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CORPORATE INSIDER TRADING: REAWAKENING THE COMMON LAW*

THOMAS LEE HAZEN**

I. INTRODUCTION

The thrust of many recent Supreme Court decisions that have limited the role of the federal securities laws has been a fear of undue federalism.¹ The other articles in this symposium² evidence the continued tension in securities regulation at both the state and federal levels. The courts in interpreting the securities laws have long been struggling to strike the proper balance between federal and state influence. One point of distinction is the dividing line between state blue sky laws and federal acts.³ Another point of departure is between the federal role of investor protection and the states' corporate chartering function.⁴ State law also has a role to play in investor protection, as is the case with insider trading.

State securities regulation not only involves the enforcement of blue sky laws and tender offer legislation, but also includes the enforcement

*This article is not intended to provide a comprehensive analysis of insider trading. The interested reader should consult the authorities in note 11 *infra*. The purpose of this piece is to present a basis for reconciling the recent federal decisions and the common law of fiduciary responsibility.

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¹ See, e.g., Ferrara & Steinberg, *A Reappraisal of Santa Fe: Rule 10b-5 and the New Federalism*, 129 U. PA. L. REV. 263 (1980); Hazen, *Implied Remedies Under Federal Statutes: Neither a Death Knell nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333 (1980).

² See Johnson, *Preface for the Annual Review of Securities and Commodities Law*, 39 WASH. & LEE L. REV. 821 (1982); Pickholz & Horahan, *The SEC's Version of the Efficient Market Theory and Its Impact on Securities Law Liabilities*, 39 WASH. & LEE L. REV. 943 (1982); Rapp, *Rule 10b-5 and "Fraud-on-the-Market"—Heavy Seas Meet Tranquil Shores*, 39 WASH. & LEE L. REV. 861 (1982); Stassen, *The Commodity Exchange Act in Perspective*, 39 WASH. & LEE L. REV. 825 (1982); and Tyler, *More About Blue Sky*, 39 WASH. & LEE L. REV. 899 (1982).

³ See, e.g., Tyler, *More About Blue Sky*, 39 WASH. & LEE L. REV. 899 (1982). The Supreme Court's most recent effort to balance federal and state law influence involves the preemption of state tender offer statutes by the federal Williams Act. See *Edgar v. Mite Corp.*, 102 S. Ct. 2629 (1982), *aff'g sub nom.* *Mite Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980).

⁴ See Hazen, *Corporate Chartering and the Securities Markets: Shareholder Suffrage, Corporate Responsibility and Managerial Accountability*, 1978 WIS. L. REV. 391 (1978) [hereinafter cited as Hazen].

of traditional common law principles and state court enforcement of federal law.⁵ The increasing concern of halting a creeping federalism should not be used as a guise for unduly restricting the advances that have been made in curtailing unscrupulous activity with regard to transactions in securities. One frequently forgotten avenue is the common law. This article will explore the relevance of common law theories to one aspect of securities regulation—insider trading.

II. THE LAW OF INSIDER TRADING

Some commentators have suggested that when corporate insiders trade in their company's securities, the use of inside information promotes market efficiency.⁶ However, the bulk of authority is to the contrary,⁷ and this support for sanctions against insider trading no doubt represents the proper view. Even in the face of today's overworked, understaffed, and increasingly more *laissez faire* Securities and Exchange Commission (SEC or Commission), the SEC is pursuing insider trading violations with a vengeance.⁸ In contrast to the SEC's vigor, the Supreme Court struck a severe blow against effective policing of insider trading in *Chiarella v. United States*.⁹ As will be developed more fully below, this decision, although certainly consistent with the Supreme Court's limiting trend,¹⁰ does not foreclose federal remedies. Furthermore, the *Chiarella* decision forces a re-examination of the common law remedies against insider trading.

In recent years there has been a great deal of controversy concerning the legality of corporate insiders trading in the shares of their company. The common law did not deal adequately with insider trading. Accordingly, federal securities legislation supplemented by judicial interpretation began to fill the void. Recent federal decisions, however, have cut back on the general thrust of the securities laws and in particular the regulation of insider trading. In light of these recent limitations and the state law avenues that might be available, it is appropriate to reconsider the limitations on insider trading. Commentators¹¹ and the courts¹² are in

⁵ See Hazen, *Allocation of Jurisdiction Between the State and Federal Courts for Private Remedies Under the Federal Securities Laws*, 60 N.C. L. REV. 707 (1982).

⁶ See generally H. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966); Wu, *An Economist Looks at Section 16 of the Securities Exchange Act of 1934*, 68 COLUM. L. REV. 260 (1968); Note, *The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry*, 29 STAN. L. REV. 1031 (1977).

⁷ See authorities cited in note 11 *infra*.

⁸ See, e.g., Longstreth, *SEC Battle Against Insider Trading Is Worth the Effort*, *Legal Times of Washington*, May 10, 1982, at 16.

⁹ 445 U.S. 222 (1980). See text accompanying notes 31-43 *infra*.

¹⁰ See Hazen, *The Supreme Court and the Securities Laws: Has the Pendulum Slowed?*, 30 EMORY L.J. 5 (1981).

¹¹ See generally Barry, *The Economics of Outside Information and Rule 10b-5*, 129 U. PA. L. REV. 1307 (1981); Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322 (1979); Conant, *Duties of Disclosure of*

conflict as to both the propriety and extent of legal controls that should govern corporate insiders who trade in their company's own stock with advance knowledge of information not generally available to the investing public. It is the thesis of this article that insider trading should be severely curtailed and controlled by the federal securities acts and that state law offers opportunities for filling the gaps that currently exist under federal law.

The development of legal limitations on insider trading at both common law and under SEC Rule 10b-5¹³ have striking parallels. The early common law cases held that in a faceless market insiders had no duty to refrain from trading in their corporation's stock when armed with material inside information.¹⁴ The courts, however, were willing to recognize a cause of action where the director traded with the plaintiff directly or through an agent as opposed to dealing through a faceless market.¹⁵ In these early cases the courts stressed that the buyer and

Corporate Insiders Who Purchase Shares, 46 CORNELL L.Q. 53 (1960); Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1 (1980); Fleischer, Mundheim & Murphy, *An Initial Inquiry Into the Responsibility to Disclose Market Information*, 121 U. PA. L. REV. 798 (1973); Haft, *The Effect of Insider Trading Rules on the Internal Efficiency of the Large Corporation*, 80 MICH. L. REV. 1051 (1982) [hereinafter cited as Haft]; Jennings, *Insider Trading in Corporate Securities: A Survey of Hazards and Disclosure Obligations Under Rule 10b-5*, 62 NW. U. L. REV. 809 (1968); Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement*, 70 CALIF. L. REV. 1 (1982); Morrison, *Silence is Golden: Trading on Nonpublic Information*, 8 SEC. REG. L.J. 211 (1980) [hereinafter cited as Morrison]; Rapp & Loeb, *Tippee Liability and Rule 10b-5*, 1971 U. ILL. L.F. 55 (1971); Wang, *Trading on Material Nonpublic Information on Impersonal Stock Markets: Who Is Harmed and Who Can Sue Whom Under SEC Rule 10b-5*, 54 So. CAL. L. REV. 1217 (1981).

¹² Compare, e.g., *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156 (2d Cir. 1980) (recognizing civil liability under SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1981)); *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974) (same); *Financial Indus. Fund, Inc. v. McDonnell Douglas Corp.*, 474 F.2d 514 (10th Cir.), cert. denied, 414 U.S. 874 (1973); *Brophy v. Cities Service Co.*, 31 Del. Ch. 241, 70 A.2d 5 (1949) (recognizing a common law remedy); *Diamond v. Oreamuno*, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969) (same) with *Freeman v. Decio*, 584 F.2d 186 (7th Cir. 1978) (denying a common law remedy); *Fridrich v. Bradford*, 542 F.2d 307 (6th Cir. 1976), cert. denied, 429 U.S. 1053 (1977) (denying a 10b-5 remedy); *Schein v. Chasen*, 313 So.2d 739 (Fla. 1975) (denying common law remedy). For other cases recognizing a private remedy for insider trading see, e.g., *Tarasi v. Pittsburgh Nat'l Bank*, 555 F.2d 1152 (3rd Cir.), cert. denied, 434 U.S. 965 (1977) (discussing the *in pari delicto* defense); *Schein v. Chasen*, 478 F.2d 817, 822 (2d Cir. 1973) (applying common law principles to hold tippees liable), vacated sub nom. *Lehman Bros. v. Schein*, 416 U.S. 386 (1974). Cf. *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981) (criminal conviction for illegal insider trading).

¹³ 17 C.F.R. § 240.10b-5 (1981). See Ratner, *Federal and State Roles in the Regulation of Insider Trading*, 31 BUS. LAW. 947 (1976).

¹⁴ See *Goodwin v. Agassiz*, 283 Mass. 358, 186 N.E. 659 (1933); *Carpenter v. Danforth* 52 Barb. (N.Y.) 581 (1868).

¹⁵ See *Strong v. Repide*, 213 U.S. 419 (1909); *Blazer v. Black*, 196 F.2d 139 (10th Cir. 1952); *Sampson v. Hunt*, 222 Kan. 268, 564 P.2d 489 (1977); *Hotchkiss v. Fisher*, 136 Kan. 530, 16 P.2d 531 (1932); *Jacobson v. Yaschik*, 249 S.C. 57, 155 S.E.2d 601 (1967).

seller were in privity; in the case of a faceless market, however, many courts held the investor's injury was too remote.¹⁶ The common law was reluctant to impose an affirmative duty to disclose in the face of silence, the theory being that fraud should be limited to misstatements as opposed to mere nondisclosure.¹⁷ However, the cases became increasingly more likely to recognize "special facts" that trigger an insider's duty to disclose prior to trading in his corporation's stock.¹⁸ Most recently, a few cases have recognized a much stricter duty at common law.¹⁹ As will be developed more fully below, the recent common law decisions that impose strict limitations upon insider trading represent the logical culmination of the law's development. They are not novel, but rather are grounded in sound basic principles.

On the federal front, corporate insiders' duty to wait until disclosure of nonpublic information before trading in their company's stock developed rapidly in the 1960s.²⁰ In the seminal administrative ruling in *Cady, Roberts & Co.*,²¹ the SEC disciplined a broker-dealer who had given favored customers nonpublic information about an impending dividend cut in a publicly traded stock. The Commission reasoned that, although the broker was not an insider of the corporation, he had been tipped by an insider, and thus his passing on the tip "at least violated [Rule 10b-5(3)] as a practice which operated as fraud or deceit upon the purchasers [of the securities sold by the tippees]."²² The next major in-

¹⁶ See, e.g., *Goodwin v. Agassiz*, 283 Mass. 358, 186 N.E. 659 (1933); *Peek v. Gurney*, 1873 L.R. 6 H.L. 377.

¹⁷ E.g., *Keates v. Earl of Cardogan*, 1851, 10 C.B. 138, 138 Eng. Rep. 234; *Windram Mfg. Co. v. Boston Blacking Co.*, 239 Mass. 123, 131 N.E. 454 (1921); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 695-96 (4th ed. 1971). The rule that fraud should be limited to misstatements is based in part on a supposed distinction between misfeasance and nonfeasance and has been subject to much erosion.

¹⁸ See, e.g., *Toledo Trust Co. v. Nye*, 426 F. Supp. 908 (N.D. Ohio 1977) (purchasing shareholders of close corporation required to inform selling shareholder of negotiations with another corporation to buy close corporation at higher per share value), *rev'd*, 588 F.2d 202 (6th Cir. 1978); *Weatherby v. Weatherby Lumber Co.*, 94 Idaho 504, 492 P.2d 43 (1972) (disclosure required even where sale negotiations between buyer and seller not yet finalized); *Fox v. Cosgriff*, 66 Idaho 371, 159 P.2d 224 (1945) (insider's failure to disclose negotiations leading up to dissolution of business); *Agatucci v. Corradi*, 327 Ill. App. 153, 63 N.E.2d 630 (1945) (nondisclosure to seller of stock of "assured sale" of corporate business); *Sampson v. Hunt*, 222 Kan. 268, 564 P.2d 489 (1977) (nondisclosure of corporate affairs by insider director purchasing shares from nonmanagement shareholder). See also W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 714-15 (5th unab. ed. 1980).

¹⁹ See authorities cited in note 12 *supra*.

²⁰ See note 6 *supra*.

²¹ 40 S.E.C. 907 (1961). For more detailed descriptions of both the common law and federal developments see the authorities cited in note 1 *supra*.

²² 40 S.E.C. at 913. The Commission explained that "[a]nalytically, the obligation rests on two principal elements; first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of any one, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing." *Id.* at 912.

sider trading decision was by the Second Circuit in a SEC enforcement action.²³ That court in the landmark *Texas Gulf Sulphur* case held that corporate insiders who had purchased Texas Gulf Sulphur stock on the open market while possessing nonpublic knowledge of a valuable mineral find had violated Rule 10b-5.²⁴ The court found a federal law violation since the information not disclosed was, at the time of the transactions complained of, material to a reasonable investor's decision whether or not to purchase the stock in question.²⁵

The next extension in the federal jurisprudence, although subsequently rejected by some courts, was to hold that a tip of inside information gives rise to liability for fraud on the market.²⁶ One court went so far as to hold, in a decision that would be questionable today, that even noninsider tippees who sell relying on confidential inside information have violated Rule 10b-5 and thus must disgorge their profit.²⁷ The Ninth Circuit held a financial columnist liable to a purchaser of stock where the columnist had purchased stock at a discount prior to making a public "buy" recommendation that was based on an overly optimistic view of the company.²⁸ It is against this background that the Supreme Court handed down its decision in *Chiarella*. The cases which impose a strict view of the federal law against insider trading have been characterized as creating an informational rather than fiduciary duty,²⁹ an interpretation which is most questionable in light of *Chiarella*.³⁰

Much of the federal expansion of liabilities for insider trading was brought into question by the Supreme Court decision in *Chiarella*.³¹ In *Chiarella*, the Court held that in an open-market transaction, a noncorporate insider has no duty to disclose inside information, at least where the information is "market information" as opposed to fundamental information relating to the company's condition.³² The defendant *Chiarella*

²³ SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

²⁴ *Id.* at 852.

²⁵ *Id.* at 849-52.

²⁶ *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974). *Accord, e.g., Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156 (2d Cir. 1980). *Contra* *Fridrich v. Bradford*, 542 F.2d 307 (6th Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977). The fraud on the market theory of liability extends beyond insider trading cases. *See* Rapp, *Rule 10b-5 and "Fraud-on-the-Market"—Heavy Seas Meet Tranquil Shores*, 39 WASH. & LEE L. REV. 861 (1982).

²⁷ *Financial Indus. Fund, Inc. v. McDonnell Douglas Corp.*, 474 F.2d 514 (10th Cir. 1974). *Cf. Tarasi v. Pittsburgh Nat'l Bank*, 555 F.2d 1152 (3rd Cir. 1977) (discussing the defense of *in pari delicto*).

²⁸ *Zweig v. Hurst Corp.*, 594 F.2d 1261 (9th Cir. 1979). The activity complained of—purchasing a security prior to publicly recommending it—is known as "scalping". *See, e.g., SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

²⁹ *See Dirks v. SEC*, 681 F.2d 824, 837 (D.C. Cir. 1982), quoted in the text accompanying note 43 *infra*.

³⁰ *See* text accompanying notes 31-43 *infra*.

³¹ *Chiarella v. United States*, 445 U.S. 222 (1980).

³² *Id.* at 233-37.

was an employee of a printing firm that had been used in connection with various tender offers. In an effort to maintain confidentiality the target company's identity was concealed in the galleys. Chiarella, who worked on the galleys, would identify the target company by reading the other information in the tender offer material. Armed with this knowledge Chiarella would purchase the target company's stock and then sell it at a profit after the tender offer was announced publicly.³³ The federal indictment was framed in terms of what was characterized as Rule 10b-5's requirement that an insider possessed with confidential material information must either disclose or abstain from trading.³⁴ The defendant was convicted but the Supreme Court overturned the convictions on the ground that there was no legal duty to speak.³⁵

The Court first distinguished the earlier "disclose or abstain" decision of the SEC in *Cady, Roberts*³⁶ on the ground that the insider trader in *Cady, Roberts* had wrongfully obtained information from a corporate insider while in the special position of broker-dealer.³⁷ According to the *Chiarella* Court, the *Cady, Roberts* decision thus "recognized a relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation."³⁸ There is ample authority for the proposition that persons who are not traditional corporate insiders may be held accountable under Rule 10b-5 when occupying a special position in the market place that puts them under SEC supervision, especially when these persons knowingly obtain confidential information from corporate insiders.³⁹ In such cases it is the possession of information coupled with a special position that triggers the Rule 10b-5 duty.

Another aspect of most insider trading decisions is the wrongful appropriation of the inside information. The *Chiarella* Court explained that the Second Circuit's "disclose or abstain" rule as announced in *Texas Gulf Sulphur* and its progeny⁴⁰ was limited to insiders (and others) where there is a basis for imposing a duty to disclose apart from the mere possession of confidential inside information.⁴¹ In summarizing its

³³ *Id.* at 224. The defendant engaged in five similar transactions realizing an aggregate profit of approximately \$30,000. *Id.*

³⁴ *Id.* at 225.

³⁵ *Id.* at 233-37.

³⁶ See text accompanying notes 21 & 22 *supra*.

³⁷ 445 U.S. at 226-28.

³⁸ *Id.* at 228 (footnote omitted; emphasis supplied).

³⁹ See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963); *Dirks v. SEC*, 681 F.2d 824 (D.C. Cir. 1982); *Investors Management, Inc.*, 44 S.E.C. 633 (1971).

⁴⁰ See note 12, 23-28 *supra*.

⁴¹ 445 U.S. at 229-31. Compare *Frigitemp Corp. v. Financial Dynamics Fund, Inc.*, 524 F.2d 275, 282 (2d Cir. 1975) (no liability for failure to disclose intent to continue large purchases of target company's stock) with *American Gen. Ins. Co. v. Equitable Gen. Corp.*, 493 F. Supp. 721, 742-48 (E.D. Va. 1980) (actionable nondisclosures found in press releases concerning merger negotiations).

holding the Supreme Court explained that the absence of a wrongful conversion or misappropriation of the information in question dictated that there could be no violation of Rule 10b-5 since there was no legal duty to disclose prior to trading.⁴² The D.C. Circuit Court of Appeals has observed:

Therefore, reading *Chiarella* in light of the case law that preceded it, and extracting those views that seem to command a clear majority of the Court, we take the following lessons from *Chiarella*: Rule 10b-5 and its statutory sources, standing alone, do not require "any person" who is a party to a securities transaction to disclose all material, nonpublic information or refrain from trading, and a mere failure to disclose material information, absent other compelling legal circumstances, does not "operate as a fraud." Thus, the "information" theory is rejected. Because the disclose-or-refrain duty is extraordinary, it attaches only when a party has legal obligations other than a mere duty to comply with the general antifraud proscriptions in the federal securities laws.⁴³

By focusing on the legal source of the asserted duty to disclose, the Supreme Court in federal securities cases has highlighted the importance of the common law in the area. The *Chiarella* decision thus expressly incorporates common law theories of liability into Rule 10b-5's duty to speak. Such theories of liability have been lying dormant and now stand to be revived in both federal and state court forums. In the state courts, the common law can provide an alternative to the 10b-5 claim. In federal court, common law principles will be applicable at least by analogy.

Injecting the common law into the 10b-5 cases can raise ticklish questions. For example, is the federal court to find a general common law applicable to 10b-5 or must it defer to the appropriate state law? Specifically, when the law of the states varies as to the scope of the common law duty to speak, the result under 10b-5 would vary depending upon the local law governing the transaction in question. This result, of course, precludes uniformity in the federal courts, but is an approach many courts have adopted in Rule 10b-5 corporate mismanagement cases.⁴⁴ On the other hand, to apply federal law on the issue of duty could impose a higher

⁴² 445 U.S. at 231 (The "market information upon which he relied did not concern the earning power or operations of the target company, but only the plans of the acquiring company").

⁴³ *Dirks v. SEC*, 681 F.2d 824, 837 (D.C. Cir. 1982).

⁴⁴ In the following corporate mismanagement cases, the courts have recognized a 10b-5 claim based upon nondisclosure of facts that would have alerted the plaintiff to a potential cause of action under state law. *Healey v. Catalyst Recovery of Pa., Inc.*, 616 F.2d 641 (3rd Cir. 1980); *Alabama Farm Bureau Mut. Cas. Co. v. American Fidelity Life Ins. Co.*, 606 F.2d 602 (5th Cir. 1979); *Kidwell v. Meikle*, 597 F.2d 1273 (9th Cir. 1979); *Goldberg v. Meridor*, 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978); *Wright v. Heizer Corp.*, 560 F.2d 236 (7th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). *But cf.* *Biesenback v. Guenther*, 588

standard than some states,⁴⁵ and the Supreme Court has forbidden this result in another 10b-5 context.⁴⁶

III. THE PROPER ROLE FOR THE COMMON LAW

The major premise of this article is that the stage has now been set for renewed application of common law theories of liability to cases involving insider trading. The United States Supreme Court in *Chiarella* properly focused upon the obligations of those possessed with material inside information to the investing public. This focus is appropriate since the thrust of the federal securities laws is investor protection.⁴⁷ However, there are alternative bases for the duty to disclose. For example, what about the insider's obligation to the corporation? Is not the fiduciary duty of the director, or any corporate agent, one that properly runs to the principal? This approach, which has firm support, has been the theory of recovery of insider profits in a handful of cases that have met considerable resistance.⁴⁸ It is this author's thesis that these decisions are not novel but in fact reflect long observed, traditional common law principles and thus do and should provide an effective weapon against the premature use of material inside information. The "disclose or abstain from trading" rule is a weapon that has an appropriate place both in state and federal law.

It has long been the rule that where an insider fails to disclose material information to a purchaser or seller of shares in a face-to-face transaction many courts will impose liability for fraud.⁴⁹ The courts have applied this rule most often in cases where controlling shareholders, directors, or officers have entered into transactions with existing shareholders.⁵⁰ In such a case there is an already existing fiduciary relationship between the parties to the transaction. However, in open market transactions the courts have generally held that under principles of common law fraud there is no duty to disclose between buyer and seller.⁵¹ This doctrine is important insofar as Rule 10b-5's deception requirement incorporates elements of common law fraud.⁵² It is thus not

F.2d 400 (3rd Cir. 1978); *Valente v. Pepsico, Inc.*, 454 F. Supp. 1228 (D. Del. 1978). See generally *Hazen, Corporate Mismanagement and the Federal Securities Act's Antifraud Provisions: A Familiar Path with Some New Detours*, 20 B.C. L. REV. 819 (1979).

⁴⁵ See *Freeman v. Decio*, 584 F.2d 186 (7th Cir. 1978); *Schein v. Chasen*, 313 So.2d 739 (Fla. 1975).

⁴⁶ *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977) (dealing with corporate mismanagement).

⁴⁷ See *Hazen, supra* note 4, at 391.

⁴⁸ See authorities cited in note 12 *supra*.

⁴⁹ See, e.g., *Strong v. Repide*, 213 U.S. 419 (1909).

⁵⁰ See, e.g., *Hotchkiss v. Fischer*, 136 Kan. 530, 16 P.2d 531 (1932); *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974).

⁵¹ See, e.g., *Goodwin v. Agassiz*, 283 Mass. 358, 186 N.E. 659 (1933); *Peek v. Gurney*, 1873 L.R. 6 H.L. 377.

⁵² E.g., *Aaron v. SEC*, 446 U.S. 680 (1980) (scienter must be proven as part of any 10b-5 claim); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977) (actual deception requirement);

surprising that the federal courts are far more receptive to cases involving face-to-face transactions than those based upon a faceless market.⁵³

In contrast to the cases based upon a fraud theory, cases applying the common law of agency have recognized an insider's duty to abstain from trading without disclosure of material inside information.⁵⁴ Under an agency law theory, however, the duty runs to the principal—to the corporation—rather than to sellers, purchasers, or the investing public in general. Although grounded in traditional fiduciary principles, this line of insider trading cases did not surface until relatively recently.

The first expansive common law case arose in Delaware, a state not known for its strict view of corporate fiduciary duties.⁵⁵ In *Brophy v. Cities Services Co.*,⁵⁶ the "confidential secretary" to an officer and director, who himself served in "an executive capacity,"⁵⁷ knew in advance of the company's intent to purchase its own stock on the open market. The defendant purchased shares for his own account before the company's purchases had the anticipated effect of causing the market price to rise significantly. The Delaware court held the insider accountable for his profits but did not rely on the line of cases holding the directors liable to purchasers and sellers.⁵⁸ Rather, the court based its holding upon fiduciary obligations to the corporation. As such, the decision is more in line with a fiduciary, as opposed to an informational, duty to disclose or abstain from trading.⁵⁹ The court in *Brophy* relied upon both restitutionary principles⁶⁰ and the law of trusts⁶¹ in concluding that where "an

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (scienter must be proven as part of any 10b-5 claim).

⁵³ Compare, e.g., *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) (face-to-face transaction, 10b-5 liability imposed) with *Chiarella v. United States*, 445 U.S. 222 (1980) (market transaction, no 10b-5 violation).

⁵⁴ E.g., *Diamond v. Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969); *Brophy v. Cities Service Co.*, 31 Del. Ch. 241, 70 A.2d 5 (1949).

⁵⁵ See generally Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974); Murdock, *Delaware: The Race to the Bottom—Is the End in Sight?*, 9 LOY. CHI. L.J. 643 (1978); Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861 (1969).

⁵⁶ 31 Del. Ch. 241, 70 A.2d 5 (1949).

⁵⁷ *Id.* at 243, 70 A.2d at 8.

⁵⁸ See text accompanying notes 15-18 *supra*.

⁵⁹ See text accompanying notes 29 & 41-43 *supra*.

⁶⁰ See 31 Del. Ch. at 245, 70 A.2d at 7-8. The *Brophy* Court quoted from RESTATEMENT OF THE LAW OF RESTITUTION § 290, Comment a (1937):

The general rule with respect to the rights and duties of a fiduciary appears in the Restatement of the Law of Restitution (§ 200, Comment a); "A fiduciary is subject to a duty to the beneficiary not to use on his own account information confidentially given him by the beneficiary or acquired by him during the course of or on account of the fiduciary relation or in violation of his duties as fiduciary, in competition with or to the injury of the beneficiary, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge. . . ."

31 Del. Ch. at 245, 70 A.2d at 7-8.

⁶¹ 31 Del. Ch. at 245, 70 A.2d at 8. The *Brophy* Court quoted from A. SCOTT, THE LAW

employee acquires [inside] knowledge in the course of his employment, the application of general principles would seem to require the conclusion that he cannot use that information for his own personal gain."⁶² The applicable provision of the Restatement of the Law of Restitution provides: "where a fiduciary in violation of his duty to the beneficiary acquires property through the use of confidential information, he holds the property so acquired upon a constructive trust for the beneficiary."⁶³ The rationale thus treats inside information like any other piece of corporate property, be it tangible or intangible like a trade secret.⁶⁴

The law of trade secrets, although protecting a principal's property right in information, is not directly relevant to insider trading because in the trade secret cases disclosure puts the principal at a competitive disadvantage. This competitive disadvantage can result in a presumed injury. There is no presumed injury in the context of insider trading. However, actual loss is not a requirement of many causes of action based upon breaches of fiduciary duty. For example, when a corporate official deals with his or her corporation, the transaction is voidable unless there has been full disclosure to a disinterested decision-maker.⁶⁵ Another example of the absence of a provable loss requirement is in the kick-back cases. An employee who receives a kick-back for placing a contract with his or her principal must disgorge that profit to the principal even if the contract price was fair and would have been the same in an arm's length bargain.⁶⁶ A third type of fact pattern where the courts re-

OF TRUSTS, § 505.1 (1939):

When, therefore, a person "in a confidential or fiduciary position, in breach of his duty, uses his knowledge to make a profit for himself, he is accountable for such profit. . . ." Scott on Trusts, § 505.1, *supra*.

31 Del. Ch. at 247, 70 A.2d at 8. *See also* Note, *Confidential Disclosure of Trade Secrets*, 15 GEO. WASH. L. REV. 87 (1946); Note, *Protection and Use of Trade Secrets*, 64 HARV. L. REV. 976 (1951).

⁶² 31 Del. Ch. at 245, 70 A.2d at 8.

⁶³ RESTATEMENT OF THE LAW OF RESTITUTION § 200 (1937).

⁶⁴ It is well established that the law will protect a business' right to informational property such as trade secrets and will hold others accountable for any profits gained from unauthorized disclosure. *See, e.g.*, 12 R. MILGRAM, TRADE SECRETS chs. 3 & 4 (1973); A. TURNER, THE LAW OF TRADE SECRETS pt. IV-B (1962).

⁶⁵ *See Wyman v. Bowman*, 127 F. 257 (8th Cir. 1904); *Minnesota Loan & Trust Co. v. Peteler Car Co.*, 132 Minn. 217, 156 N.W. 255 (1916); *Johnson v. Duensing*, 340 S.W.2d 758 (Mo. Ct. App. 1960), *mod. on other grounds*, 351 S.W.2d 27 (Mo. 1961); *Point Trap Co. v. Manchester*, 98 R.I. 49, 199 A.2d 592 (1964). *See also* ALI-ABA MODEL BUS. CORP. ACT § 41. In those jurisdictions adopting the Model Act fairness alone arguably validates a self-dealing transaction by corporate officials even in the absence of full disclosure. In those cases where there is no showing of transactional fairness the contract is voidable regardless of whether the agent has profited or whether the principal has suffered a provable loss. *See generally* Anderson, *Conflicts of Interest: Efficiency, Fairness, and Corporate Structure*, 25 U.C.L.A. L. REV. 738 (1978); Bulbulla & Pinto, *Statutory Responses to Interested Directors' Transactions: A Watering Down of Fiduciary Standards*, 53 NOTRE DAME LAW 201 (1977).

⁶⁶ *See Sears, Roebuck & Co. v. American Plumbing & Supply Co.*, 19 F.R.D. 334 (D. Wis. 1956); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 683-84 (1970) [hereinafter cited as DOBBS].

quire disgorgement of an ill-gotten profit although no injury is proven is in the bribery of an agent. The agent must disgorge the bribe even though he or she can prove that his or her actions would have been the same without the bribe and thus that the principal did not incur a provable injury.⁶⁷

The theory in all of the foregoing fiduciary duty cases is that the agent should not profit in a conflict of interest situation. As explained in the Restatement of the Law of Restitution, the rule "is not based on harm done to the beneficiary in the particular case, but rests upon a broad principle of preventing a conflict of opposing interests in the minds of fiduciaries, whose duty it is to act solely for the benefit of their beneficiaries."⁶⁸ The rule purportedly acts to deter conduct that has the potential for abuse. When a corporate official trades in stock on the basis of inside information, he or she now has a dual interest: to profit from the transaction and to act in the corporation's best interest. Although no actual injury to the corporation may occur, the conflict is there just as with a bribe or kick-back. Moreover, when an investor learns that corporate insiders are using confidential information to their own advantage, the investor may have less trust in the company, thus adversely affecting both public confidence in the company and the saleability of the company's stock.⁶⁹ In such circumstances, the company would suffer actual financial harm the next time the company had to raise additional capital.

Arguably, a potential conflict arises whenever an insider trades in the securities of his or her company. However, there are gains from allowing an insider to invest, such as giving the insider a self-interest in the company's success. It would be totally unrealistic to bar insider trading, especially when the long term goals of the insider and corporation coincide—a successful enterprise and a high priced stock. But when the insider seeks a short-term profit based on fluctuations in the company's stock, the conflict develops. The federal law applicable to public companies, therefore, expressly requires disgorgement of insider profits realized as a result of a purchase and sale within six months regardless of proof of the use of inside information.⁷⁰ When an insider relies on inside information in making a trade, his or her short-term investment interests are being placed in potential conflict with the corporation's interest. The agent is thus put in a dual role that is traditionally forbidden.

Although firmly grounded in traditional concepts, the *Brophy*

⁶⁷ See *Fuchs v. Bidwell*, 31 Ill. App. 3d 567, 334 N.E.2d 117 (4th Dist. 1975) (bribery of public official). Cf. *Continental Management, Inc. v. United States*, 527 F.2d 613 (Ct. Cl. 1975) (action by principal against person giving the bribe who was not its agent).

⁶⁸ RESTATEMENT OF THE LAW OF RESTITUTION § 197, Comment c (1937).

⁶⁹ See *Diamond v. Oreamuno*, 24 N.Y. 494, 499, 301 N.Y.S.2d 78, 81-82, 248 N.E.2d 910, 912-13 (1969).

⁷⁰ 15 U.S.C. § 78p(b) (1981). See *Hazen, The New Pragmatism Under Section 16(b) of the Securities Exchange Act*, 54 N.C. L. Rev. 1 (1975).

reasoning did not resurface until twenty years later in the New York Court of Appeals' decision in *Diamond v. Oreamuno*.⁷¹ In *Diamond*, the two defendants, the company's chairman of the board and president, knew of certain impending cost increases that would deflate anticipated earnings. The two insiders sold their holdings in the company prior to any public disclosure. The court, picking up where the *Brophy* decision left off, held both defendants liable to the corporation for their ill-gotten gain.⁷² Chief Judge Fuld, after citing *Brophy* with approval, pointed to the law relating to principal and agent:

[A] similar view has been expressed in the Restatement 2d, Agency (§388, comment c):

"c. Use of confidential information. An agent who acquires confidential information in the course of his employment or in violation of his duties has a duty . . . to account for any profits made by the use of such information, although this does not harm the principal. . . . So, if [a corporate officer] has 'inside' information that the corporation is about to purchase or sell securities, or to declare or to pass a dividend, profits made by him in stock transactions undertaken because of his knowledge are held in constructive trust for the principal."⁷³

The Restatement does not require injury to the principal as a prerequisite to a cause of action. Presumably, the absence of an actual injury requirement is based on the idea that a breach of trust necessarily damages the principal or cestui qui trust. Nevertheless, Judge Fuld pointed out that the corporation is injured whenever its integrity has been impugned.⁷⁴

Notwithstanding the common law basis for the foregoing Delaware and New York decisions, two subsequent cases have rejected the *Brophy-Diamond* rationale. In *Schein v. Chasen*, the Second Circuit, applying Florida law, went beyond *Diamond* and imposed liability on a noninsider tippee who profited from trading on insider information.⁷⁵ However, the United States Supreme Court viewed the divided Second Circuit decision as questionable in light of the "novelty of the question and the great unsettlement of Florida law,"⁷⁶ and accordingly certified the question to the Florida Supreme Court. Although one might have expected that the only novelty of the decision was its extension to nonin-

⁷¹ 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969).

⁷² *Id.* at 504, 301 N.Y.S.2d at 86, 248 N.E.2d at 915-16.

⁷³ *Id.* at 501, 301 N.Y.S.2d at 83, 248 N.E.2d at 914. For a collection of the relevant common law authority see the cases cited in Annot., *Employer's Right to Earnings or Profits Made by Employee*, 13 A.L.R. 907 (1921).

⁷⁴ 24 N.Y.2d at 499, 301 N.Y.S.2d at 81-82; 248 N.E.2d at 912.

⁷⁵ *Schein v. Chasen*, 478 F.2d 817, 822 (2d Cir. 1973), *vacated sub nom. Lehman Bros. v. Schein*, 416 U.S. 386 (1974).

⁷⁶ *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

sider tippees, the Florida Supreme Court decision purported to constitute a wholesale rejection of *Diamond* due to the absence of any injury to the corporation, a prerequisite under Florida Law to bringing a shareholder derivative suit.⁷⁷ Due to the nature of the derivative suit, the Florida decision was thus able to ignore the Restatement position as to the irrelevance of the lack of damages.⁷⁸

The fact that the defendants in the Florida case were not insiders or even corporate employees distinguishes the case from both *Brophy* and *Diamond* where the defendants were agents and fiduciaries of the corporate principal. The defendants thus were no different than the printer in *Chiarella* who was held to have owed a duty to disclose or abstain from trading based merely on the possession of insider information. A joint venture theory or tort-based aiding and abetting rationale might be sufficient to hold noninsider tippees accountable under the *Brophy-Diamond* rationale,⁷⁹ at least where there is a knowing participation. However, since *Diamond* and *Brophy* were based on a fiduciary theory, the decisions cannot be extended easily to hold noninsider tippees accountable. A showing that those profiting from the insider information knew that it had been obtained wrongfully would present a different and stronger case for the plaintiff.⁸⁰ *Schein* was decided within the procedural context of a derivative suit where courts have erected barriers such as Florida's corporate injury requirement in order to prevent shareholder strike suits. It is thus an overreading to consider the Florida decision in *Schein* as a proper rejection of *Diamond* as it applies to corporate fiduciaries on any basis other than the derivative suit injury requirement. This is especially true in light of the Restatement (Second) of Agency which, as noted above, expressly recognizes the rights to an accounting of profits even without proof of injury.⁸¹ The obvious impropriety of a wholesale rejection of the *Brophy-Diamond* rationale can be illustrated by the following example. Consider the case of a corporate insider who sells information to someone, surely that sale is a breach of duty and the agent must account to the principal.⁸² Why should the insider who profits by trading in the stock be treated more leniently?

⁷⁷ *Schein v. Chasen*, 313 So.2d 739, 746-47 (Fla. 1975).

⁷⁸ The shareholder derivative suit enables a shareholder to bring suit in the corporation's behalf to vindicate corporate rights. See, e.g., FED. R. CIV. P. 23.1; Dent, *The Power of Directors to Terminate Shareholder Litigation: The Death of the Derivative Suit?*, 75 Nw. U. L. REV. 96 (1980); Prunty, *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980 (1957).

⁷⁹ See *Schein v. Chasen*, 478 F.2d 817, 823-24 (2d Cir. 1973), *vacated sub nom. Lehman Bros. v. Schein*, 416 U.S. 386 (1974). The Second Circuit apparently has retreated from its decision in *Schein* to impose liability on noninsider tippees. See *Frigitemp Corp. v. Financial Dynamics Fund*, 524 F.2d 275, 278-79 (2d Cir. 1975).

⁸⁰ Cf. *Dirks v. S.E.C.*, 681 F.2d 824 (D.C. Cir. 1982); *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981) (both decided under Rule 10b-5).

⁸¹ See text accompanying note 73 *supra*.

⁸² See *Hunter v. Shell Oil Co.*, 198 F.2d 485 (5th Cir. 1952); DOBBS, *supra* note 66, at 693.

Unfortunately, the Florida decision does not stand alone. The Seventh Circuit in *Freeman v. Decio*⁸³ rejected *Diamond* on similar facts. The defendant officers in *Freeman* who traded on inside information were held not liable to the corporation under Indiana law, with the court relying largely upon Florida's rejection of *Diamond* in *Schein*.⁸⁴ The Seventh Circuit, however, did not take into account the fact that the *Schein* decision involved noninsiders and was based on the lack of corporate injury.⁸⁵ Furthermore, the tenor of the Seventh Circuit's position was that the state law should defer to the federal law on insider trading. There was no federal claim since the corporate plaintiff was not a purchaser or seller of securities and thus could not satisfy Rule 10b-5's standing requirement.⁸⁶ Also, the facts in *Freeman* fell short of establishing liability under the express provision for insider short-swing profits.⁸⁷ The idea of the state's deference to federal law seems questionable in light of the Supreme Court's recent refusals to federalize issues traditionally left to state law.⁸⁸ The *Freeman* decision may thus be brought into question by the increasing reluctance of federal decisions to intrude into the province of the states. Otherwise the law of insider trading might fall through a gap created by an "Alphonse and Gaston" routine of the federal and state courts. Another failing of the *Freeman* decision may sound like a law professor's lament, but the court there seemed to lose track of the basic common law principles involved.

While both the *Schein* and *Freeman* cases have been given much weight in calling the *Brophy-Diamond* rule into question,⁸⁹ there is ample authority in favor of the common law remedy. Aside from the authority of the Restatement (Second) of Agency⁹⁰ and the Restatement of the Law of Restitution,⁹¹ there are a number of cases to the same effect. For example, the Third Circuit has observed,

⁸³ 584 F.2d 186 (7th Cir. 1978).

⁸⁴ *Id.* at 189.

⁸⁵ See text accompanying notes 71-77 *supra*.

⁸⁶ The limitations on who can bring suit in a Rule 10b-5 action were set out in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). See generally Note, *Standing Under Rule 10b-5 After Blue Chip Stamps*, 75 MICH. L. REV. 413 (1976).

⁸⁷ Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1981), requires insiders of publicly traded companies to disgorge all profits realized from short-swing profits (i.e., within six month statutory periods). See generally Hazen, *The New Pragmatism Under Section 16(b) of the Securities Exchange Act*, 54 N.C. L. REV. 1 (1975). The *Freeman* court felt that the unavailability of 16(b) and SEC Rule 10b-5 should be interpreted as a federal statement that the fact situation before it should not be covered as a matter of policy. 584 F.2d at 190. In contrast, the New York Court in *Diamond* viewed section 16(b) as a strong statement disfavoring insider trading. See 24 N.Y.2d at 502; 301 N.Y.S.2d at 84; 248 N.E.2d at 914.

⁸⁸ See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977).

⁸⁹ See the authorities cited in notes 6 & 11 *supra*.

⁹⁰ See text accompanying note 73 *supra*.

⁹¹ See text accompanying note 63 *supra*.

We read both *Diamond* and *Brophy* to stand for the same fundamental proposition: as a matter of common law, a fiduciary of a corporation who trades for his own benefit on the basis of confidential information acquired through his fiduciary position breaches his duty to the corporation and may be held accountable to that corporation for any gains without regard to whether the corporation suffered damages as a result of the transaction. This obligation continues even after termination of the relationship which created the fiduciary duty.⁹²

This common law principle will apply and thus provide a state law remedy even though the purchaser/seller standing limitations of SEC Rule 10b-5 would preclude a federal claim by the corporation or one of its shareholders.⁹³ Further, while there may be no direct injury to the corporation,⁹⁴ a remedy should still be recognized since the gravamen of the evil is the fiduciary's ill-gotten gain rather than the loss to the principal.⁹⁵

As the foregoing discussion points out, substantial remedies against insider trading abuses can be found in traditional common law principles. Simply put, nonpublic information concerning a company's fundamentals (as opposed to market information)⁹⁶ or its stock is as much a part of the corporate property as any tangible asset. An employee, agent, or even a third party is no more entitled to profit from use of information than would be the case with a trade secret. Accordingly, the principal is entitled to restitution of all ill-gotten profits. Although some courts have rejected this theory of liability for the misuse of inside information,⁹⁷ most decisions have adopted it and at the same time have recognized its long-standing basis.⁹⁸ It follows that many federal cut-

⁹² *Thomas v. Roblin Indus., Inc.*, 520 F.2d 1393, 1397 (3rd Cir. 1975). *Accord* *Davidge v. White*, 377 F. Supp. 1084 (S.D.N.Y. 1974) (applying Delaware Law). *See also* *Polin v. Conduccion Corp.*, 552 F.2d 797, 811 (8th Cir.), *cert. denied*, 434 U.S. 857 (1977).

⁹³ *See* *Thomas v. Roblin Indus., Inc.*, 520 F.2d 1393 (3rd Cir. 1975); *Diamond v. Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969).

⁹⁴ *But see* *Diamond v. Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969).

⁹⁵ RESTATEMENT (SECOND) OF AGENCY § 388, Comment c (1957); RESTATEMENT OF THE LAW OF RESTITUTION § 300 (1937). *Cf.* *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) ("Disgorgement is not to compensate investors . . . [but] is a method of forcing a defendant to give up the amount by which he was unjustly enriched.").

⁹⁶ Fundamental information relates to matters directly involving the internal affairs of the company, its operations, profitability, and the like. In contrast, market information is not specific to the company's internal affairs, but relates to extrinsic events that affect the market price of the company's stock. A change in a company's earnings picture is fundamental. A third party's decision to acquire a target company is market information, as it does not relate directly to the company's operations. *See* note 42 *supra*. *See generally* Morrison, *supra* note 11.

⁹⁷ *See* text accompanying notes 75-88 *supra*.

⁹⁸ *See* note 12 *supra*.

backs on insider trading limitations can and should be remedied by reliance on the common law. Furthermore, continued recognition of this common law rationale should bolster federal remedies by providing a solid basis for imposing a duty to disclose or abstain from trading.

The Supreme Court's continued reference to the common law in interpreting Rule 10b-5 is perpetuated by *Chiarella's* reliance on the duty issue. Since there is no relevant federal common law, state law appears an appropriate reference point for resolving the question. In an insider trading case where the plaintiff satisfies Rule 10b-5's purchaser/seller standing requirement, a cause of action should lie assuming the defendant insider acted with the requisite scienter. The duty to speak that is addressed in the cases discussed above is grounded in fiduciary principles rather than common law fraud and this should not preclude the 10b-5 remedy. Since the breach of duty is based upon a non-disclosure, section 10(b)'s deception requirement would appear to be satisfied.⁹⁹ Accordingly, the common law presents a viable way to find an actionable duty to speak under Rule 10b-5. This is not an across-the-board duty but a duty that will arise only on appropriate facts as is indicated by the Supreme Court's decision in *Chiarella*. In addition to the federal impact, therefore, the fiduciary duty rationale has a definite role to play under state law.

The federal and state remedies against insider trading should be "parallel" and "non-exclusive."¹⁰⁰ Since the evils of insider trading offend both common law and federal securities laws, the divergent policies behind each should be complementary.

⁹⁹ See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), where the Court held that a breach of fiduciary duty standing alone will not support a Rule 10b-5 claim but the rule is otherwise when there is a nondisclosure of material facts in connection therewith. See also *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971).

¹⁰⁰ See Haft, *supra* note 11, at 1070.