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Casenotes: Blue Sky Law — New York Blue Sky Law Antifraud Provision Used to Impose Criminal Liability on Attorney Who Engaged in Insider Trading. *People v. Florentino*, 116 Misc. 2d 692, 456 N.Y.S.2d 638 (N.Y. Crim. Ct. 1982)

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CASENOTES

BLUE SKY LAW—NEW YORK BLUE SKY LAW ANTIFRAUD PROVISION USED TO IMPOSE CRIMINAL LIABILITY ON ATTORNEY WHO ENGAGED IN INSIDER TRADING. *People v. Florentino*, 116 Misc. 2d 692, 456 N.Y.S.2d 638 (N.Y. Crim. Ct. 1982).

Defendant, an attorney in a New York law firm that specialized in corporate takeovers and mergers, acquired confidential information regarding planned takeover attempts and merger transactions by his firm's corporate clients.¹ Without disclosing this information, he purchased on the open market shares of both the firm's clients and the takeover target corporations.² When news of the impending corporate transactions was made public, defendant liquidated his shares at a considerable profit.³ The attorney was prosecuted for insider trading and for trading on material nonpublic information under section 352-c of the New York blue sky law (Martin Act).⁴ On defendant's motion to dismiss the misdemeanor information, the New York City Criminal Court held that section 352-c was applicable to insider trading when the transactions were made on a national stock exchange.⁵

1. *People v. Florentino*, 116 Misc. 2d 692, 693, 456 N.Y.S.2d 638, 640 (N.Y. Crim. Ct. 1982).

2. *Id.*

3. *Id.*

4. The statute provides in pertinent part:

1. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, to use or employ any of the following acts or practices:

- (a) Any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale;

where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities.

2. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, to engage in any artifice, agreement, device or scheme to obtain money, profit or property by any of the means prohibited by this section.
3. A person, partnership, corporation, company, trust or association, or any agent or employee thereof, using or employing any act or practice declared to be illegal and prohibited by this section shall be guilty of a misdemeanor.

N.Y. GEN. BUS. LAW § 352-c (McKinney 1968).

5. *People v. Florentino*, 116 Misc. 2d 692, 693, 456 N.Y.S.2d 638, 641 (N.Y. Crim. Ct. 1982). An insider is a corporation director, officer, majority stockholder, or one who by virtue of his relationship stands in a similar position. Wang, *Trading on Material Nonpublic Information on Impersonal Stock Markets: Who is Harmed, and Who Can Sue Under S.E.C. Rule 10b-5?*, 54 S. CAL. L. REV. 1217, 1219 n.2, 1286 n.270 (1981). Insider trading is trading by an insider with shareholders of the corporation using any material nonpublic information originating from the issuing corporation and regarding its profits or the market for its securities. *Speed v. Transamerica Corp.*, 99 F. Supp. 808, 829 (D. Del. 1951).

Since its enactment in 1921, New York courts have broadly construed the Martin Act,⁶ using as their lodestar the language of Judge Pound in *People v. Federated Radio Corp.*⁷ Section 352-c⁸ was added to the Martin Act in 1955⁹ with the express purpose of providing "a deterrent to fraud where no adequate deterrent exists."¹⁰ Its addition was intended to broaden the scope of the Martin Act to include a wider range of deceptive or misleading acts, omissions, and practices that were prevalent in the securities industry.¹¹ The amendment of section 352-c to the Martin Act represented a legislative attempt to harmonize the New York statute with what were then viewed as the more liberal federal antifraud provisions.¹²

The extensive judicial treatment¹³ of federal rule 10b-5¹⁴ reflects

6. N.Y. GEN. BUS. LAW §§ 352-359 (McKinney 1968). For a discussion of the Martin Act, see I L. LOSS, SECURITIES REGULATION 35-42, 1440 (2d ed. 1961).

7. 244 N.Y. 33, 154 N.E. 655 (1926). As Judge Pound explained in *Federated Radio*: In a broad sense, the term [fraud] includes all deceitful practices contrary to the plain rules of common honesty.

The purpose of the law is to prevent all kinds of fraud in connection with the sale of securities and commodities and to defeat all unsubstantial and visionary schemes in relation thereto whereby the public is fraudulently exploited. The terms 'fraud' and 'fraudulent-practice', in this connection, should be given a wide meaning so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law.

Id. at 35, 154 N.E. at 657 (citations omitted); see *People v. Concord Fabrics, Inc.*, 83 Misc. 2d 210, 371 N.Y.S.2d 550 (N.Y. Sup. Ct.), *aff'd*, 50 A.D.2d 787, 377 N.Y.S.2d 84 (1975); *People v. Cadplaz Sponsors, Inc.*, 69 Misc. 2d 417, 330 N.Y.S.2d 430 (N.Y. Sup. Ct. 1972); L. Loss, *supra* note 6, at 40-41 n.78.

8. See *supra* note 4.

9. 1955 N.Y. LAWS 553.

10. Memorandum of New York Attorney General Jacob Javits in Support of Chapter 553 of the Laws of 1955, *reprinted in* 1955 N.Y. LEGIS. ANN. 135 [hereinafter cited as Attorney General's Memorandum].

11. *Id.*

12. *Id.*

13. *E.g.*, *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied sub nom.* *Coates v. SEC*, 394 U.S. 976 (1969); *Speed v. Transamerica Corp.*, 99 F. Supp. 808 (D. Del. 1951); *Ward LaFrance Truck Co.*, 13 S.E.C. 373 (1943).

14. 17 C.F.R. § 240.10b-5 (1980), was issued under § 10(b) of the Securities Exchange Act of 1934 (codified at 15 U.S.C. § 78j (1976)). Rule 10b-5 provides in pertinent 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 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 (1980).

the courts' recognition of a need for broader interpretation and flexible application of antifraud provisions. From its inception in 1942, Rule 10b-5 virtually preempted, albeit unintentionally, state and common law remedies for securities fraud.¹⁵ According great deference¹⁶ to what they perceived to be the congressional intent in drafting federal securities legislation,¹⁷ courts gave Rule 10b-5 an almost uniformly broad reading, most notably in the area of insider trading.¹⁸ The duty to disclose inside information about a corporation or to abstain from trading with that corporation's shareholders was initially founded on the existence of a special relationship with the corporation that allowed access to this information.¹⁹ The scope of this duty, however, was soon expanded to require disclosure to the general public²⁰ based on the mere possession of the inside information.²¹ These and other decisions²² clearly reflect judicial concern over the inequity inherent in the exploitation of an informational advantage gained by virtue of one's rela-

15. See Langvoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Re-statement*, 70 CAL. L. REV. 1, 2-3 (1982); Comment, *Action Under State Law: Florida's Blue Sky and Common Law Alternatives to Rule 10b-5 for Relief in Securities Fraud*, 32 U. FLA. L. REV. 636, 636-39 (1981); cf. Diamond v. Oreamuno, 24 N.Y.2d 494, 502-04, 248 N.E.2d 910, 914-15, 301 N.Y.S.2d 78, 83-84 (1969) (although impact of federal securities regulation has been great, that law was not intended to limit state power to fashion its own remedies for securities violations).

16. United States v. Naftalin, 441 U.S. 768, 773, 775-76 (1979); Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151-54 (1972); SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963).

17. See H.R. REP. NO. 1383, 73d Cong., 2d Sess. 5, 13 (1934) and S. REP. NO. 792, 73d Cong., 2d Sess. 4, 9 (1934), reprinted in 5 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934 §§ 17-18 (1973); H.R. CONF. REP. NO. 94-229, 94th Cong., 1st Sess. 91-92, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 322-23.

18. See Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied sub nom. Coates v. SEC, 394 U.S. 976 (1969); Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951); In re Investors Management Co., 44 S.E.C. 633 (1971); In re Cady, Roberts & Co., 40 S.E.C. 907 (1961); Ward LaFrance Truck Co., 13 S.E.C. 373 (1943); Pitt, *After the Fall: The Ins and Outs of Rule 10b-5*, 12 AM. INST. SEC. REG. (P.L.I.) 603 (1980).

19. In re Cady, Roberts & Co., 40 S.E.C. 907 (1961).

These three groups [officers, directors, and controlling stockholders], however, do not exhaust the classes of persons upon whom there is such an obligation. Analytically, the obligation rests on two principal elements; first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.

Id. at 912 (footnote omitted).

20. Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 236 (2d Cir. 1974).

21. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968) (en banc), cert. denied sub nom. Coates v. SEC, 394 U.S. 976 (1969).

22. See Pitt, *supra* note 18, at 641-49 (listing of cases).

tionship with a corporation.²³

This historically broad, flexible application of Rule 10b-5 sharply contrasts with its current interpretation. In *Chiarella v. United States*,²⁴ the Supreme Court severely limited a trader's duty to disclose or abstain from trading by holding that the duty rests on the existence of a fiduciary relationship between the parties to the securities transaction. Absent this relationship there is no duty, and failure to disclose material nonpublic information is not fraud under Rule 10b-5.²⁵ Thus, disclosure was not required of one not a classic insider, who was in possession of material nonpublic information, and who would trade with shareholders of the information source. Subsequently, in *United States v. Newman*,²⁶ the government advanced an alternative theory of insider liability, and the United States Court of Appeals for the Second Circuit held that the breach of a fiduciary relationship with one not a party to the securities transaction is a sufficient fraud or deception to invoke criminal liability under Rule 10b-5.²⁷ While *Newman* does not represent a wholesale return to the broad pre-*Chiarella* duty formulations,²⁸ the decision does operate to expand the disclosure limitation

23. *Chiarella v. United States*, 445 U.S. 222, 247-48 (1980) (Blackmun, J., dissenting); Brudney, *Insiders, Outsiders and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 345-46 (1979).

24. 445 U.S. 222 (1980).

25. *Id.* at 232-33; see also *Dirks v. SEC*, 103 S. Ct. 3255, 3262 n.15 (1983) ("[The] mere possession of non-public information does not give rise to a duty to disclose or abstain; only a specific relationship does that."); *General Time Corp. v. Talley Indus.*, 403 F.2d 159, 164 (2d Cir. 1968) (purchaser of securities, who was not an insider of issuer, and who had no fiduciary relation to prospective seller, had no duty to disclose circumstances that might raise the seller's demands); *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1353 (S.D.N.Y. 1983) (breach of fiduciary duty to one's employer in a Rule 10b-5 civil action cannot be extended to target corporation shareholders so as to give rise to a duty to disclose). Although characterizing the *Cady, Roberts* duty to disclose as seminal, the Court, in both *Chiarella* and *Dirks*, neglected to note that the *Cady, Roberts* opinion went on to state that any limitation on the duty to disclose premised on the lack of a fiduciary relationship between the parties to the transaction would be contrary to the broad purpose of the federal securities acts. *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 913-14 (1961); accord *In re Investors Management Co.*, 44 S.E.C. 633, 644 (1971); Brudney, *supra* note 23, at 354; Pitt, *supra* note 18, at 641-42.

26. 664 F.2d 12 (2d Cir. 1981), cert. denied, 104 S. Ct. 193 (1983).

27. *Newman*, 664 F.2d at 16. Defendants' criminal convictions were based on the theory that the misappropriation of confidential corporate information from one's employer for personal benefit is sufficient fraud or deception for Rule 10b-5 liability to attach to a securities transaction between parties (brokers and target shareholders) otherwise dealing at arm's length. *Id.* at 17. Although it would reach the same result as *Newman*, the misappropriation theory of Chief Justice Burger uses the trader's misappropriation of inside information for personal benefit, which in many cases will also result in the breach of any fiduciary relationship between the trader and the information source, to create an absolute duty on the part of the trader to disclose the information to target shareholders or abstain from trading. Failure to disclose constitutes fraud or deception under Rule 10b-5. *Chiarella v. United States*, 445 U.S. 222, 240-42 (1980) (Burger, C.J., dissenting).

28. See *supra* notes 20-21 and accompanying text.

imposed by *Chiarella*.²⁹

In *Florentino*, the defendant drew on the differences between New York's section 352-c and Rule 10b-5 in challenging the applicability of section 352-c to his case. He contended³⁰ that because he had no fiduciary relationship with any of the parties to the transaction, he had no duty to disclose his inside information and therefore committed no fraud by failing to do so.³¹ The court found a fiduciary relationship giving rise to a duty to disclose between the attorney and shareholders of the firm's corporate clients by virtue of his representation of those corporations.³² By trading with these shareholders without disclosure, defendant thus committed fraud under section 352-c.³³ In strong dic-

29. *Newman* may still represent a viable formula for expanding the *Chiarella* duty limitation in criminal cases. See *Proofreader Liable for Insider Trading, Judge Orders Disgorgement of Profits*, SEC. REG. & L. REP. (BNA) No. 48, at 2231 (Dec. 9, 1983) [hereinafter cited as *Proofreader Liable*]; *High Court Lets Stand Newman Insider Conviction, Three Other Securities Cases*, SEC. REG. & L. REP. (BNA) No. 39, at 1870 (Oct. 7, 1983); *Dirks Enhanced SEC Enforcement of Insider Trading, Goelzer Says*, SEC. REG. & L. REP. (BNA) No. 37, at 1820-21 (Sept. 30, 1983).

30. Defendant also argued that § 352-c was not intended to apply to insider trading absent privity between buyer and seller. To so apply the provision for the first time to his case, the defendant contended, constituted unfair surprise, and that because this interpretation of § 352-c was not apparent on its face, the provision was void as unconstitutionally vague. *People v. Florentino*, 116 Misc. 2d 692, 693, 456 N.Y.S.2d 638, 640, 642 (N.Y. Crim. Ct. 1982). He contended that a 1955 memorandum by then Attorney General Jacob Javits in support of the addition of § 352-c to the Martin Act evidenced a legislative intent that § 352-c apply *not* to stock exchange transactions, but only to "the retail distribution of speculative securities—those situations in which the defrauded victim would be in privity with the wrongdoer." Reply Memorandum of Law In Support of Defendant Florentino's Motion to Dismiss the Misdemeanor Information at 3, 5, *People v. Florentino*, 116 Misc. 2d 692, 456 N.Y.S.2d 638 (N.Y. Crim. Ct. 1982). Because the Attorney General's memorandum, which was drafted by the amendment's sponsor, was the only source of legislative history for § 352-c, it was dispositive on the issue of a privity requirement for the provision. *Id.* Judge Crane refuted this contention by holding that although the historical development of the Martin Act might suggest a privity limitation in § 352-c, because the New York legislature failed to state clearly such a limitation and because this was a *criminal*, rather than civil, action, any privity requirement was negated. *Florentino*, 116 Misc. 2d at 701-02, 456 N.Y.S.2d at 645-46. The *Florentino* court also rejected the defendant's vagueness and unfair surprise arguments, stating that the concept of fraud embodied in § 352-c "has been applied to insider trading for longer than defendant has been a member of the bar." *Id.* at 695-96, 456 N.Y.S.2d at 641. Judge Crane found it unlikely that defendant, a securities expert, was unfairly surprised to learn that his conduct, clearly a violation of federal antifraud provisions, was also a violation of a state provision that was amended in 1955 to harmonize the New York and federal securities laws. *Id.* at 697, 456 N.Y.S.2d at 643.

31. *Florentino*, 116 Misc. 2d at 702, 456 N.Y.S.2d at 646.

32. *Id.*

33. *Id.* This holding is consistent with the common law rule that prohibits a corporate insider or one in a similar position from using confidential corporate information for personal benefit. *Diamond v. Oreamuno*, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969). It also follows the traditional Rule 10b-5 principle that a corporate director, officer, majority stockholder, or one in a similar position must disclose any material nonpublic information about the corporation when trading

tum, the court stated that while no fiduciary relationship giving rise to a duty to disclose may have existed between the attorney and target shareholders, he still may have violated section 352-c: the breach of a fiduciary relationship between defendant and his firm and clients resulting from defendant's misuse of confidential corporate information would constitute fraud in connection with the securities transaction between the attorney and target shareholders.³⁴ The *Florentino* court apparently would incorporate the breach of *any* existing fiduciary obligation in connection with a securities transaction as the element of fraud or deception in a section 352-c criminal proceeding.³⁵

The continued availability of the *Newman* theory of Rule 10b-5 criminal liability³⁶ has alleviated the disparity between section 352-c and Rule 10b-5 caused by the narrow *Chiarella* formulation of the duty to disclose.³⁷ Should other federal courts of appeal elect to ignore *Newman* in favor of the more forceful *Chiarella* rule, the reach of a section 352-c-type provision would become significantly broader than that of Rule 10b-5 under the same circumstances. Under *Chiarella*, because no fiduciary relationship existed between the attorney and target shareholders, the attorney had no duty to disclose his inside information and thus committed no fraud by failing to do so before trading.³⁸ Under section 352-c, however, the breach of a fiduciary obligation owed by an attorney to his firm and clients, occasioned by his misappropriation of confidential corporate information, constitutes a fraud or deception

with its shareholders or abstain if the information cannot be disclosed. See Langevoort, *supra* note 15, at 4-11; Pitt, *supra* note 18, at 646-50; *supra* notes 18-19.

34. *People v. Florentino*, 116 Misc. 2d 692, 703, 456 N.Y.S.2d 638, 646-47 (N.Y. Crim. Ct. 1982). That neither the firm nor its corporate clients would have standing to sue the attorney in a § 352-c (or Rule 10b-5) *civil* action for any breach of fiduciary duty to them does not preclude the use of this breach to find fraud or deception in a *criminal* action, where the antifraud provision is being used to protect the general investing public. *Id.*; *United States v. Newman*, 664 F.2d 12, 17 (2d Cir. 1981), *cert. denied*, 104 S. Ct. 143 (1983); see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (plaintiff in a Rule 10b-5 civil action must be seller or purchaser of the securities involved).
35. *People v. Florentino*, 116 Misc. 2d 692, 703, 456 N.Y.S.2d 638, 647 (N.Y. Crim. Ct. 1982).
36. See *supra* note 27. It is surprising that in light of Supreme Court decisions such as *Chiarella*, *Dirks*, and *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), which reflect a certain hostility to "novel" or broader, more flexible interpretations and applications of Rule 10b-5, the Court let pass an opportunity to further cement the *Chiarella* rule in denying the writ of certiorari in *Newman*. See Pitt, *supra* note 18, at 640-41.
37. See *supra* notes 24-25 and accompanying text; see Poser, *Misuse of Confidential Information Concerning a Tender Offer as a Securities Fraud*, 49 BROOKLYN L. REV. 1265, 1275 (1983).
38. While perhaps reprehensible, the mere breach of some fiduciary duty to one's firm and its clients is not always fraud. Rule 10b-5 is not designed to detect every breach of fiduciary duty that may occur in connection with a securities transaction. *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980) (citing *Santa Fe Indus. v. Green*, 430 U.S. 462, 472-74 (1977)).

that taints the entire transaction, regardless of whether the attorney and the target corporation shareholders were dealing at arm's length.³⁹

A state blue sky provision such as section 352-c may represent a viable alternative to Rule 10b-5 in an action for trading on material nonpublic information. *Florentino* illustrates a judicial willingness to treat *any* fiduciary breach occurring in relation to a securities transaction as sufficient to meet a broadly defined fraud/deception element. This approach significantly reduces the target shareholders' or the state's burden because the breach of a fiduciary relationship is concurrent with the misappropriation of material nonpublic information from an employer or client. Therefore, proof of the misappropriation constitutes proof of the breach.⁴⁰ The burden is further alleviated because section 352-c does not require proof of scienter, which may be difficult where the transactions occurred on a "faceless" national stock exchange.⁴¹ As a note of caution, however, a party contemplating the use of a state antifraud provision should carefully discern which elements are required; not all state statutes are uniformly less stringent than Rule 10b-5.⁴²

Of the countless post-*Chiarella* criminal, civil, and SEC insider

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39. *People v. Florentino*, 116 Misc. 2d 692, 710, 456 N.Y.S.2d 638, 646-47 (N.Y. Crim. Ct. 1982); *accord* *United States v. Newman*, 664 F.2d 12, 17-18 (2d Cir. 1981), *cert. denied*, 104 S. Ct. 143 (1983).
40. The receipt of confidential information in the course of one's employment imposes a duty not to use that information for personal benefit. *Brophy v. Cities Serv. Co.*, 31 Del. Ch. 241, 70 A.2d 5 (1949); *Diamond v. Oreamuno*, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969). The SEC has used a 1983 Supreme Court decision to obtain a similar result: a stranger to a corporation can become a "temporary insider" of that corporation, complete with fiduciary duties to its shareholders, upon receipt of inside information originating from that corporation, and he will be precluded from trading in that corporation's stock without disclosure. *Dirks v. SEC*, 103 S. Ct. 3255, 3261 n.14 (1983); *see SEC Wins "Outsider Trading" Case: Tippee Deemed Temporary Insider*, SEC. REG. & L. REP. (BNA) No. 37, at 1818 (Sept. 30, 1983) (discussing *SEC v. Lund*, 570 F. Supp. 1397 (1983)).
41. Scienter, or intent to defraud, is a requisite element in criminal, civil, and SEC actions under Rule 10b-5. *Aaron v. SEC*, 446 U.S. 680, 689-91 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-202, 212-13 (1976). Defendant, in *Florentino*, contended that § 352-c should also contain this scienter requirement. *People v. Florentino*, 116 Misc. 2d 692, 699-700, 456 N.Y.S.2d 638, 644-45 (N.Y. Crim. Ct. 1982). Since the information in the pleadings sufficiently alleged scienter, the *Florentino* court refused to consider whether a scienter requirement was constitutionally mandated, noting that the standard as developed in prior § 352-c cases is proof only of intentional or knowing conduct. *Id.* at 700-01, 456 N.Y.S.2d at 645; *see People v. Barysh*, 95 Misc. 2d 616, 618, 408 N.Y.S.2d 190, 193 (1978). In addition, the *Florentino* court rejected a privity requirement (implicit in the *Chiarella* holding because of the fiduciary relationship requirement, *Pitt*, *supra* note 18, at 643), for § 352-c based on its legislative history, and because in a *criminal* action, the objective of the Martin Act is to punish fraud perpetrated on the general public rather than to vindicate the rights of an individual investor, which would be the purpose of a civil action for securities fraud. *Florentino*, 116 Misc. 2d at 701-02, 456 N.Y.S.2d at 644-45.
42. Comment, *supra* note 15, at 637-38, 649-51; MICHIGAN SECURITIES REGULATION

trading and trading on material nonpublic information actions under Rule 10b-5,⁴³ many have seemingly inconsistent results, leading to the conclusion that Rule 10b-5 is in a state of confusion. Part of this confusion indubitably stems from the ingenuity of those seeking to circumvent its reach. Attempts, however, to close legislatively loopholes in Rule 10b-5 seem ill-advised.⁴⁴ Legislation proscribing specific acts as fraudulent may have the effect of limiting the scope of Rule 10b-5, the argument being that since a particular act or practice is not specifically proscribed by the statute, the act or practice is not fraudulent.⁴⁵ Equally as compelling a reason for less Rule 10b-5 legislation is the existence of a perfectly serviceable state antifraud provision such as section 352-c which, with perhaps some judicial testing, may provide a broader remedy for inside trading than Rule 10b-5 in its current guise.

Ralph V. Partlow III

§§ 9.09 E-F, 10.03 C (Moscow & Makens eds. 1983); cf. L. Loss, *supra* note 6, at 31 n.40. The general antifraud provision of Maryland's blue sky laws provides:

It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:

- (1) Employ any device, scheme, or artifice to defraud;
- (2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- (3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person.

MD. CORPS. & ASS'NS CODE ANN. § 11-301 (1975). Section 11-102 expressly states that the terms "fraud," "deceit," and "defraud," as used in Title 11 of the Code are not limited to common law deceit. The element of scienter has apparently been read out of § 11-301 and § 11-703, which set out civil penalties for securities fraud. *O'Hara v. Kovens*, 625 F.2d 15, 17 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981). For a general discussion of Maryland law, see Brune, *Rule 10b-5 and the General Law as to Deceit in Securities Transactions in Maryland*, 33 MD. L. REV. 129, 135-38 (1973).

43. See, e.g., *Dirks v. SEC*, 103 S. Ct. 3255 (1983); *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981), *cert. denied*, 104 S. Ct. 193 (1983); *SEC v. Lund*, 570 F. Supp. 1397 (C.D. Cal. 1983); *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347 (S.D.N.Y. 1983); *Proofreader Liable*, *supra* note 29; *Post-Dirks Insider Trading Issues Debated At Conference*, SEC. REG. & L. REP. (BNA) No. 44, at 2070 (Nov. 11, 1983).
44. *But cf.* Block & Barton, *Securities Litigation*, 10 SEC. REG. L.J. 350 (1983) (advocating harsher, more detailed 10b-5 legislation to close gaps in the Rule created by *Chiarella*, *Dirks*, and other decisions); Block & Huff, *Life After Dirks: Can Outsider Trading Constitute Fraud?*, Nat'l L.J., Sept. 19, 1982, at 22, col. 4 (same).
45. "As the maxim [*expressio unius est exclusio alterius*] is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions." 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (C. Sand 4th ed. 1973) (footnotes omitted).