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Extraterritorial Application Of Section 16(B) Of The Securities Exchange Act Of 1934-Wagman V. Astle, 380 F. Supp. 497 (S.D.N.Y. 1974)

EXTRATERRITORIAL APPLICATION OF SECTION 16(b) OF THE SECURITIES EXCHANGE ACT OF 1934—*WAGMAN V. ASTLE*, 380 F. SUPP. 497 (S.D.N.Y. 1974)

The extent to which the provisions of the Securities Exchange Act of 1934[1] may be applied extraterritorially is currently unsettled.[2] There exists a general presumption that, absent express congressional intent to the contrary, regulatory legislation is not to be applied beyond the territorial boundaries of the United States.[3] While the jurisdictional language of the Exchange Act does not clearly indicate that the Act is to have other than domestic application,[4] courts have given extraterritorial effect to some of its sections,[5] particularly the

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[1] 15 U.S.C. §§ 78a-hh (1970).

[2] See authorities cited in note 6 *infra*.

[3] Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949); Blackmer v. United States, 284 U.S. 421, 437 (1932).

[4] Express congressional intent concerning the application of the Securities Exchange Act of 1934 is found in § 27 of the Act. 15 U.S.C. § 78aa (1970). This section reads in pertinent part:

> The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.

Only this sentence of § 27 is directed toward subject matter jurisdiction, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972), thus the extent to which the Act should be applied extraterritorially is not clearly indicated.

Nevertheless, § 30(b) does provide an exemption from the Act for anyone "insofar as he transacts a business in securities without the jurisdiction of the United States . . . ." 15 U.S.C. § 78dd(b) (1970). This section arguably exempts foreign defendants from liability under the 1934 Act if their actions are outside of the United States. However, the exemption has been interpreted narrowly by the courts, effectively refuting such an argument in most situations. *See* SEC v. United Financial Group, Inc., 474 F.2d 354, 357-58 (9th Cir. 1973); Roth v. Fund of Funds, Ltd., 405 F.2d 421, 422 (2d Cir. 1968), *cert. denied*, 394 U.S. 975 (1969); Schoenbaum v. Firstbrook, 405 F.2d 200, 206-09 (2d Cir.), *partially rev'd on rehearing*, 405 F.2d 215 (1968), *cert. denied*, 395 U.S. 906 (1969); Bersch v. Drexel Firestone, Inc., 389 F. Supp. 446 (S.D.N.Y. 1974), *partially rev'd*, [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 95,080 (2d Cir. 1975). *See also* Note, 10 COLUM. J. TRANSNAT'L LAW 150 (1971); Note, *United States Taxation and Regulation of Offshore Mutual Funds*, 83 HARV. L. REV. 404, 444-52 (1969); Note, *Offshore Mutual Funds: Possible Solutions to a Regulatory Dilemma*, 3 LAW & POLICY IN INT'L BUS., 157, 179-91 (1971); Note, *The International Character of Securities Credit: A Regulatory Problem*, 2 LAW & POLICY IN INT'L BUS. 147, 155-64 (1970).

[5] The breadth of the term "extraterritorial" and its myriad connotations prevent a precise legal definition. Consequently, at times it is unclear whether a court has applied the 1934 Act extraterritorially or simply has based jurisdiction on territorial

anti-fraud provisions found in § 10(b).[6] However, extraterritorial ap-

principles. In any event, § 10(b) is the only section of the Exchange Act that has been applied extraterritorially to any significant extent, although the extraterritorial application of other provisions has been discussed. *See* Roth v. Fund of Funds, Ltd., 405 F.2d 421 (2d Cir. 1968), *cert. denied*, 394 U.S. 975 (1969); Wagman v. Astle, 380 F. Supp. 497 (S.D.N.Y. 1974); Note, *The International Character of Securities Credit: A Regulatory Problem*, 2 LAW & POLICY IN INT'L BUS. 147 (1970).

[6] 15 U.S.C. § 78j(b) (1970). Basically, § 10(b) declared fraudulent conduct in securities transactions illegal by authorizing the SEC to establish regulations which prohibit such conduct. The SEC has promulgated Rule 10b-5 for this purpose. 17 C.F.R. § 240. 10b-5 (1974).

The scope of the extraterritorial application of § 10(b) is uncertain. The following are principal cases in which the problems and difficulties of the extraterritorial application of § 10(b) are discussed: Bersch v. Drexel Firestone, Inc., [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 95,080 (2d Cir. 1975); IIT v. Vencap, Ltd., [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 95,082 (2d Cir. 1975); SEC v. United Financial Group, Inc., 474 F.2d 354 (9th Cir. 1973); Travis v. Anthes Imperial Ltd., 473 F.2d 515 (8th Cir. 1973); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.), *partially rev'd on rehearing*, 405 F.2d 215 (1968), *cert. denied*, 395 U.S. 906 (1969); Garner v. Pearson, 374 F. Supp. 591 (M.D. Fla. 1974); Madonick v. Denison Mines Ltd., [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,550 (S.D.N.Y.); United States v. Clark, 359 F. Supp. 131 (S.D.N.Y. 1973); Investment Properties Int'l Ltd. v. IOS, Ltd., [1970-1971 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,011 (S.D.N.Y. 1971); Manus v. The Bank of Bermuda, Ltd. [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,299 (S.D.N.Y. 1971); Finch v. Marathon Sec. Corp., 316 F. Supp. 1345 (S.D.N.Y. 1970); Ferraioli v. Cantor, 259 F. Supp. 842 (S.D.N.Y. 1966); SEC v. Gulf Intercontinental Fin. Corp., 223 F. Supp. 987 (S.D. Fla. 1963); Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960); IOS, Ltd. (S.A.), [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,637 (SEC 1972).

The above cases have been discussed by numerous commentators. A partial list of publications includes: R. JENNINGS & H. MARSH, SECURITIES REGULATION 684-89 (3d ed. 1972); Goldman & Magrino, *Some Foreign Aspects of Securities Regulation: Towards a Reevaluation of Section 30(b) of the Securities Exchange Act of 1934*, 55 VA. L. REV. 1015 (1969); Mizrack, *Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities and Exchange Act of 1934*, 30 BUS. LAW. 367 (1975); Note, *Extraterritorial Application of the Securities Exchange Act of 1934*, 69 COLUM. L. REV. 94 (1969); Note, *The Extraterritorial Application of Rule 10b-5*, 4 CORNELL INT'L L.J. 81 (1970); Note, *The Judicial Role in Extraterritorial Application of the Securities Exchange Act of 1934*; Vesco, 4 GA. J. INT'L COMPARATIVE L. 192 (1974); Note, *United States Taxation and Regulation of Offshore Mutual Funds*, 83 HARV. L. REV. 404 (1969); Note, *Offshore Mutual Funds: Possible Solutions to a Regulatory Dilemma*, 3 LAW & POLICY IN INT'L BUS. 157 (1971); Note, *Extraterritorial Application of the Securities Exchange Act of 1934*, 1 LAW & POLICY IN INT'L BUS. 168 (1969); Note, *Extraterritorial Application of Section 10(b) and Rule 10b-5*, 34 OHIO ST. L.J. 342 (1973); Note, 8 TEX. INT'L L.J. 430 (1973); Comment, *An Interest Analysis Approach to Extraterritorial Application of Rule 10b-5*, 52 TEX. L. REV. 983 (1974); Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363 (1973); Note, 6 VAND. J. TRANSNAT'L LAW 687 (1973); Note, 7 Vand. J. Transnat'l Law 770 (1974); Note, 20 WAYNE L. REV. 169 (1973).

plication of other sections of the Act has not been as broad as that of § 10(b).[7]

Whether § 16(b),[8] which requires the automatic forfeiture of insider profits,[9] applies to securities transactions consummated outside the United States is unclear. Nevertheless, a court presented with the question of the extraterritorial application of either § 10(b) or § 16(b) must initially make a two-fold determination. The court must determine whether subject matter jurisdiction may be inferred, and if so, it must then find whether personal jurisdiction may be properly asserted over the defendant.[10] One prerequisite to subject matter jurisdiction in a § 10(b) action is the use of an instrumentality of United States commerce by the defendant in accomplishing part of his fraud.[11] In addition, the imposition of § 10(b) liability requires a finding that the defendant acted with intent to cause foreseeable harm within the United States.[12] These two elements of § 10(b) liability generally suffice to fulfill the requirements of personal and subject matter jurisdiction in actions involving the extraterritorial application of this provision.[13]

Unlike § 10(b), § 16(b) imposes virtually strict liability on its offenders. Section 16(a),[14] which was enacted in conjunction with §

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[7] See authorities cited in note 5 *supra*.

[8] Section 16(b), 15 U.S.C. § 78p(b) (1970) reads in pertinent part:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months.

[9] See text accompanying notes 14-17 *infra*.

[10] *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

[11] Section 10(b), 15 U.S.C. § 78j(b)(1970).

[12] The exact degree of scienter, intent or foreseeability necessary in order to recover under § 10(b) is currently unsettled. Note, *The Development of a Flexible Duty Standard of Liability Under SEC Rule 10b-5*, 32 WASH. & LEE L. REV. 99 (1975). *See* 2 A. BROMBERG, SECURITIES LAW: FRAUD, SEC RULE 10b-5, § 8.4 (501 *et seq.*) (1973).

[13] *See* Travis v. Anthes Imperial Ltd., 473 F.2d 515 (8th Cir. 1973); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.), *partially rev'd on rehearing*, 405 F.2d 215 (1968), *cert. denied*, 395 U.S. 906 (1969).

[14] 15 U.S.C. § 78p(a) (1970). Section 16(a) and § 16(b) are interrelated, to some degree, and were enacted to eliminate, or at least to reduce, insider abuse. S. REP. No.

16(b), requires all directors, officers, and 10% beneficial owners of certain issuers[15] to file disclosure statements reflecting any changes in their holdings of the issuer's securities. Individuals who are required to disclose are considered "insiders" and under § 16(b)[16] must forfeit all profits realized from the purchase and sale, within a six month period, of any equity security of the issuer. Recovery of these "short swing" profits is not dependent upon a showing that the profits were realized through actual abuse of insider information. Rather, automatic liability is imposed in order to eliminate any possible abuse of inside information.[17] Thus, Congress did not intend that § 16(b) liability be contingent on proof of those elements necessary to establish a violation of § 10(b). Accordingly, in § 16(b) actions there is no need to prove that the defendant used an instrumentality of interstate commerce or that he foresaw harm to American interests.[18]

The absence of both the interstate commerce and the culpability requirements as elements of a § 16(b) violation exacerbates the problems inherent in the two-fold jurisdictional determination that a court must make when giving extraterritorial application to § 16(b).[19] These problems become even more acute when insider profits are realized by a foreign defendant from transactions conducted solely through a foreign securities exchange. Thus, despite similarities in analysis, substantial distinctions exist between the extraterritorial application of § 10(b) and that of § 16(b).

These distinctions are illustrated in *Wagman v. Astle*,[20] a recent

792, 73d Cong., 2d Sess. 6 (1934). *See* S. REP. No. 1455, 73d Cong., 2d Sess. 81 (1934); H.R. REP. No. 1383, 73d Cong., 2d Sess. 2, 5-6 (1934); Note, 25 VAND. L. REV. 660, 661-62 (1972).

[15] An issuer must be required to register with the SEC under § 12 of the 1934 Act, 15 U.S.C. § 78*l* (1970), before its insiders are subject to § 16. 15 U.S.C. § 78p(a) (1970).

[16] For the pertinent text of § 16(b) see note 8 *supra*.

[17] See note 14 *supra*.

[18] Although § 16(b) does require that a violator have used an instrumentality of interstate commerce in order for liability to be imposed, as does § 10(b), there is no constitutional problem because all insiders who are held liable under § 16(b) will have dealt with securities listed or traded in the United States' interstate commerce.

[19] As previously noted, the term "extraterritorial" has many connotations. *See* note 5 *supra*. In an extraterritorial application of § 16(b) there are essentially seven situations where problems of subject matter jurisdiction, personal jurisdiction, or both could arise:

Nationality/Residence Of Insurer	Situs of the Securities Transactions	Nationality/Residence of Insider
1. U.S.	U.S.	Foreign
2. U.S.	Foreign	Foreign
3. U.S.	Foreign	U.S.
4. Foreign	U.S.	U.S.
5. Foreign	U.S.	Foreign
6. Foreign	Foreign	U.S.
7. Foreign	Foreign	Foreign

The seventh situation presents the most acute jurisdictional problems. *See* Wagman

decision from the Southern District of New York. In *Wagman* the plaintiff brought a derivative suit to force three Canadian residents who were officers of a Canadian corporation (Dome) to disgorge short swing profits to the corporation. Dome securities were traded on the American Stock Exchange and the corporation was registered with the SEC.[21] The defendants admitted realizing short swing profits from transactions involving Dome securities,[22] but asserted that there was neither domestic conduct by them nor a domestic effect from their acts sufficient to establish subject matter jurisdiction. They emphasized that all of the transactions had occurred in Canada without utilization of the American Stock Exchange or any instrumentality of interstate commerce. Further, the defendants contended that since § 16(b) liability is automatic the transactions giving rise to liability could not be presumed to have had an actual substantial effect in the United States.[23] They also argued that the court lacked personal jurisdiction over them because the acts giving rise to their short swing profits occurred entirely in Canada. This assertion was bolstered by the fact that the officers were residents of Canada who neither conducted business nor were served with process in the United States.[24]

The *Wagman* court declined to reach the issue of subject matter jurisdiction and instead dismissed the action for lack of personal jurisdiction over the defendants.[25] The decision thus affords at least some degree of immunity to foreign insiders who realize short swing profits. However, since *Wagman* is a case of first impression,[26] the extent of this immunity is uncertain. Indeed, the *Wagman* court intimated that § 16(b) could have extraterritorial application in certain undefined circumstances if personal jurisdiction could be asserted over the defendants.[27]

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[21] *Id.* at 498-99.

[22] Brief for Plaintiff at 5.

[23] Brief for Defendant at 4-18.

[24] 380 F. Supp. at 499. The defendants also argued that venue was improper. *Id.*

[25] *Id.* at 502-03.

[26] However, the *Wagman* plaintiff noted one similar lawsuit, Glicken v. King, 69 Civ. 1847 (N.D. Ill. East.Div.). The American Stock Exchange forced settlement of that suit with the defendant insider forfeiting all of his insider profits to a Canadian Corporation. Plaintiff Reply Brief to Brief for SEC as Amicus Curiae at 3-4.

[27] The court stated that "[a] case can be imagined in which individual foreign defendants come into, do business in, or knowingly cause an actual effect in this country, in connection with a transaction which violates the provisions of § 16(b)." 380 F. Supp. at 502 n.6.

Subject Matter Jurisdiction

The tacit recognition by the *Wagman* court of potential extraterritorial application of § 16(b) acknowledged the recent judicial trend expanding the coverage of the Exchange Act to transactions conducted outside of the United States.[28] This expansion began with *Schoenbaum v. Firstbrook*,[29] a landmark decision by the Second Circuit. In *Schoenbaum* an American shareholder in Banff Oil Ltd., a Canadian corporation, brought a derivative action against certain insiders of Banff and other corporate defendants for alleged § 10(b) and Rule 10b-5 violations. Banff securities were listed and traded on the American Stock Exchange and the corporation was registered with the SEC. Except for very limited use of the United States mails, all of the conduct and transactions constituting the alleged fraud occurred in Canada.[30] The court nevertheless held that subject matter jurisdiction over the alleged violations existed on the basis that Banff securities were traded on a domestic exchange and the extraterritorial transactions were detrimental to the interests of American investors. The court reasoned that

> . . . Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities.[31]

The *Schoenbaum* court did not inquire into either the *actual* effect or the extent of the alleged fraud. Rather, the court presumed that such fraud had a sufficient adverse effect to permit assertion of subject matter jurisdiction.[32] Thus, the mere listing of the securities on an American exchange coupled with the alleged § 10(b) fraud involving those securities was an adequate basis for applying § 10(b) extraterritorially.[33]

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[28] *See* notes 5 and 6 *supra*.

[29] 405 F.2d 200 (2d Cir.), *partially rev'd on other grounds on rehearing*, 405 F.2d 215 (1968); *cert. denied*, 395 U.S. 906 (1969).

[30] 405 F.2d 204-05.

[31] *Id.* at 206.

[32] *Id.* at 208-09.

[33] *Id.* at 206-09. The interstate commerce requirement in § 10(b) ensures that, even in extraterritorial applications of the provision, each defendant found liable will have had some contact within the United States. Whether the domestic contact is sufficient to enable a court to assert subject matter jurisdiction is unclear. *See* SEC v. United Financial Group, Inc., 474 F.2d 354 (9th Cir. 1973). However, in *Schoenbaum*, the court stated that subject matter jurisdiction was proper without any consideration

Decisions rendered subsequent to *Schoenbaum* have more fully developed the circumstances in which an extraterritorial application of § 10(b) is proper and have limited to some degree the rather broad scope of extraterritorial jurisdiction that was intimated in the earlier case.[34] For example, in *Travis v. Anthes Imperial Ltd.*,[35] an American plaintiff brought a § 10(b) action against a predominantly foreign group of defendants for self dealing and misrepresentation that caused the plaintiff to refrain from selling securities of a corporation not registered or listed on an American exchange.[36] There were two separate § 10(b) claims asserted by the plaintiff. One was based on misrepresentation and nondisclosure propagated in both Canada and the United States, and the other was for illegal self dealing occurring solely in Canada. The court determined that the defendant's use of American mails was sufficient to establish subject matter jurisdiction over the first claim. On the second claim, the court determined that the defendants' use of an instrumentality of interstate commerce was sufficient to fulfill the § 10(b) requisites, but that such use was insufficient to satisfy the requirements for subject matter jurisdiction. Rather, jurisdiction over the second claim was asserted on the basis that the defendants' extraterritorial acts caused an actual adverse effect in the United States.[37] The court concluded that this adverse effect was direct and foreseeable, and that the assertion of subject matter jurisdiction was consistent with the principles of international law.[38]

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of the domestic conduct of the defendants. Once the court determined that § 10(b) applied to the defendants' foreign transactions, it then considered whether the "use of an instrumentality of interstate commerce" prerequisite was sufficiently met. 405 F.2d at 210.

[34] *See* authorities cited in note 6 *supra*. The courts seem more comfortable in asserting subject matter jurisdiction where there is some act within the United States itself that constitutes an essential part of the fraudulent activity in extraterritorial § 10(b) actions. *See e.g.*, SEC v. United Financial Group, Inc., 474 F.2d 354 (9th Cir. 1973) (court asserted subject matter jurisdiction in a § 10(b) action but noted that there were more *acts* within the United States by the defendants than the mere use of interstate commerce in their scheme). However, since § 10(b) requires some use of interstate instrumentalities within the United States, it is difficult to ascertain whether any additional domestic acts are required for courts to assert subject matter jurisdiction. *See* Mizrack, *Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities and Exchange Act of 1934*, 30 BUS. LAW. 367 (1975).

[35] 473 F.2d 515 (8th Cir. 1973).

[36] *Id.* at 518-19, 524-28.

[37] *Id.* at 520-28.

[38] *Id.* at 528. The court was willing to presume that Congress intended the extraterritorial application of § 10(b). However, the court properly indicated that such application of § 10(b) should not be extended beyond the principles recognized in

Similarly, in *Leasco Data Processing Equipment Corp. v. Maxwell*,[39] the plaintiff brought a § 10(b) action against the defendants, most of whom were British, for the fraudulent sale of securities of a foreign corporation. The securities were neither registered nor listed on an American exchange.[40] The Second Circuit held that the district court had subject matter jurisdiction over the action because some of the misrepresentations essential to the alleged fraud had occurred in the United States.[41] The court, in dictum, stated that had the misrepresentations occurred solely outside of the United States it would have been hesitant to assert subject matter jurisdiction.[42]

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international law.

The principle that a state has jurisdiction over conduct within its borders is embodied in the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965). *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339 (2d Cir. 1972). This principle is commonly referred to as the territorial principle of jurisdiction. Conduct outside of the United States may also suffice as a basis for asserting subject matter jurisdiction. United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945). *Cf.* Strassheim v. Daily, 221 U.S. 280, 285 (1911). *See, e.g.*, Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.), *partially rev'd on other grounds on rehearing*, 405 F.2d 215 (1968), *cert. denied*, 395 U.S. 906 (1969). This objective territorial principle is expressed in the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) as follows:

> § 18. Jurisdiction to Prescribe with Respect to Effect within Territory
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> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
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> (a) the conduct and its effect are generally recognized as constitutent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
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> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

It is within the power of Congress to extend the limits of the jurisdiction of American courts, but it is unlikely that the courts would or should go beyond the limits expressed in § 18 of the Restatement without evidence of express congressional intent. *See* Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363, 1370 (1973). This does not necessarily mean that all provisions of the Securities Exchange Act of 1934 should be extended to the outer limits of international law, but only that it should not be presumed that Congress intended to go beyond those limits. *Id.* 1369-70.

[39] 468 F.2d 1326 (2d Cir. 1972).

[40] *Id.* at 1330-34.

[41] *Id.* at 1334-39.

[42] *Id.* at 1334.

The *Travis* and *Leasco* decisions imply that something more than a presumed harmful effect within the United States is required before a court may properly assert subject matter jurisdiction in an extraterritorial § 10(b) action.[43] The use of an instrumentality of interstate commerce sufficient to satisfy the literal terms of § 10(b) does not necessarily constitute a satisfactory basis for subject matter jurisdiction. The courts concluded that Congress did not intend an automatic application of § 10(b) when an alleged extraterritorial fraud involved only an incidental use of interstate commerce. Nevertheless, both decisions emphasized that a defendant's domestic conduct in perpetrating an essentially extraterritorial fraud could provide a basis for the application of § 10(b) to the whole of the defendant's scheme.[44] Further, neither of these cases involved securities registered or listed on a national exchange as was the case in *Schoenbaum*.

Consequently, the limitations placed upon the extraterritorial application of § 10(b) are not clear. In the absence of significant domestic conduct it appears that, at the minimum, either the securities involved must have been registered and listed on a national exchange, or the defendant must have foreseen adverse effects within the United States in order for a court to entertain the case. Apparently, the primary concern of the *Travis* and *Leasco* courts was to ensure that a court would not assert subject matter jurisdiction over fraudulent transactions if there had been no effect on a vital national interest.

While the § 10(b) cases provide helpful analysis in determining the extent of the extraterritorial application of § 16(b), they are not dispositive of the issue. Unlike § 10(b), § 16(b) has no statutory requirement that an instrumentality of interstate commerce have been used. However, in all such actions the issuer will be a North American corporation[45] registered with the SEC and its securities will be traded within the United States.[46] Whether these factors alone are sufficient to establish subject matter jurisdiction over transactions consummated outside of the United States and involving foreign insiders is uncertain.[47]

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[43] *See* Mizrack, *Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities Exchange Act of 1934*, 30 BUS. LAW. 367, 372-75 (1975).

[44] *See* Note, *Extra Territorial Application of Section 10(b) and Rule 10b-5*, 34 OHIO ST. L.J. 342, 346-53 (1973).

[45] *See* notes 52-55 and accompanying text *infra*.

[46] § 16(b), 15 U.S.C. § 78p(b) (1970).

[47] Section 16(b) has been applied extraterritorially. In Roth v. Fund of Funds, Ltd., 405 F.2d 421 (2d Cir. 1968), *cert. denied*, 394 U.S. 975 (1969), § 16(b) liability was imposed on a Canadian corporate defendant doing business in Switzerland who

In *Wagman* foreign defendants realized short swing profits from transactions consummated entirely outside the United States. On these facts it could be inferred from the *Leasco* and *Travis* decisions that the *Wagman* court did not have subject matter jurisdiction. Further, since § 16(b) liability is automatic, there arguably was absent that foreseeability of harm which would constitute a basis for jurisdiction. On the other hand, the *Schoenbaum* opinion supports the premise that the *Wagman* court did have jurisdiction over the action since the insiders realized their profits from transactions in securities registered and listed on an American exchange. This view is reinforced by the *Schoenbaum* court's assertion that Congress intended subject matter jurisdiction to attach to extraterritorial activity which could harm domestic securities markets.

While the extraterritorial § 10(b) cases suggest contradictory conclusions with respect to extraterritorial application of § 16(b), consistency in those opinions may be discerned in their reliance upon congressional intent in reaching their results. Similarly, the extent to which § 16(b) should be extended extraterritorially will depend upon the policy and intent behind the specific provisions of the section.

In its deliberations over the passage of the 1934 Act, Congress was vitally concerned with insider abuse:

> Among the most vicious practices unearthed at the hearings before the subcommittee was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who

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realized insider profits on the New York Stock Exchange. The court held that Congress intended § 16(b) liability to attach to foreign insiders as well as to Americans since the effect of insider trading was the same regardless of the nationality of the insider. *Id.* at 422. However, because the conduct creating liability was domestic, the court did not have to consider whether the presumed adverse effect of insider trading would alone suffice to establish subject matter jurisdiction. The *Roth* decision, while to some extent overcoming the presumption against the extraterritorial application of § 16(b), only required forfeiture of insider profits realized through domestic trading and did not reach a wholly extraterritorial transaction.

Nevertheless, it is important to note that the *Roth* defendant contended that § 30 of the 1934 Act exempted it from liability. Section 30 provides that any person who transacts a business in securities outside of the United States is exempt from the Act. *See* note 4 *supra*. The *Roth* court rejected this argument on two grounds. First, and most important, the court concluded that since the insider profits were realized within the United States, the requirements of § 30 that the defendant's dealings be without the United States was not met. Second, despite the situs of the defendant's trading, there was no exemption since § 30(b) refers only to individuals who transact a business in securities as opposed to investing in securities. 405 F.2d at 422. The implied result from this narrow interpretation of § 30(b) is that the court viewed § 16(b) to have extraterritorial application except where expressly prohibited.

> used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities.[48]

Congress concluded that all insider abuse had a potentially detrimental impact on investor confidence and American interests.[49] Section 16 was thus enacted with a requirement of full disclosure by insiders of their transactions in the issuer's securities together with an enforcement provision of automatic forfeiture of any short swing profits.[50]

The rationale for the remedial provisions of § 16 indicates that to require disclosure by foreign insiders pursuant to § 16(a) without the concomitant forfeiture of insider profits is contrary to congressional intent. The imposition of liability for short swing profits only upon insiders who realize their profits within the United States would result in an inconsistent application of § 16(b), since the situs of insider trading has no basic relevance to the harm Congress recognized was caused by such trading.[51]

Congress delegated responsibility for dealing with the special problems that could arise regarding the extraterritorial application of the Act's provisions to the SEC. Fruition of this congressional policy is evidenced by the SEC's continual regulation of foreign securities since 1934, especially the exemption of only non-North American foreign issuers from the Act's registration requirements.[52] Indeed, the 1964 Amendment by Congress brought even more foreign issuers within the scope of the Act,[53] while explicitly granting the SEC au-

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[48] S. REP. No. 1455, 73d Cong., 2d Sess. 55 (1934).

[49] S. REP. No. 792, 73d Cong., 2d Sess. 6-9 (1934); H.R. REP. No. 1383, 73d Cong., 2d Sess. 13 (1934).

[50] *See* S. REP. No. 1455, 73d Cong., 2d Sess. 55-68 (1934); H.R. REP. No. 1383, 73d Cong., 2d Sess. 13 (1934). *See generally* Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 612 (1953). For some specific examples of the types of insider abuse that Congress was attempting to eliminate, *see* S. REP. No. 1455, 73d Cong., 2d Sess. 55-68 (1934); S. REP. No. 792, 73d Cong., 2d Sess. 9 (1934).

[51] *Cf.* Roth v. Fund of Funds, Ltd., 405 F.2d 421, 422 (2d Cir. 1968), *cert. denied*, 394 U.S. 975 (1969). *See* note 47 *supra*.

[52] The SEC exempts certain issuers from the registration requirements of the 1934 Act, but these exemptions do not apply to any North American issuers. Rule 12g3-2(d), 17 C.F.R. § 240.12g3-2(d) (1974). Since certain foreign issuers are not subject to these requirements neither are the insiders of these issuers subject to § 16. Rule 3a 12-3, 17 C.F.R. § 240.3a12-3 (1974).

[53] Section 12(g), 15 U.S.C. § 78*l*(g) (1970) was added and provided that all issuers who met certain conditions and engaged in interstate commerce or whose securities were traded in interstate commerce shall comply with the Securities Exchange Act of

thority to exempt from the strictures of § 16 those insiders whose compliance with this section would not be in the public interest.[54] Significantly, the SEC has never exempted North American issuers and their insiders from the operation of § 16.

Since Congress determined, in essence, that the transactions giving rise to insider profits have an adverse effect on American markets and investor confidence, the conduct creating such profits should provide the courts with a sufficient basis for asserting subject matter jurisdiction and imposing the § 16(b) penalty of forfeiture. For American investors to remain assured that the protections afforded by § 16 are viable, that section must be consistently applied to all insiders required to file disclosure statements with the SEC.[55] This application is not unduly harsh since all officers, directors, and 10% beneficial owners have notice of their possible § 16(b) liability through compliance with the disclosure requirements of § 16(a). These individuals, even if foreign, may derive substantial benefit from the listing and trading of issuers' securities within the United States. Their required compliance with the disclosure provisions of § 16(a) should subject them to the operation of § 16(b). Whether the transactions violating § 16(b) occur in New York or Canada, the harm to the interests Congress sought to protect are similar. Thus, had the court addressed the issue in *Wagman*, jurisdiction should have been asserted over the Canadian transactions that created the short swing profits for the Canadian defendants.[56] The intent of Congress was that federal courts should have subject matter jurisdiction over § 16(b) actions regardless of the location of the transactions giving rise to the insider profits.

1934's reporting requirements and shall register with the SEC.

[54] Section 12(g)(3), 15 U.S.C. § 78*l*(g)(3) (1970). The SEC was specifically authorized to exempt the officers, directors and 10% beneficial owners who would have otherwise had to comply with § 16 of the Act pursuant to the 1964 Amendment. *See* note 53 *supra*. This exemption is authorized by § 12(h), 15 U.S.C. § 78*l*(h) (1970).

The Senate Committee on the 1964 Amendment noted the SEC's policy of exempting foreign issuers other than North American and Canadian issuers and gave tacit approval to that policy. S. REP. No. 379, 88th Cong., 1st Sess. 29 (1964). *See* H.R. REP. No. 1418, 88th Cong., 2d Sess. 11 (1964).

[55] To the extent the 1934 Act places a hardship on issuers, and therefore issuers' insiders, the SEC has the power to make certain necessary exemptions it determines to be in the public interest. *See* notes 52-54 and accompanying text *supra*.

[56] The court in *Wagman* did not reach the issue of subject matter jurisdiction since it determined that it did not have personal jurisdiction over any of the defendants. 380 F. Supp. at 502.

Personal Jurisdiction

Concluding, however, that the federal courts have subject matter jurisdiction over all § 16(b) violations is not tantamount to stating that all § 16(b) violators can be forced to disgorge their insider profits. Courts must have personal jurisdiction over the defendants in order to render judgment.[57] In this regard, § 27 of the 1934 Act[58] reflects a congressional intent to have personal jurisdiction asserted to the broadest extent possible in order to bring offenders within the courts' power.[59] The only limits on this power are the traditional "minimum contacts" necessary to satisfy the requirements of due process.[60]

Section 27 provides that service of process is proper in any district in which the defendant either conducts business or may be found.[61]

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[57] Hanson v. Denckla, 357 U.S. 235 (1958); International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See* 1 J. MOORE, FEDERAL PRACTICE ¶ 0.60[10] (2d ed. 1974); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 65 (2d ed. 1970).

[58] Section 27, 15 U.S.C. § 78aa (1970) reads in pertinent part:

> Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulation thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

The first sentence and the first portion of the second deal with venue. Only the last portion of the second deals expressly with service of process. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972).

[59] Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339-40 (2d Cir. 1972). The *Wagman* defendants argued that congressional intent in 1934 could not have included express extraterritorial service of process over foreign defendants. "It was not until *McGee v. International Life Ins. Co.*, 355 U.S. 220, decided in *1957*, that non-consensual *in personam* jurisdiction based on extraterritorial service was accepted in the Federal Courts." Defendant's Reply Brief to Brief for SEC as Amicus Curiae at 8 (emphasis in original). However, this overlooks the continual congressional scrutiny and approval of the securities laws since 1934; especially the tacit approval of the SEC's handling of securities regulation. *See* notes 48-54 and accompanying text *supra*.

[60] The Supreme Court defined the boundaries of due process in the exercise of personal jurisdiction in Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); and International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See also* O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d 1064 (9th Cir. 1974), *noted in* 8 VAND. J. TRANSNAT'L L. 249 (1974).

[61] *See* note 58 *supra*. However, the defendants in *Wagman* argued that proper extraterritorial service of process was contingent upon satisfaction of one of the four venue requirements. Brief for Defendant at 19-23. The *Leasco* court rejected these contentions however, and held that those venue provisions do not affect or apply to

In a federal securities action personal service on a defendant in the United States eliminates the need for minimum contacts with the forum.[62] Consequently, if a corporate insider realizes short swing profits from transactions on the New York Stock Exchange and is served with process while in New York, the district court for southern New York will have personal jurisdiction over the defendant even if he is an alien.[63] Further, a New York district court would have personal jurisdiction over a Canadian defendant served with process in Michigan even if the unlawful profits were realized from transactions in Canada.[64] However, when a foreign defendant reaps insider profits from transactions in Canada and also is served with process in Canada, as in *Wagman*, due process limitations may intervene.

Due process requires that a defendant have certain minimum contacts within the territory of the forum "[s]uch that the maintenance of the suit does not offend 'traditional notions of fair play and sub-

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the assertion of personal jurisdiction. Thus, the only limit on extraterritorial service process was due process. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972).

Note that Rule 4(i) of Federal Rules of Civil Procedure for the United States District Courts authorizes service on a party not within a state where service is to be made outside of the United States if federal law (§ 27 of the Act) so provides.

[62] Mariash v. Morrill, 496 F.2d 1138, 1142-43 (2d Cir. 1974). The court in this case stated that in a federal question jurisdiction action a federal court has personal jurisdiction over a defendant found anywhere in the United States. The court added that only when the defendant is outside the United States would the question of a forum's power to assert control over that defendant arise. *Id.*

However, in Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191 (E.D. Pa. 1974), the court took a more restricted view on whether it had personal jurisdiction over defendants served with process within the United States but outside of its forum in a § 10(b) action. The court developed a balancing test for determining whether it should assert personal jurisdiction over defendants outside of its forum but within the United States. It stated that the due process standard of fundamental fairness must be met where a defendant is beyond the forum. *Id.* at 203.

[63] SEC v. Gulf Intercontinental Fin. Corp., 223 F. Supp. 987, 995 (S.D. Fla. 1963). *See* Roth v. Fund of Funds, Ltd., 405 F.2d 421 (2d Cir. 1968), *cert. denied*, 394 U.S. 975 (1969).

[64] *See* note 62 *supra*. However, the venue provisions of § 27 should not be overlooked. Venue is proper only where the act or transaction occurred, or in the district where the defendant resides, is an inhabitant or transacts business. *See* note 58 *supra*. Therefore, it appears that the venue requirements of the 1934 Act are more stringent than the requirements for personal jurisdiction. These venue requirements, nevertheless, do not apply to aliens. 28 U.S.C. § 1391(d) (1970) states that: "[a]n alien may be sued in any district." The Supreme Court has taken the view that this section removes the application of all federal venue statutes in suits against aliens. Brunette Machine Works, Ltd. v. Kockum Indus. Inc., 406 U.S. 706, 714 (1972). Thus, in § 16(b) actions against foreign defendants venue is proper in any district court.

stantial justice.' "[65] Since effective service of process cannot be made without it,[66] a minimum contact is a necessary prerequisite to the maintenance of an extraterritorial action when the defendants are outside of the United States. However, the contact need not consist of an act consummated within the United States. When an extraterritorial act has significant consequences within the United States, a court may assert jurisdiction over the individual who was responsible for the act and its consequential domestic effects.[67]

Due process problems are rare in extraterritorial § 10(b) actions, however, due to the nature of the particular statutory provisions.[68] Section 10(b) requires that both domestic conduct and foreseeable harm be shown before imposing § 10(b) liability.[69] These elements normally fulfill the due process requirements for personal jurisdiction. Nevertheless, Judge Friendly, in *Leasco*, stated that regardless of the subject matter jurisdictional requirements of § 10(b), the extraterritorial conduct of a defendant must, at the minimum, meet the tests enunciated in § 18 of the *Restatement of Foreign Relations Law* before an assertion of personal jurisdiction over a defendant is proper.[70] This section requires that the domestic effects of a defendant's conduct occur "as a direct and foreseeable result of the conduct outside the territory."[71] Thus, the foreseeability necessary to support a finding of § 10(b) fraud may not be sufficient to subject a defendant to a personal judgment when the defendant's conduct is almost solely extraterritorial. Judge Friendly asserted that "[t]he person sought to be charged must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him."[72]

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[65] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[66] Hanson v. Denckla, 357 U.S. 235, 251 (1958).

[67] Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340-41 (2d Cir. 1972). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 27, 35, 36, 37, 47, 49, 50 (1971). *See* note 38 *supra*.

[68] *See, e.g.*, Travis v. Anthes Imperial Ltd., 473 F.2d 515, 529 (8th Cir. 1973); Note, *United States Taxation and Regulation of Offshore Mutual Funds*, 83 HARV. L. REV. 404, 429 n.7 (1969). However, courts have begun to recognize that in § 10(b) actions, certain defendants may be immune from liability because their contact with the United States is too minimal to meet the due process requirements necessary for personal jurisdiction. *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339-44 (2d Cir. 1972).

[69] *See* text accompanying notes 11-12 *supra*.

[70] 468 F.2d at 1341. *See* note 68 *supra*.

[71] 468 F.2d at 1341, *citing* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(b) (1965). See note 38 *supra*.

[72] 468 F.2d at 1341 (footnote omitted); in *Leasco* the court dismissed one of the

The *Leasco* decision provided the essential basis for the *Wagman* court's holding that personal jurisdiction could not properly be asserted over the defendants. The latter court reasoned that since § 16(b) liability is automatic regardless of any foreseeability of harm, the defendants could not be subjected to the jurisdiction of the forum.[73] Even in *Schoenbaum*, the *Wagman* court noted, there was substantial evidence that the defendants' extraterritorial acts had a detrimental effect on American investors.[74] The *Wagman* court bolstered its conclusion with the assertion that § 16(b)'s rationale was "that it is unfair for some to profit in ways that others cannot, rather than that such speculation will adversely affect the price to the detriment of the 'outside' shareholders."[75] Emphasizing that some commentators regard insider trading as having a minimal effect on stock prices, the court implied that insider trading on foreign exchanges has no detrimental effect on American markets or investors. Further, the court noted that no other country has a rule similar to § 16(b), that Canada expressly rejected such a rule, and that the efficacy and propriety of § 16(b) has created widespread debate in the United States.[76] These arguments constituted the basis for the court's determination that an assertion of personal jurisdiction over the defendants "would 'offend traditional notions of justice and fair play.' "[77]

While the *Wagman* court's rationale is persuasive, it is not necessarily correct. The absence in § 16(b) actions of the § 10(b) requirements for imposing liability does not conclusively determine that § 16(b) should not be applied outside of the United States. The court's conclusion that insider trading in Canada has an insignificant impact in the United States was in contrast to the congressional determination that, in essence, such trading does have an adverse effect on American interests.[78] Traditionally, courts have not substituted their

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defendants in the § 10(b) action for lack of personal jurisdiction. That foreign defendant had prepared false financial reports in England concerning a foreign corporation. The defendant's only contact with the plaintiff was at a luncheon in England where the defendant met with the plaintiff's accountant. *Id.* at 1341-42. Since the defendant could not have foreseen United States investors relying on his reports any more than other investors, the degree of foreseeability was not sufficient "[t]o constitute a basis of personal jurisdiction consonant with due process." *Id.* at 1342.

[73] 380 F. Supp. at 501-02.

[74] However, as the *Wagman* court noted, Judge Lumbard, in *Schoembaum*, never discussed the question of personal jurisdiction since it was not an issue.

[75] 380 F. Supp. at 501.

[76] *Id.*

[77] 380 F. Supp. at 502, *quoting* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[78] *See* text accompanying notes 48-56 *supra*. *See* Western Auto Supply Co. v.

own conclusions for those prescribed by Congress.[79] Certainly, as the *Wagman* court noted, part of the rationale behind § 16b is the unfairness in allowing insiders to profit from the use of inside information. However, enactment of the section was also designed to restore the previously shaken confidence of American investors through the imposition of an automatic forfeiture penalty of profits realized from insider trading.[80] By preventing short swing profit taking, Congress intended both to reduce the evils of market manipulation and to prevent insider disregard of trust relationships, thereby increasing investor confidence.[81] Thus, the situs of such trading does not appear relevant to the harm Congress sought to remedy.[82]

Nevertheless, a presumption of harm from the realization of extraterritorial short swing profits is insufficient in itself to fulfill the due process requisites necessary for an assertion of personal jurisdiction over a § 16(b) violator residing outside of the United States. As the *Leasco* court stated, foreseeability of domestic harm is a due process requirement for an assertion of personal jurisdiction.[83] Since § 16(b) liability is not dependent upon a finding of foreseeability, the *Wagman* court concluded that it could not bring the defendants into its forum.[84] However, this conclusion overlooks the fact that the foreseeability requirements may be fulfilled through the operation of § 16(a) in conjunction with § 16(b). Pursuant to § 16(a) the *Wagman* defendants filed reports with the SEC which indicated their realization of short swing profits.[85] A reasonable inference may be drawn from the filing of the disclosure statements that not only did the corporate officers understand the penalty of forfeiture, but that they were also aware that Congress implemented § 16(b) to counter the presumed adverse domestic effects of insider trading. While the filing of disclosure statements alone does not constitute a domestic act sufficient to support personal jurisdiction,[86] the defendants' aware-

Gamble-Skogmo, Inc., 348 F.2d 736, 743 (8th Cir. 1965), *cert. denied*, 382 U.S. 987 (1966).

[79] *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[80] *See* S. REP. No. 1455, 73d Cong., 2d Sess. 55-68, 81 (1934); H.R. REP. No. 1383, 73d Cong., 2d Sess. 2-6, 13-14 (1934).

[81] *See* note 79 *supra*.

[82] *See* Roth v. Fund of Funds, Ltd., 405 F.2d 421 (2d Cir. 1968), *cert. denied*, 394 U.S. 975 (1969); Western Auto Supply Co. v. Gamble-Skogmo, Inc., 348 F.2d 736, 743 (8th Cir. 1965), *cert. denied*, 382 U.S. 987 (1966).

[83] 468 F.2d at 1341.

[84] 380 F. Supp. at 500-02.

[85] *Id.* at 499.

[86] The *Wagman* defendants argued that a corporation is not subject to process in New York merely by having its shares listed on an exchange and having a transfer

ness of both the automatic penalty and the congressional presumption that insider trading is detrimental to American interests should constitute a basis sufficient to support an assertion of personal jurisdiction consonant with due process.[87]

Similarly, the *Wagman* court's reliance upon Canada's rejection of a rule comparable to § 16(b) to conclude that it would be unfair to force a Canadian defendant into an American forum[88] apparently ignores several countervailing considerations. The implication of the opinion is that unless a foreign country has a rule imposing liability similar to our own laws the due process requisites for an assertion of personal jurisdiction over an alien, in that foreign country, cannot be satisfied.[89] If this were true, assertion of personal jurisdiction over many defendants successfully prosecuted in previous extraterritorial § 10(b) actions would have been improper. Indeed, in *Travis* the court expressly rejected the contention that § 10(b) liability could not be imposed since Canada did not have a similar rule covering the defendants' Canadian conduct.[90] The *Wagman* court apparently viewed § 16(b) as an undesirable and unfair provision in the Securities Exchange Act, as indicated by the court's statement that § 16(b) has caused widespread debate within the United States. However, such debate would scarcely justify judicial emasculation of the statute.

Further, and more importantly, the *Wagman* court failed to give adequate consideration to the fact that § 16(b) does not operate

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agent in the district. Brief for Defendant at 30, *citing* Gilson v. Pittsburgh Forgings Co., 284 F. Supp. 569 (S.D.N.Y. 1968). Thus, by analogy, the mere reporting of insider profits to the SEC by the defendants did not constitute sufficient activity within the United States to enable the court to assert personal jurisdiction over the defendants. Brief for Defendant at 30. The defendants further emphasized that the filing of equity changes with the SEC is independent from the transactions actually giving rise to the insider profits. Brief for Defendant at 30.

[87] It need not be proven that a defendant had actual knowledge of the domestic effects of his extraterritorial acts in order to fulfill the due process requisites for an assertion of personal jurisdiction. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972). Further, one should not lose sight of the principal function of service of process, to give notice and opportunity to be heard. *Id.* at 1340.

[88] 380 F. Supp. at 501-02.

[89] To some extent "fairness to the foreign defendant" implies a consideration of the degree to which foreign courts will recognize the judgments of American courts. For discussion of enforcement problems in foreign countries from judgments rendered in securities cases *see* Note, *Offshore Mutual Funds: Possible Solutions to a Regulatory Dilemma*, 3 LAW & POLICY IN INT'L BUS. 157, 170 (1971); Comment, *An Interest Analysis Approach to Extraterritorial Application of Rule 10b-5*, 52 TEX. L. REV. 983, 997-1002 (1974); Note, 6 VAND. J. TRANSNAT'L LAW. 687, 692-93 (1973).

[90] 473 F.2d at 527-28. The court, however, considered this fairness argument in its discussion of subject matter jurisdiction.

against aliens who have no interest or contact with the United States. The *Wagman* defendants were officers of a corporation which had voluntarily subjected itself to the laws of the United States, and these defendants also had complied with the disclosure provisions of § 16(a). To the extent that their relationship with the corporation was regulated, the *Wagman* defendants could be presumed to have implicitly subjected themselves to American service of process.[91] Nevertheless, even if the court did not desire to hold that it automatically had personal jurisdiction over an alien insider, it should have recognized that one of the primary purposes of the 1934 Act was to ensure the sanctity of the fiduciary relationship between the insiders and minority shareholders of a corporation.[92] As officers of a corporation registered with the SEC and listed on a national exchange, the *Wagman* defendants, to a certain extent, gained the benefit and protection of American laws.[93] Certainly, Dome would not have continued trading its shares in American markets if it did not regard such trading as beneficial.[94] Thus, the arguments set forth by the *Wagman* court concerning the inherent unfairness in subjecting the defendants to the jurisdiction of an American forum appear to be less than convincing.

Conclusion

If other courts adopt the *Wagman* rationale, many foreign insiders will be immune from § 16(b) liability despite their compliance with § 16(a). Whether the *Wagman* decision will "create a new haven for

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[91] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 39 (1971) states in part:

> A state has power to exercise judicial jurisdiction over an individual . . . in other situations where the individual has such a relationship to the state that it is reasonable for the state to exercise such jurisdiction.

[92] *See* notes 48-56 and accompanying text *supra*.

[93] It may be fairly argued that as Dome benefitted from its registration on an American exchange the opportunities for the realization of insider profits increased.

[94] However, the *Wagman* defendants countered that to hold them subject to the court's jurisdiction would be tantamount to holding that a corporate officer is present wherever the corporation is present. Brief for Defendant at 31, *citing* Beckman v. Ernst, [1964-1966 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,462 (S.D.N.Y. 1964). On the other hand, since § 16(b) liability is automatic and the *Wagman* defendants admitted reaping insider profits it would seem that aside from personal liabilities, they would suffer no actual hardship from the court's assertion of jurisdiction over them. There was no need for the defendants to enter a personal appearance. The only issues were jurisdictional in nature. In addition, even if there were hardships, the defendants could request the transfer of the action to a more convenient district court pursuant to 28 U.S.C. § 1404(a) (1970).

faithless fiduciaries"[95] and lead to "flagrant manipulations and fiduciary abuse of trust by corporate insiders,"[96] as the plaintiff in *Wagman* asserted, is still open to question. At the minimum, the congressional intent to eliminate profit taking from short swing transactions will be thwarted to some extent, and this might result in an erosion of investor confidence in those corporations with foreign insiders. On the other hand, if alien insiders are held liable for insider profits, foreign incentive to trade and list securities in the United States may lessen. For this reason it may be better for Congress to reconsider the desirability of applying § 16(b) and other security provisions to foreigners. However, this is a legislative consideration and thus is not appropriate for judicial evaluation.

Since § 16(b) is a remedial statute it should be broadly interpreted to carry out legislative intent.[97] An extraterritorial application of § 16(b) is consistent with congressional policy and probably is necessary to maintain investor confidence. The realization of insider profits from transactions outside of the United States does not lessen the adverse effects of such trading upon American markets. Therefore, it would seem that United States courts should assert subject matter jurisdiction over all actions involving a violation of § 16(b), regardless of the situs of the insider trading. Whether the defendants will be subject to the personal jurisdiction of the courts is less clear, as the *Wagman* opinion indicates.[98] However, American courts should be able to assert personal jurisdiction even over § 16(b) violators outside of the United States. Since all insiders must disclose their short swing profits to the SEC pursuant to § 16(a), all insiders are on notice that such profits are realized in violation of § 16(b). This foreseeability, coupled with the harmful effect on American interests as determined by Congress, should be sufficient to satisfy the due process requirements necessary for an assertion of personal jurisdiction.

CLIFFORD LOGAN WALTERS, III

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[95] Brief for Plaintiff at 12.

[96] *Id.* at 4.

[97] *See, e.g.*, Western Auto Supply Co. v. Gamble-Skogmo, Inc., 348 F.2d 736, 743 (8th Cir. 1965), *cert. denied*, 382 U.S. 987 (1966); Booth v. Varian Associates, 334 F.2d 1, 4 (1st Cir. 1964), *cert. denied*, 379 U.S. 961 (1965); Volk v. Zlotoff, 285 F. Supp. 650, 655 (S.D.N.Y. 1968); Blau v. Oppenheim, 250 F. Supp. 881, 884 (S.D.N.Y. 1966).

[98] 380 F. Supp. at 501.