Washington and Lee Law Review

Volume 28 | Issue 2 Article 10

Fall 9-1-1971

Implied Civil Remedy For Violation Of Section 16(A) Of The Securities Exchange Act Of 1934

STATUTORY COMMENTS

IMPLIED CIVIL REMEDY FOR VIOLATION OF SECTION 16(a) OF THE SECURITIES EXCHANGE ACT OF 1934.

In 1934 Congress enacted the Securities Exchange Act[1] for the avowed purpose of preventing inequitable and unfair practices in the security markets.[2] Designed for the protection of innocent purchasers, it prescribes full and fair disclosure[3] enabling the operation of a free and open market reflecting true evaluations.[4] Section 16 of the Securities Exchange Act[5] is devised to further this basic purpose. Subsection (a)[6] requires disclosure of their holdings in the issuer[7] by officers, directors, and beneficial owners of more than ten percent of any equity security, exposing "insider trading to 'the white glare of publicity.'"[8] This is accomplished by requiring an insider[9] to file a statement of ownership with the Securities and Exchange Commission and to file a change of ownership statement within ten days after the close of any calendar month in which a change has occurred.[10] A problem upon which few courts have passed is whether a civil remedy should be available to one injured by a violation of the section 16(a) filing requirements.

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[1]Securities Exchange Act of 1934, 15 U.S.C. § 78 (1964).

[2]Securities Exchange Act of 1934, preamble, 48 Stat. 881 (1934).

[3]*See* Fuller v. Dilbert, 244 F. Supp. 196, 213 (S.D.N.Y. 1965), *aff'd per curiam sub nom.* Righter v. Dilbert, 358 F.2d 305 (2d Cir. 1966); Texas Continental Life Ins. Co. v. Bankers Bond Co., 187 F. Supp. 14, 22 (W.D. Ky. 1960), *rev'd on other grounds sub nom.* Texas Continental Life Ins. Co. v. Dunn, 307 F.2d 242 (6th Cir. 1962).

[4]Securities Exchange Act of 1934, § 2, 15 U.S.C. § 78b (1964).

[5]Securities Exchange Act of 1934, § 16, 15 U.S.C. § 78p (1964).

[6]Securities Exchange Act of 1934 § 16(a), 15 U.S.C. § 78p(a) (1964) provides:

> Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security . . . which is registered . . . or who is a director or an officer of the issuer of such security, shall file, at the time of registration . . . or within ten days after he becomes such beneficial owner, director, or officer, a statement with the Exchange [and the Commission] . . . of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been any change in such ownership during such month . . . .

[7]"Issuer" is used herein to mean the corporation in which a person is an "insider."

[8]Meeker & Cooney, *The Problem of Definition In Determining Insider Liabilities Under Section 16(b)*, 45 U. VA. L. REV. 949 (1959).

[9]"Insider" is used herein to mean an officer, director, or beneficial owner of more than ten percent of any equity security, of a corporation.

[10]Securities Exchange Act § 16(a).

The case of *Grow Chemical Corp. v. Uran*[11] exemplifies the type of situation in which the question of civil liability arises. There the plaintiff, Grow Chemical Corporation, desired to obtain a controlling interest in Guardsman Chemical Coatings, Inc. After checking with the Securities and Exchange Commission to determine if there were any other ten percent shareholders who had filed as required by section 16(a), Grow Chemical purchased a thirteen percent interest in Guardsman, paying a premium for control. Defendant, Uran, owned more than ten percent of the outstanding shares but had not filed a section 16(a) statement of ownership. Plaintiff alleged that as a result of this violation it had been injured, and claimed damages equal to the premium it had paid for control. In denying defendant's motion to dismiss for failure to state a claim, the federal district court sustained the availability of a private action for violation of section 16(a).[12]

Unless an injured plaintiff in this type of situation were permitted a civil action under section 16(a), he might have no other federal remedy. However, a leading authority in the field of securities regulation has stated: "The only sanctions for enforcing compliance with § 16(a)—unless the person required to file happens to be an exchange member or a registered broker-dealer, against whom the commission might take disciplinary action administratively—are criminal prosecution and mandatory injunction."[13] In addition to these two sanctions, some courts have held that failure to file under section 16(a) tolls the short, two-year statute of limitations applicable to actions brought under section 16(b).[14] The only other section of the Securities Exchange Act which would possibly be helpful to the injured plaintiff is section 10(b).[15] Under section 10(b) there need be no privity between the

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[11]316 F. Supp. 891 (S.D.N.Y. 1970).

[12]The opinion of the court was merely upon the motion to dismiss and did not reach the question of liability itself.

[13]2 L. LOSS, SECURITIES REGULATION 1039-40 (2d ed. 1961); *see* Securities Exchange Act § 32.

[14]Carr-Consolidated Biscuit Co. v. Moore, 125 F. Supp. 423 (M.D. Pa. 1954); Grossman v. Young, 72 F. Supp. 375 (S.D.N.Y. 1947). Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78 p(b) (1964) provides:

> 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 . . . but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover . . . transactions which the Commission . . . may exempt . . . .

[15]Securities Exchange Act of 1934 § 10, 15 U.S.C. § 78j (1964) provides in part:

> It shall be unlawful for any person, directly or indirectly, by the use of

plaintiff and the defendant.[16] Nonetheless, there must have been a deceptive device or fraud employed in connection with the purchase or sale of a registered security.[17] Though the requirement is minimal,[18] it would evidently preclude recovery by an injured party in the position of Grow Chemical Corporation.[19] Therefore if an innocent purchaser is to recover in a similar situation, it must be in an action under section 16(a).

Since section 16(a) has no express provision for a civil remedy,[20] any private right of action thereunder would have to be implied. The lower federal courts have developed means for private enforcement of the Securities Exchange Act[21] to supplement its express provisions for civil

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any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate

. . . .

17 C.F.R. § 240.10b-5 (1970), promulgated thereunder, provides in relevant part:

It shall be unlawful for any person . . .

(c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[16]In an action under section 10(b), a defrauded seller or purchaser is not limited to an action against the other party to the transaction. Miller v. Bargain City U.S.A., Inc., 229 F. Supp. 33, 38 (E.D. Pa. 1964); New Park Mining Co. v. Cramer, 225 F. Supp. 261, 266 (S.D.N.Y. 1963). Privity between plaintiff and defendant is not a condition precedent to liability, but an evidentiary fact to be considered in determining whether the relationship is one involving the duty created by statute. Cochran v. Channing Corp., 211 F. Supp. 239 (S.D.N.Y. 1962).

[17]Securities Exchange Act § 10(b).

[18]*See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968); Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1962).

[19]Apparently there was no sale or purchase within the meaning of section 10(b) in the *Grow Chemical* case. *See* SEC v. Great Am. Indus., 407 F.2d 453 (2d Cir. 1968); Greenstein v. Paul, 400 F.2d 580 (2d Cir. 1968); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952); *cf.* R. JENNINGS & H. MARSH, SECURITIES REGULATION, CASES AND MATERIALS 866-67 (2d ed. 1968) [hereinafter cited as JENNINGS & MARSH].

[20]*See* Securities Exchange Act § 16(a); 2 L. LOSS, SECURITIES REGULATION 1039-40 (2d ed. 1961); Poole, *Corporate Insiders Face More Regulation*, 48 MICH. ST. B.J., Oct., 1969, at 28, 31.

[21]Private rights have been found to exist in: *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944) (for Securities Exchange Act § 6(b)); *Osborne v. Mallory*, 86 F. Supp. 869 (S.D.N.Y. 1949) (for Securities Exchange Act § 15); *Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane*, 85 F. Supp. 104 (W.D. Ark. 1949) (for Securities Exchange Act §§ 11, 17); *Remar v. Clayton Securities Corp.*, 81 F. Supp. 1014 (D. Mass. 1949) (for Securities Exchange Act § 7(c)).

liability.[22] These remedies were based on the general principle of tort law that the "disregard of the command of a statute is a wrongful act and a tort."[23] Under this view, the basic requirements for recovery are that the plaintiff has not conducted himself so as to preclude his recovery;[24] that a causal connection exists between the violation and the plaintiff's injury;[25] and that the purpose of the legislation, at least in part, is to protect a plaintiff as an individual and the particular interest that has been invaded.[26]

The United States Supreme Court, in *J.I. Case Co. v. Borak*,[27] has also determined that a private action would lie for violation of a section of the Securities Exchange Act of 1934.[28] However, the Court did not rely upon general tort theory, but based its decision upon section 27 of the Act[29] and general policy considerations. Section 27 grants the district courts of the United States jurisdiction "of suits in equity and actions at law brought to enforce any liability or duty created . . . ."[30] The power to enforce implies the power to afford an effective remedy and provide a

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[22]*E.g.*, Securities Exchange Act of 1934, § 9, 15 U.S.C. § 78i (1964); Securities Exchange Act of 1934, § 18, 15 U.S.C. § 78r (1964). Since some sections of the Act expressly provided for civil actons a problem arose because of the statutory construction rule of *expressio unus est exclusio alterius*. However this has been dealt with "by pointing out that the sections which contain specific rights of action are '. . . sections [which] deal with special matters only indirectly germane to the regulation of securities exchanges; they provide for more unrestricted recovery than would be possible at common law; and they prescribe narrow statutes of limitations.'" Fratt v. Robinson, 203 F.2d 627, 632 (9th Cir. 1953), *quoting* Baird v. Franklin, 141 F.2d 238, 245 (2d Cir. 1944).

[23]Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946).

[24]For a plaintiff in the situation of Grow Chemical Corp. to recover, he would have to satisfy the requirements of the Williams Bill. Note 62 and accompanying text *infra*.

[25]*See* Robinson v. Cupples Container Co., 316 F. Supp. 1362 (N.D. Cal. 1970); Bound Brook Water Co. v. Jaffe, 284 F. Supp. 702 (D.N.J. 1968).

[26]RESTATEMENT OF TORTS § 286 (1934), as relied on in granting a private right of action under Securities Exchange Act § 10(b) in *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). *See also* Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), *aff'd* 343 F.2d 902 (10th Cir. 1965); Miller v. Bargain City U.S.A., Inc., 229 F. Supp. 33 (E.D. Pa. 1964); Trussell v. United Underwriters, Ltd., 228 F. Supp. 757 (D. Colo. 1964); RESTATEMENT OF TORTS (Second) §§ 281, 285, 286 (1968); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 329-33 (1914).

[27]377 U.S. 426 (1964).

[28]The action involved a violation of section 14(a) of the Securities Exchange Act. *See* Comment, *Buttrey v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.: Implied Civil Liability For Violation of Stock Exchange Rules*, 3 IND. LEGAL F. 555 (1970).

[29]Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1964) provides as follows:

> The district courts of the United States . . . shall have exclusive jurisdiction of violations of this charter 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. (emphasis added)

[30]15 U.S.C. § 78aa (1964).

right of recovery.[31] Furthermore it was stated that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[32]

By allowing civil actions and molding remedies to maximize the rights created under the Securities Exchange Act, the federal courts have poured content and substance into otherwise skeletal prohibitions.[33] Yet it remains uncertain whether or not a civil action will be allowed for violation of section 16(a).[34] Under either the tort theory[35] or the theory used in *J.I. Case Co. v. Borak*,[36] the question of an implied civil action under section 16(a) will be determined by the courts' view of the purpose of that section. It would seem that section 16(a) can properly be viewed either as part of a comprehensive section to preclude misuse of information by insiders or as an independent filing provision with its own distinct purpose.[37]

If all of section 16 is to be read together, it would be "[f]or the purpose of preventing the unfair use of information which may have been obtained by [an insider] by reason of his relationship to the issuer."[38] Section 16(a) furthers this purpose because "the most potent weapon against the abuse of inside information is full and prompt disclosure."[39] However, Congress was not content with disclosure alone[40] and enacted section 16(b) which provides for recovery for the issuer of any profit realized by an insider on a

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[31]J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *See also* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940).

[32]377 U.S. at 433. *See also* Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 213 (1944); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942); Deitrick v. Greaney, 309 U.S. 190, 201 (1940). The Securities Exchange Act being broadly remedial, *Smolowe v. Delendo Corp.*, 136 F.2d 231 (2d Cir. 1943), and for the protection of investors, *Stevens v. Abbott, Proctor & Paine*, 288 F. Supp. 836 (E.D. Va. 1968), implies the availability of judicial relief. W. CARY, CASES AND MATERIALS ON CORPORATIONS 721 (4th ed. 1969) [hereinafter cited as CARY].

[33]*See generally* Comment, *Private Rights and Federal Remedies: Herein of J. I. Case v. Borak*, 12 U.C.L.A. L. REV. 1150 (1965).

[34]*Compare* Smith v. Murchison, 310 F. Supp. 1079 (S.D.N.Y. 1970); General Time Corp. v. American Investors Funds, Inc., 283 F. Supp. 400 (S.D.N.Y. 1968), *aff'd sub nom.* General Time Corp. v. Talley Indus., 403 F.2d 159 (2d Cir.), *cert. denied*, 393 U.S. 1026 (1969); Robbins v. Banner Indus., 285 F. Supp. 758 (S.D.N.Y. 1966), *with* Grow Chemical Corp. v. Uran, 316 F. Supp. 891 (S.D.N.Y. 1970); Kroese v. Crawford, C.C.H. FED. SEC. L. REP. ¶ 91,262 (S.D.N.Y. 1963).

[35]Notes 23-26 and accompanying text *supra*.

[36]Notes 27-32 and accompanying text *supra*.

[37]*See* S.E.C., REPORT ON THE SPECIAL STUDY OF SECURITIES MARKETS pt. III, at 4 (1963); H.R. REP. NO. 1333, 73d Cong., 2d Sess. 7705 (1934); SEA Release No. 4801, 18 Fed. Reg. 1131 (1953); SEA Release No. 8202, 32 Fed. Reg. 18063 (1967).

[38]Securities Exchange Act § 16(b).

[39]H.R. REP. NO. 1333, 73d Cong., 2d Sess., 78 CONG. REC. 7705 (1934).

[40]*See* 2 L. LOSS, SECURITIES REGULATION 1040 (2d ed. 1961).

purchase and sale, or sale and purchase, within six months.[41] Section 16(a) aids in the recovery of these insider short-swing profits by providing for disclosure of insider transactions in shares.[42] Also subsection (b) must be read together with subsection (a) for definitional clarity.[43] Under this view, a violation of section 16(a), though not extending the scope of section 16(b),[44] would extend its statute of limitations.[45]

Even considering section 16(a) as part of an integrated statute designed to curb misuse of inside information, a civil remedy for its violation may be desirable. By allowing recovery to go to the plaintiff rather than the issuer, it would avoid the vice of champerty.[46] In addition, an action under section 16(a) would circumvent the strict limitations contained in 16(b), namely that the security involved be a registered equity security, that recovery go to the issuer, the six months trading requirement, the short statute of limitations, and the specific grant of exemptive power to the Securities and Exchange Commission.[47] Furthermore, the scope of transactions covered by section 16(b) has been limited. Originally the courts applied an objective test to determine if section 16(b) applied.[48] Under this test every profit-making transaction in

[41]See language of Securities Exchange Act § 16(b), *supra* note 14.

[42]*See* Poole, *supra* note 20, at 31.

[43]Pappas v. Moss, 257 F. Supp. 345 (D.N.J. 1966); Heli-Coil Corp. v. Webster, 222 F. Supp. 831 (D.N.J. 1963), *aff'd*, 352 F.2d 156 (3d Cir. 1965). The use of "such beneficial owner" in section 16(b) clearly refers to "[e]very person who is . . . beneficial owner . . ." in section 16(a).

[44]It has been held that a failure to file under section 16(a) will not bring within section 16(b) a purchase and sale transaction occurring over a period greater than six months. *See* Rogers v. Valentine, 37 F.R.D. 231 (S.D.N.Y. 1964).

[45]The short two-year statute of limitations in section 16(b) has been held to be intelligible only in light of the absolute duty to make reports under section 16(a). Thus a failure to file under section 16(a) tolls the statute of limitation until section 16(a) reports are filed. A contrary holding would frustrate the will of Congress and non-performance of both subdivisions of section 16 would be less hazardous than the non-performance of section 16(b) alone. *See* Carr-Consolidated Biscuit Co. v. Moore, 125 F. Supp. 423 (M.D. Pa. 1954); Grossman v. Young, 72 F. Supp. 375 (S.D.N.Y. 1947).

[46]Recovery under section 16(b) goes to the issuer except for allowances of attorney's fees. *See* Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943). In many instances this is the sole stimulus for enforcement of section 16(b), and therefore encourages champerty. *See* CARY, 812. Achievement of a statutory purpose, only by allowing violation of generally accepted ethics by attorneys certainly appears undesirable. *See* 2 L. LOSS, SECURITIES REGULATION 1053-54 (2d ed. 1961). On the other hand, it does perform a valid function and it is doubtful whether the SEC could properly supervise and investigate this area. Cary, Book Review, 75 HARV. L. REV. 857, 860-61 (1962).

[47]Note 6 *supra*; CARY 826.

[48]*See, e.g.*, Blau v. Mission Corp., 212 F.2d 77 (2d Cir.), *cert. denied*, 347 U.S. 1016 (1954); Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir.), *cert. denied*, 332 U.S. 761 (1947); Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943); Marquette Cement Mfg. Co. v. Andreas, 239 F. Supp. 962 (S.D.N.Y. 1965).

securities which could fit within the terms of the statute was subject to section 16(b).[49] This was done because "the statute was intended to be thoroughgoing, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary . . . and the faithful performance of his duty."[50] However, the recent judicial tendency has been to use a subjective or pragmatic approach, interpreting section 16(b) in ways most consistent with the legislative purpose resulting in the narrowing of its scope.[51] This view has some support from the legislative history of section 16(b).[52] In light of these limitations on section 16(b), perhaps a civil remedy needs to be implied for violation of section 16(a).

However, the majority of courts which have passed upon the question have held that no civil action arises for violation of section 16(a).[53] In *Robbins v. Banner Industries*,[54] the district court viewed section 16 as an integrated section designed to curb abuses by insiders. The line of cases allowing a civil remedy under other sections of the Securities Exchange Act,[55] and *J. I. Case Co. v. Borak*[56] in particular, were distinguished. In *Borak* the private remedy had been developed to effectuate the Congressional purpose. Since section 16 had a "built-in" private remedy in subsection (b), the statutory scheme was found to be complete and a private civil remedy unnecessary.[57]

On the other hand, section 16(a) can be read as an independent filing provision with a distinctive purpose additional to that of preventing

[49]*See* Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir.), *cert. denied*, 332 U.S. 761 (1947).

[50]Smolowe v. Delendo Corp., 136 F.2d 231, 239 (2d Cir. 1943).

[51]*E.g.*, Petteys v. Butler, 367 F.2d 528 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967); Blau v. Lamb, 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); Newmark v. RKO Gen., Inc., 294 F. Supp. 358 (S.D.N.Y. 1968), *aff'd*, 425 F.2d 348 (2d Cir. 1970). *See also* CARY 825-827; Lowenfels, *Section 16(b): A New Trend in Regulating Insider Trading*, 54 CORNELL L. REV. 45 (1969); Note, *Stock Exchanges Pursuant To Corporate Consolidation: A Section 16(b) "Purchase or Sale"?*, 117 U. PA. L. REV. 1034 (1969). The only recent expansion of coverage under 16(b) has been to allow recovery where a director purchased while he was a director and sold within six months, but after his directorship had terminated; and, under a deputization theory to hold a principal liable. *See* Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969), *cert. denied*, 396 U.S. 1036 (1970); O'Neil, *Extension of Liability Under § 16(b)—A Whole New Can of Worms*, 11 ARIZ. L. REV. 309 (1969).

[52]*See* S. REP. NO. 792, 73d Cong., 2d Sess. 9 (1934); CARY, 825-27.

[53]General Time Corp. v. American Investors Fund, Inc., 283 F. Supp. 400, 403 (S.D.N.Y. 1968) *aff'd sub nom.* General Time Corp. v. Talley Indus., 403 F.2d 159 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969); Smith v. Murchison, 310 F. Supp. 1079, 1088 (S.D.N.Y. 1970); Robbins v. Banner Indus., 285 F. Supp. 758, 763 (S.D.N.Y. 1966).

[54]285 F. Supp. 758 (S.D.N.Y. 1966).

[55]Cases cited note 21 *supra*.

[56]377 U.S. 426 (1964); notes 27-32 and accompanying text *supra*.

[57]Robbins v. Banner Indus., 285 F. Supp. 758, 763-64 (S.D.N.Y. 1966).

misuse of inside information. The Securities and Exchange Commission has stated that a decision[58] by the Second Circuit Court of Appeals that a holder of convertibles did not come within section 16(b) was not, "in light of the differing purposes of Section 16(a), . . . determinative of the obligation to file ownership reports."[59] Furthermore, it has been held that section 16(a) establishes *reporting* standards for insiders, having only slight significance in assessing liability under section 16(b).[60] It would also seem that had Congress intended section 16(a) and section 16(b) to be read for the same purpose, it would have stated its purpose in section 16(a) rather than in section 16(b).[61]

It would therefore appear that section 16(a), at least in part, has its own distinctive purpose. Further evidencing this point is Congress' passage of the Williams Bill[62] which requires that any person acquiring ten percent of the shares of a corporation must file with the issuer and the Commission a statement containing his identity, sources and amount of financial support, amount of his holdings, any arrangement with third parties, and plans for alteration of the corporation.[63] One of the reasons for this enactment was that "[s]ection 16(a) of the Exchange Act . . . does not fully meet the need of stockholders for information . . . ."[64] Presumably then, section 16(a) is partially designed to give information to shareholders or prospective purchasers relative to control of a corporation and the extent of that control. If that is one purpose, then the invaded interest of a plaintiff in the position of Grow Chemical Corporation is an interest intended to be protected by the statute. Therefore a civil remedy would properly be implied under either the tort theory[65] or the *Borak* rationale[66] since under either the primary criterion is whether the statute was designed to protect the interest invaded.

It would seem that a violation of section 16(a) should give rise to a civil remedy to one injured by reason of its breach. The availability of a civil action would be a further deterrent to the inimical practices in the securities industry which the Securities Exchange Act is designed to

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[58]Chemical Fund, Inc. v. Xerox Corp., 377 F.2d 107 (2d Cir. 1967).

[59]SEA Release No. 8202, 32 Fed. Reg. 18063 (1967). *See also* JENNINGS & MARSH 1042.

[60]Marquette Cement Mfg. Co. v. Andreas, 239 F. Supp. 962, 967 (S.D.N.Y. 1965). It has been held that section 16(b) cannot be read without reference to section 16(a). *See* cases cited note 39 *supra*. However the converse is not true. Section 16(a) can be read without the need to refer to section 16(b) for definitional clarity.

[61]*Cf.* Robinson v. Difford, 92 F. Supp. 145 (E.D. Pa. 1950).

[62]Pub. L. No. 90-439, § 2 (July 29, 1968), *amending* Securities Exchange Act of 1934, § 13, 15 U.S.C. § 78m (1964).

[63]CARY, 1633-34.

[64]*Hearing on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 14 (1968).

[65]Note 26 and accompanying text *supra*.

[66]Notes 27-32 and accompanying text *supra*.