpretations: (1) "whether the plaintiff is a person who has suffered a legal wrong," and (2) "whether he has a sufficient interest in a real controversy with the defendant to entitle him to invoke the jurisdiction of a federal court." Concluding that the purchaser-seller limitation had been construed in this latter "constitutional and jurisdictional sense," the court found such an interpretation to be "unwarranted" and, moreover, superfluous to a determination of the standing question in a 10b-5 suit:

"We have no doubt that the plaintiffs' interest in the controversy before us is sufficient to satisfy the requirements of Article III. Indeed, the parties with a vital stake in the outcome of the dispute are the individual plaintiffs on the one hand and GMAC on the other. . . . This dispute may certainly be regarded as a "case" or "controversy" between these parties within the meaning of Article III."

B. The Protection Question

A "more useful" question, according to the court of appeals, was "whether were successful in using Birnbaum as a shield to disarm the guarantors of their 10b-5 claim while simultaneously pursuing the state cause of action against these same guarantors."

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61 The issues presented were:
- (1) whether the appellants were "purchasers" of the notes guaranteed for purposes of Rule 10b-5.
- (2) whether the guaranty contracts constituted a "sale" of securities for purposes of Rule 10b-5.
- (3) whether the Birnbaum rule served to block the appellants' action assuming that they were neither purchasers nor sellers of securities in the complained-of transaction.
- (4) whether a derivative action on behalf of the now-defunct corporations was appropriate.

62 Judge Stevens made clear the intention of the court of appeals:

Since the necessity of stretching the definitions of "purchasers," "sellers," and "securities" is a result of the Birnbaum rule we think it appropriate to examine the viability of that rule first. For purposes of decision, therefore, we assume that the only purchase or sale of securities involved in the transaction complained of was the transfer of 7,000 shares of stock from Bank Service to Waite, and we reject the suggestion that plaintiffs should be characterized as "sellers" of stock.


63 Id. at 4, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,161.

65 Id. at 5, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,161.

67 Id.

69 Id. at 6, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,161.
the plaintiffs were members of the class for whose special benefit Rule 10b-5 was adopted."76 Acknowledging that Judge Hand's formulation in Birnbaum was in form an identification of persons to whom Rule 10b-5 afforded protection, the Eason court sought to demonstrate, by reference to a series of recent decisions,71 how the course of judicial opinion over the last decade had actually shifted, recognizing a class of "protected" persons extending beyond mere purchasers and sellers of securities to a much more inclusive group—"investors."72 To support further its contention, the court of appeals cited the plain language of § 10(b) and Rule 10b-5,73 recent statements by the Supreme Court adumbrating its acceptance of an "investor" approach to Rule 10b-5,74 and a series of pronouncements by the SEC in its role as amicus curiae urging abolition of the Birnbaum rule in favor of a more flexible approach to 10b-5 litigants.75

Convinced that the Birnbaum rule should no longer be controlling, the court of appeals rejected it and fashioned its own interpretation of persons protected under Rule 10b-5.76 The "Eason approach" extended the coverage of Rule 10b-5 to those persons who suffered significant injury in their capacity as investors as a direct consequence of fraud in connection with a securities transaction even though their participation in the complained-of transaction did not involve either the purchase or sale of securities.

Under this formulation the Eason plaintiffs were adjudged to have suffered a legal injury justiciable in the federal courts notwithstanding that they were neither purchasers nor sellers in the traditional Birnbaum sense.77

C. The Overriding Considerations Question

Perhaps anticipating the furor its "investor" approach might foment, the Eason court attempted to dispel two of the most persistent bugaboos surrounding the Birnbaum rule in its closing remarks. To the contention that its decision would open the floodgates to federal litigation, the court countered that the "volume of 10b-5 litigation has already expanded dramatically and will no doubt continue to do so whether or not the purchaser-seller limitation is rejected."78 It added that the "causation" test it formulated would act as a limit

70 Id., CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,162.
73 Id.
74 Id., CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,163.
75 Id. at 8, 10, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,163, 95,164.
76 Id. at 8, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,163.
77 Id. at 8-9, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,163. Two considerations were controlling in the court's determination: (1) the guarantors' interest as shareholders of Bank Service was apparently sufficient to induce them to execute substantial personal guarantees to GMAC, thereby fulfilling the "significant injury" and "investor" aspects of the Eason test; (2) as individual guarantors, the appellants were direct parties to the transaction in dispute, thus meeting the "direct consequence" aspect of the test.
78 Id. at 9, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,163.
on the availability of private relief" and that, even assuming the abandonment of Birnbaum would significantly increase the courts' workload, it could not for that reason "reject what we believe to be a correct interpretation of the statute or the rule." Similarly, in regard to the argument that abolition of Birnbaum would debilitate national consistency in application of Rule 10b-5, the court of appeals retorted that the present extent of such consistency was "overstated" and "less important than an independent appraisal of an important issue arising in an area of the law which, despite the age of the statute, is still in an embryonic stage of development."

IV. Pitfalls in Practicability

In reaching its decision, the court of appeals supplanted the Birnbaum rule with its own "investor" approach grounded upon causal connection. While the "causal connection" test is not in itself new, the bold swath in long-established legal doctrine which the court of appeals cut to grant relief to the Eason plaintiffs parallels in significance the stance taken earlier by the Kardon court and harbors much the same explosive potentiality. As such, the approach of the Eason court bears careful scrutiny.

A. Response to the Standing Question

Since persons seeking relief under § 10(b) are provided no express statutory remedy, their asserted rights of action must be determined at the outset under the generalized "common law" rules of standing extant in the federal courts. Mindful of Mr. Justice Douglas' admonition that "generalizations about standing are largely worthless," one working premise in this area is safely assumed: "[T]he question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.'" The Eason court addressed the standing question in this constitutional and jurisdictional sense, limiting its scope to whether the appellants had a sufficient interest in a real controversy with the appellees to entitle them to invoke federal jurisdiction under the § 10(b) headland. But, in addition to the Article III question, the determination of standing in the federal courts may involve the use of other rules as well. These ancillary rules, developed by the judiciary in the exercise of self-restraint and designed to mitigate the flood of litigants swirling

79 Id. at 10, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,163-64.
81 Id. at 11, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,164.
82 Id.

84 In the cases cited at note 83 supra, the relief sought was exclusively injunctive in nature. The Eason plaintiffs sought rescission and money damages. Hence, in adapting the "causation" test to the Eason plaintiffs, the court of appeals entered virgin territory.
85 Note 25 supra.
87 Id.
88 Id. at 154; see also Barrows v. Jackson, 346 U.S. 249, 255 (1953).
about the federal court system, have turned the standing question into a "complicated specialty of federal jurisdiction."

Exemplary of this stratified approach to the determination of standing is Association of Data Processing Service Organizations, Inc. v. Camp, decided by the Supreme Court in 1970. Camp involved a competitor's suit challenging an administrative ruling by the Comptroller of the Currency where the plaintiff's standing to sue absent statutory authorization was in issue. In ruling against the plaintiff, the Supreme Court relied on a two-pronged test of standing: (1) whether the plaintiff had alleged that the challenged action caused him "injury in fact, economic or otherwise"; and (2) whether the interest sought to be protected by the plaintiff was "arguably within the zone of interests to be protected" by the statute.

Since normally both aspects of the Camp test must be fulfilled before the plaintiff is accorded standing in a federal action where his right to relief is not authorized by statute and since the Birnbaum rule is no more than a reflection of Camp's second test, it may be argued that the Eason court in repudiating Birnbaum effectively overrode a prescription on standing mandated by the Supreme Court as well. At first glance this suggestion is appealing, particularly when placed in the context of the statute invoked. On closer examination, however, such a view of Eason appears to overlook what should be the primary consideration in any standing question—the "facts and circumstances surrounding the particular claim presented."

In cases challenging administrative actions, Camp's two-pronged test insures that the plaintiff is a party "most immediately concerned" with the administrative action; but in private actions for damages brought pursuant to Rule 10b-5, such as Eason, the plaintiff is seeking primarily to protect his own interests and only secondarily to foster the interests of the public in preventing violations of 10b-5. Therefore, the purpose of the Camp test, to determine whether a given party will be a "reliable private attorney general," makes it inapplicable to the 10b-5 context where the concern is ascertaining the existence of a genuine "case" or "controversy." Furthermore, even if an application of the Camp test to the Eason plaintiffs were undertaken, it would generally involve inquiry into the merits, an excursion the Camp court expressly sought to avoid. Finally, the Eason approach would seem to embody both aspects of the Camp test in its own right although at different stages in the proceedings. Thus, the "injury in fact" (damnum) aspect would be decided in Eason at the determination of standing. The "legal wrong" (injuria) aspect would be postponed until proof of causal con-

92 Id. at 152.
93 Id. at 153.
95 Jaffe, Standing Again, 84 Harv. L. Rev. 633, 637 (1971).
nection was heard. So, the Eason court appears to satisfy Camp's second test as well, albeit with less specificity than suggested in Birnbaum.

B. Response to the Protection Question

The Eason court discarded the long-standing contention that Rule 10b-5 applied solely to purchasers and sellers of securities in favor of a more expansive definition of protected parties, collected under the general rubric of "investors." This departure from the Birnbaum rationale in an action for money damages was predicated upon four bases of support each of which has been, at various times and in varying degrees of intensity, the subject of controversy in the courts.

1. SEC Amicus Appearances

As one ground of support for its "investor" approach, the Eason court alluded to the many recent appearances by the SEC as amicus curiae wherein it argued for adoption of a similar investor-oriented rationale. Specifically, the court referred to the SEC amicus brief in Superintendant of Insurance v. Bankers Life & Casualty Co., the last important Supreme Court decision involving Rule 10b-5. The problem in deriving support from such pronouncements springs from the administrative history surrounding Rule 10b-5. Issued by the SEC, these historical documents reflect a contradictory viewpoint from that presently urged by the Commission in its amicus appearances. Thus, in its initial disclosure to the public of Rule 10b-5, the SEC explained its purpose as being to close "a loophole in the protection against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." This expression of administrative intent was specifically relied upon by Judge Hand in Birnbaum and fostered the creation of the purchaser-seller limitation therein. So, in forsaking Birnbaum the Eason court appears to have defaulted on its obligation to follow the prescriptions of administrative intent. Two factors regarding present-day reliance on such pronouncements dispel the notion of impropriety in departing from their express language. First, it has been argued that the Commission understated the purposes of Rule 10b-5 in its original pronouncements. Second, and more importantly, it must be remembered that, unlike a legislature, an administrative body, such as the SEC, has more than one opportunity to express its views; hence, it can change its mind. Such a change has occurred within the Commission regarding Rule 10b-5 as the SEC amicus briefs amply demonstrate. Since the language of Rule 10b-5 is broad enough to support both viewpoints, past and present, there seems

100 See, e.g., Mt. Clemens Indus., Inc. v. Bell, 464 F.2d 339, 341 (9th Cir. 1972); Levine v. Sellon, Inc., 439 F.2d 328, 329 (2d Cir. 1971); Iroquois Indus., Inc. v. Syracuse China Corp., 417 F.2d 963, 967 (2d Cir. 1969); Pappas v. Moss, 393 F.2d 865, 870 (3d Cir. 1968); Dashe v. Susquehanna Corp., 380 F.2d 262, 266 (7th Cir. 1967); Vine v. Beneficial Fin. Co. 374 F.2d 627, 635 n.6 (2d Cir. 1967); O'Neill v. Maytag, 399 F.2d 764, 768 (2d Cir. 1968).
103 Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952).
no good reason to elevate the 1942 Release and other historical documents above the Commission’s present efforts as amicus.\textsuperscript{105}

2. Congressional Intent

A similar predicament confronts the \textit{Eason} court because of its apparent failure to consult the legislative history preceding passage of the Securities Exchange Act and, particularly, § 10(b) to ascertain the parameters of congressional intent.

When Congress enacted the securities acts, it did not write on a clean slate; rather, it wrote on top of a broad-based state law of corporations. Because of this, it has long been argued that the Exchange Act was intended solely to regulate transactions on the securities markets and not to invade the legitimate interests of state law. A recent decision in the Third Circuit Court of Appeals, \textit{Landy v. FDIC},\textsuperscript{106} emphasized this viewpoint:

When Congress enacted Section 10(b), it did not contemplate the protection of every person injured by a fraudulent scheme in connection with the purchase or sale of securities. Its immediate concern was the protection of the purity of the informational system in the securities market.\textsuperscript{107}

Flowing from this interpretation of congressional intent has been an equally restrictive viewpoint on protected parties under § 10(b), again rooted in congressional intent. As \textit{Landy} makes clear, under this view, “the purpose of Congress in enacting Section 10(b) was merely to extend to sellers of securities the same protection that had been afforded to buyers under the 1933 Securities Act.”\textsuperscript{108} In validating these interpretations of congressional intent, adherents to this viewpoint stress the legislative history surrounding passage of the Exchange Act and, specifically, § 10(b).\textsuperscript{109}

The \textit{Eason} court interpreted § 10(b) in a wholly different sense. Relying upon its plain language to ascertain congressional intent, the court construed § 10(b) expansively to include “investors” within its scope. Here again, disregard for historical context hardly seems fatal, especially since any inquiry into statutory intent must “begin with the language of the statute itself.”\textsuperscript{110} Besides, there is such a dearth of evidence regarding congressional intent in the legislative history of § 10(b)\textsuperscript{111} that any generalizations drawn from it appear dubious. There appears no logical necessity for the remedial sweep of § 10(b) to be so narrowly restricted given the broadly interpreted remedial scope of the Exchange Act generally.\textsuperscript{112}

\textsuperscript{105} See Mt. Clemens Indus., Inc. v. Bell, 464 F.2d 339, 342 n.6 (9th Cir. 1972).
\textsuperscript{106} 486 F.2d 139 (3d Cir. 1973).
\textsuperscript{107} Id. at 157.
\textsuperscript{108} Id. at 156.
\textsuperscript{109} See, e.g., statement by Senator Duncan U. Fletcher, Chairman of the Senate Committee on Banking and Currency, 78 Cong. Rec. 2270-71 (1934).
3. Implied Support of \textit{Bankers Life}

More critical support problems appear when the \textit{Eason} court relies on developments in the case law to validate its abolition of \textit{Birnbaum}.

Of initial importance is the court’s use, or \textit{misuse}, of the \textit{Bankers Life} opinion in a supportive context.\textsuperscript{113} Conceding that no Supreme Court holding was inconsistent with the view that only purchasers or sellers were protected by Rule 10b-5,\textsuperscript{114} the court of appeals—in a bit of judicial legerdemain—sought to demonstrate otherwise in repeated references to \textit{Bankers Life}. Of damning significance is the following passage:

[S]peaking for a unanimous court in \textit{Superintendent of Insurance v. Bankers Life \\& Casualty Co.}, Justice Douglas stated that the crux of the case was the fact that “Manhattan suffered injury as a result of deceptive practices touching its sale of securities as an investor.”\textsuperscript{115}

Use of the \textit{Bankers Life} decision in this manner, as a bootstrap to formulation of a viable doctrine of “investor” protection, has met staunch resistance in the courts.\textsuperscript{116} In \textit{Mt. Clemens Industries, Inc. v. Bell}\textsuperscript{117} Judge Ely noted, in commenting upon the use of “isolated, conclusory statements”\textsuperscript{118} drawn from \textit{Bankers Life} to support the appellants’ contention that \textit{Birnbaum} be abolished, that:

These statements, standing alone, might seem to support a literalistic approach to the statute, yet when they are read in context, it becomes apparent that the Supreme Court’s opinion lends more credence to our view [that \textit{Birnbaum} be maintained] than that of appellants. Throughout the \textit{Bankers Life} opinion Mr. Justice Douglas repeatedly emphasized that Manhattan, the claimant there, was to be afforded standing under the Act because of its status as a defrauded “seller” of securities.\textsuperscript{119}

Reliance by the \textit{Eason} court on the \textit{Bankers Life} decision to substantiate its “investor” approach appears misplaced and erroneous.

4. The Course of Judicial Opinion

An even more serious question is whether the \textit{Eason} court misread the “course of judicial decision since 1952”\textsuperscript{120} in concluding that it “has actually recognized that the class of protected persons is broader than merely purchasers and sellers.”\textsuperscript{121}

\textsuperscript{113} The Supreme Court expressly refused to rule on the continued vitality of the purchaser-seller limitation on standing in the \textit{Bankers Life} opinion. \textit{Supt. of Ins. v. Bankers Life \\& Cas. Co.}, 404 U.S. 6, 13 n.10 (1971).

\textsuperscript{114} \textit{Eason v. GMAC}, No. 72-1722 (7th Cir. Dec. 28, 1973), slip opinion at 8, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,163.

\textsuperscript{115} \textit{Id.}, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,162.


\textsuperscript{117} 464 F.2d 339 (9th Cir. 1972).

\textsuperscript{118} \textit{Id.} at 344.

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Eason v. GMAC}, No. 72-1722 (7th Cir. Dec. 28, 1973), slip opinion at 7, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,162.

\textsuperscript{121} \textit{Id.}
Although the cases cited by the Eason court to substantiate its conclusion do represent an expansion of the Birnbaum rule beyond the traditional limitations of "purchaser" or "seller," it has vigorously been argued that this liberality in application is no more than a reflection of the Supreme Court's admonition to construe § 10(b) "not technically and restrictively, but flexibly to effectuate its remedial purposes," and by no means a repudiation of the Birnbaum rule itself. This view is substantially supported in recent case law. No appellate opinion, except Eason, has yet overruled Birnbaum where the plaintiff's claim involved money damages. Moreover, where the purchaser-seller rule has been ignored—as in actions seeking injunctive relief—the result is more properly viewed as an exception to, rather than departure from, Birnbaum. Finally, it cannot be ignored that even where the expansion of the Birnbaum rule is most obvious, in cases involving "constructive" or "forced" purchasers and sellers, the courts continue to pay homage to Birnbaum by working within its central premise.

Thus, reliance upon developments in the course of judicial decision antecedent to Birnbaum to repudiate its standing limitation in favor of an "investor" approach also appears misplaced.

C. Response to the Question of Overriding Considerations

Two public policy considerations for maintaining Birnbaum were confronted by the Eason court. Both were rejected. The first, that abolition of the purchaser-seller limitation would unleash a flood of federal litigation, was dismissed by the court of appeals as "really a matter of speculation." This attitude belies the breadth of the "investor" approach. When coupled with the corresponding de-emphasis upon standing suggested by the Eason court, it appears certain to encourage continued attempts at transforming state law questions of corporate mismanagement into 10b-5 complaints. The advantages of a federal forum, both procedural and substantive, in this area of law seem too bountiful to indicate

122 Note 71 supra.
125 See notes 49 & 50 supra.
126 Note 46 supra.
128 Note 44 supra.
129 Note 45 supra.
130 The Eason court acknowledged this, but viewed it as a further indication of the loss of integrity sustained by the Birnbaum rule. Eason v. GMAC, No. 73-1722 (7th Cir. Dec. 28, 1973), slip opinion at 7, CCH FED. SEC. L. REP. ¶ 94,344, at 95,162.
131 Id. at 9, CCH FED. SEC. L. REP. ¶ 94,344, at 95,163.
132 If the action can be based on the federal securities acts, the plaintiff, under the liberal venue provisions, has a degree of choice in selecting the forum and, also, can obtain jurisdiction over the defendant parties through extraterritorial service of process. See 15 U.S.C. § 78a (1970). Moreover, the plaintiff may rely on the liberal pleading and discovery provisions of the Federal Rules of Civil Procedure available in a federal forum.
133 See note 47 supra. Judge Stevens acknowledged this advantage: "It is not unlikely that the principal cause of concern about the increase in this type of litigation is an assumption that it will always be much easier to allege and prove a 10b-5 case than a common law fraud case." Eason v. GMAC, No. 72-1722 (7th Cir. Dec. 28, 1973), slip opinion at 9 n.28, CCH FED. SEC. L. REP. ¶ 94,344, at 95,163.
otherwise. Courts have been quick to condemn these juristic transplants as dis
serving the function of investor protection. It is true that the “causal connec
tion” test proposed in Eason would act to curtail such interlopers, but since the
causal relationship between the fraud and the plaintiff’s loss is a substantive ele
ment of Rule 10b-5, it will ordinarily involve matters of proof which should be
handled on the merits. As such, a further reason arises to seek a federal forum
under the Eason approach, linked to the marked reluctance of corporate de
fendants in 10b-5 actions to risk trial, the so-called “strike” or “nuisance” suits.
A similar lack of regard for public policy is demonstrated in the court of
appeals’ out-of-hand dismissal of the second consideration examined, national
consistency. Again, this cavalier attitude belies the magnitude of the problem.
Because securities transactions are conducted on a nationwide scale, often without
regard for geographical boundaries, substantial reasons exist to foster national
consistency in securities regulation, particularly in the 10b-5 area. Reduction in
the mischief of forum shopping, a problem magnified by the potential flood of
10b-5 plaintiffs, provides a vivid example. More importantly, national con-
sistency promotes the predictive function of the law which, in turn, facilitates
legal counseling, and leads eventually to a greater degree of awareness of legal
responsibility by corporate officialdom—a very significant consideration where
Rule 10b-5 is involved. In this regard, the Eason court might well take notice of
the caveat set down in Herpich v. Wallace by Judge Ainsworth:

Protection for investors is of primary importance, but it must be kept in mind
that the nation’s welfare depends upon the maintenance of a viable, vigorous
business community.

V. Conclusion

So long as significant procedural and substantive advantages await them in
the federal courts, there will be plaintiffs who prostitute the broad language of
Rule 10b-5 by using it as a touchstone to a federal forum in a purely state law
cause of action for corporate mismanagement. The Birnbaum court recognized
this and drew a stringent line of demarcation between persons protected and un-
protected under the Rule—the purchaser-seller rule—and applied it at the outset
in the form of a limitation on standing to sue. Such an approach was too rigid
and inflexible to accommodate the variety and complexity of fraud in contem-
porary securities markets. Because of its severity, the Birnbaum rule may
actually have sanctioned the continuance of dishonest practices in securities
transactions by rendering Rule 10b-5 impotent to protect one entire group of
injured parties—those investors who purchase stock and then watch helplessly

135 Largely obviated in the state courts by security bond requirements, where the action
is based on the federal securities acts federal policy controls and ordinarily will preclude imposition
of state procedural requirements, such as posting a security bond, and, hence, remove an effec-
136 430 F.2d 792 (5th Cir. 1970).
137 Id. at 804.
138 See Lowenfels, The Demise of the Birnbaum Doctrine: A New Era for Rule 10b-5,
as it decreases in value because of fraudulent "insider" manipulations designed
to depress market price.\textsuperscript{139}

In contrast, the \textit{Eason} court offers a functional approach to protected per-
sons,\textsuperscript{140} geared to the vagaries of contemporary securities markets. If accepted
as law, it would rectify the deficiencies in investor protection under Rule 10b-5
wrought by \textit{Birnbaum} and its progeny. The standing question would be returned
to its proper role in a 10b-5 suit, the determination of whether the claim presented
is a "case" or "controversy" within the meaning of Article III.\textsuperscript{141} Legal niceties
of "purchasers," "constructive" purchasers, "forced" purchasers, and the like
would become obsolete, replaced with an "investor" classification determined
by reference to "causal connection," a test rooted in the limiting phrase of the
language of Rule 10b-5. As such, the unwarranted bias against nonselling share-
holders explicit in \textit{Birnbaum} would be abolished. Furthermore, by forcing courts
to examine the merits of each claim in order to determine whether it states a
cause of action under 10b-5, the \textit{Eason} approach would promote the further
delineation of the substantive scope of Rule 10b-5 and thereby bring a greater
degree of certainty to this highly volatile area of statutory interpretation. A final
advantage of the \textit{Eason} approach is that it sidesteps the common criticism leveled
at other suggested substitutes for the purchaser-seller rule—that third parties
would then be able to reap the benefits of another's misfortune—since under
\textit{Eason} no plaintiff would be able to recover absent proof that the 10b-5 violation
resulted directly in injury to him. Thus, the successful plaintiff under the \textit{Eason}
approach would not be usurping another's right, but merely vindicating his
own loss.

In "curing" \textit{Birnbaum}'s procedural disabilities, however, the \textit{Eason} court
exposes its flank to attack on \textit{Birnbaum}'s substantive ground: that cases of purely
state law corporate mismanagement should be isolated solely within the state
courts. Under the \textit{Eason} approach the area of proscribed activity within Rule
10b-5 could become so great that the beneficial aspects of the Rule would no
longer warrant the proscription.\textsuperscript{142} That is, the extension of Rule 10b-5 to en-
compass all forms of corporate mismanagement, a proposition long feared by
adherents to \textit{Birnbaum}'s substantive holding,\textsuperscript{143} could become a reality. Such an
extension of legislative purpose could conceivably be justified on the ground

\textsuperscript{139} It has been argued that nonselling shareholders, when denied a 10b-5 claim because of
the \textit{Birnbaum} rule, are not left without a remedy for two reasons: (1) Wall Street Rule;
this rule, embodied in the maxim, "If you don't like the management, sell your stock," ignores
the fact that the nonselling shareholder may already have incurred paper losses which could
seriously impair his collateral, particularly if the stock was purchased on margin, see Comment,
The Purchaser-Seller Limitation to SEC Rule 10b-5, 53 Cornell L. Rev. 684, 693 (1968); (2)
Availability of a state cause of action; although readily available, the state law cause of action
for corporate mismanagement has been roundly criticized as inadequate and often biased against
shareholders, especially minority interests, see Whitaker, The Birnbaum Doctrine: An Assess-
ment 23 Ala. L. Rev. 543, 617 & n.289 (1971).


\textsuperscript{141} See Baker v. Carr 369 U.S. 186, 200 (1962); Ass'n of Data Processing Organizations,
Inc. v. Camp, 397 U.S. 150, 169 (1970) (dissenting opinion). But see Jaffe, Standing Again,
84 Harv. L. Rev. 633, 634 (1971).

\textsuperscript{142} See Herpich v. Wallace, 430 F.2d 792, 804 (5th Cir. 1970).

\textsuperscript{143} See, e.g., Boone & McGowan, Standing to Sue Under SEC Rule 10b-5, 49 Tex. L. Rev.
617, 646-49 (1971); Folk, Corporation Law Developments—1969, 56 Va. L. Rev. 755, 812-14
(1970); Patton, The "Purchase of Sale" Restriction of SEC Rule 10b-5—Judicial Extension
that fraudulent mismanagement always constitutes a practice "in connection with the purchase or sale of a security" because it necessarily affects the rights of someone who has purchased some shares in the corporation at some time in the past. Fearful of such a development, sister circuits will be wary of the Eason decision. It is doubtful, therefore, whether Eason will be accepted as a viable alternative to the modified Birnbaum concept now in vogue. Hence, conflict within the circuits is an inevitable outcome and, as such, a Supreme Court resolution of the Eason-Birnbaum dichotomy must be considered.¹⁴⁴

Thus far, the Supreme Court has been markedly reluctant to hear claims involving § 10(b) and Rule 10b-5¹⁴⁵ so denial of certiorari appears a likely possibility. If utilized by the Court, it would precipitate a case-by-case evolutionary adaptation of the Eason approach;¹⁴⁶ but such an approach would induce the practice of forum shopping, wreaking havoc in the courts. Also, if the development of the Birnbaum Doctrine is any indication, the laggard pace of evolutionary change may be such that the Eason approach would be obsolete before its acceptance could become absolute. Of course, the Supreme Court might simply overrule Eason and, in doing so, affirm the validity of the Birnbaum rule. Again, this is a likely possibility, especially since it has been argued that the Court has already impliedly affirmed Birnbaum in the Bankers Life decision.¹⁴⁷ Here, too, problems would lie, rooted primarily in the Draconian strictures of the Birnbaum rule itself. Finally, the Court could affirm Eason, using it as a vehicle to issue a far-ranging opinion setting out all the elements of a cause of action under 10b-5 in its various circumstances. Apart from doubts whether it would or even could undertake such a task,¹⁴⁸ the Court would be subject to the immediate criticism that in affirming Eason it was opening the floodgates to federal litigation. More seriously, it would be subject to the charge that in proselytizing the Eason approach it was attempting the judicial expansion of a concept, "federal corporate law," better left to Congress and the legislative process.¹⁴⁹ Thus, should Eason be appealed, the Supreme Court would be hard put to resolve conclusively the Birnbaum-Eason controversy.

The apparent inability of the Supreme Court to settle this dispute dramatizes what is the crux of the current 10b-5 dilemma. Courts are simply unable to reconcile the twin goals of "investor protection" and "federal integrity" within the language of § 10(b) and Rule 10b-5. The Birnbaum court tried, but it erred on the side of investor protection. The Eason court tried, but it erred on the side of federal integrity. So, it appears no judicial prophylaxis can hope to accomplish a full measure of investor protection without severely straining the

¹⁴⁴ The appellees have filed a petition for certiorari before the United States Supreme Court, 42 U.S.L.W. 3511 (1974).
¹⁴⁵ SEC v. Nat'l Secs., Inc., 393 U.S. 453 (1969), was the first decision considered by the Supreme Court involving a 10b-5 claim.
¹⁴⁶ The Eason court urged such a case-by-case evolutionary adaptation of its central thesis: "In any event, we deliberately avoid the temptation to try to formulate a succinct substitute for Birnbaum, trusting that the appropriate limits to the rule will best be defined through the process of case-by-case adjudication." Eason v. GMAC No. 72-1722 (7th Cir. Dec. 28, 1973), slip opinion at 10 n.29, CCH Fed. Sec. L. Rep. ¶ 94,344, at 95,164.
¹⁴⁷ See note 119 supra.
federal court system in the process—at least within the present statutory construction of § 10(b).

In this light, Judge Hays' impassioned plea in SEC v. Texas Gulf Sulphur Co.\[^{150}\] is particularly apposite. "May the Future, the Congress or possibly the SEC itself be able to bring some semblance of order by means of workable rules and regulations in this field. . . ."\[^{2151}\] Discounting the Future, both Congress and the SEC could undertake a reformulation of protected persons under § 10(b) and Rule 10b-5 in order to resolve the current controversy. The SEC has offered such proposals to Congress in past legislative sessions,\[^{152}\] but now it seems content to argue its proposals in the courts through amicus appearances rather than beseech the Congress for doctrinal reformulations.\[^{153}\] Moreover, the discretion of the SEC in reshaping Rule 10b-5 sans legislative change in § 10(b) is severely limited,\[^{154}\] a function of its administerial capacity. Thus, if reformulation of principles is to be undertaken in this area, as the Eason-Birnbaum controversy indicates it must, then Congress appears the proper body to do so.\[^{155}\]

A final question involves the extent of any redefinition of purpose to be undertaken by Congress with regard to § 10(b). Proponents of "federal corporate law" argue for a comprehensive codification.\[^{156}\] Such claims are based on the notion that state corporate law has not kept pace with the growing sophistication of the corporate endeavor, can no longer hope to protect adequately the rights of shareholders vis-à-vis "big business," and has already been largely subsumed under an unwritten federal law of corporations.\[^{157}\] The better view, in keeping with the express intent of the Securities Exchange Act\[^{158}\] and the precepts of the Erie Doctrine,\[^{159}\] seeks a more circumscribed purpose; the solution of the Birnbaum-Eason controversy through a statutory amendment to § 10(b).

Without such congressional action, § 10(b) will remain an area "where glib generalizations and unthinking abstractions are major occupational hazards."\[^{160}\]

Gerald T. Woods

\[^{150}\] 401 F.2d 833 (2d Cir. 1968).
\[^{151}\] Id. at 899 (dissenting opinion).
\[^{152}\] The '57 and '59 legislative programs submitted to Congress by the SEC, if enacted, would have amended Section 10(b) to read: "to use or employ, in connection with the purchase or sale of or any attempt to purchase or sell. . . ." S. 2545 & H.R. 9327, 85th Cong., 1st Sess. (1957), S. 1179 & H.R. 2480, 86th Cong., 1st Sess. (1959) (emphasis added).
\[^{153}\] See note 100 supra.
\[^{159}\] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).