10-1982

Herman & McLean v. Huddleston

Lewis F. Powell Jr.

CFR in 81-1076 - dove 1/21/82

Grant 81-680

Discuss 81-1076 when response is received

Case No 81-680 (Response received)
This is another of the many 10b(5) suits.

81-680 presents Q whether a private cause of action (for false statements in a prospectus) may be inferred vs Reps (an accounting firm). It is conceded that an express statutory remedy existed under § 11 of '33 Act, but Pltf/Lim had been allowed to sue by Reps.

We resolved this Q in Blue Chips. Issue is important, & there is conflict

Case 81-1076, raises Q whether the "clear & convincing" standard or the "preponderance" standard is applicable in a 10b(5) suit.

Response Received in 81-1076 See over. RF

PRELIMINARY MEMORANDUM

February 19, 1982 Conference
List 1, Sheet 1

No. 81-680			
HERMAN & MACLEAN	acct + firm	Cert to CA 5 (Wisdom, Rubin, Sam Johnson)	
v.			
HUDDLESTON, ET AL.	pltf	Federal/Civil	Timely
81-1076			
HUDDLESTON, ET AL.	pltf	Same	
v.			
HERMAN AND MACLEAN, ET AL.	pltf	Federal/Civil	Timely (w/ext.)

CFR in 81-1076, ~~[illegible]~~ The fact that no CA has explicitly rejected the "clear and convincing" standard is inadequate to distinguish the cases; other CAs apparently do apply a different ("preponderance") standard. RF

1. SUMMARY: These petitions raise numerous issues relating to implied private right of actions under Rule 10b-5, promulgated pursuant to § 10(b) of the Securities Exchange Act of 1934.

2. FACTS AND DECISION BELOW: In 1969, Texas International Speedway, Inc. (TIS) filed a registration statement and prospectus with the SEC and the Texas State Securities Board. TIS's securities offering totalled over $4 million, the proceeds of which were to be used to construct an automobile race track. One year later, TIS filed a petition for bankruptcy. In 1972, petrs in No. 81-1076 filed a class action on behalf of purchasers of TIS securities under Rule 10b-5, and a pendant claim pursuant to the Texas Securities Act. The factual dispute in the case focused on statements made in the TIS prospectus. The jury ultimately found that the prospectus was materially misleading as to the cost of constructing the speedway and that the defendants had failed to disclose the true facts with "reckless disregard for the truth." Prior to trial, the class compromised its claims against the underwriters of the offering and the speedway contractor. The remaining defendants, resps in No. 81-1076, apparently are the accounting firm and the accountants who helped prepare the prospectus. The amounts received in settlement were credited against the judgment eventually obtained by the plaintiffs, but the non-settling defendants' cross claims for contribution were disallowed.

The CA reversed. The CA first held that a private right of action under Rule 10b-5 may be implied despite the applicability of express civil remedies. The CA noted that this question was

reserved by the Supreme Court in Blue Chip Stamps v. Manor Drug Stores, 421 U.SA. 723, 752 n. 15 (1975), and Ernst & Ernst v. Hochfelder, 425 U.S. 185, 211 n. 31 (1976). Although recent decisions by the Supreme Court give substance to the argument that no remedy should be implied for actions covered by express liability provisions of a statute, this is not a case where the court is being asked to create a new judicial remedy. It is well established that a private remedy exists under Rule 10b-5. The question is thus whether an established remedy may be invoked despite the existence of another remedy for the same conduct. While §§ 11 and 12(2) of the 1933 Act contain limitations and requirements not exacted of Rule 10b-5 litigants, allowing invocation of the Rule 10b-5 remedy does not impermissably nullify these constraints. The implied remedy under Rule 10b-5 should not depend on whether the statement relied upon was or was not contained in an SEC filing. In this regard, the CA relied on Wachovia Bank and Trust Co. v. National Student Marketing Corp., 650 F.2d 342 (CA DC 1980), cert. denied ____ U.S. ____ (1981); Ross v. A. H. Robins Co., 607 F.2d 545 (2nd Cir. 1979), cert. denied 446 U.S. 946 (1980).

The CA then examined the elements of a cause of action under Rule 10b-5. Inter alia, the CA held that the "clear and convincing evidence standard" is required in a Rule 10b-5 action. The court relied on the fact that the traditional burden of proof in common-law fraud cases is the clear and convincing standard. Next, the CA held that it was error for the DC not to require the plaintiffs to demonstrate reliance and causation. Although in

Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972), the Court relieved the investor in certain circumstances of the necessity of providing affirmatively that he relied on the prospectus or other representation, it does not eliminate the reliance element from a Rule 10b-5 case. Where it is alleged that a defendant has made positive misrepresentations of material information, proof of reliance by the plaintiff upon the misrepresentation is required. On the other hand, where a plaintiff alleges deception by the defendant's nondisclosure of material information, the Affiliated Ute presumption obviates the need to prove actual reliance on the omitted information. The difference between misrepresentation and nondisclosure cases relates only to the whether proof of reliance is a prerequisite to recovery (misrepresentation case) or whether proof of nonreliance is an affirmative defense (nondisclosure case). The CA then held that this case cannot be characterized as a nondisclosure case. The defendants did not stand mute in the face of a duty to disclose. They undertook instead to disclose relevant information in an offering statement now alleged to contain certain misstatements of fact and to fail to contain other facts necessary to make the statements made, in light of the circumstances, not misleading. This is not a case in which difficulties of proof of reliance require the application of the Affiliated Ute presumptions.

The CA also found that there is a right to contribution in Rule 10b-5 actions. The court noted that of the seven express civil remedies provided in the federal securities laws, three

expressly provide for contribution. A no-contribution rule promotes a rush to settlement while contribution provides a more equal distribution of justice.

The CA held that the evidence was insufficient to support the jury's finding that the defendants were "sellers" under the Texas Securities Act. The Texas Securities Act creates liability on the part of any person who offers or sells a security by means of any untrue statement of a material fact. In Brown v. Cole, 291 S.W.2d 704 (1956), the Texas Supreme Court defined the term "sell" as meaning any act by which a sale is made. Nevertheless, in Stone v. Enstam, 541 S.W.2d 473 (Tex. Civ. App. 1976), the court distinguished Brown v. Cole as a case involving an active negotiator whose efforts resulted in the sale. The Stone court limited the term "seller" to the actual seller and one who acts as an agent for either the buyer or seller. This decision effectively limits the Texas Securities Act to those who are actively engaged in the sale process and prevents it from reaching those who merely participate in preparing an offering. There is no evidence that resps in No. 81-1076 participated in instigating the actual sales transactions to any member of the plaintiff class. The two class representatives testified that they purchased TIS securities on the open market and not from the corporate issuer.

3. CONTENTIONS: Petr in No. 81-680 asks this Court to grant cert on the issue of whether an implied remedy exists under Rule 10b-5 in favor of purchasers of securities who have an express remedy under § 11 of the Securities Act of 1933. In the

instant case, plaintiffs had a § 11 remedy which they permitted to become time-barred. The CA's reasoning assumes it to be the proper function of the federal courts to find implied remedies where necessary to fill out the statutory scheme. This view has been emphatically rejected by this Court in Touche Ross & Co. v. Redington, 442 U.S. 560, 579 (1979). The most serious problem with the decision below, however, is its failure to heed the repeated teachings of this Court that federal courts should not imply remedies in those instances where express remedies are provided by Congress for the same conduct. See, e.g., Northwest Airlines, Inc. v. Transport Workers Union, _____U.S._____ (1981); Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1 (1981).

Resps in No. 81-680 argue that 3 CAs, including the court below, have recently concluded that the existence of express remedies under the securities laws does not preclude the implied remedy under Rule 10b-5. See Wachovia Bank, supra; A. H. Robbins, supra. Petr does not cite any decision by any other CA adopting a contrary rule. Moreover, this Court has held in the past that the overlap between Rule 10b-5 and other provisions of the federal securities laws is not a reason for excluding the Rule 10b-5 remedy. See SEC v. National Securities, Inc., 393 U.S. 453 (1969) (§ 14 of Securities Exchange Act). An implied private right of action under Rule 10b-5 is well established. A Rule 10b-5 plaintiff must prove facts not necessary for recovery under § 11 -- deceit committed with scienter. Second, Rule 10b-5

applies to all misrepresentations whereas § 11 applies only to misstatements in a registration statement.

Petrs in No. 81-1076 raise five issues. First, petrs contend that the proper standard of proof is an important question of federal securities law on which a split of authority exists among the CAs. Petrs cite to numerous decisions which petr asserts holds that the preponderance standard is the appropriate standard in a Rule 10b-5 action. See Mihara v. Dean Whitter & Co., 619 F.2d 814, 824-25 (9th Cir. 1980); Dzenitz v. Merrill Lynch, Pierce, Penner & Smith, 494 F.2d 168, 171 n. 2 (10th Cir. 1974). The determination of the appropriate standard of proof requires the balancing of interests in order to allocate the risk of error between the litigants and to indicate the relevant importance attached to the ultimate decision. Addington v. Texas, 441 U.S. 418, 423 (1979). The possible opprobrium to a defendant that may result from an adverse decision clearly falls far short of the extraordinary interests that warrant the clear and convincing standard of proof.

Second, petrs argue that the CA's decision conflicts with decisions of other CA's with regard to whether petrs bear the burden of proving that they relied upon the material misrepresentations and half truths contained in the TIS prospectus. There is a presumption of reliance whenever the defendant's fraudulent conduct affects the market in which the plaintiff purchased or sold his securities. Blakie v. Barrack, 524 F.2d 891, 906 (9th Cir. 1975), cert. denied 429 U.S. 816 (1976); Herbst v. ITT, 495 F.2d 1308 (2nd Cir. 1974). A

presumption of reliance is justified on the ground that material representations and half-truths in a registration statement and prospectus are inevitably reflected in a decision of an underwriter to market a security and generally in the market price of publicly traded securities. It is also justified by the impracticalities of proving individual reliance whenever large numbers of investors have been defrauded. Petrs also contend that the presumption of reliance should apply in cases involving half-truths. Half-truths present as severe an evidentiary hurdle for a plaintiff as with omissions. Moreover, the omission of a material fact from a prospectus creates a half-truth. In the case at bar, the jury found that resps had failed to disclose the cost of completing the speedway and the financial condition of the company. Each of these failures to disclose involves both a misrepresentation and an omission. Four CAs have upheld a presumption of reliance in cases involving half-truths. See Holmes v. Bateson, 583 F.2d 542, 558 (1st Cir. 1978); Sharp v. Coopers & Lybrand, 649 F.2d 175, 187-189 (3rd Cir. 1981); Chelsea Associates v. Rapanos, 527 F.2d 1266 (6th Cir. 1975); Continental Grain v. Pacific Oil Seats, Inc., 592 F.2d 409, 411-412 n. 1 (8th Cir. 1979).

Third, petrs contend that the decision below requires the plaintiff to bear the burden to prove his own lack of culpability. Fourth, petrs ask this Court to resolve whether defendant in a Rule 10b-5 case should be entitled to a right of contribution. In two recent cases, this Court has held that in the absence of an express provision for contribution made part of

a remedial statute, Congress did not intend to give federal courts the broad power to fashion a right to contribution. See Texas Industries v. Radcliff Materials, Inc., _____U.S._____ (1981); Northwest Airlines, Inc. v. Transport Workers Union, _____U.S._____ (1981). Finally, petrs contend that the CA ignored a controlling decision by the Tex. S. Ct. in favor of a decision by a lower Texas court. The court below chose to ignore Brown v. Cole and relied on the decision of a middle-level Tex. App. Ct. in Stone v. Enstam. Under Texas state law, decisions of the Texas civil appeals court are not binding on other courts unless the decision has been reviewed by the Tex. S. Ct. Because of its no writ history, Stone v. Enstam would not bind another Texas appellate court.

The State of Texas has filed an amicus brief supporting petrs' contentions regarding the Texas Securities Act in No. 81-1076.

4. DISCUSSION: Only two of the issues raised in these petitions can be characterized as substantial. Both parties agree that this Court has never decided whether a remedy may be implied under Rule 10b-5 where an express statutory remedy already exists. This Court, however, recently denied review on two cases raising this issue. Unlike A. H. Robbins and Wachovia Bank, however, there can be no doubt that the plaintiffs in this case would have had an action under § 11 of the 1933 Act but for their failure to comply with the statute of limitations. In Wachovia and A. H. Robbins, there was considerable doubt as to whether the express statutory remedies were applicable to the

challenged transactions. Second, it is at least arguable that there is a conflict among the CAs as to whether the preponderance or clear and convincing standard applies in a Rule 10b-5 action. The cases cited by petr in No. 81-1076 apply the preponderance standard, but none rejects the clear and convincing standard. As to the reliance/causation issue, the CAs appear to agree that reliance is required in a Rule 10b-5 action alleging misrepresentations. The problem in this case is merely one of characterization. Whether this case should be characterized as one involving misrepresentations or nondisclosure would not appear to be certworthy. Although the rationale of Radcliff certainly calls into question the CA's decision that contribution may be allowed in a Rule 10b-5 case, the plaintiffs are hardly the proper party to bring this issue to this Court. Unlike petrs in No. 81-1076, I find nothing in the CA's opinion that requires the plaintiff to prove that he exercised due care. Finally, even if the CA improperly applied Texas law, this is not a certworthy issue. The decision will have absolutely no effect even on CA 5's interpretation of the Texas Securities Act if a Texas court disapproves the interpretration applied by this decision.

I recommend a CFR in No. 81-1076, if the Court is interested in the evidentiary standard issue. A response has been filed in No. 81-680. No response has been filed in 81-1076.

1/15/82 Dunkelman Op in petn.
CMS

No. 81-1076

Responses have been received. Generally they reinforce the conclusion of the pool memo that this petition properly presents only one issue of arguable certworthiness: whether the "preponderance" or "clear and convincing" standard should apply in a Rule 10b-5 action. CA5 opted for the latter. There is a split.

If the Court grants on this issue--respondents suggest that it might wish to await developments in the circuits--the grant should be limited to Question 1.

KF

PRELIMINARY MEMORANDUM

February 19, 1982 Conference
List 1, Sheet 1

No. 81-1076

HUDDLESTON, ET AL.	Cert to CA 5 (Wisdom, Rubin, Sam Johnson)	
v.		
HERMAN AND MACLEAN, ET AL.	Federal/Civil	Timely (w/ext.)

Please see Preliminary Memorandum in No. 81-680.

1/15/82 Dunkelman Op in petn.
JB

March 26, 1982

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 81-680

HERMAN & MacLEAN

vs.

HUDDLESTON

Burstein intervened in standard of proof in 10b-5 cases & held in conflict

Grant & consolidate

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING
Burger, Ch. J.		✓											
Brennan, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.		✓											

March 26, 1982

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 81-1076

Submitted ....., *19*... *Announced* ....., *19*...

HUDDLESTON

vs.

HERMAN & MacLEAN

Grant
&
consolidate

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING
Burger, Ch. J.		✓											
Brennan, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.				Join 3									
Powell, J.		✓											
Rehnquist, J.			✓										
Stevens, J.			✓										
O'Connor, J.			✓										

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 1, 1982

MEMORANDUM TO THE CONFERENCE

Re: 81-680) - Herman & MacLean v. Huddleston
81-1076) - Huddleston v. Herman & MacLean

(Page 11)

I asked that these cases be relisted to determine whether the grant in 81-1076 should be limited. My own preference would be to limit the grant in that case to question 1, the standard of proof issue, and not extend the grant to any of the other four questions. There is only a single question in 81-680, the implied right of action issue.

BRW

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 1, 1982

MEMORANDUM TO THE CONFERENCE

Re: 81-680) - Herman & MacLean v. Huddleston
81-1076) - Huddleston v. Herman & MacLean

(Page 11)

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BRW

April 2, 1982

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 81-1076

HUDDLESTON

vs.

HERMAN & MacLEAN

Consolidate with 81-6801

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

April 2, 1982

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 81-680

HERMAN & MacLEAN

vs.

HUDDLESTON

Granted on Q 1
See Bryan's note

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Reviewed 9/12 - Excellent memo.

Jim persuasively suggests:

1. "Assume" existence of 10b remedies - as this Court has in Ernst & Ernst + Blue Chips. Court has never so "held" but a host of lower courts have held dating back to Fleischman (CA2-1951).

2. Do not limit remedy - even to situations where express remedies are provided. E.g. §11 suits vs "signers", directors + underwriters; and §11(a)(4) vs "experts" only for statements prepared or certified. Impractable to have 10b apply to some persons charged with securities fraud & others not. (See Jim's good examples - p 11

3. "Clear & Convincing" standard. Jim views this a close. He leans towards leaving this to law of each State, as Ernst & Ernst held w/r/t to St/Line. But, as CA5 recognized in balancing the considerations, the stigma of fraud is more serious than the loss of money or a security. Jim observantly notes that the SEC (SG) "undervalues a professional reputation"

(DC + 25 states apply common law of "reliance" - p 16)

BENCH MEMORANDUM

To: Mr. Justice Powell

From: Jim

Jim's "bottom line": affirm CA5 (I am inclined to agree

Re: Herman & MacLean v. Huddleston, et al., No. 81-680

Huddleston, et al., v. Herman & MacLean, et. al., No. 81-1076

Questions Presented

1. (No. 81-680) Does an implied cause of action under §10(b) of the Securities Exchange Act of 1934 or under §17(a) of the 1933 Act exist for the benefit of the purchasers of securities who have an express remedy under §11 of the Securities Act of 1933? Yes, in view of years of assuming this

2. (No. 81-1076) Is the clear and convincing standard the appropriate burden of proof in private §10(b) actions? Yes

Background

One of the most difficult--and important--questions in this case is determining exactly what the first issue presented is. The CA found without discussion, and the cert memo assumed, that "the alleged misrepresentations in the prospectus would also warrant a suit Under Sections 11 and 12(2)." But only one of the four material misrepresentations or omissions in the prospectus, however, clearly is an "expertised" statement that gives rise to an express cause of action under §11(a)(4). See 15 U.S.C. §77k(a)(4) (accountant is liable for material misstatements only "with respect to the statement...which purports to have been prepared or certified by him") (emphasis added). Both parties agree that pltfs had no complete §11 remedy for the misrepresentations alleged here.

The parties, amici curiae, and the SG raise and discuss three main issues, and this memo will at least briefly analyze each: First, it addresses whether a private §10(b) remedy exists. Second, assuming a private §10(b) remedy exists, it discusses whether the action should be limited to remedying violations that are not actually actionable under an express remedy. Third, again assuming there is a private §10(b) remedy, the memo will discuss whether purchasers of registered securities may pursue their remedy against experts under §10(a) rather than §11.

Pltfs in the DC also sought relief pursuant to §17(a) of the Securities Act of 1933, but the CA did not rely on or address §17(a). Pltfs concede that the existence of an implied cause of action under that section is not an issue in this case.

Discussion

I. Implied Cause of Action

A. Existence of Section 10(b) Remedy

1. Precedent. As plaintiffs point out, although the Court has never itself decided the existence of a private §10(b) remedy, it has, in many opinions, affirmed its existence. See, e. g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976) (POWELL, J.) ("well established"); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) (POWELL, J., joining) ("confirmed") (cited in Hochfelder); Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971) ("It is now established that a private right of action is implied under §10(b)."") (cited in Hochfelder). The SG contends that, because the private right of action under §10(b) is so well rooted in federal jurisprudence, the Court need not inquire whether that right is congruent with recent decisions evaluating other implied remedies. See Touche Ross & Co. v. Redington, 442 U.S. 560, 577 n.19 (1979). Deft, on the other hand, suggests that the implied right under §10(b) is an historical anachronism and should be given the usually strict scrutiny given any implied right of action. The abbreviated discussion below on the existence of a private §10(b) action is for your information only if you do not feel bound by precedent on this point. Cf. Cannon v. University of Chicago, 441 U.S. 677, 736 n.6 (1979) (POWELL, J., dissenting) ("I do not suggest overruling [J.I. Case Co. v.] Borak[, 377 U.S. 426 (1964)] at this late date....").

2. Legislative Reenactment Doctrine. The "central inquiry" in deciding whether a private remedy may be implied is congressional

intent. See Touche Ross, 442 U.S., at 575. That inquiry differs, however, depending whether a court considers new legislation or legislation that Congress amended following its enactment. Compare Merrill Lynch, 102 S.Ct., at 1839 ("When Congress enacts new legislation, the question is whether Congress intended to create a private remedy...."), with id. ("[W]hen Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts...the inquiry...is whether Congress intended to preserve the preexisting remedy.")."

In Merrill Lynch, the Court upheld the implied remedy under an analogous antifraud provision of the Commodity Exchange Act even though "the consensus of opinion concerning the existence of a private cause of action under the CEA was neither as old nor as overwhelming as the consensus concerning §10(b)...." Id., at 1840. The SG argues that Congress has reaffirmed the private §10(b) action three times in the last twenty years: (1) in the Securities Acts Amendments of 1964; (2) in the Securities Acts Amendments of 1975; and (3) in the Foreign Corrupt Practices Act (1977). On the other hand, the Court in Merrill Lynch commented that "no comparable legislative approval or acquiescence exists for the Rule 10b-5 remedy." 102 S.Ct., at 1845 n.88. Cf. Aaron v. SEC, 446 U.S. 680, 694 n.11 (1980) (holding that the legislative consideration of [the 1975 amendments and the Foreign Corrupt Practices Act of 1977] do not confirm the SEC's construction of §10(b)). The legislative reenactment doctrine is thus not conclusive, although it could most strongly support a finding of "reenactment." See Merrill Lynch, 102 U.S., at 1846 n.92 ("'The statutes enacted in 1933 and 1934 have

been amended so often with full congressional awareness of the judicial interpretation of Rule 10b-5 as implicitly creating a private remedy that we must now assume that Congress intended to create rights for the specific beneficiaries as well as duties to be policed by the SEC.'") (quoting Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 55 n.4 (1977) (STEVENS, J., dissenting)).

3. Cort Analysis. Pltfs admit that there is no direct evidence of congressional intent to create any private remedy under §10(b). See Blue Chip Stamps, 421 U.S., at 729-732, 737. The structure of the 1933 Act, including §§16 and 18, 15 U.S.C. §77p,r (preserving state and common-law remedies), offer little support that Congress intended a private federal remedy to duplicate the express remedies.

4. Conclusion. The Court has generally "assumed" the existence of a §10(b) cause of action. See Aaron, 446 U.S., at 689. "[W]hether a cause of action exists" is a question the answer to which "may be assumed without being decided." Burks v. Lasker, 441 U.S. 471, 476 n.5 (1979). The Court should do likewise regarding the issue whether a private §10(b) issue exists.

I think we could simply "assume" existence

B. Preemption by Express Remedy

Issue on which Cert was granted

The precise issue on which cert was granted--whether an action made a violation of the 1933 Act for which an express remedy is provided may serve as a basis for an implied action under §10(b) of the 1934 Act--is one that the Court presumably left open in Blue Chip Stamps, 421 U.S., at 733 n.15, and again in Hochfelder, 425 U.S., at 211 n.31. The answer to the question is important: section 10(b) potentially overlaps with a substantial number of express

Why does Jim say "presumably" left open? Isn't this conceded?

liability provisions in the federal securities laws, including §§11, and 12(2) of the 1933 Act and §§9(e) and 18 of the 1934 Act.

1. The Court's Preemption Test. In Blue Chip Stamps, the Court acknowledged that when an express remedy is provided the Court should be reluctant to find for the same conduct a more expansive implied cause of action: "It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." 421 U.S., at 736. See Touche Ross, 442 U.S., at 574 ("[W]e are extremely reluctant to imply a cause of action...that is significantly broader than the remedy that Congress chose to provide."). In no case has the Court recognized an implied private §10(b) remedy where there was an express remedy available under the federal securities laws. This Court, however, has also emphasized that express remedies do not by themselves negate additional implied remedies. See, e. g., Cannon, 441 U.S., at 711; Cort v. Ash, 422 U.S. 66, 83 n.14 (1975). Indeed, many §10(b) actions have arisen from fraudulent conduct associated with registered offerings. See 1 A. Bromberg & L. Lowenfels, Securities Fraud & Commodities Fraud §§2.4(2), 2.4(4) (1982) (collecting cases).

Plaintiffs primarily rely on this Court's analysis in Hochfelder, which rested in part on the premise that actions under §10(b) depend on proof of scienter precisely because conduct actionable under §§11 and 12(2) also is actionable in a private suit under §10(b). See 425 U.S., at 210-211 (citing Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 786-787 (CA2 1951) (upholding private §10(b)

action by stockholders for fraudulent statements in registration statement)). In SEC v. National Securities, Inc., 393 U.S. 453 (1969), the Court stated that "the existence or nonexistence of regulation under §14 would not affect the scope of §10(b) and Rule 10b-5.... The fact that there may well be some overlap is neither unusual nor unfortunate." Id., at 468. Pltfs "overlook", however, that in National Securities the Commission acted pursuant to the authority expressly granted in §21(e) of the 1934 Act. Indeed, the Court observed that National Securities presented "none of the complications which may arise in determining who, if anyone, may bring private actions under §10(b) and Rule 10b-5." 393 U.S., at 467 n.9.

It is important to identify what factors will inform any judgment whether the existence of express remedies preempt §10(b) remedies. Pltfs argue that the question here is not what the 1934 Congress intended, but what Congress would intend had it known that eight years later the courts would imply a private §10(b) remedy. In Touch Ross, the Court stated that, in implying a right of action, "[t]he ultimate question is one of congressional intent[.]" 442 U.S., at 578. See Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 13 (1981) (POWELL, J.). It is certainly arguable, however, that congressional intent is beside the point now, because Congress never intended the §10(b) remedy in the first instance. See Blue Chip Stamps, 421 U.S., at 749 (because §10(b) action "has been judicially found to exist," the Court is free in "judicially delimit[ing]" it to rely upon "practical factors" and "considerations of policy"). See also Merrill Lynch,

102 S.Ct., at 1846 n.92 (because §10(b) private remedy must now be assumed, defining its scope does not "present the same kind of issue discussed in Cort") (quoting Piper, 430 U.S., at 55 n.4 (STEVENS, J., dissenting)). Arguably, the Court's task now is to fashion a workable federal common-law remedy of fraud that does not completely negate congressional intent as manifested in the express statutory provisions. See Hochfelder, 425 U.S., at 210 (issue whether an implied remedy will "nullify the effectiveness of the carefully drawn procedural restrictions on the [] express actions") (footnote omitted).

(a) Merrill Lynch Test. The line of decisions finding no preemption since Fischman, 188 F.2d, at 786-787, provide a rule of judicial interpretation of §10(b) that Congress has left undisturbed when it has amended the Securities Exchange Act. See Merrill Lynch, 102 S.Ct., at 1841 n.66 ("'Congress is presumed to be aware of [a]...judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change....'"); Blue Chip Stamps, 421 U.S., at 733 (observing that congressional silence on a longstanding judicial interpretation "argues significantly in favor of acceptance" of the rule by the Court). Deft argues persuasively that Fischman was decided on principles that are inconsistent with the development of the law of implied remedies since Cort, but that is similar to JUSTICE POWELL's point in Merrill Lynch, 102 U.S., at 1849, to no avail. On the other hand, the issue of implied §10(b) actions is considerably more proximate to the matters dealt with in the amendments than is the overlap between §10(b) and §11. Moreover, if Congress were familiar

in 1975 and 1977 with lower court authorities permitting overlapping remedies, it should also have known of National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."). Thus, while a strong case could be made for the doctrine of legislative reenactment in support of a private §10(b) remedy, it is a much weaker case that Congress considered the preemption or overlap issue in 1975 and 1977.

(b) Practical Considerations. There is no evidence that Congress intended the express remedy of §11 to provide the exclusive method of recovery for investors defrauded in a registered securities offering. In §16 of the Securities Act, Congress stated that "[t]he rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." See also 15 U.S.C. §78b (purpose of securities laws is "to impose requirements necessary to make [securities] regulation and control reasonably complete and effective"). The SG contends that Congress narrowed the reach of §11 only because of its appreciation of the greatly expanded liability imposed by that section. Once the Court "assumes" the existence of a private §10(b) remedy, it is difficult to "assume" that Congress meant for §11 to be an exclusive remedy.

Moreover, a holding that express remedies restrict the availability of remedies under §10(b) would impose on the federal judiciary the burdensome task of making a detailed comparison at the threshold of the litigation concerning the relief available to pltf

Type of Qs if we hold the §11 remedy is exclusive

against each deft under each potentially applicable statutory provision. For example, before concluding that a §11 remedy is available, the DC would have to find that the shares purchased by pltfs were covered by and traceable to the challenged registration statement. In cases involving a registered offering of additional shares of a previously traded security, tracing of shares purchased in the aftermarket back to the registration statement can be an extremely difficult task. Here, if there were a dispute whether a portion of a registration statement had been "purportedly" prepared by deft, the parties would have to litigate that issue before reaching the merits. In many cases, the DC would be required to make that analysis on the basis of the pleadings. Finally, the courts would have to determine which party in a §10(b) action has the burden of proving that pltf does or does not have a §11 remedy.

C. Elements of §10(b) Cause of Action

Even if the Court rejects deft's argument that the actual availability of express remedies precludes implied remedies, the existence of "express remedies" is not irrelevant when discussing who may bring a §10(b) action, who may be sued, and what elements he must prove.

Qs remain as to who may be sued.

1. Who May Sue. Where the Court has previously addressed the issue of who may assert a recognized implied remedy, it has emphasized the importance of determining whether the claimant is within the class of persons for whose "especial" benefit the statute was enacted. See Piper, 430 U.S., at 37 (denying to a tender offeror the right to assert a claim for private relief under §10(b)); Blue Chip Stamps, 421 U.S., at 733-736 (denying to a

Is π within the "class"?

nonpurchaser offeree of registered securities the right to sue under §10(b)). Deft argues that the structure of the Securities Act, and the circumstances of its enactment, preclude the possibility that Congress intended to make purchasers of securities in registered offerings the special beneficiaries of §10(b). But see Blue Chip Stamps, 421 U.S., at 733-734 (indicating purchasers are the beneficiaries of §10(b)). There are three objections, however, to precluding purchasers of registered securities from pursuing a remedy under §10(b). First, the language of the provision does not distinguish between purchases and sales of securities. That purchasers were to be protected by §10(b) is reenforced by the delegation of authority to the SEC to prescribe rules necessary for the protection of "investors." Second, the section comprehends transactions involving any type of security: securities purchased pursuant to a registration statement are not excluded. Third, the suggested approach practically eliminates the utility of the private §10(b) action, taking away what the precedents implying the action purport to give. Thus, this approach is intellectually unsatisfying, regardless what one thinks of private §10(b) actions. In sum, the all-inclusive language of this provision does not easily permit the Court to carve out an exception for defrauded purchasers or sellers of registered securities once an implied action is found.

Reasons for not excluding purchasers

Examples

Yes

2. Who May Be Sued. Unlike the issuer of the security, the signers of the registrations statement, the directors of the issuer, and the underwriters, who are liable for material inaccuracies in the whole of the registration statement, see 15 U.S.C. §77k(a)(1), (2), (3) & (5), section 11(a)(4) effectively allows "accountants" and

accountants (experts) liable only for what they prepared & certified to

other experts to define for themselves the breadth of their §11 liability: An accountant is liable only for statements that "purport[] to have been prepared or certified by him." It would seem that the Court could say that accountants and other experts cannot be sued under §10(b) for ~~any section~~ all misrepresentations of a registration statement: any remedy for misstatements must come under §11(a)(4). This approach, however, may be precluded by the facts in Hochfelder, which involved Ernst & Ernst.

3. Same Restrictions. The Securities Industry Association argues that, if an implied remedy under §10(b) is permitted, "it must be subject to restrictions expressly imposed by Congress." This seemingly straightforward solution is unsupportable. First, if all the procedural restrictions of §11 were appended to §10(b), it would become merely a §11 action with the added requirements of scienter, reliance, and causation. Second, if a purchaser of securities sued under §10(b) for conduct also actionable under both §§11 and 12(2), it would be unclear from which express remedy to import the procedural restrictions.

II. Standard of Proof

If the Court finds that there is no implied remedy under §10(b) for the purchasers of securities in this case, there is, of course, no reason to reach the standard-of-proof issue.

A. Issue. Pltfs contend that the CA's discussion of the standard-of-evidence issue in that portion of the opinion dealing with scienter, and the fact that the considerations supporting the clear-and-convincing standard are primarily relevant to scienter, indicate that the CA intended to instruct the DC only as to the

submission on retrial of the special interrogatory regarding scienter. Although some of the Court's discussion certainly supports the pltfs' assertion, the CA did not expressly limit its holding. This discussion will assume that the issue presented is whether pltfs must prove all elements of a private §10(b) remedy by clear and convincing evidence.

B. Standards. Where, as here, neither the Constitution nor any federal statute requires any particular standard of proof, it should be presumed, deft argues, that Congress intended use of the traditional preponderance standard. There are two problems with this straightforward approach. As the preceding section indicates, implied causes of action, once established by judicial action, have little to do with congressional intent. A private §10(b) action is meant to "supplement" the congressional scheme by a judicially fashioned remedy, and looking to congressional intent to define the elements of this federal common-law fraud action is disingenuous. More important to the inquiry here is how the express regulatory scheme coexists with the implied remedial scheme.

Second, it is not clear what the "traditional" standard of proof is in this area. The Court could: (1) adopt the burden of proof that applies where fraud is an element of a claim arising under federal law in a nonsecurities case (clear and convincing); (2) adopt the prevailing standard in the state courts (clear and convincing); (3) adopt the standard of proof applicable to fraud actions under the law of the forum state; or (4) fashion a standard after an analysis of the particular factors in this area of the law.

1. Federal Fraud Standard. The preponderance of the evidence standard is traditionally applied in civil actions. See Addington v. Texas, 441 U.S. 418, 423-424 (1979). In one of its first opinions under the federal securities laws, SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 355 (1943), this Court applied the preponderance standard to cases brought by the SEC under §17(a) of the Securities Act of 1933--a provision that is quite similar to rule 10b-5. See Blue Chip Stamps, 421 U.S., at 767 (BLACKMUN, J., dissenting) (indicating that SEC put §10(b) and §17 together to form rule 10b-5). Nevertheless, some federal fraud cases have employed a clear and convincing standard, particularly when certain equitable relief has been sought. See, e. g., Nowak v. United States, 356 U.S. 660, 663 (1958) (citizenship) (finding of fraud requires proof by "clear, unequivocal, and convincing" evidence); Pereira v. United States, 347 U.S. 1, 10 (1954) (indicating clear and convincing standard for mail fraud statute). Cf. Fed. R. Civ. P. 9(b) ("In all averments of fraud...the circumstances constituting fraud...shall be stated with particularity.")

2. Common-Law Approach. Some state courts have adopted the preponderance standard in common-law fraud cases involving violations of securities or blue-sky laws. See Capital Gains, 375 U.S., at 194 ("There has...been a growing recognition by common-law courts that the doctrines of fraud and deceit which developed around transactions involving land...are ill-suited to the sale of such intangibles as [investment] advice and securities...."). Even outside the area of securities fraud, twelve states, according to defts, apply the preponderance-of-the-evidence standard; twenty-six

states and the District of Columbia the clear-and-convincing-proof standard; two states apply a "preponderance of the clear and convincing proof" standard; seven states require a standard of proof higher than a preponderance but one not termed "clear and convincing"; and three states apply different standards depending whether the action is one at law or in equity.

3. Law of Forum. In Hochfelder, the Court observed that, in the absence of legislative guidance concerning the contours of §10(b) actions, the federal courts should follow the law of limitations of the forum state as it did in other cases involving judicially implied remedies. 425 U.S., at 210 n.29. Deft argues, however, that the Court should adopt a uniform rule rather than refer to the law of the forum state whenever it is possible: litigation concerning applicable statutes of limitations has been confusing and wasteful; there is particular difficulty with borrowing when pltfs are a class; and using the law of the forum state also invites forum shopping. On the other hand, these same objections could go to the holding in Hochfelder. Moreover, it is standard practice for plfts in private §10(b) actions to include a separate common-law fraud claim and a demand for jury trial. Use of the same standard of proof for both would reduce jury confusion.

We should adopt a uniform rule - not apply law of states. But →

4. Fashioning a §10(b) Standard. The function of a standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). In Addington, 441 U.S., at 423 (requiring the clear-and-convincing

standard before an individual could be confined indefinitely in a mental institution), the Court stated that the determination of an appropriate standard of proof requires a balancing of interests in order "to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." The Court observed:

Addington

> One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. [Citing Woodby v. INS, 385 U.S. 276, 285 (1966) (deportation); Chaunt v. United States, 364 U.S. 350, 353 (1960) (denaturalization); Schneiderman v. United States, 320 U.S. 118, 159 (1943) (denaturalization)].

441 U.S, at 424. The special measure of protection for deft at the cost of increased risk of error is tolerable only when the possible injury to deft is significantly greater than the possible harm to the pltf. In most civil cases, society has no interest in preferring one party or handicapping the other: Its interest is in maximizing the likelihood of a correct judgment. Although all of the considerations discussed below do not point in one direction, it is reasonable to conclude, as the CA did, that the interests of the persons charged with complicity in a fraudulent distribution of securities outweighs the interests of persons who purchased the securities, especially in light of the fact that there is considerable doubt that Congress intended to protect under §10(b) individuals who purchase registered securities.

Society's

You inclined to agree with CA5

a. The CA based its conclusion, at least in part, on the fact that "judgment for the plaintiff detracts from defendant's reputation to a far greater extent than in other civil litigation." Cf. Blue Chip Stamps, 421 U.S., at 739 (finding the "vexatiousness" of §10(b) litigation to be "different in degree and in kind" from that of other litigation). Pltfs argue that the possible opprobrium to a deft that may result from an adverse private §10(b) decision clearly falls far short of the extraordinary interests that warrant the clear-and-convincing standard of proof, and that the interests of deft, who has allegedly participated intentionally in the fraudulent sale of securities to the public, do not outweigh the interests of those who purchased the securities, the very individuals whom the federal securities laws are intended to protect. Deft argues that it is a small firm of certified public accountants, and the effect on its reputation of a fraud judgment predicated on findings that it acted with intent to deceive or defraud investors would be ruinous. The SG argues that deft's general interest in protecting its reputation in a case brought under the federal securities laws is not substantially different from the interest of defts in other civil proceedings, such as antitrust or civil rights actions, in which violations of federal statutes are alleged and in which the preponderance standard applies. See Vance v. Terrazas, 444 U.S. 252, 266-267 (1980) (preponderance standard applies to expatriation proceeding).

It seems that the SG undervalues a professional's reputation.

b. The other reason offered by the CA5 to justify imposition of the clear-and-convincing standard is that "proof of intent to

deceive is often a matter of inference...." Although the CA held that a clear-and-convincing standard should have been applied, it also held that the evidence was sufficent under that standard to permit a finding that each deft acted with intent to deceive. The CA supported its holding by references to "expert testimony that [deft] was, to some degree, negligent in its accounting procedures"; to deft's "involvement" in the preparation of the Use of Proceeds section of the prospectus; and to deft's refusal to give a comfort letter to the underwriters referring to the construction costs in the prospectus, a matter arguably beyond the competence of accountants and auditors. Deft contends that, if §10(b)'s scienter requirement, cf. Hochfelder, 425 U.S., at 194 n.12 (leaving open whether reckless behavior will establish liability), may be satisfied under a clear-and-convincing standard by so insubstantial a body of evidence, it is fearful to imagine the quality of evidence necessary to establish scienter under a preponderance-of-the-evidence standard. But cf. Vance, 444 U.S., at 267 (noting that pltf's duty to prove a state-of-mind element was "in itself...a heavy burden" that militates in favor of using the preponderance standard of proof).

c. In addition, the CA5's decision creates somewhat of an anomaly when read in the light of this Court's decision in Steadman v. SEC, 450 U.S. 91 (1981), which held that the preponderance-of-the-evidence standard applies in SEC administrative proceedings brought pursuant to §9(b) of the Investment Company Act of 1940 and §203(f) of the Investment Advisers Act of 1940. Because the Court based its holding on an interpretation of §7(c) of the APA, Steadman

is distinguishable from the present case. Nevertheless, under the CA5's ruling, a deft in an SEC proceeding would be afforded only a preponderance standard, but in a private §10(b) case the same deft would be afforded the higher standard, even though the potential harm to a deft from an erroneous decision in an SEC administrative proceeding where his business and livelihood are at risk could be greater than in a private §10(b) action.

d. Different standards of proof for private suits and for agency actions may also hinder the efficient disposition of securities litigation by sometimes foreclosing use of the doctrine of collateral estoppel. In Parkline Hosiery Co. v. Shore, 439 U.S. 322 (1979), this Court held that a private pltf could collaterally estop a deft from relitigating issues previously decided in an action brought by the SEC. Arguably, collateral estoppel may be used only if the standard in the first proceeding is as stringent as the standard in the subsequent proceeding.

Summary

1. I recommend that you once again "assume" the existence of §10(b) remedies for purposes of addressing the questions presented.

2. While the existence of express remedies is compelling evidence that no private remedy should be implied, I believe it is a poor rationale for limiting "existing" implied remedies. The rationale cannot be limited to situations where there is an express remedy: the existence of other remedies does not indicate congressional intent any more than does the absence of remedies. Most important, the judicial costs of deciding whether an express remedy is available in every §10(b) case to eliminate only a few

poorly pleaded cases are not justified: It would not eliminate the case before the Court. The only principled alternatives are (1) reject defendant's limitation or (2) definitively state that the remedies available under federal securities laws are only those expressly created by Congress. Protection against unwarranted imposition of liability may be better obtained through faithful application of this Court's prior decisions defining the elements of a private §10(b) action. (e.g. malice)

Having said that, some thought should be give to stating simply that there is no private §10(b) remedy. As this case so well indicates, it is very difficult to "limit" the remedy once it is assumed to exist. The area is sufficiently messy to permit you to say that no private §10(b) remedy will be implied under any circumstances, and if you are so inclined, there is no better case.

3. It is difficult to square the limitations suggested in this case concerning who may sue, who may be sued, or what the elements of a private §10(b) action may be with precedent.

4. The standard-of-proof issue is close, and there are persuasive arguments on all sides. The §10(b) remedy, however, is for all purposes a federal common-law fraud action. I see no reason why a uniform rule here is any more necessary than it would have been in Hochfelder and would opt for the standard of the forum state. If the Court decides to fashion its own standard, the disfavored use of private §10(b) remedies, as well as the risk to reputation in any fraud case, counsel for adoption of the clear-and-convincing standard.

5. I would affirm.

lfp/ss 09/13/82

MEMORANDUM

TO: Jim Browning DATE: Sept. 13, 1982

FROM: Lewis F. Powell, Jr.

81-680 Herman & MacLean v. Huddleston

I read your excellent memorandum over the weekend, and found it extremely helpful. This is an area in which I am particularly interested - as you know from what I have written in "implied action" cases. I am tentatively inclined to agree with you, however, as to the correct analysis and disposition of this case.

With respect to the "clear and convincing" standard (which I am inclined to think should be adopted as a federal rule), I make the following observations - somewhat personal. My first experience in corporate as distinguished from trial practice was in the representation of Virginia investment banking firms. I therefore have some familiarity with the Securities Acts, and also with the way in which they have been administered. Generally, I think these acts have been among the best of the regulatory statutes. But the SEC always has sought to expand its reach. The history of 10b-5 is an example.

In balancing the "equities" or policy considerations relevant to the standard of proof, I also know from my corporate experience in the latter years of my practice that the increase in damage suits has certain

negative effects in addition to those identified in your memorandum.

The typical private damages action under the Securities Acts takes place several years after the alleged fraud. There are bankrupt companies today that, only a year or two ago, were widely viewed as fine investments. Jurors - and indeed judges - tend to be influenced by the present rather than conditions existing at the time of the alleged fraud. Information that may not have seemed important then can loom quite large years later. The number of suits have multiplied, and sometimes damages have been large and - as your memorandum noted - reputations destroyed.

One consequence of all of this is that many of the ablest people in our country no longer will serve on boards of directors. I know this from personal experience. Even insurance covering directors is usually limited to negligence and not fraud. Premiums are high, an expense consumers ultimately pay. Our basic economic system - the free enterprise system - is a "risk" system and investors should not expect guaranteed equity investments in particular.

Against this background, if the following information is readily obtainable on Lexis it might be interesting, and possibly relevant to the standard of proof: How many 10b cases have there been since Fleschman was decided in 1951? Has the number accelerated in recent years? Will Lexis identify suits filed against various

categories of defendants: persons who sign registration statements, officers and directors, underwriters, experts - particularly accounting firms. My impression is that a good many small accounting firms no longer will work on registration statements.

In the literature in this area, is there any discussion that has come to your attention as to the public interest that may be adversely affected by opening the field wide to damage suits that have never been expressly authorized by Congress.

I do not want you to commit any substantial amount of time to this. Get as much help as you can from the library.

L.F.P., Jr.

ss

job 09/29/82

To: Mr. Justice Powell

From: Jim

Re: Herman & MacLean v. Huddleston, No. 81-680

You asked if in the literature there is any discussion as to the public interest that may be adversely affected by opening the securities field wide open to damage suits that have never been expressly authorized by Congress. I hope the following list addresses your inquiry and proves helpful. I have copies of the articles in my office if you wish to see any of them.

Frankel, Implied Rights of Action, 67 Va. L. Rev. 553, 577-578 (1981)

Dooley, The Effects of Civil Liability on Investment Banking and the New Issues Market, 58 Va. L. Rev. 776, 840-842 (1972)

Note, Rule 10b-5: The Rejection of the Birnbaum Doctrine by Eason v. General Motors Acceptance Corp. and the Need for a New Limitation on Damages, 1974 Duke L.J. 610, 628-631

Not really helpful on public interest

To Jim

job 10/31/82

To: Mr. Justice Powell

From: Jim

Re: Herman & MacLean v. Huddleston, No. 81-680

Huddleston v. Herman & MacLean, No. 81-1076

You asked for statistics on: (1) the number of 10b cases decided since Fleschman (1951); (2) whether the number has accelerated in recent years; (3) who the defts were in those cases. The research librarian helping me on this project had hopes at first that this information would be available from the SEC. She has since learned that such is not the case. She has also informed me that she thinks it would be impossible to retrieve the information from Lexis. It would require a case-by-case examination of over 1500 cases per year (in recent years).

Do you have any suggestions? No

Jim - My thanks to you & the Research Librarian

LFP

81-680 HERMAN & MacLEAN v. HUDDLESTON
81-1076 HUDDLESTON v. HERMAN & MacLEAN

Argued 11/9/82

able lawyer.

Truitt (Peter) (representative accounting firm Δ in this case)

Overlapping remedies:

Relies on § 11 that is specific, & advises all parties specified therein what their liabilities are.

By relying surely under § 10b-5, Π's have avoid St. of Lim. Also, broadens liability of "experts" beyond that specified in § 11.

Also § 10b-5 expands potential liability for damages above § 11.

(See transcript of Counsel example of dramatic increase in liability. The example was a small underwriter - Rust & Co

Most § 10b-5 case are settled because of expenses & risk of high damages.

Allys fee of $1 million were awarded.

The standard of cv. issue Q is not present in a § 11 case.

~~Fraud~~

Jaffe (Resp)

Fraud ~~[illegible]~~ committed by Peltz were not limited by §11: See A257a + 267a

Lower courts found Peltz guilty of intent to deceive.

§11 is a negligence standard, & §10b-5 is a fraud standard.

Gonson (SEC)

Hochfelder requires scienter. The Δ's here were found guilty of scienter.

§11 provides only a neg. standard

When Act of '33 was amended in 1975, it ~~enacted~~ in light of construction of Act by courts finding implied causes of action. §10b ~~was~~ was not touched. Relies on Commodities Exchange Act case

→ | ~~Account~~ The Δs were participants well beyond certifying statements. See A267, 257.

10b-5 is much like common law. It requires scienter.

Relies heavily on Hochfelder

Pruitt (Reply)

Hochfelder did not Hold there are overlapping implied remedies. We merely left issue open.

The legislative re-enactment argument is contrary to Cort.

November 11, 1982

81-680 Herman & MacLean v. Huddleston
81-1076 Huddleston v. Herman & MacLean

Dear Chief:

I have decided tentatively to remain out of this case for the following reason:

Our oldest daughter lives in Houston, where her husband is an officer (or partner?) of Rotan-Mosle Co., a leading Texas investment banking firm that has been prominent in underwriting issues related to the oil industry. My understanding is that one or more of these issues "went sour" with the general collapse of oil-related securities.

Our daughter has told me that her husband, together with Rotan-Mosle and I suppose other officials, are being sued for alleged Securities Act violations. I have not discussed the matter with our son-in-law, but it is safe to assume that the customary claims - similar to those in the above case - are being made.

I suppose it is possible that pending litigation involving our son-in-law could be settled before our case is brought down. In that event, I could join in the decision of the case. Otherwise, I think it best for me to remain out.

Sincerely,

The Chief Justice

lfp/ss

81-680 Herman & MacLean v. Huddleston
No. 81-1076, Huddleston v. Herman & MacLean Conf. 11/12/82

The Chief Justice

Justice Brennan

Justice White

Justice Marshall

Justice Blackmun

Justice Powell

December 30, 1982

81-680 Herman & MacLean v. Huddleston
81-1076 Huddleston v. Herman & MacLean

Dear Thurgood:

Please add that I took no part in the decision of this case.

Sincerely,

Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 30, 1982

Re: 81-680 - Herman & MacLean v. Huddleston; and 81-1076 - Huddleston v. Herman & MacLean

Dear Thurgood:

Please join me.

Respectfully,

JPS

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 3, 1983

Re: No. 81-680 - Herman & MacLean v. Huddleston
No. 81-1076 - Huddleston v. Herman & MacLean

Dear Thurgood:

Please join me.

Sincerely,

Harry

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 10, 1983

No. 81-680 Herman & MacLean v. Huddleston
No. 81-1076 Huddleston v. Herman & MacLean

Dear Thurgood,

Please join me.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 17, 1983

Re: 81-680, Herman & MacLean v. Huddleston
81-1076, Huddleston v. Herman & MacLean

Dear Thurgood:

I join.

Regards,

WEB

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 19, 1983

Re: No. 81-680) Herman & MacLean v. Huddleston
No. 81-1076) Huddleston v. Herman & MacLean

Dear Thurgood:

You said at Conference last week that it would be a close question whether the Chief or I were the last to join your opinion. I see I now have that honor, and want to commend you for the outstanding piece of work you have done in this case.

Sincerely,

Justice Marshall

cc: The Conference

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. O'C.
			11/15/82					
Join TM 1/17/83	agree 1/3/83	Join TM 1/4/83	1st draft 12/30/82 2nd draft 1/21/83	Join TM 1/3/83	out letter 12/30/82	Join TM	Join TM 12/30/82	Join TM 1/10/83
				81-680 Herman & MacLean v. Huddleston				