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Securities Exchange Act of 1934--Rule 10B-5--  
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under Section 10(B) [*Jordan Building Corp. v. Doyle,  
O'Connor & Co.*, [1966-1967 Transfer Binder]  
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Jan Horbaly

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**SECURITIES EXCHANGE ACT OF 1934 — RULE 10B-5 —  
PURCHASERS OF DEBENTURES DENIED A RIGHT  
OF ACTION UNDER SECTION 10(B)**

*Jordan Building Corp. v. Doyle, O'Connor & Co.,*

[1966-1967 Transfer Binder] CCH FED. SEC. L. REP.  
§ 91,996 (N.D. Ill. June 28, 1967).

After the great stock market crash of 1929, and in response to President Roosevelt's call for legislation to supplement the doctrine of caveat emptor with the new doctrine of "let the seller also beware,"<sup>1</sup> Congress passed the Securities Act of 1933 (Securities Act)<sup>2</sup> and the Securities Exchange Act of 1934 (Exchange Act).<sup>3</sup> The Acts were designed to protect the investor, outlaw fraud, and regulate the trading of securities.<sup>4</sup> Under the Securities Act, Congress granted specific remedies to *purchasers* of securities and carefully circumscribed these remedies by procedural limitations and defenses.<sup>5</sup> However, the courts have generally not limited themselves to these express remedies, but rather have found broad implied remedies in the Exchange Act<sup>6</sup> for both *purchasers and sellers* under section 10(b) and rule 10b-5.<sup>7</sup> The goal of protecting the investor by providing unrestricted remedies under rule 10b-5 may be laudable,<sup>8</sup> but there remains the question whether the courts in their effort to grant investors further protection should be permitted, through judicial expansion, to rewrite the provisions of the securities laws so as to make their effect contrary to what legislative history and rules of statutory construction would suggest it should be.<sup>9</sup>

In the recent case of *Jordan Building Corp. v. Doyle, O'Connor & Co.*,<sup>10</sup> a federal district court at first appeared eager to follow the trend in favor of implying a right of action under rule 10b-5 to *purchasers* as long as the plaintiffs submitted further evidence in compliance with State statutes to show that knowledge of a misstatement was acquired before knowledge of the true facts. But on reconsideration, the court dismissed the complaint and decided

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holder. The case was remanded to the trial court where additional evidence was to be taken in order to best determine the type of relief to be granted. Ordinarily a return to the status quo is the best form of relief in a situation such as this. However, that was not feasible here as the defendants had pledged their stock to third parties (query the possibility of a collateral issue of fraud). In other words, for Browning to retain his proportionate interest, he would most likely find it necessary to spend a considerable amount to purchase a substantial part of the new stock issue.

against implying a purchaser's right of action under rule 10b-5, since Congress had provided a specific remedy for purchasers under section 12(2) of the Securities Act.<sup>11</sup>

The plaintiffs in the *Jordan* case had purchased debentures of the International Photocopy Company, Inc. They alleged that they had been induced to purchase the grossly overvalued securities because of material misstatements made by the defendants<sup>12</sup> and spe-

<sup>1</sup> *Wilco v. Swan*, 346 U.S. 427, 430-31 (1953). See also *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963).

<sup>2</sup> 15 U.S.C. §§ 77a-bbbb (1964) [hereinafter cited as Securities Act].

<sup>3</sup> 15 U.S.C. §§ 78a-hh (1964) [hereinafter cited as Exchange Act].

<sup>4</sup> Gadsby, *Historical Development of the SEC — The Governmental View*, 28 GEO. WASH. L. REV. 6, 9-10 (1959).

<sup>5</sup> Comment, *The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors*, 59 YALE L.J. 1120 n.9, 1121, 1126-27 (1950).

<sup>6</sup> 15 U.S.C. § 78j(b) (1965).

<sup>7</sup> 17 C.F.R. § 240.10b-5 (1967). Section 10(b) of the Exchange Act makes unlawful the contravention of specific rules and regulations prescribed by the Securities Exchange Commission for the protection of the investors. Rule 10b-5 specifies the rules and regulations referred to under section 10(b) of the Exchange Act. Thus, section 10(b) sets down a basic area of unlawful conduct, and rule 10b-5 sets out in detail that which in generality is prohibited by section 10(b). Rule 10b-5 does not create any private right of action in either buyer or seller, but simply describes in detail certain actions which shall be unlawful.

<sup>8</sup> Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 NW. U.L. REV. 627, 628 (1963). For an interesting discussion of this area of the law, see Lowenfels, *The Demise of the Birnbaum Doctrine: A New Era for Rule 10b-5*, 54 VA. L. REV. 268 (1968).

<sup>9</sup> Ruder, *supra* note 8.

<sup>10</sup> [1966-1967 Transfer Binder] CCH FED. SEC. L. REP. § 91,996 (N.D. Ill. June 28, 1967).

<sup>11</sup> 15 U.S.C. § 771(2) (1964).

<sup>12</sup> Within 6 months after the purchase, the plaintiffs learned that the securities were grossly overvalued. At that time, the plaintiffs served notice by registered mail on each of the defendants pursuant to section 137.13 of the Illinois Securities Law of 1953, claiming that the sale of the securities was voidable. The Illinois statute provided in pertinent part:

A. Every sale of a security made in violation of the provisions of this Act shall be voidable at the election of the purchaser exercised as provided in sub-section B of this Section . . . .

B. Notice of any election provided for in sub-section A of this Section shall be given by the purchaser, *within 6 months after the purchaser shall have knowledge that the sale of the securities to him is voidable*, to each person from whom recovery will be sought, by registered letter addressed to the person to be notified at his last known address with proper postage affixed, or by personal service . . . . ILL. ANN. STAT. ch. 121½, § 137.13 (Smith-Hurd 1960) (emphasis added).

The defendants moved to dismiss counts 1 and 3 of the complaint for failure to state a claim upon which relief could be granted. With respect to count 1, the court having initially held that there had been a violation of rule 10b-5, on reconsideration granted the defendant's motion to dismiss and held that purchasers did not have a right of action under rule 10b-5 of the Exchange Act. With respect to count 3, the court first decided that a determination of whether the Illinois securities laws had been vio-

cifically posited four theories upon which rule 10b-5 relief might be sustained.<sup>13</sup> One theory was based on an adherence to the doctrine of stare decisis, for Congress had not seen fit to change the broad judicial interpretation of the securities laws by further legislation. This theory requires that in the absence of a change in congressional policy, the court must assume that its original decision reflects the intent of Congress<sup>14</sup> and thus has become part of the statute.<sup>15</sup> Such an assumption, however, becomes erroneous when it is recognized that "[t]he general public receives knowledge of the law through statutes and not through judicial decisions which may or may not be published, and to which few people will have access."<sup>16</sup> Further, to equate inaction with congressional approval of these original decisions is logically unsound.<sup>17</sup> Political considerations<sup>18</sup> as well as the sheer pressure of more important business<sup>19</sup> often forbid Congress from taking corrective action. Thus, it would seem that the inaction of Congress should not prevent courts from considering anew the wisdom and rationality of prior judicial decisions rendered under a statute.<sup>20</sup>

A second theory supporting the implication of a private right of action in favor of the buyers in *Jordan* under rule 10b-5 was manifested by *Fischman v. Raytheon Manufacturing Co.*<sup>21</sup> Here the

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lated would require proof that the plaintiffs had knowledge of the misstatement before they acquired knowledge of the true facts. On reexamination the court granted the defendant's motion to dismiss on the grounds that the plaintiffs had failed to comply with the Illinois statute which required an allegation by the plaintiffs that they had notified the defendants within 6 months from the date they had knowledge of the misstatement.

<sup>13</sup> Numerous arguments have been presented in support of implying a private right of action in favor of purchasers under rule 10b-5. For a good summary of these arguments, see Comment, *supra* note 5, at 1133-42.

<sup>14</sup> Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEXAS L. REV. 247, 255 (1947).

<sup>15</sup> *Id.* at 261.

<sup>16</sup> Thomas, *Statutory Construction When Legislation Is Viewed As a Legal Institution*, 3 HARV. J. LEGIS. 191, 214-15 (1966).

<sup>17</sup> See *Cleveland v. United States*, 329 U.S. 14, 22 (1946) (concurring opinion).

<sup>18</sup> *Id.* at 23.

<sup>19</sup> *Id.*

<sup>20</sup> See *Girouard v. United States*, 328 U.S. 61 (1946), where "a majority of the Court determined that congressional inaction after judicial interpretation of congressional enactment did not prevent the reversal of earlier decisions and the establishment of a new policy." Horack, *supra* note 14, at 253.

<sup>21</sup> 188 F.2d 783 (2d Cir. 1951), *rev'g*, 9 F.R.D. 707 (S.D.N.Y. 1949). The district court dismissed the action. Professor Louis Loss of Harvard University, in discussing the *Fischman* case notes that the "opinion . . . leaves many questions unanswered." 3 L. LOSS, SECURITIES REGULATION 1784 (2d ed. 1961). He also observed that the defendants probably did not argue that the shareholders should have sued under section

court held that shareholders, as buyers, could maintain an action under section 10(b) of the Exchange Act and rule 10b-5 on the theory that purchasers of securities would have no remedy against fraudulent practices under the Securities and Exchange Acts if a private right of action was not implied for them under rule 10b-5. Strangely, the court chose to ignore section 12(2) of the Securities Act of 1933 which would have given the plaintiffs in this action a remedy. Perhaps the argument advanced was that when the specific remedies for buyers are inadvertently disregarded, a private right of action should be implied under rule 10b-5 so as not to leave the purchaser of securities without a remedy against fraud. In sustaining such an argument it can only be concluded that the court was rewarding professional ignorance.<sup>22</sup>

A third and more meritorious argument for the implication of a private right of action under rule 10b-5 for buyers was presented in *Ellis v. Carter*.<sup>23</sup> The court implied a buyer's right of action, as well as a seller's, under rule 10b-5 in a desire to fulfill the dominant purpose of the Exchange Act by making protection of investors "reasonably complete and effective."<sup>24</sup> The court appeared to be well aware that the decision to imply a private right of action in favor of buyers under rule 10b-5 amounted to a construction of the Exchange Act which would render it inconsistent with the Securities Act.<sup>25</sup> But the court held that such a construction was necessary so as to further the dominant policy of Congress to "provide complete and effective sanctions, public and private, with re-

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12(2) for the reason "that they felt plaintiffs would not be permitted to sue under Rule 10b-5 and did not want to give them any ideas." *Id.* at 1783 n.335.

Judge Parsons, writing in *Jordan*, attributed poor advocacy as the reason for the court's failure to deal with section 12(2). *Jordan Bldg. Corp. v. Doyle, O'Connor & Co.*, [1966-1967 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,996, at 96,384 (N.D. Ill. June 28, 1967). Had the court applied section 12(2) of the Securities Act, there would have been no need to *imply* a buyer's right of action under section 10(b) of the Exchange Act and rule 10b-5, since according to Loss "[t]he two acts, being *in pari materia*, must be construed together . . ." 3 L. LOSS, *supra* at 1781; see *Rosenberg v. Globe Aircraft Corp.*, 80 F. Supp. 123, 124 (E.D. Pa. 1948); McCaffrey, *The Rule In Pari Materia as an Aid to Statutory Construction*, 3 LAWYER & L. NOTES 11, 12 (1949).

<sup>22</sup> If a purchaser is so unfortunate as to find himself in a situation where the specific remedies under the Securities Act provide no relief, it is submitted that the purchaser would be wise to bring an action under rule 10b-5. However, the purchaser who proceeds under rule 10b-5 should be subject to the procedural limitations and defenses expressly set forth in the Securities Act.

<sup>23</sup> 291 F.2d 270 (9th Cir. 1961). Here, purchasers of stock sought damages for fraud in connection with an asserted joint venture to acquire control of a corporation.

<sup>24</sup> 15 U.S.C. § 78b (1964).

<sup>25</sup> 291 F.2d at 273. See also *Fratt v. Robinson*, 203 F.2d 627, 631-32 (9th Cir. 1953).

spect to the duties and obligations imposed under the two acts."<sup>26</sup> Not only does this construction violate the settled rule of statutory construction that specific provisions will prevail over general provisions where both afford a remedy in a particular situation,<sup>27</sup> but it also raises the clear implication that Congress intended to strike the specific remedies prescribed for purchasers under the Securities Act when it enacted the Exchange Act a year later.<sup>28</sup> If the two acts are viewed as one statute, it is hard to conceive that Congress would have prescribed detailed procedural requirements and limitations in one section and "casually nullified" them in a later section.<sup>29</sup>

A fourth theory posited by the plaintiffs in *Jordan* was revealed in *Hooper v. Mountain States Securities Corp.*<sup>30</sup> The *Hooper* plaintiffs, as corporate trustees in bankruptcy, argued for the implication of a right of action under rule 10b-5 predicated on the basic tort law that a person injured by another's violation of a statute intended for his protection may maintain a civil action for private relief provided the injury sustained is other than that suffered by the public generally.<sup>31</sup> This basic tort law approach had been applied in *Kardon v. National Gypsum Co.*<sup>32</sup> to grant a seller of se-

<sup>26</sup> 291 F.2d at 274. Despite the fact that such a construction would mean "that Congress in 1934 undid what it carefully did in 1933," *id.*, the court found the general provisions of the Exchange Act to be controlling over the specific provisions of the Securities Act.

<sup>27</sup> See, e.g., *Montague v. Electronic Corp. of America*, 76 F. Supp. 933, 936 (S.D. N.Y. 1948), where the court stated:

The settled rule of statutory construction is that, where there is a special statutory provision affording a remedy for particular specific cases and where there is also a general provision which is comprehensive enough to include what is embraced in the former, the special provision will prevail over the general provision, and the latter will be held to apply only to such cases as are not within the former.

See also 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5204 (3d ed. 1943).

<sup>28</sup> *Rosenberg v. Globe Aircraft Corp.*, 80 F. Supp. 123, 124 (E.D. Pa. 1948).

<sup>29</sup> *Id.*

<sup>30</sup> 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961).

<sup>31</sup> *Id.* at 201-02. "[I]t is a well-established doctrine that where remedial legislation is concerned, 'members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach.'" Comment, *supra* note 5, at 1133-34; see RESTATEMENT (SECOND) OF TORTS §§ 286-88 (1965).

<sup>32</sup> 73 F. Supp. 798 (E.D. Pa. 1947). In this case, the purchasers fraudulently conspired through misrepresentation and suppression of the truth to induce the sale of stock for less than its true value.

The right of action was implied into Rule 10b-5 on two grounds: first, the common law doctrine which creates torts out of certain kinds of statutory violations, Restatement of Torts, § 286, and second, section 29(b) of the 1934 Act which declares void any contracts made in violation of the Act or of rules or regulations thereunder. *Jordan Bldg. Corp. v. Doyle, O'Con-*

curities a private right of action under rule 10b-5. The application of the basic tort law doctrine is generally permitted to the extent that it does not conflict with prescribed statutory remedies that might be available.<sup>33</sup> In *Rosenberg v. Globe Aircraft Corp.*<sup>34</sup> the same judge who wrote the opinion in *Kardon* held that plaintiffs, as buyers, could not recover under rule 10b-5 for losses incurred in the purchase of stock based on false and fraudulent statements contained in the corporation's prospectus.<sup>35</sup> Since Congress did make other provision — specifically section 12 of the Securities Act — for private relief for defrauded buyers, the court ruled that section 12 must be applied and that it must govern exclusively.<sup>36</sup> In addition, the court felt that any effort to imply relief under rule 10b-5 in favor of the buyer would make the 1933 and 1934 Acts "incongruous."<sup>37</sup> Thus, it would appear that an implication of a private right of action under rule 10b-5 in favor of buyers, under the tort doctrine, would be permitted where there was no congressional indication that buyers should not be able to sue under the rule. However, such an implication would not be permitted where the statute either withholds relief or makes other provisions for private relief inconsistent with the application of the tort doctrine.

Although not raised in the *Jordan* case, an additional argument has been raised elsewhere: if indeed the tort theory cannot be relied upon, a private right of action for purchasers under rule 10b-5 may be implied under a statutory construction theory.<sup>38</sup> The statutory construction theory centers around the 1938 amendment to section 29 of the Exchange Act. As enacted in 1934, section 29(b) merely declared that any contract made in violation of the Ex-

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ner & Co., [1966-1967 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,996, at 96,384 (N.D. Ill. June 28, 1967); see Ruder, *supra* note 8, at 637 n.53.

<sup>33</sup> RESTATEMENT (SECOND) OF TORTS § 287, comment *a* at 29 (1965).

<sup>34</sup> 80 F. Supp. 123 (E.D. Pa. 1948).

<sup>35</sup> The judge noted that in the *Kardon* case there had been no congressional indication that injured sellers should not be able to sue under rule 10b-5. However, in the *Rosenberg* case, the judge indicated that prescribed regulations and limitations regarding registration statements and prospectuses, along with specific remedies for buyers relying on such statements, were provided under the Securities Act. Section 11(a) makes an issuer liable to the buyer when registration is false or misleading. 15 U.S.C. § 77k(a) (1964). Section 12(1) permits the buyer to sue the seller where the seller has violated the registration requirements. 15 U.S.C. § 771(1) (1964). Section 12(2) affords the buyer a remedy against a seller who has used interstate facilities to communicate untruths or statements containing omissions in order to sell securities. 15 U.S.C. § 771(2) (1964).

<sup>36</sup> 80 F. Supp. at 124-25.

<sup>37</sup> *Id.* at 125.

<sup>38</sup> See Ruder, *supra* note 8, at 635, 685.

change Act or its *rules* would be void as to the rights of the violator.<sup>39</sup> In 1938, an amendment to section 29(b) was passed by Congress imposing a short statute of limitations on actions brought for violations of *specific commission rules*.<sup>40</sup> Since a private right of action was not expressly provided in any of these commission rules, the effect of Congress placing this statute of limitations on actions brought for violations of the rules suggested a congressional intent that private rights of action be implied for violation of these rules, as well as for many of the provisions of the Exchange Act which do not expressly provide private rights of action. The courts, by means of this argument, have had no difficulty concluding that there is a private right of action under section 10(b) of the Exchange Act.<sup>41</sup> However, it has been suggested that a careful examination of the legislative history of the Securities Act and the Exchange Act indicates that Congress did not intend to create an implied right of action under section 10(b) of the Exchange Act, rule 10b-5, or any of the other provisions of the Exchange Act which do not expressly authorize private recovery.<sup>42</sup> It has also been contended that section 29(b) as amended "should be restrictively interpreted" to recognize a private right of action to enforce only the specific commission rules.<sup>43</sup> Further, an examination of legislative history suggests that by the inclusion of certain express remedies, Congress clearly intended to discourage the creation of implied civil remedies.<sup>44</sup> Finally, in an attempt to deny implied

<sup>39</sup> Exchange Act § 29(b), 48 Stat. 903 (1934), as amended, 15 U.S.C. § 78cc(b) (1964).

<sup>40</sup> 52 Stat. 1076 (1938), 15 U.S.C. § 78cc(b) (1964) (proviso clause).

<sup>41</sup> For an extensive list of cases through 1963 dealing with rule 10b-5 arranged by circuits, see Ruder, *supra* note 8, at 687-90. *E.g.*, Stevens v. Vowell, 343 F.2d 374 (10th Cir. 1965); Boone v. Baugh, 308 F.2d 711 (8th Cir. 1962); Texas Continental Life Ins. Co. v. Dunne, 307 F.2d 242 (6th Cir. 1962); Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); McClure v. Borne Chem. Co., 292 F.2d 824 (3d Cir. 1961); Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); Fischman v. Raytheon Mfg. Co., 9 F.R.D. 707 (S.D.N.Y. 1949), *rev'd*, 188 F.2d 783 (2d Cir. 1951); Kardon v. National Gypsum Co., 73 F. Supp. 798 (E.D. Pa. 1947).

<sup>42</sup> Ruder, *supra* note 8, at 685. For a discussion of legislative history, see note 44 *infra*.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 635.

One of the arguments most frequently made and rejected in the reported cases is that since the Securities Act and Exchange Act contain specific sections making a civil cause of action available, the doctrine "*expressio unius est exclusio alterius*" should apply and therefore no civil liability should exist where not expressly provided. *Id.* at 648.

*See, e.g.*, Fratt v. Robinson, 203 F.2d 627, 632 (9th Cir. 1953). *See also* 59 HARV. L. REV. 769, 779 (1946).

rights of action under rule 10b-5, it has been argued that the Securities Act of 1933 and the Exchange Act of 1934 are undeniably *in pari materia* and must be construed as a single statute.<sup>45</sup>

The Supreme Court has not yet ruled on the question of whether a buyer's or seller's right of action may be implied under rule 10b-5.<sup>46</sup> In the absence of such a decision, it has been sug-

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An examination of the legislative history of the Securities Act and the Exchange Act leads to conclusions antithetical to the judicial trend granting implied private rights of action. Where private causes of action were provided in the two acts, they were carefully circumscribed. Ruder, *supra* note 8, at 645; Comment, *supra* note 5, at 1121. "Where [private causes of action] were not expressly provided, the Commission was charged with regulation by investigation, injunction, and criminal proceedings." Ruder, *supra* note 8, at 645.

With respect to section 10(b) of the Exchange Act, reference to legislative history indicates that the section was intended to provide the Securities Exchange Commission with a catchall provision to cover unforeseen loopholes in the Securities Act and the Exchange Act: section 10(b) "is a catch-all clause to prevent manipulative devices. I do not think there is any objection to that kind of a clause. The Commission should have the authority to deal with new manipulative devices." . . . Testimony of Mr. Thomas G. Corcoran, *Hearings on Stock Exchange Regulation Before House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 115 (1934)." *Id.* at 658. It is also important to note that section 10(b) was created for use and benefit of the Commission and not private buyers and sellers of securities. *Id.* at 657.

Given the legislative history, it is difficult to understand why enlightened courts have persistently implied a private right of action in favor of purchasers under section 10(b) of the Exchange Act and rule 10b-5, since it has long been held that interpretation of a statute cannot be inconsistent with the plain intention of Congress so as to defeat the object of the legislation. *See, e.g., Johnson v. Southern Pac. Co.*, 196 U.S. 1, 14 (1904).

However, it must be remembered that legislative history is only as important as courts desire it to be. Congressional testimony has been given varying weight by courts and commentators. *See, e.g., Jackson, The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535, 537-38 (1948). *Contra, Jones, Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 744 (1940). *See also SEC v. Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935) (opinion by Hand, J.).

<sup>45</sup> *Rosenberg v. Globe Aircraft Corp.*, 80 F. Supp. 123, 124 (E.D. Pa. 1948); *Rosenberg v. Hano*, 121 F.2d 818, 821 (3d Cir. 1941); 3 L. LOSS, *supra* note 21, at 1781. The majority of courts have ignored the restrictions and limitations of the Securities Act and have consistently implied a buyer's right of action under rule 10b-5. *Stevens v. Vowell*, 343 F.2d 374 (10th Cir. 1965); *Ellis v. Carter*, 291 F.2d 270 (9th Cir. 1961); *Hooper v. Mountain States Sec. Corp.*, 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); *Fischman v. Raytheon Mfg. Co.*, 9 F.R.D. 707 (S.D.N.Y. 1949), *aff'd in part & rev'd in part*, 188 F.2d 783 (2d Cir. 1951).

Other courts have been more faithful to careful legislative construction. In *Rosenberg v. Globe Aircraft Corp.*, 80 F. Supp. 123 (E.D. Pa. 1948), the court found the two acts to be unquestionably *in pari materia* and concluded that: "Looking at [the two Acts] as one statute it is simply not possible that Congress, having prescribed in elaborate detail procedural requirements which must be fulfilled in order to enforce civil liability attaching to a carefully defined type of violation, would have casually nullified them all in a later section." *Id.* at 124; *see Montague v. Electronic Corp. of America*, 76 F. Supp. 933, 936 (S.D.N.Y. 1948). *Contra, Osborne v. Mallory*, 86 F. Supp. 869, 879 (S.D.N.Y. 1949).

<sup>46</sup> The Supreme Court has, however, expressed a feeling "that the Securities Exchange Act should not be broadened in ways not intended by Congress." Ruder, *supra* note 8, at 643; *see Blau v. Lehman*, 368 U.S. 403, 411-13 (1962).

gested that several alternative constructions might be placed on section 10(b) and rule 10b-5: (1) that there be permitted "no civil actions to either buyer or seller" under rule 10b-5; (2) that "sellers but not buyers [may] sue under [rule 10b-5], thereby giving both buyers and sellers a civil remedy but limiting that of buyers to the remedies provided in the [Securities Act]"; (3) that "buyers as well as sellers [may] sue under [rule 10b-5], but to make buyers' actions thereunder subject to the same restrictions as provided for in the [Securities Act]"; and (4) that "buyers as well as sellers [may] sue under section 10(b) and rule 10b-5 without any distinction whatever, free of the restrictions imposed under the [Securities Act]."<sup>47</sup> To date the courts have limited themselves to these four alternatives and have generally chosen to follow the fourth.

A fifth alternative deserves consideration, *i.e.*, that sellers may sue under rule 10b-5 subject to the restrictions imposed on buyers under the Securities Act.<sup>48</sup> In implying a seller's right of action under rule 10b-5, the courts have tended to give sellers an unrestricted civil remedy.<sup>49</sup> In an effort to award buyers the same unrestricted civil remedies, other courts have pointed to the inconsistency in granting unrestricted remedies to sellers under the Exchange Act, and only restricted remedies to buyers under the Securities Act.<sup>50</sup> The solution inevitably suggested and ultimately followed is the elimination of the restrictions applicable to buyers under the Securities Act in favor of unrestricted civil remedies implied under rule 10b-5.<sup>51</sup> The result is rationalized on the grounds

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<sup>47</sup> *Ellis v. Carter*, 291 F.2d 270, 273 (9th Cir. 1961). Professor Loss believes that the purchasers of securities should not have a civil remedy under rule 10b-5, although he hesitates to say that purchasers of securities should *never* be permitted to recover under rule 10b-5. He sees only two alternative constructions: (1) that sellers should not be permitted to recover under rule 10b-5; and (2) that sellers should be permitted to recover under rule 10b-5, but that they should be restricted to the specific remedies of the Securities Act. In concluding, Loss states:

it seems relatively safe to predict that the Supreme Court will someday have to choose between abandoning the seller altogether and accepting the anomaly of favoring him over the buyer as inevitable under a system of securities regulation which after all is not an integrated code adopted at a single legislative sitting, however one may try to construe it so. The former solution would be the easiest of all, but not the happiest. The anomalies and problems attendant upon [the latter solution] do not seem too great a price to pay for the extension of a federal remedy to defrauded sellers of securities. 3 L. LOSS, *supra* note 21, at 1790-91.

<sup>48</sup> Loss raises the same point but dismisses the possibility rather summarily, concluding that to do so "would require too substantial a judicial rewriting of the statutes." 3 L. LOSS, *supra* note 48, at 1790; see *Ellis v. Carter*, 291 F.2d 270, 273 (9th Cir. 1961).

<sup>49</sup> See text accompanying notes 31-33 *supra*.

<sup>50</sup> See, e.g., *Ellis v. Carter*, 291 F.2d 270, 272-74 (9th Cir. 1961).

<sup>51</sup> See Comment, *supra* note 5, at 1137-40.

that Congress has shown no reason why it "would have wanted the procedure to be different."<sup>52</sup> But it is questionable whether such a conclusion can be drawn, assuming that the two statutes are *in pari materia*. Since the underlying purpose of the rule of *in pari materia* is harmony and effectiveness among the various parts of the statute,<sup>53</sup> it would seem more logical to imply sellers' remedies circumscribed by the restrictions that govern buyers under the Securities Act. Such a construction would require no more judicial rewriting of a statute than any other attempt to clear up obscurities and ambiguities in the effort to construe a statute as a whole. Certainly the maxim of statutory construction of *in pari materia* should apply to express as well as implied provisions.

JAN HORBALY

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<sup>52</sup> *Ellis v. Carter*, 291 F.2d 270, 274 (9th Cir. 1961).

<sup>53</sup> *McCaffrey*, *supra* note 21, at 12.