INSIDER TRADING: A REVIEW AND COMMENT

Arthur J. Marinelli*

I. INTRODUCTION

There is a growing need to address a number of evasive tactics used by United States corporations that are seemingly immune from securities law in its current configuration.[1] With the increase in mergers and tender offers, there are often immediate and dramatic movements in the stock of a target company. With the growth of the options and derivatives markets, there is a powerful lure to illegal activity.[2] There are those who believe that the present law targets only a fraction of the types of activities that create market inefficiencies and unfairness.[3]

The issue of controlling fraud in connection with the purchase or sale of securities becomes critical in the light of the linkages that have developed among security markets around the world, along with the transnational interest in the management of investment portfo

*Professor, Ohio University; J.D., 1967, Ohio State University; B.A., 1964, Ohio University.

[1] *See* Steven R. Salbu, *Tipper Credibility, Noninformational Tippee Trading and Abstention From Trading: An Analysis of Gaps in the Insider Trading Laws,* 68 WASH. L. Rev. 307, 309 (1993).

2. See, e.g., Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (codified at 15 U.S.C. § 78 (1988)); H.R. Rep. No. 355, 98th Cong., 2d Sess. 4 *(reprinted in* 1984 U.S.C.C.A.N. 2274,2278).

3.See Salbu, *supra* note 1, at 316 (identifying three gaps in the present trading laws: tipper credibility, trading on non-information, and abstention from trading).

lios.[4] The lack of clarity in American securities law relating to fraud makes it even more difficult to convince governments in other countries to enforce insider-trading laws aggressively. Only two countries in Western Europe, Britain and France, can claim an insider-trading conviction. In the thirteen years that insider trading has been an offense, United Kingdom authorities have brought only thirty cases to trial and have won just seventeen. During this same period the Securities and Exchange Commission of the United States ("SEC") filed well over three hundred-fifty cases, with most of the cases resulting in punitive action.[5] Switzerland[6] and the European Community[7] have enacted new statutes which have strengthened existing laws that prohibit insider trading.

This article will examine the status of insider trading regulations looking at both the statutory formulation and the judicial theories of liability. Among the significant developments that will be examined are Section 14e of the Securities Exchange Act of 1934 dealing with fraudulent, deceptive and manipulative acts and means in connection with tender offers.[8] The article will also address current Supreme Court interpretations of who may be subject to Rule 10b-5[9] and its

[4] *See generally* Donald C. Longevoort, *Fraud and Insider Trading in American Securities Regulation: Its Scope and Philosophy in a Global Marketplace,* 16 HASTINGS INT'L & COMP. L. REV. (1993); Joseph A. Gundfest, *Internationalization of the World's Securities Markets: Economic Causes and Regulatory Consequences,* 4 J. FIN. SERV. RES. 349 (1990).

5 *See* Glenn Whitney, *Europe Moves to Curb Insider Trading,* Wall St. J., NOV. 4, 1993, atA-13.

[6] *See* Douglas W. Hawes & Alan Hirsch, *Key Swiss Case: Insider Law Examined in Europe,* NAT'L L.J., Mar. 29, 1993, at 25.

[7] *See* EDDY WYMEERSCH, THE INSIDER TRADING PROHIBITION IN THE EC MEMBER STATES: A COMPARATIVE OVERVIEW IN EUROPEAN INSIDER DEALING 65 (Klaus J. Hopt & Eddy Wymeersch, eds. 1991).

[8] 15 U.S.C. § 78n(E) (1994).

[9] Insider trading is addressed by § 10(b) of the Securities Exchange Act of 1934. Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange...(b) To use or employ, in con nection 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 [Securities and Exchange) Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1994). Since 10(b) is not self-executing, in 1942 the SEC Promulgated Rule 10b-5, which provides in relevant part:

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

limitations. The misappropriation theory and the expansion of liability for insider trading will be examined, as well as the status of aiding and abetting claims and insider trading violations in tender offers.[10] Finally the article will argue that either the Supreme Court or Congress should adopt an access to information theory[11] to prevent outsiders[12] from slipping through the current loopholes created by Supreme Court precedents.[13]

II. BACKGROUND ON THE REACH OF RULE 10B-5

Rule 10b-5 is a broad anti-fraud provision of the federal securities law. It prohibits fraud, misrepresentation, half-truths, concealment of after-acquired information and omissions.[14] It applies to conduct including insider trading,[15] exchange and tender offers,[16] broker-dealer

> facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud,...(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 (1992).

[10] The misappropriation theory holds that "it is fraud in connection with the purchase or sale of a security—and therefore a violation of Rule 10b-5—for a person to trade in securities in breach of fiduciary duty by secretly converting for personal use, information which has been entrusted to him." DONALD C. LONGEVOORT, INSIDER TRADING: REGULATION, ENFORCEMENT AND PREVENTION §§ 6.01, 6-1 (1992).

[11] This theory was first suggested by Professor Victor Brudney in *Insiders, Outsiders, and Informational Advantages Under Federal Securities Laws,* 93 HARV. L. REV. 322 (1979). This theory provides that (1) any use of confidential information (2) known to be inaccessible by the public (3) to trade in the securities market would be fraud and consequently a violation of Rule 10b-5(4) unless otherwise provided in other section of the securities laws. *Id.* at 353-67.

[12] An outsider is anyone not under a duty arising from a relationship of trust. *See* Louis LOSS, FUNDAMENTALS OF SECURITIES REGULATION 754-55 (2d ed. 1988).

[13] *See, e.g.,* Chiarella v. United States, 445 U.S. 222 (1980) (violations of Rule 10—5 occur only if a duty to disclose the information exists and such a duty arises only from a relationship of trust and confidence); Dirks v. SEC, 463 U.S. 646 (1983) (only a specific relationship between tipper and tippee gives rise to a duty to disclose or abstain). For a discussion of these cases see *infra* notes 48—83 and accompanying text.

[14] These are common 10b-5 violations. *See* SEC v. National Bankers Life Ins. Co., 324 F. Supp. 189,195 (N.D. Texas), *aff'd,* 448 F.2d 652 (5th Cir. 1971).

[15] *See* Comment, *Insiders' Liability Under Rule 10b-5 for the Illegal Purchase of Actively Traded Securities,* 78 YALE L.J. 864 (1969).

[16] *See* Charles F. Dugan & Mary Ellen Fairfield, *Chris-Craft Corp. v. Piper Aircraft Corp.-Liability in the Context of a Tender Offer,* 35 OHIO St. L.J. 412 (1974).

activities,[17] market manipulation[18] and mismanagement.[19] Rule 10b-5 also applies to appropriate disclosure in management's discussion, Form 10-K analysis, and the annual report.[20] While many changes took place in the market in the 1980s, the total trading on the exchanges was approximately 476 billion dollars. In recent years trading has increased to 1.8 trillion dollars.[21] Deterring fraud, policing, accounting and requiring financial disclosure remain the core missions of the SEC.[22]

The statute of limitations under Rule 10b-5 was once more favorable than other federal securities provisions, since it was subject to the generous time periods of state statutes.[23] However, the Supreme Court in *Lampf Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*[24] held that private actions under Section 10(b) must be brought within one year of discovery but no more than three years after the date of the alleged violation.[25] In so holding, the Court threw out decades of precedent set by lower courts citing the need for uniformity, and held that the statute of limitations arising under Rule 10b-5 should be found in the Act itself.

Initially courts held that illegal conduct must meet the minimum common law requirements for fraudulent misdisclosure in order to violate Rule 10b-5.[26] Courts soon sought to impose fiduciary duties on corporate insiders through special facts or trusteeship doctrines to effectuate the goals of the securities legislation[27] and the expansion of

[17] *See* Arnold S. Jacobs, *The Impact of Securities Exchange Act Rule 10b-5 on Broker- Dealers,* 57 CORNELL L. REV. 869 (1972).

[18] United States v. Regan, 946 F.2d 188 (2d Cir. 1991), *cert, denied sub nom.,* Zarzechi v. United States, 112 S. Ct. 2273 (1992).

[19] *See* Arnold S. Jacobs, *The Role of SEC Rule 10b-5 in the Regulation of Mismanagement,* 59 CORNELL L. REV. 27 (1973).

[20] Kowal v. MCI Communications Corp., 16 F.3d 1271 (D.C. Cir. 1994).

[21] STATISTICAL ABSTRACT OF THE UNITED STATES 514 (U.S. Bureau of the Census 111th ed. 1991).

[22] *See* Remarks of William R. McLucas, Chief of the Division of Enforcement, Securities and Exchange Commission, 17 SETON HALL LEGIS. J. 7,10-11 (1993).

[23] *See* Janigan v. Taylor, 344 F.2d 781, 783-84 (1st Cir. 1965), *cert, denied,* 382 U.S. 879 (1965); Robert B. Martin, Jr., *Statutes of Limitations in 10b-5 Actions: Which State Statute Is Applicable,* 29 Bus. LAW. 443 (1974).

[24] 501 U.S. 350 (1991).

[25] *Id.* at 361.

[26] *See* In re Cady Roberts *& Co.,* 40 S.E.C. 907 (1961) (court applied common law rules of fraud by requiring insiders to disclose material information).

[27] *See* Kardon v. National Gypsum Co., 73 F. Supp. 798, 803 (E.D. Pa. 1947). In this case insiders, corporate officers and directors, failed to disclose material information while they purchased corporate stock. The court held that the officers had obligations similar to the fiduciary obligations of a trustee.

legal remedies. The meaning and scope of Rule 10b-5 has since been in a state of evolution and has been described as a "judicial oak which has grown from little more than a legislative acorn."[28] Courts have had few problems in applying Rule 10b-5 to corporate insiders, but have had difficulty with those individuals outside the corporate structure who can affect the securities marketplace.[29] *In re Cady, Roberts and Company*[30] emphasized that Rule 10b-5 restricts the trading activities of *any person* and is based on "the inherent unfairness involved where a party takes advantage of [information intended to be available only for a corporate purpose] knowing it is unavailable to those with whom he is dealing."[31] The list of insiders no longer need be limited to a corporate official, director or controlling shareholder; it is extended to "those persons who are in a special relationship with a company and privy to its internal affairs."[32] The Second Circuit reached the same conclusion in *SEC v. Texas Gulf Sulphur Company*,[33] holding that anyone in possession of insider information must either disclose it to the investing public or refrain from trading.[34] With SEC support, the courts expanded the list of insiders and the transactions covered by Rule 10b-5, along with relaxing common law requirements for fraudulent nondisclosure.[35] The courts extended the definition of *insiders* to include both tippers and tippees.[36] The SEC also has begun to look at relevant inside information which was obtained as a result of an individual's partici

[28] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723,737 (1975).

[29] *See* Daniel R. Glickman, *"Tippee" Liability Under Section 10b and 10b-5 of the Securities Exchange Act of 1934,* 20 KAN. L. REV. 47, 52 (1971). Examples of such cases include Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) (market makers); Dirks v. SEC, 463 U.S. 646 (1983) (broker/analyst); Chiarella v. United States, 445 U.S. 222 (1980) (financial printer). *See also* Salbu, *supra* note 1, at 309.

[30] 40 S.E.C. 907(1961).

[31] *Id.* at 912.

[32] *Id.*

[33] 401 F.2d 833 (2d Cir. 1968) (en banc), *cert, denied sub norn.,* Coates v. SEC, 394 U.S. 976 (1969). The case centered on misleading press releases regarding minerals on Canadian land owned by the corporation.

[34] *Id.* at 848. Other circuits also agreed. *See, e.g.,* Freeman v. Decio, 584 F.2d 186, 189 (7th Cir. 1978); Fridrich v. Bradford, 542 F.2d 307, 318 (6th Cir. 1976), *cert, denied,* 429 U.S. 1053 (1977); White v. Abrams, 495 F.2d 724, 735-36 (9th Cir. 1974); Johnson v. Wiggs, 443 F.2d 803, 806 (5th Cir. 1971).

[35] See, *e.g.,* Donald C. Longevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement,* 70 Cal. L. REV. 1, 9 (1982); Jonathan R. Macey, *From Fairness to Contract: The New Direction of the Rules Against Insider Trading,* 13 Hofstra L. REV. 17-19 (1984). *See also* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (discussing the broad language of Section 10-b and Rule 10b-(5)).

[36] *See* Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, 495 F.2d 228, 239 40 (2d Cir. 1974).

pation on a creditor's committee. The first creditor committee member settled in *SEC v. Baker*,[37] After the *Texas Gulf* decision, access to material non-public information carried with it a duty either to disclose or abstain from trading. This was based on a broad interpretation of the purpose of Section 10(b) and Rule 10b-5 along with basic fairness.

Fairness has few bounds, and the Burger Court placed restrictions on Rule 10b-5, even though it had no unified approach.[38] Among the elements necessary for recovery in a 10b-5 action is that the proscribed activities must be "in connection with the purchase or sale of any security."[39] If plaintiffs are neither purchasers nor sellers of the offered shares, they will not be able to recover.[40] Before the plaintiff may prevail in a private action, he must prove reliance,[41] causation in fact[42] and scienter[43] on the part of the defendants. The Ninth Circuit held in *In re GlenFed Securities Litigation*[44] that plaintiffs may satisfy the requirement that a complaint under Rule 10b-5 alleging an intent to deceive or defraud may simply assert the *existence* of such scienter.[45] This opinion runs contrary to the generally accepted practice in the Second and other circuits whereby a complaint will be dismissed for failure to comply with Federal Rules of Civil Procedure 9(b) unless the plaintiff pleads with specificity facts that give rise to a strong inference that the defendants were aware of the facts that

[37] SEC Reg. & L. Rep. (BNA) No. 25, at 1463 (Oct. 29, 1993). The SEC charged that Sherman Baker, a member of the official Creditors Committee in the Chapter 11 bankruptcy proceedings of Ames Department Store sold Baker stock after learning that many Ames stores in which Baker operated lease shoe departments were to be closed.

38.*See, e.g.,* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977) (exchange offeror has no implied cause of action against rival offeror); United Hous. Foundation Inc. v. Foreman, 421 U.S. 837 (1975) (shareholders of stock in a nonprofit housing cooperative do not own securities and are not proper parties to a private suit). *See also* C. Larimore Whitaker & James E. Rotch, *The Supreme Court and the Counter Revolution in Securities Regulation,* 30 ALA. L. REV. 335 (1979).

[39] 17 C.F.R. § 240.10b-5 (1993).

[40] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

[41] *See, e.g.,* Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977); Rose v. A.H. Robbins Co., 607 F.2d 545 (2d Cir. 1979), *cert, denied,* 446 U.S. 946 (1980). *See also* Basic, Inc. v. Levinson, 485 US. 224 (1988) (there exists a rebuttable presumption that the plaintiff relied on the misrepresentation as part of a defrauded market providing there is a link between the alleged misrepresentation and the price paid or received).

[42] Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972). The statute provides that those who trade contemporaneously against the defendant in the relevant share have a cause of action provided they can prove fraud apart from specific causality. 15 U.S.C. § 78j (1994).

[43] *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

[44] 42 F.3d 1541 (9th Cir. 1994).

[45] *Id.* at 1545.

the complaint alleges were fraudulently made. The conflict has increased the likelihood that the Supreme Court will grant review on this issue. The standard of proof in civil actions under Rule 10b-5 is a preponderance of the evidence.“ Further, tippees may also be liable under Rule 10b-5 because tippers are subject to the same duties as traditional corporate insiders by reason of their special access to inside information.[47]

III. THE SUPREME COURT'S RESTRICTIVE DECISIONS

In *Chiarella v. United States*[48] the Supreme Court considered the substantive reach of Rule 10b-5. Reversing the Second Circuit's decision,[49] the Court held that Chiarella's conduct was not violative of Section 10b or Rule 10b-5 because a duty to disclose before trading does not arise from mere possession of non-public market information.[50] Chiarella was a financial printer's markup man and traded using material and non-public information entrusted to his employer.[51] He was convicted of seventeen counts of willful violation of Rule 10b-5.[52] Chiarella appealed on the basis that he had no direct relationship with the issuers in whose stocks he traded, and therefore, that he was an *outsider.*™ The Second Circuit affirmed his conviction, holding that his egregious abuse of his regular access to market information made him a “quasi-insider”[54] subject to the insider trading strictures of 10b-5. The Second Circuit found that unfair trading took place where one had unequal access to material nonpublic information.[55]

The Supreme Court reversed the lower court. Justice Powell, writing for the majority, stated that mere possession of material non-public information neither imposes an obligation to disclose nor a duty to

46 See, *e.g.,* Addington v. Texas, 441 U.S. 418, 423 (1979); Herman & MacLean v. Huddleston, 459 U.S. 275,390 (1983).

47 Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, 495 F.2d 228 (2d Cir. 1974); Dirks v. S.E.C., 463 U.S. 646 (1983). *See also* Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified as amended in scattered sections of 15 U.S.C.).

48 445 U.S. 222 (1980).

49 588 F.2d 1358 (2d Cir. 1978), *rev'd,* 445 U.S. 222 (1980).

50 *Chiarella,* 445 U.S. at 233.

51. Id. at 224.

52 *Id.* at 225, 236.

53 *Id.* at 232-33.

54 United States v. Chiarella, 588 F.2d 1358, 1365 (2d Cir. 1978), *rev'd,* 445 U.S. 222 (1980).

55. *Id.* at 1365-66.

refrain from trading.[56] The Court rejected the lower court's delineation of the parameters of insider trading violations[57] and found that "Section 10(b) is aptly described as a catch-all provision, but what it catches must be fraud."[58] The Court identified the errors of the district and circuit courts as their "failure to identify a relationship between petitioner and the sellers that could rise to a duty."[59] The Court held that non-disclosure can be fraudulent only when there is a duty to speak, and that a relationship that gives rise to a duty to disclose must exist before Rule 10b-5 can be violated.[60] The Court rejected the equal access and parity of information approach of the lower courts and adopted the *Cady, Roberts & Company* rules that a fiduciary relationship requirement exists between "shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation."[61] In rejecting the equal access theory, the Court argued that there was no Congressional intent on which to base such a theory, and that the formulation of such a broad duty departs from the established doctrine that a duty to disclose arises from a specific relationship of the parties.[62] The majority never reached the claim that Chiarella's misappropriation of information from his employer sufficed for Rule 10b-5 liability because this theory was not presented to the jury.[63]

The number and diversity of views stated by the Justices in *Chiarella* left open a significant number of issues, including whether or not 1) the misappropriation theory is applicable to Section 10 actions; 2) tippees who receive material non-public information from fiduciaries or in whom trust and confidence has been placed can cause a violation; and 3) there must be a relationship of trust and confidence, and if so, under what circumstances such a relationship can exist between parties to the securities transaction before a violation occurs. Because of the evolution of the misappropriation theory,[64] the

56. *Chiarella,* 445 U.S. at 235.

57. *Id.* at 231-33.

58. *Id.* at 234-35.

59. *Id.* at 232.

60. *Id.* at 235.

61. *Id.* at 228.

62. *Id.* at 233.

63. *Id.* at 236-37. One author has argued that *Chiarella* would not endure and the concept that the insider must have a fiduciary relationship to the victimized trader will be expunged from the law as a pervasive misconception. *See* David Bayne, *The Insider's Natural Law Duty; Chiarella and the 'Fiduciary' Fallacy,* 19 J. CORP. LAW 681,685 (1994).

64. *See* Barbara Bader Aldave, *Misappropriation: A General Theory of Liability for Trading on Nonpublic Information,* 13 HOFSTRA L. REV. 101, 111-121 (1984) (the misappropriation of confidential information damages the reputation of the employer and affects the stocks of its customer).

financial printer whose criminal conviction was reversed in *Chiarella* would be found a wrongdoer today. In *Securities and Exchange Commission v. Materia*[65] another printer who did exactly what Chiarella did was enjoined and compelled to disgorge his profits.

Three years after *Chiarella,* in *Dirks v. Securities and Exchange Commission*,[66] the Supreme Court again reversed the lower court, reasoning that a financial analyst's liability could only derive from a breach of fiduciary duty by his tipper.[67] The SEC brought an action against a securities analyst, Dirks, the tippee, who received information about fraudulent practices of Equity Funding Corporation from a former employee, the tipper, which enabled the analyst to dump millions of his clients' holdings before the investigation became public. Because the tipper did not breach a duty to the shareholders, Dirks should not have been censured by the SEC.[68] Further, the Court required that the tippee must either know or have reason to know that the tipper has breached a fiduciary obligation by revealing the information.[69] Finally, the Court held that an insider's tip constitutes a breach only if the insider receives a direct or indirect personal benefit.[70] The Court reversed the conviction because Dirks did not have a duty to disclose information before trading.[71] The insider from whom Dirks received the information did not breach a duty to the shareholders nor to the corporate employer because he had no motive for personal gain.[72] Dirks did not himself own or trade Equity Funding stock during his investigation, but he shared his knowledge of fraud with some clients and investors who did sell the stock. The stock price declined significantly. The Court refused to adopt a parity of information theory which would require traders to disclose any nonpublic information in their possession.[73] Justices Brennan, Blackmun and Marshall dissented on the ground that the majority further limited the reach of Rule 10b-5 by "engraft[ing] a special motivational requirement on the fiduciary duty doctrine."[74] In dictum, a majority of the Court accepted the misappropriation theory as adopted by the

65.745 F.2d 197 (2d Cir. 1984), *cert, denied,* 471 U.S. 1053 (1985).

66. 463 U.S. 646 (1983). For a discussion of the case see *infra* text accompanying notes 90-94.

67 *Id.* at 659-61. A tipper is an insider who passes secret information, that is, a tip to an outsider, the tippee.

68. *Id.* at 667.

69. *Id.* at 660.

70 *Id.* at 662.

71 *Id.* at 665-67.

72 *Id.* at 667.

73 *Id.* at 654-55, 657-58.

74 *Id.* at 668.

Second Circuit,[75] stating that Dirks did not misappropriate or illegally obtain the information.[76]

The Court in both *Chiarella* and *Dirks* premised its holding on the rationale articulated by the SEC in *In Re Cady, Roberts & Company*.[77] In *Cady, Roberts & Company,* the SEC held that if an insider trades with material and inside information, a violation of Rule 10b-5 occurs because a relationship exists affording access to inside information intended for corporate purposes. A violation also exists because it is unfair for the insider to take advantage of the insider information without disclosure. One of the most significant holdings of the Court in *Dirks* was that certain persons to whom corporate information is given may become fiduciaries of the shareholders. These fiduciaries may include underwriters, accountants, lawyers or consultants to the corporation.[78] The concept of an insider is flexible, and the test is whether or not this information was intended to be available only for a corporate purpose and not for the personal benefit of anyone.[79]

The Supreme Court in *Dirks* identified two situations wherein the tipper has received the necessary benefit. The first situation is when the tipper expects compensation from the tippee.[80] The other situation is when the tip, even if made without expectation of compensation, is given to a friend or relative.[81] The Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA")[82] will cause the professional tipper to have been held to have received a benefit in the form of present and future consideration for services rendered and be liable for the tippee's profits, as long as the tipper's generic tip was predicated on actual inside information sufficient to establish the breach of fiduciary duty necessary under the appropriation test. Under current law, where material non-public corporate information for reasons other than personal gain is given selectively to a securities analyst, there is no violation of the law.[83]

[75] See, *e.g.,* SEC v. Materia, 745 F.2d 197, 203 (2d Cir. 1984); United States v. Newman, 664 F.2d 12,17 (2d Cir. 1981).

[76] *Dirks,* 463 U.S. at 665.

[77] 40 S.E.C. 907(1961).

[78] *Dirks,* 463 U.S. at 655 n.14. This category of insiders is now commonly referred to as quasi-insiders.

[79] Feldman v. Simkins Indus., Inc., 679 F.2d 1299 (9th Cir. 1982).

80. Dirks, 463 U.S. at 667.

[81] *Id.* at 664.

[82] 15 U.S.C. § 78 (1994).

[83] *See generally* Donald C. Longevoort, *Investment Analysts and the Law of Insider Trading,* 76 Va. L. Rev. 1023 (1990).

IV. THE MISAPPROPRIATION THEORY: EXPANSION OF LIABILITY FOR INSIDER TRADING

Under the rules set forth in *Chiarella* and *Dirks,* individuals not in a relationship of trust with the corporation, the so-called outsiders, may use confidential non-public information to trade in that corporation's securities with impunity. After *Chiarella,* the law of insider trading applied not to prevent the use of an unfair informational advantage, but to prevent persons in a relationship of trust and confidence from overreaching their common law fiduciary duties. *Chiarella* forced the SEC and the lower federal courts to formulate new theories and rules to reach a broader group of persons. This was done through the use of the misappropriation theory, which permits the extension of liability to any situation where a person secretly trades in a security in violation of a duty of loyalty owed to another, whether or not the employer or principal is also the issuer.[84] The other effort was the creation of Rule 14e-3,[85] which established liability for trading while in the possession of tender offer-related information without regard to any questions of fiduciary duty.[86]

The *Chiarella* and *Dirks* decisions limited liability by requiring that a person trading on the basis of inside information must breach a fiduciary duty owed either directly or derivatively. The duty owed derivatively may arise from being a tippee of an insider who breached his fiduciary duty, or by being a temporary insider by virtue of access to certain confidential information to be used for corporate purposes. The framework of *Chiarella* and *Dirks* leaves gaps in liability coverage. For example, trading in a target company's stock with inside information may occur without a violation under 10b-5 because the traders owe no fiduciary duty to the company's shareholders. The SEC and the Second Circuit have advocated a misappropriation theory to impose criminal and civil liability on non-tradi- tional insiders and tippees. The theory was first advanced in *Chiarella* when it was argued that he breached a duty to the acquiring corporation by misappropriating information entrusted to his employer, and therefore fraud took place upon the entrusting corporate client and the sellers of the target companies' securities.[87] The majority did not believe the issue was properly before the Court

[84] *Chiarella,* 445 U.S. at 235-37.

[85] 17 C.F.R. § 240.14e-3 (1991).

86. See United States v. Chestman, 947 F.2d 551 (2d Cir. 1991), *vacating* 903 F.2d 75 (2d Cir. 1990), *cert, denied,* 112 S. Ct. 1759 (1992) (affirmed the validity of the Securities and Exchange Commission's Rule 14e).

[87] *See Chiarella,* 445 U.S. at 235-37.

because the theory had not been submitted to the jury.[88] However, four justices indicated varying degrees of acceptance of the misappropriation theory.[89]

In *SEC v. Materia*[90] the Second Circuit held that Materia, a copy- reader employed by a financial printer, had misappropriated confidential information concerning proposed tender offers of the printer's corporate clients for the purpose of trading in the securities of the target companies.[91] The court emphasized the damage to the reputation of the employer and the damage to the corporate clients because of the rise in the price of the target companies' securities.[92] The court did not extend Materia's duty to the sellers of the securities even though they had been damaged by his actions.[93] The theory of fraud draws on the *upon any person* language of Rule 10b-5.[94]

In *United States v. Carpenter,*[m] an equally divided Supreme Court affirmed the decision of the Court of Appeals for the Second Circuit holding that the conduct of the defendant amounted to a violation of 10(b) of the Securities Exchange Act of 1934.[96] In an unanimous opinion, the Court found that the defendant's conviction should stand under the federal mail and wire fraud statutes,[97] which prohibit the use of the mails to execute any scheme or artifice to defraud or obtain money or property by means of false or fraudulent pretenses, representation, or promises. The Second Circuit had significantly expanded the application of the misappropriation theory in *Carpenter*.[98] A divided court of appeals affirmed the criminal conviction of *Wall Street Journal* financial reporter, R. Foster Winans, who was one of the writers of the widely-read *Heard on the Street* column.[99] He provided stockbrokers at the brokerage house of Kidder Peabody, with the content and publication dates of certain columns. Generally, Brant, a broker at Kidder Peabody, would learn of the subject of the article a day before publication from a call from Winans on a pay

[88] *Id.* at 236-37.

[89]*Id.* at 238-51 (Brennan, J., and Stevens, J., concurring).

90.745 2d 197 (2d Cir. 1984), *cert, denied,* 474 U.S. 1053 (1985).

91. See id. at 199-201.

92. Id. at 202.

[93] *Id.* at 203 (acknowledging the ruling in Moss v. Morgan Stanley, Inc., 719 F.2d 5 (2d Cir. 1983), *cert, denied,* 465 U.S. 1025 (1984)).

[94] *Id.*

[95] 484 U.S. 19 (1987), *aff'g* 791 F.2d 1024 (2d Cir. 1986), *affg sub norn.,* United States v. Winans, 612 F. Supp. 827 (S.D.N.Y. 1985).

96. *Id.* at 24.

[97]18 U.S.C. §§ 1341, 1343 (1993).

98.United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1986).

99. Id. at 1026.

phone,[100] and he in turn traded in the stock of the companies to be reported on in the articles.[101] David Carpenter, a newspaper clerk at the *Journal,* served as a messenger between the reporter and brokers.[102] The Kidder Peabody Compliance Department noticed the correlation between the trades in their broker's accounts and the information in the columns.[103] The Court found that both Winans and Carpenter were aware that they were using company property, and that non-public information was to be treated as confidential.[104]

The district court pointed out that information contained in the columns could have a real impact on the stock market.[105] The court of appeals subsequently pointed out that this confidential information enabled the defendants to realize profits of approximately 690,000 dollars through trading on the basis of the information obtained.[106] Eventually Winans and Carpenter voluntarily testified before the SEC,[107] and were convicted of securities fraud in violation of Section 10(b) and Rule 10b-5.[108] Neither the *Wall Street Journal* nor its parent company engaged in securities trading. Corporate clients who were the source of information for the columns also had not engaged in securities trading.[109] Winans had not improperly altered the content of the columns, and the information was available to the public generally.[110]

The Court of Appeals for the Second Circuit, in an opinion written by Judge Pierce, affirmed the convictions[111] and acknowledged that Congress had given the judiciary the burden to determine whether a violation occurred in a particular case given the broad prohibitions in Section 10(b) of the 1934 Act.[112] The Court found that the misappropriation theory could be the basis of a Section 10(b) violation if the defendants' unlawful misappropriation of material, non-public information from the *Journal,* and its subsequent use of the information for their profit, was in connection with the sale or purchase of securi

100. Id.

101. *Id.* at 1027. The defendants made approximately twenty-seven trades on the basis of pre-publication information concerning the columns.

102 *Id.* at 1026.

103 *Id.*

104.Id.

105 United States v. Winans, 612 F. Supp. 827, 830 (S.D.N.Y. 1985).

106. United States v. Carpenter, 791 F.2d 1024,1027 (2d Cir. 1986).

107 *Id.*

108 United States v. Winans, 612 F. Supp. 827,848—50 (S.D.N.Y. 1985).

109 United States v. Carpenter, 791 F.2d 1024,1029 (2d Cir. 1986).

110 *Id.* at 1031-32.

111 *Id.* at 1025-26. All convictions were affirmed except for one particular transaction involving Winans. *Id.* at 1026.

112 *Id.* at 1027.

ties.[113] The Supreme Court had never precluded the lower courts from utilizing the theory of misappropriation in cases involving securities fraud.[114] In *Carpenter,* however, the defendants sought to distinguish previous misappropriation cases by arguing that the only breach was of the employer's confidentiality; there was no injury to the corporation or to the shareholders whose stock was sold or purchased on the basis of the confidential information.

The court of appeals found that the defendants' interpretation constituted too narrow a reading of previous misappropriation cases, and that the misappropriation theory prohibited conversion of non-public information by insiders and others.[115] The court relied on statements that accompanied the Insider Trading Sanctions Act of 1984[116] to determine Congressional intent. The intent of the 1984 Act was to prohibit all manipulative or deceptive trading regardless of whether the information about the corporation or its securities came from inside or outside the corporation.[117] While a person may gain knowledge about securities through skill or industry, such knowledge may not be gained through misappropriation of information from any employer in breach of a fiduciary duty of confidentiality.[118] The fraud took place when Winans and Carpenter damaged the reputation of the *Wall Street Journal* and used the information for their own profit.[119]

The misappropriation theory as applied to Carpenter and Winans has divided the Supreme Court. Only the future decisions of the Court will indicate the acceptance or rejection of the theory in securities fraud cases and possible limits of the theory. This sharp division of the Court is not surprising given the broad step that the court of appeals took away from *Chiarella.* The Court held there was no general duty for disclosure unless there is a fiduciary duty with the shareholders. "We know of no rule of law . . . that a purchaser of stock, who was not an insider and had no fiduciary relationship to a prospective seller, had any obligation to reveal circumstances that

113. Id.

[114] *Id.* at 1028. *See also, e.g.,* SEC v. Materia, 745 F.2d 197 (2d Cir. 1984), *cert, denied,* 471 U.S. 1053 (1985); United States v. Newman, 664 F.2d 12 (2d Cir 1981), *cert, denied,* 464 U.S. 863 (1983).

[115] United States v. Carpenter, 791 F.2d 1024,1029 (2d Cir. 1986).

116. *Id.* at 1030.

[117] *Id.* (citing H.R. REP. NO. 355, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2274).

[118] *Id.* at 1031 (2d Cir. 1986) (citing SEC v. Capital Gains Research Bureau, 375 U.S. 180,186-87(1963)).

[119] *Id.* at 1032.

might raise a seller's demands and thus abort the sale."[120] In *Carpenter,* Winans owed no duty to shareholders because he had no relationship with the issuers of stock or the corporations whose information was reported on, whereas in prior misappropriation cases there was a direct link between the misappropriators and corporate clients who were purchasing securities.[121] It is unfortunate that the Supreme Court affirmed the conviction of Winans by an equally divided Court without an opinion on this issue. It has left open many unanswered questions concerning whether or not the misappropriation theory may be used in a situation like *Winans.*[122]

The appropriation theory allows outsiders to be liable for their improper actions where they have a duty of confidentiality owed to the employer and they misappropriate material non-public information. They must use this information in a securities transaction and liability attaches regardless of whether or not they had any duty to the shareholders of the traded stock.[123] The Insiders Trading and Securities Fraud Enforcement Act of 1988[124] closed several gaps created by the loopholes of the *Chiarella* duty by making the law of insider trading applicable to options and similar securities[125] and created a private cause of action.[126] The *Chiarella* duty, however, does not apply to debt securities.[127]

V. AIDING AND ABETTING CLAIMS

In one of the most significant securities law decisions in recent years, *Central Bank of Denver, N.A. v. First Interstate Bank,* ALA.,[128] a closely divided Supreme Court determined that the secondary liability theo

[120] *Chiarella,* 445 U.S. at 232 n.13 (quoting General Time Corp. v. Talley Indus., Inc., 403 F.2d 159,164 (2d Cir. 1968), *cert, denied,* 393 U.S. 1026 (1969)).

[121] *See Materia,* 745 F.2d at 199-200. *See also* United States v. Newman, 664 F.2d 12,16 (2d Cir. 1981).

[122] *Carpenter,* 484 U.S. at 24. Some lower federal courts have adopted the misappropriation theory in some circumstances. *See, e.g.,* SEC v. Cherif, 33 F.2d 403 (7th Cir. 1991); SEC v. Clark, 915 F.2d 439 (9th Cir. 1990).

[123] SEC v. Clark, 915 F.2d 439, 443 (9th Cir. 1990).

[124] 15 U.S.C. § 78t-u (1994).

[125] 15 U.S.C. § 78(t) (1994). *See also* Steve Thel, *Closing a Loophole: Insider Trading in Standardized Options,* 16 FORDHAM URB. L.J. 573, 575 (1987—88).

[126] 15 U.S.C. § 78-f (1994).

[127] *See* DONALD C. LONGEVOORT, INSIDER TRADING: REGULATION, ENFORCEMENT, AND PREVENTION §§ 3.03[2], 3.16 (1992); Thomas A. McGrath III, *The Rise and Fall (And Rise?) of Information Based Insider Trading Enforcement,* 61 FORDHAM L. REV. 127, 145-46(1993).

[128] 114 S. Ct. 1439(1994).

ry of aiding and abetting does not apply to implied private damage actions pursuant to Section 10(b) of the Securities Exchange Act of 1934. This case involved a suit by investors against an indenture trustee who allegedly failed to obtain an appraisal of collateral when it knew that the evaluation being relied on by investors was *optimistic.* A public building authority issued bonds to finance improvements to a planned residential community. The bonds were secured by landowner assessment liens which required that the land subject to the liens had to be worth at least one hundred-sixty percent of the bonds' outstanding principal and interest. Central Bank was responsible for protecting the interest of the bondholders as the indenture trustee. Before the bonds were issued, Central Bank became aware of the possibility that the land values had declined and the value of the land might not meet the one hundred-sixty percent test. Central Bank agreed to delay the independent appraisal of the land until the end of the year and thus allowed the bond issue to go forward. After the building authority defaulted on the bonds, purchasers of the bonds brought suit against Central Bank for aiding and abetting securities fraud by delaying the independent appraisal and allowing the bonds to be sold.

Central Bank's petition for certiorari focused on whether or not recklessness or actual knowledge was the proper scienter requirement in an aiding and abetting claim and assumed, consistent with a long line of circuit court cases, the existence of aiding and abetting as a cause of action under Rule 10b-5. The Supreme Court requested *sua sponte* that the parties brief the issue of whether or not a private plaintiff could maintain an aiding and abetting action under Rule 10b-5. Overturning decades of circuit court precedent the Court ruled in a 5-4 decision that a "private plaintiff may not maintain an aiding and abetting suit under Section 10(b) and Rule 10b-5."[129] The Court rejected the arguments of plaintiffs and the SEC that because Section 10b covers those who act indirectly, the statute is broad enough to encompass aiding and abetting liability. Instead, the Court determined that if "Congress had intended to impose aiding and abetting liability...it would have used the words aid and abet in the statutory text."[130] The Court pointed out that Congress did not include private aiding and abetting liability as an express cause of action in the 1934 Securities Exchange Act, and further reasoned that it was unlikely that it would have done so if it had provided an express punitive damages Section 10(b) cause of action.

[129] *Id.*
[130] *Id.*

The *Central Bank* decision casts doubt as to whether or not the SEC can pursue aiding and abetting. The SEC has indicated that it will refrain from asserting aiding and abetting theories of liability and when possible will utilize its administrative disciplinary powers to pursue aiding and abetting.[131] While the SEC has requested Congress to overrule *Central Bank,* it appears unlikely that Congress will do so.[132]

Since *Central Bank* plaintiffs have recast many of their allegations from aiding and abetting as the primary violation and the courts have been mixed in their responses focusing their analyses on the scienter and in connection with requirements.[133] The Supreme Court made clear in *Central Bank* that lawyers, accountants or bankers, who employ manipulative devices or make a material misstatement on which a purchaser or seller of securities relies, may be liable as primary violators under 10b-5.[134]

Commentators on *Central Bank* were in agreement that auditors who issued reports to the public that misrepresented facts in connection with a purchase or sale of a security were likely to be deemed primary violators under 10b-5.[135] A number of courts have held that an auditor or attorney who publishes a misleading report or opinion may be a primary violator of 10b-5.[136] A number of courts have held that there is no liability under 10b-5 for conspirators.[137]

131 *See* Simon M. Lorne, *Central Bank of Denver v. SEC,* 49 Bus. Law. 1467 (1994).

132 Senate Subcommittee Examiners Aiding and Abetting Decision, FED. SEC. L. REPS. (CCH), No. 1609, at 11,11-14 (May 18,1994).

133 *Compare* In re ZZZZ, Best. Sec. Litig., 864 F. Supp. 960 (D.C. Cal. 1994) (alleged review of financial statements by accountant sufficient to give rise to primary violation of 10b-5); In re Software Toolworks, Inc. Sec. Litig., 39 F.3d 1078 (9th Cir. 1994) (sufficient participation indirectly by accounting firm to subject it to primary liability under 10b-5); Kline v. First Western Government Securities, Inc., 24 F.3d 480 (3d Cir. 1994) (law firm issuing tax opinion letter can be held to be primary violator of Rule 10b-5) *with* Twiss v. Kury, 25 F.3d 1551 (11th Cir. 1994) (no 10b-5 action against participating brokerage firm); Vosgerichian v. Commodore International, 862 F. Supp. 1371 (E.D. Pa. 1994) (accountants acting as consultant or, advisor precluded from being primary violator under 10b-5).

134 *Central Bank,* 114 S. Ct. at 1455.

135 See, *e.g.,* Joel Seligman, *The Implications of Central Bank,* 49 Bus. LAW. 1429, 1439(1994).

136 *E.g.,* Kline v. First Western Government Securities, Inc., 24 F.3d 480 (3d Cir. 1994) (attorney's opinion); Adam v. Silicon Valley Bancshares [1994—95 Tr. Bin.] FED. SEC. L. REP. (CCH) H 98,525 (N.D. Cal. 1994) (auditor opinion).

137 *E.g.,* In re Ross Systems, Sec. Lit. [1994—95 Tr. Bin.] Fed. Sec. L. Rep. *1198,363 (N.D. Cal. 1994); *In re* Syntex Corp., Sec. Lit., 855 F. Supp. 1086, 1098 (N.D. Cal. 1994).

VI. TENDER OFFERS AND INSIDER TRADING

Congress enacted the Williams Act in 1968[138] to regulate tender offers and other corporate acquisitions. The Williams Act included the broad anti-fraud provision section 14(e) of the Exchange Act in connection with any tender offer.[139]

One of the most significant recent developments in insider trading law is the decision by the Second Circuit Court of Appeals in *United States v. Chestman.*[140] This case involved important issues on the validity and scope of Rule 14e-3 and tippee liability in the context of a tender offer.[141] Rule 14e-3 defines fraud as the purchase or sale of a security by a person with material information about a tender offer when the person knows or has reason to know that the information is non-public and has been acquired from an insider.[142] This definition is not dependent upon a breach of fiduciary duty and is a departure from court rulings of section 10(b) of the Securities and Exchange Act and its accompanying Rule 10b-5.[143]

The *Chestman* case illustrates the significance of Rule 14e-3. The defendant, a registered representative stockbroker, was criminally convicted on thirty-one counts, including securities fraud, mail fraud and perjury during the Commission investigation. Chestman traded securities of Waldbaum Incorporated after learning of an impending tender offer by Great Atlantic and Pacific Tea Company. Waldbaum, the company president, informed his sister who informed her daughter, Susan Loeb, of the impending sale. Loeb was warned not to tell anyone, except her husband, Keith Loeb, since it could ruin the sale. Susan shared the information with her husband, telling him not to tell anyone else. Keith Loeb ignored his wife's advice and called his stockbroker, Robert Chestman, disclosing that he "had some definite,

[138] 15 U.S.C. §§ 78 m(d), (e) & 78 n(d), (e) (1994).

[139] *Id.* at § 78 n(e). In 1980 the Commission promulgated rule 14e-3 to further aid in the prosecution of trading cases.

[140] 903 F.2d 75 (2d Cir. 1990), *vacated in part on other grounds,* 947 F.2d 551 (2d Cir. 1991) (affirming validity of Rule 14e en banc), *cert, denied,* 112 S. Ct. 1759 (1992). *See also* SEC v. Peters, 978 F.2d 1162 (10th Cir. 1992) (upholding the authority of the SEC to adopt Rule 14e-3 without including a breach of fiduciary duty as an element of the insider trading defense).

[141] For a general discussion of these issues see Janell M. Kurtz & Bradley J. Sleeper, *Fraud Liability for Outsider Trading: SEC Rule 14e-3 in Limbo,* 29 AM. BUS. L.J. 691 (1992); Susan Lorde Martin, *Insider Trading and Rule 14e-3 After Chestman,* 29 AM. BUS. L.J. 665 (1992).

[142] 17 C.F.R. § 250 (1992).

[143] *See, e.g.,* Kurtz & Sleeper, *supra* note 141, at 716-22; Martin, *supra* note 141, at 673-76.

some accurate information" that Waldbaum was being sold at a "substantially higher" price than the market price of its stock.[144] Chestman bought Waldbaum stock for Loeb's account, his own account, and for several other of his customer's accounts.

A panel opinion of the Second Circuit initially overturned Chestman's convictions based on insufficient evidence that Chestman knew that the information was derived from a breach of a relationship of trust and confidence, or that Rule 14e-3 exceeded the Commission's statutory authority. The Second Circuit, sitting *en banc,* vacated the panel's decision with the exception of a perjury count. The court affirmed six to five, Chestman's conviction for fraudulent trading in connection with a tender offer and reversed his convictions for securities and mail fraud on the finding that Loeb did not breach a fiduciary duty or its functional equivalent. The majority panel followed Congress' primary interest in strengthening enforcement against insider traders by giving the SEC broad authority and flexible laws.[145] The Court found the legislative histories of the Insider Trading Sanctions Act of 1984[146] and the ITSFEA[147] supported Rule 14e-3. Given the heavy tender offer activity and potential abuses connected with tender offers, Rule 14e-3 reflects aggressive SEC support of the broad congressional goal to eliminate insider trading.

VII. EVALUATION AND CONCLUSION

The present law of insider trading is sufficient under *Chiarella* and *Dirks* to reach both those individuals who are under an obligation to disclose and their tippees. While outsiders would be liable under the misappropriation theory,[148] the Supreme Court has not yet adopted that theory of liability. The misappropriation theory rests on dubious legal reasoning. Its focus is on the wrongful act necessary to acquire the information and on the party from whom the information was acquired. Improper use of the non-public information, regardless of

[144] *Chestman*, 903 F.2d at 77-78.

[145] H.R. REP. No. 910, 100th Cong. 2d Sess. (1988) (noting cases involving the "Yuppie Five:" Dennis Levine, Ivan Boesky, Martin Siegal, Stephen Wang, William Dillim).

[146] Pub. L. No. 98-376, 98 Stat. 1264 (1984) (codified at 15 U.S.C. §§ 78c, 78o, 78t (1994)).

[147] Pub. L. No. 100-704,102 Stat. 4677 (1988) (codified at 15 U.S.C. § 78 (1994)).

[148] A misappropriation theory would generally not reach employees of a trash company who, in the process of collecting a company's trash, learned confidential, material information that would affect the company's stock price, and acted to profit from this information. The access to information theory would cover this factual case.

its source or how it was acquired, is the proper focus of securities laws. Moreover, Rule 10b-5 requires fraud or deceit while the misappropriation theory involves the theft and improper use of property rights. Whether the individual possessing monopolies information is an insider or not is insignificant. What is significant is the perceived unfairness created by the inability of all parties to the transaction to possess the same level of information.

Achieving the same level of information has been called the *equal access information standard* which covers all non-public information.[149] This more expansive and flexible reading of the Rule as embodied by the equal access theory is consistent with the broad catch-all language as well as the public's perception of fairness so essential to our securities markets. The access to information theory seeks to extend the abstain or disclose requirement to any party knowingly in possession of non-public information. Neither Section 10(b) nor Rule 10b-5 define insider trading. However, the language of Rule 10b-5 of *any* is an indication that there be few limitations on the reach of Rule 10b-5. The desire of Congress was to protect the ordinary investor and insure a level playing field and, to quote one court, "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."[150] The equal access theory would discourage investors from attempting to obtain nonpublic information illegally and would result in punishments to these with equally culpable behavior in a consistent manner.

[149] *See generally* Brudney, *supra* note 11 (equal access to information forbids exploiting informational advantages that one trader has over another). For an extensive discussion of the access to information perspective see Ronald F. Kidd, Note, *Insider Trading: The Misappropriation Theory versus an Access to Information Perspective*, 18 DEL. J. CORP. L. 101 (1993) (the access to information theory is based on the common law requirement to divulge undiscoverable information).

[150] Affiliated Ute Citizens v. U. S., 406 U.S. 128, 151 (1972).