Iv. Rule 10B-6
IV. RULE 10b-6

The Securities and Exchange Commission (SEC) has promulgated certain rules designed to check manipulative acts in the securities market. The primary antimanipulative provision through which the SEC regulates the transactions of participants in a distribution of securities is Rule 10b-6. This Rule generally prohibits certain persons, who participate in the distribution of securities, from directly or indirectly bidding for or purchasing, or inducing others to bid for or purchase, securities of the same class and series as those distributed until the distribution is completed. The Rule also enumerates eleven transactions that are excepted from its coverage.

In one of the transactions, directors of the subsidiary had caused the corporation to make loans to its corporate parents. Id. at 662. The plaintiffs claimed that the loans were advanced in violation of a prospectus statement and that this fact and the fact that the loans were for far less than fair consideration were not disclosed. Id. at 664. The complaint did not allege that the terms of the loans had not been disclosed, but only that the terms were unfair and that the loans were inconsistent with company policy as stated in the prospectus. Id. at 664-65. The court held that since the shareholders were not misled as to the actual terms of the loan transactions, mere nondisclosure of “unfairness” did not rise to the level of deception contemplated in Santa Fe. Id. at 665. This holding recognized an appropriate limitation in the Meridor decision. The Meridor court noted that Rule 10b-5 does not require insiders to characterize conflict of interest transactions in pejorative terms. 567 F.2d at 218 n.8. To require disclosure that a transaction is “unfair” in addition to disclosure of the terms of that transaction would amount to requiring a pejorative characterization. Failure to make such “disclosure” is not a sufficient claim of deception after Santa Fe. 442 F.2d at 665.

1 17 C.F.R. § 240.10b-6, -7, -8, -13 (1977). Rule 10b-6 is the primary antimanipulative provision. See text accompanying notes 2-11 infra. Rules 10b-7 and 10b-8 govern the permissible scope of stabilizing transactions during securities offerings. 17 C.F.R. § 240.10b-7, -8 (1977). Rule 10b-13 prohibits manipulative or deceptive devices in connection with exchange or tender offers. 17 C.F.R. § 240.10b-13 (1977); see text accompanying notes 153-157 infra.


3 The classes of persons covered are underwriters and prospective underwriters, see text accompanying notes 39-47 infra, issuers or other persons on whose behalf the distribution is being made, see text accompanying notes 48-96 infra, and brokers and dealers, see text accompanying notes 96-114 infra.


5 Rule 10b-6 states that such activity shall constitute a “manipulative or deceptive device or contrivance. . . .” See text accompanying notes 7-18 infra.

6 17 C.F.R. § 240.10b-6(a)(3)(i)-(xi) (1977). The Rule does not apply to eleven specified transactions because those transactions either do not involve manipulative purposes or are
Section 9(a)(2) of the Securities Exchange Act of 1934 provides the general antimanipulative section upon which Rule 10b-6 is based. Of particular importance in understanding the thrust of Rule 10b-6 is the prohibition in section 9(a)(2) of transactions that create "actual or apparent active trading" in a distributed security. The two-fold purpose of this prohibition is to protect against the defrauding of unwary investors and to remove any impediments to a free and open market. Rule 10b-6 was designed to codify principles generally followed by the courts and the SEC in construing section 9 and to define further the phrase "actual and apparent trading activity." The classic case of manipulation occurs when persons distributing stock drive up the selling price by making purchases in the market, thereby inducing others to buy at the artificially inflated price.

necessary to allow the offering to proceed. For example, exception (iv), which permits odd-lot transactions by registered odd-lot dealers, and exception (vii), which allows the exercise of any right or conversion privilege to acquire securities, cannot involve manipulative purposes because the transactions are closely regulated and have fixed prices. See also exceptions (viii)-(x) (transactions governed by Rules 10b-7, 10b-8, and 10b-2 respectively). Exceptions (i) and (vi) permit underwriters to purchase from an issuer and to solicit purchasers for the distributed securities. No offering could ever proceed without these two essential steps.

Exception (iii) allows unsolicited, privately negotiated purchases of a substantial amount, effected neither on a security exchange nor from or through a broker. The purpose of this exception is to permit the issuer to acquire securities from a large stockholder to add to the distributed securities. See Wolfson, Rule 10b-6: The Illusory Search for Certainty, 25 STAN. L. REV. 809, 809-10 n.4 (1973) [hereinafter cited as Wolfson]; text accompanying notes 53-58 infra. Exception (v) permits brokerage transactions not involving solicitation of the customer's order. See PRACTICING LAW INSTITUTE, NINTH ANNUAL INSTITUTE ON SECURITIES REGULATION 216-28 (Mundheim, Fleisher & Vandegrift eds. 1977) [hereinafter cited as NINTH ANNUAL INSTITUTE].

Section 10(b) of the '34 Act, another general antimanipulative section, prohibits manipulative devices whether in the over-the-counter market or on an exchange in contravention of the rules of the SEC. Id. at § 78j(b). Thus the scope of Rule 10b-6 extends to both exchange and over-the-counter markets.

Section 9(a)(2) identifies the two elements of a prohibited manipulation as a series of transactions coupled with a purpose of inducing others to purchase or sell a security. Before the adoption of Rule 10b-6, the courts and the SEC had held that manipulative purposes existed where a motive to manipulate could be shown. Since intent is difficult to prove, the courts and the SEC usually relied on circumstantial evidence to establish the requisite state of mind in cases of manipulation. Under Rule 10b-6, however, purchasing or inducing purchases during a distribution is per se manipulative without regard to purpose. By defining certain behavior as per se manipulation, Rule 10b-6 obviates any need for a specific finding of intent.

The attempt to curb manipulation by use of Rule 10b-6's per se approach has produced difficulties in the application of the Rule. Since the presence of a distribution makes all unexempted purchases or inducements to purchase a violation of the Rule, the scope of that term determines the applicability of the Rule. While neither the 1933 or 1934 Acts defines distribution, the courts and the SEC have struggled to interpret its meaning. Although at one time the SEC distinguished between registered and unregistered stock offerings, the generally accepted standard is the...
facts and circumstances test originally formulated by the SEC in *Bruns, Nordeman & Company*. The *Bruns, Nordeman* test is “to be interpreted in light of the Rule’s purposes” and focuses upon the selling efforts utilized and the magnitude of the offering. This necessarily requires a case by case determination. The relation of the amount of stock offered to the total amount outstanding, the amount of “float,” and the amount of normal trading volume for that particular security are examined to determine whether the magnitude of the offering constitutes a distribution. Any extra sales commission paid to the broker, the sales literature employed to recommend the stock, and the number of investors to whom the securities are offered are the factors used to evaluate the selling effort. Moreover,

In *Jaffee & Company*. Another broker made purchases on behalf of Jaffee from the appointed agent. Jaffee argued that a shelf registration, while a distribution under the ’33 Act because the offering was syndicated and under a registration statement, was not a distribution for Rule 10b-6 purposes. *Id.* at 288. The SEC maintained, however, that such an offering was a distribution per se, *id.* at 288-89, stating only that an offering of stock pursuant to a registration statement is “by its very nature” a 10b-6 distribution. *Id.* at 288.

Commissioner Smith disagreed with this per se approach, stating that the purpose of the ’33 Act registration was to provide adequate disclosure and not to prevent manipulation. *Id.* at 296-97. Forecasting the demise of this per se application of 10b-6 to all registered distributions, Commissioner Smith advocated the position ultimately taken by the SEC in *Collins Sec. Corp.* SEC Exchange Act Release No. 11,766 (Oct. 23, 1975) [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,327; see text accompanying notes 21-35 infra.


*See* NINTH ANNUAL INSTITUTE, *supra* note 6, at 203.

*See e.g.*, *Collins Sec. Corp., SEC Exchange Act Release No. 11,766 (Oct. 25, 1975) [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,327, at 85,795-96. The SEC emphasized that the market for the manufactured stock in *Collins Sec. Corp.* was stagnant and that only two brokers were entering quotations for the stock. *Id.* at 85,795. Thus, when the market for a stock is so inactive, even the trading of a small number of shares will increase the market price. *Id.* at 85,796. Trading in a stock that has previously been very inactive such as in *Collins Sec. Corp.* is very strong circumstantial evidence of manipulative purpose and therefore evidence of a distribution for 10b-6 purposes. *Id.* at 85,799; see text accompanying notes 21-24 supra and notes 31-35 infra.

*See* Wolfson, supra note 6, at 820.

Extra sales commission paid to a broker indicates the increased interest of the issuer in distributing its stock and provides extra incentive for the broker to accomplish that goal. Both factors make it more likely that manipulation may occur to further those objectives. See NINTH ANNUAL INSTITUTE, *supra* note 6, at 202-03; Wolfson, supra note 6, at 820-21.

the presence of any one factor alone may identify a distribution because that factor so greatly differentiates the offering from a normal trading transaction.\textsuperscript{31}

By focusing on these factors, the \textit{Bruns, Nordeman} test attempts to find a distribution in situations where the application of Rule 10b-6 will serve the antimanipulative purposes for which it was drafted.\textsuperscript{22} Special selling efforts identify circumstances where both the temptation and opportunity to manipulate the market exist.\textsuperscript{33} The use of such a pragmatic test, however, has led to the infusion of the element of purpose into the Rule and thus has sacrificed the advantages of a \textit{per se} application of the Rule.\textsuperscript{24} Nevertheless, the \textit{Bruns, Nordeman} test has the advantages of precluding arbitrary stifling of bona fide market activity and of allowing the SEC and the courts to adapt the Rule to manipulative practices in novel situations.\textsuperscript{35}

The \textit{Bruns, Nordeman} criteria make Rule 10b-6 distributions difficult to identify with any certainty because the key is not the existence of some concrete entity named a distribution but the existence of a substantial interest in manipulation coupled with trading activity.\textsuperscript{34} One person's ordinary trading transaction may be another's distribution due to the presence of an interest to manipulate.\textsuperscript{35} By identifying a distribution through factors that demonstrate a possible motive to manipulate the market, the test determines which parties are subject to the Rule. When a participant in an offering of stock acquires sufficient interest to manipulate the market, the \textit{Bruns, Nordeman} test identifies a distribution and triggers the application of Rule 10b-6 to that participant.

The first group of persons identified in the Rule as participants in the distributive process are underwriters\textsuperscript{38} and "prospective underwriters."\textsuperscript{29} In

\textsuperscript{31} The nature of the selling effort appears to be more important than the magnitude of the offering. For example, the SEC found a distribution in an offering of less than 1% of the outstanding securities because of the selling effort. SEC v. Electronics Sec. Corp., 217 F. Supp. 831 (D. Minn. 1963).


\textsuperscript{33} Special selling efforts differentiate the transaction from an ordinary one and indicate that the persons involved may have a motive to manipulate the market. This is essentially what the concept of distribution intends to define. See text accompanying notes 23-31 supra.

\textsuperscript{34} Wolfson, \textit{supra} note 6, at 812, 821.

\textsuperscript{35} \textit{Id.} at 812-14, 821.

\textsuperscript{29} See Wolfson, \textit{supra} note 6, at 821; text accompanying notes 23-31 supra.


\textsuperscript{38} 17 C.F.R. 10b-6(c)(1) (1977). An underwriter is an investment company that specializes in the marketing of new issues of securities. The underwriter may act strictly as an agent of the seller (a "best efforts" underwriting), or may purchase the issue outright and then sell to the public. Usually a managing underwriter will form a syndicate of underwriters who each
the competitive bid situation, an underwriter is subject to the Rule when he submits a bid to become an underwriter. In negotiated underwritings, an underwriter is subject to the Rule when he reaches an understanding with the issuer that he will underwrite that particular offering. Under the specific language of the Rule, a prospective underwriter refers only to a person "who has reached an understanding \textit{with the issuer} . . ." and therefore applies only to the managing underwriter. Other underwriters may be subject to the Rule, however, soon after the registration statement is filed either on the theory that they are broker-dealers who have agreed to participate or on the theory that the managing underwriter is their agent. Once the other underwriters receive their invitations to participate and make the business judgment to accept, they should consider themselves subject to the Rule as a practical matter even though they have not formally accepted by notifying the managing underwriter.

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Issuers or other persons on whose behalf a distribution is made are the second major group of persons subject to Rule 10b-6. Selling shareholders are covered by the "other persons" language. Since an issuer is usually a corporation, the SEC staff holds officers, directors and anyone in a control relationship subject to the Rule although such persons are not specifically mentioned. Further, if the decision to sell is made solely by shareholders who are officers, directors or control persons of an issuer, the issuer is nonetheless subject to the Rule on the basis that the control persons' close relationship with the issuer and the issuer's participation in the preparation, execution and filing of the registration statement constitutes participation in the distribution.

Nevertheless, exemptions are available which enable issuers to make purchases of their stock even when control persons propose to sell shares under a shelf registration. The SEC has developed standard guidelines that permit an issuer to trade so long as the issuer's purchase program and the control persons' sales are harmonized to avoid any distortion of the market. The staff explained the interplay of these conditions in a recent no-action letter. The SEC stated in the letter that a control person of a company must notify the company one week before the person is to make any sales and the company must discontinue all purchases until the seller

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5. Exemptions are allowed if the SEC determines that the transaction does not constitute a manipulative device within the purpose of the Rule pursuant to 17 C.F.R. § 240.10b-6(f) (1977).Appendices 1-B and B-6 are included in almost every no-action letter issued by the Commission. See 2 Fed. Sec. L. Rep. (CCH) ¶ 22,726.11.

notifies the company that he will make no further purchases. The thrust of this requirement is to prevent insiders of a company from selling company stock at a price which has been influenced by company purchases. Direct purchases by the company of stock from selling insiders are not prohibited by the Rule, however, as long as such purchases are not solicited by the company and are not to the advantage of any insider. Analagous to this situation is whether large block purchases by the company are also prohibited. The Commission staff maintains that there is no waiting period after the insiders' sales are completed and that Rule 10b-6(a)(3)(iii) excepts "unsolicited privately negotiated purchases ... (of) a substantial amount. . . ." The Commission staff also has attempted to apply Rule 10b-6 only if necessary when confronted with the problem of issuer purchases. In another recent no action letter, the SEC responded to an issuing company that wanted to purchase its common stock as a defensive maneuver against a tender offer the company considered to be against the best interests of its shareholders. The company feared the application of the Rule because officers and directors had simultaneously proposed to sell 25,000 shares under a registration statement. While indicating that a secondary offering by the control persons might constitute a distribution for 10b-6 purposes, the small number of shares offered compared to the total outstanding, the fact that no special effort to sell was to be made, and the fact that the qualified options currently exercisable covered only a small number of shares combined to preclude the possibility that purchases by the company would be for manipulative purposes. Issuer purchases of its own stock for employee stock benefit plans also may be subject to Rule 10b-6 due to the actions of control persons. The

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54 Id. at 87, 258-59. See also 2 Fed. Sec. L. Rep. (CCH) ¶ 22,726.11.
56 Id.
57 Appendix 1-B, 2 Fed. Sec. L. Rep. (CCH) ¶ 22,726.11.
60 Id. at 87,486-87.
61 "No underwriter was employed to sell the shares. Id.
62 The options exercisable by the control persons covered only 45,000 shares. Id.
63 Id. The analysis of factors by the staff in the Inexco letter closely resembles the Bruns, Nordeman test. See text accompanying notes 21-29 supra.
64 Some employee stock plans are automatically excluded from Rule 10b-6 restrictions by paragraph (e). 17 C.F.R. § 240.10b-6(e) (1977). In order to qualify for the exclusion, the plan must either meet the requirements of §§ 422 and 423 or § 424(b) of the Internal Revenue Code of 1954 or be a plan providing for periodic payments for acquisitions by employees and periodic purchases by either the employees or the person acquiring the securities for the
greatest possibility for manipulation in this context arises when a company is contemplating an exchange or merger offer with another company. Because the exchange formula is a function of the price of the acquiring company's stock which may be driven up by company purchases of its own stock, the type of artificial market influence proscribed by Rule 10b-6 is clearly present. The market price of the stock would then reflect the inflated value caused by the acquiring company's purchases and not the true market value.

The crucial issue in the exchange offer context concerns the point at which the distribution commences so that the time when the acquiring company may not make any more purchases can be determined. In *Richland v. Cheatham,* the district court confronted this issue only implicitly. The case is important, however, because the terms of that judgment have served as a model for subsequent staff restrictions. The SEC restrained Georgia Pacific, the acquiring company, from directly or indirectly bidding for or purchasing any Georgia Pacific stock after an agreement in principle had been reached for the acquisition of the target company. Purchases and bids for stock within ten days prior to the time the market price of Georgia Pacific stock was to be used to determine the exchange ratio were also prohibited. Georgia Pacific also agreed to disclose the daily volume and prices of purchases made after the commencement of serious negotiations. Because the prohibition on purchases began when an agreement in principle had been reached, the court and the SEC implicitly recognized at least this point as the commencement of the distribution.

Subsequent to the *Richland* judgment, the SEC issued releases which further tightened the restrictions on purchases enunciated in *Richland.* The SEC indicated that the restrictions now commence when a “definite arrangement” to acquire has been made and that the disclosure obligation now arises at “the very beginning of negotiations.” Nevertheless, these disclosure guidelines do not mark the commencement of the distributee. 17 C.F.R. § 240.10b-6(e) (1977); cf. Tandy Brands, Inc., [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,161 (trustees made purchases at sole discretion of company, plan held not exempt).


Id.


Id.


Appendix B-6, 2 Fed. Sec. L. Rep. (CCH) ¶ 26,726.11.
tion because the disclosure obligation illustrates that such purchases are permissible, which would not be true if the distribution had commenced.° Rather, the "definite arrangement" to acquire the target company marks the commencement of the distribution.°

Because many employee stock purchase plans do not satisfy the stringent requirements of paragraph (e) of Rule 10b-6, issuers must frequently ask the Commission staff for rulings on the application of the Rule to transactions pursuant to such plans. Many of the restrictions of the Richland judgment and the principles involved in Rule 10b-6 are well illustrated by some of the more recent no action letters. The most common situation in which a company has asked for an exemption has been when the employee stock plan fails in some minor way to meet the requirements of Rule 10b-6(e). For example, the plan may have non-qualified, non-restrictive options held by control persons, or the purchases may be controlled by the company and therefore not be periodic. In such situations, the SEC has granted exemptions because neither the amounts of stock involved nor the circumstances of the purchase show any manipulative purpose.°

Nevertheless, company purchases of its own stock for employee plans often cause Rule 10b-6 problems in more irregular contexts that call for closer examination of the transactions. Recently, a corporation proposed to make a cash tender offer for approximately one-fifth of its outstanding stock.° The company also had an employee stock plan that did not fit the paragraph (e) exemption because the company retained sole discretion over the terms and prices at which the stock would be purchased.° The significant amount of shares involved in the tender offer and the com-

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° Practicing Law Institute, Eighth Annual Institute on Securities Regulation 235 (Mundheim, Fleisher, & Vandegrift, eds. 1976) [hereinafter cited as Eighth Annual Institute].
° See text accompanying note 66 supra.
° No manipulative purpose is present because either the amount of shares distributed pursuant to the plan is small as compared to the company's total outstanding shares, see McDonald's Corp. [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,233 (no action letter), or the distribution to employees is the only one in which the company is engaged, see Tandy Brands, Inc., [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,161 (no action letter).
° Id. at 88,347.
pany’s unlimited power over employee stock purchases gave the company both the capability and the temptation to manipulate the market.\(^{83}\) However, the staff granted a no action position to the company.\(^{84}\) Following safe practice, the company had suspended all purchases at the time management determined to submit the tender offer proposal to the company’s board of directors,\(^{85}\) thereby eliminating any market impact on the shareholder’s decision to tender. Other conditions were imposed to insure fairness to the tendering shareholders.\(^{86}\)

Employee plans of this sort often have appointed trustees to make the purchases of the company’s stock for the plan.\(^{87}\) When the trustee is independent of the company and the trustee and company do not have common control persons, Rule 10b-6 problems usually do not arise.\(^{88}\) When the company has wholly owned subsidiary broker-dealers, however, any transactions of the subsidiaries in the parent company’s stock with the trustee present 10b-6 issues. The Commission is concerned that a broker-dealer’s professional expertise and proximity to the market for its own securities afford greater opportunity to affect the market price.\(^{89}\) Therefore, the SEC’s proposed Rule 13e-2 would prohibit an issuer who is also a broker-dealer from purchasing its own securities except through a totally independent agent.\(^{90}\) In a recent no action letter, the Commission applied similar reasoning to prevent a wholly owned subsidiary broker-dealer from selling the issuer parent company’s stock to an independent trustee of the company’s employee stock purchase plan.\(^{91}\) The parent company claimed that the trustee and the subsidiary conducted arms-length deals, that each had

\(^{83}\) See id.; text accompanying notes 21-29 supra.


\(^{85}\) Id. at 88,349.

\(^{86}\) The conditions imposed by the SEC were: (1) appropriate notice to all holders of the company’s common stock; (2) shares of common stock tendered could be withdrawn at any time until seven days after the offer was published or at any time within sixty days of the original offer; (3) any increased consideration paid for shares acquired after the offer must be paid to all who tendered. These conditions are fairly typical of limitations placed on tender offerors when Rule 10b-6 may be applicable. See, e.g., NICOR, Inc., [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,308 (no action letter); Ethyl Corp., [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,105 (no action letter).

\(^{87}\) See 17 C.F.R. § 240.10b-6(e) (1977).

\(^{88}\) See, e.g., The Mead Corp., [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,307 (no action letter). If the issuer has no control over the trustee’s purchases, it has no capability to manipulate the market. Thus, application of Rule 10b-6 would not further the Rule’s purposes.


separate fiduciary duties, that the broker-dealer subsidiary's customers would be disserved if they could not trade parent company stock, and that neither the trustee nor the parent company controlled the stock's prices.\footnote{Id. at 87,758-59.} The Commission still denied the request, claiming that the purpose of the independent agent requirement of proposed Rule 13e-2 would be undermined if that agent could trade with subsidiaries of the parent company.\footnote{Id. at 87,757.} While the Commission may have been unduly cautious considering the many safeguards on the transaction and its valid business purpose,\footnote{Id.} the motive and capability to manipulate the market are present and Rule 10b-6 should apply.\footnote{Id. at 87,758.}

The third category of persons explicitly covered by Rule 10b-6 are brokers and dealers.\footnote{See SEC Exchange Act Release No. 10539 (Dec. 6, 1973), [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) \textsection 79,600.} Under the terms of the Rule, they are subject to its prohibitions when they have agreed to participate, or are participating, directly or indirectly, in the distribution.\footnote{17 C.F.R. \textsection 240.10b-6(a)(3) (1977).} Thus, a broker-dealer\footnote{\textsuperscript{7} Id.} is probably subject to the Rule when he solicits his customers and is clearly subject to the Rule when he accepts his allotment from the underwriter, even if this occurs prior to the effective date of the offering.\footnote{Id. at 87,758.} Acceptance of the allotment and solicitation of customers demonstrate that the broker-dealer has committed himself to participate in the distribution. Furthermore, no express agreement or contractual understanding is necessary to find that a dealer is a participant in the distribution, as any furthering or facilitating of the offering will suffice.\footnote{See \textsuperscript{8} Dlugash v. SEC, 373 F.2d 107 (2d Cir. 1967).} Similarly, a broker-dealer is subject to the Rule if others place bids for him,\footnote{Id.; see, e.g., SEC v. Scott Taylor & Co., 183 F. Supp. 904, 908-09 (S.D.N.Y. 1959). In Scott Taylor, a broker was held to have violated Rule 10b-6 based upon the fact that he knew that the securities he supplied to Scott Taylor would be offered and distributed. The court held that the broker thereby facilitated and furthered the distribution. Id.} and the agent who places the bids is also subject to Rule 10b-6 if he should have known that the traded securities were being distributed.\footnote{Causing others to place bids for the broker-dealer would be covered by the "indirectly bids for" language of Rule 10b-6. 17 C.F.R. \textsection 240.10b-6(a)(3) (1977).}
Because market makers\textsuperscript{103} buy and sell securities during a distribution to maintain a liquid market and facilitate the offering, they are subject to Rule 10b-6 if they are deemed to be participating in a distribution.\textsuperscript{104} Under the SEC's prior view that any shelf registered offering was a distribution for 10b-6 purposes, any person who traded the securities covered by the registration statement was a participant and subject to the Rule.\textsuperscript{105} As a result, sales to market makers were excluded as a means by which shelf registration securities might be offered.\textsuperscript{106} The Commission's opinion in \textit{Collins Securities Corp.},\textsuperscript{107} overruling the per se application of distribution to securities sold under a registration statement, however, gave helpful guidance to permissible market making activities. The \textit{Collins} opinion, while not specifically discussing the scope of the term "participation", concluded that a market maker's normal trading activities in distributed stock are not prohibited by the Rule.\textsuperscript{108} This conclusion implicitly recog-
nized that a market maker does not participate in the stock's distribution. In a recent letter, the staff declined to give a no action position to a market maker because its sales might constitute a distribution, but did state that sales by a dealer which are part of his usual and customary market making activities are not generally viewed by the SEC as involvement in a distribution.109

Byrnes v. Faulkner, Dawkins & Sullivan110 further illustrates the scope of the term "participation" in 10b-6 as it relates to market makers. The market maker in Byrnes attempted to rescind a sale when it found that the shares were covered by a registration statement.111 The district court found that the market maker was not participating in the offering and thus did not fall within Rule 10b-6 prohibitions.112 The court based this finding by focusing on the nature and extent of the particular market maker's role rather than the nature of the offering in general.113 While the court found that a distribution was in progress, it held that the market maker did not participate in that distribution because the number of shares involved were a very small percentage of the total registered shares, and the market maker's purchase was in the ordinary course of its business.114

The Collins and Byrnes opinions stand for the proposition that a market maker will not automatically be deemed a participant in a distribution solely because the shares are covered by a registration statement. This application of a facts and circumstances test to determine the scope of the individual's participation is consistent with the Rule's application in other situations.115

Rule 10b-6 can accomplish its antimanipulative objectives without inadvertently obstructing bona fide market activity if the Rule is applied when the facts and circumstances indicate that a transaction contains possible opportunities to manipulate the market. The recent letters and cases discussed illustrate that a flexible application of Rule 10b-6 achieves greater effectiveness and simultaneously does not unduly restrict legitimate business transactions in the securities market.

112 413 F. Supp. at 472.
113 Id. at 471.
114 The Byrnes court, by focusing on the magnitude of the offering, applied the Bruns, Nordeman test to determine whether the market maker participated in the distribution. See text accompanying notes 23-37 supra. When the focus is on the individual's actions rather than on the offering in general, the Bruns, Nordeman test is helpful in distinguishing the transaction from an ordinary one and to determine whether Rule 10b-6 should apply. See 413 F. Supp. at 471; text accompanying notes 32-37 supra.
115 See text accompanying notes 50-95 supra.
Standing

While there has been comparatively little litigation concerning private rights of action under the antimanipulative provisions of Rule 10b-6, two recent district court decisions may foreshadow an increase in interest on the standing issue.

In *Halle & Stieglitz Filor, Bullard, Inc. v. Empress International, Ltd.*, the defendant counterclaimed for violations of Rules 10b-6 and 10b-7, but the district court applied a purchaser-seller requirement to private actions under Rule 10b-6 and found that the defendant did not meet that requirement. In *Warren v. Bokum Resources Corp.*, the district court implied a private right of action under Rule 10b-13 in favor of persons who had tendered their securities pursuant to a tender offer by Bokum. Examination of both these cases in light of the recent Supreme Court decision in *Piper v. Chris-Craft Industries, Inc.* demonstrates the major issues involved in determining whether and in whose favor standing exists under the antimanipulative rules.

In *Empress*, the plaintiffs publicly offered Empress stock as underwriters and then traded actively in the stock during the distribution. The court never reached the issue of whether Halle & Stieglitz’s actions violated Rule 10b-6, but summarily dismissed Empress’ claim for lack of standing. The court based this determination on its findings that Empress did not purchase or sell, but only held the stock. The *Empress* court applied the purchaser-seller requirement, originally applied in Rule 10b-5 private actions, as a prerequisite for maintenance of a 10b-6 private action. The purchaser-seller limitation requires that the plaintiff allege

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114 442 F. Supp. 217 (D. Del. 1977); see text accompanying notes 123-36 infra.
115 17 C.F.R. § 240.10b-7 (1977).
117 433 F. Supp. 1360 (D.N.M. 1977); see text accompanying notes 174-207 infra.
118 17 C.F.R. § 240.10b-13 (1977); see text accompanying notes 167-70 infra.
119 433 F. Supp. at 1367-68.
120 430 U.S. 1 (1977).
121 442 F. Supp. at 226. Halle & Stieglitz commenced a public offering of Empress stock as underwriters on May 3, 1972. All of the stock was not ultimately distributed, however, and large amounts were returned to Halle & Stieglitz. From May 3 to May 9, 1972, Halle & Stieglitz engaged in stabilization transactions in Empress stock but failed to file the reports required by Rule 10b-7. Between May 9 and October, 1972, Halle & Stieglitz participated in the distribution of Empress stock and also purchased and sold the stock. *Id.* Empress alleged Rule 10b-6 and Rule 10b-7 violations. The court did not distinguish the Rules in its discussion of the standing issue because of its analysis of their common statutory origins. See text accompanying notes 134-36 infra.
123 The purchaser-seller requirement was first formulated by the Second Circuit in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the Supreme Court firmly established the purchaser-seller requirement as a limitation on the class of plaintiffs entitled to sue under Rule 10b-5. See text accompanying notes 129-35 infra.
124 17 C.F.R. § 240.10b-5 (1977); see note 125 supra.
125 422 F. Supp. at 226-27.
that he suffered the claimed injury in connection with his purchase or sale of a security.128

The Empress court relied on the Supreme Court's decision in Blue Chip Stamps v. Manor Drug Stores129 to impose the purchaser-seller limitation on persons who can sue for Rule 10b-6 violations. In Blue Chip, the Supreme Court posed three principal justifications for the purchaser-seller requirement. The Court relied on the longstanding judicial acceptance of the requirement,130 the fact that the requirement conforms to the statutory language and legislative history of section 10(b) of the Securities Exchange Act of 1934,131 and the danger of vexatious litigation should the requirement be removed.132 The Empress court justified the imposition of the purchaser-seller limitation to Rule 10b-6 actions principally because of the limitation's conformity with the language and legislative history of section 10(b).133 Under section 10(b), no person may use, in connection with the purchase or sale of any security, any manipulative or deceptive device in contravention of rules promulgated by the SEC.134 Congress' failure to amend the language "in connection with the purchase or sale" in section 10(b) persuaded the Blue Chip Court to affirm the applicability of the purchaser-seller requirement to actions under Rule 10b-5.135

While recognizing that the purchaser-seller requirement derived from Rule 10b-5 cases and that the Supreme Court's affirmance of that requirement was also in the context of Rule 10b-5, the Empress court noted that the Blue Chip opinion indicated that the purchaser-seller requirement applies generally to section 10(b).136 The Empress court held that the purchaser-seller requirement is applicable to Rule 10b-6 because that Rule also derives its statutory authority from section 10(b).137 Since Empress

130 The Court noted that the purchaser-seller requirement had been upheld by virtually all of the reported cases considering the limitation. Id. at 731-33.
131 Id. at 733-36. The Court emphasized that several provisions of the Securities Acts provide express remedies for nonpurchasers/sellers. Id. at 733-34.
132 Id. at 737-49. The Supreme Court in Blue Chip offered the following policy justifications for retaining the purchaser-seller requirement: (1) the potential for vexatious "strike" suits arising out of the fact that a Rule 10b-5 action may have great settlement value to a plaintiff and may thus disrupt normal business activity absent limits that allow for dismissal; (2) the possibility for abuse of discovery rules in such suits; (3) the guidance that an objectively demonstrable fact of a sale transaction affords triers of fact in Rule 10b-5 cases beyond the plaintiff's testimony as to what he would have done in the absence of the alleged fraud. Id.
133 442 F. Supp. at 227.
135 421 U.S. at 732-33.
136 442 F. Supp. at 227. The Empress court relied on the passage in Blue Chip that cites Congress' failure to amend § 10(b). See 421 U.S. at 732-33. The SEC had requested Congress to amend the language of § 10(b) to bar fraud in connection with "any attempt" to purchase or sell any security. However, Congress has not amended the section which only prohibits fraud in connection with an actual purchase or sale. 442 F. Supp. at 227, citing 421 U.S. at 732-33.
137 442 F. Supp. at 227.
International held but did not purchase or sell their shares, the court found that the company lacked standing to claim damages for Rule 10b-6 violations.\(^{138}\)

In *Piper v. Chris-Craft Industries, Inc.*,\(^{139}\) the Supreme Court strongly suggested that a purchaser-seller limitation is applicable to potential plaintiffs under Rule 10b-6 private actions. Because of the posture of the case, the Supreme Court did not fully resolve the standing issue\(^{140}\) and most of the analysis presented is either dicta or based on unchallenged SEC interpretations. However, the Court’s discussion of Chris-Craft’s standing to sue Bangor Punta Corp. for alleged violations of Rule 10b-6 is still instructive.

Both Bangor Punta and Chris-Craft sought control of Piper Aircraft Co. by use of competing tender offers. After Bangor Punta was victorious, Chris-Craft sued Bangor Punta for alleged violations of the securities laws.\(^{141}\) The Second Circuit held that Chris-Craft had standing to sue for damages resulting from Rule 10b-6 violations,\(^{142}\) but the Supreme Court reversed, holding instead that Chris-Craft’s complaint was beyond the concerns of Rule 10b-6.\(^{143}\)

As one of its reasons for not fully resolving the Rule 10b-6 standing issue, the Court in *Piper* stated that the Court of Appeals below did not have the benefit of the *Blue Chip* decision when it decided the case.\(^{144}\) This

\(^{138}\) Id. The *Empress* court also cited Weitzen v. Kearns, 271 F. Supp. 616, 623 (S.D.N.Y. 1967), in which the district court held that Rule 10b-6 was designed to protect purchasers of securities. The court in *Weitzen* denied standing to stockholders of a corporation in a suit against the directors because the stockholders had not purchased the distributed securities. *Id.*

\(^{139}\) 430 U.S. 1 (1977).

\(^{140}\) *Id.* at 44-45.

\(^{141}\) For a complete history of the contest for corporate control and the eight years of protracted litigation in the *Piper* case, see *Id.* at 4-21.

\(^{142}\) 480 F.2d 341 (2d Cir. 1973), rev’d, 430 U.S. 1 (1977). The Second Circuit held that Chris-Craft had standing to sue even though Chris-Craft had not purchased the manipulated stock of Bangor Punta Corp. 480 F.2d at 379. Chris-Craft did not complain that it was misled or defrauded by Bangor Punta’s illegal purchases, but rather that these purchases misled Piper shareholders into accepting the Bangor Punta exchange offer and that Chris-Craft, as a rival for Piper stock, was thereby injured. *Id.* at 378. The Supreme Court held that such a complaint was outside the concern of Rule 10b-6 and thus denied Chris-Craft standing. 430 U.S. at 46; see text accompanying notes 150-52 infra.

The Second Circuit did not apply the purchaser-seller limitation to Rule 10b-6 because no “purchase or sale” language is found in Rule 10b-6. The Second Circuit reasoned that the requirement evolved from Rule 10b-5’s reference to purchase or sale and thus was applicable only to Rule 10b-5 private actions. 480 F.2d at 378. The Second Circuit also took a broad view of the purpose of Rule 10b-6 to support its holding. Rather than limiting Rule 10b-6’s purpose to protection of purchasers, the court found that the Rule is designed to promote fairness in contests for corporate control. *Id.* at 378. Chris-Craft was entitled to sue for violations of Rule 10b-6 that infringed its right to a fair contest. *Id.* at 378-79. The Supreme Court rejected this broad interpretation, holding instead that Rule 10b-6 protects only purchasers and sellers. 430 U.S. at 45-46; see text accompanying notes 149-51 infra.

\(^{143}\) 430 U.S. at 45-46.

\(^{144}\) *Id.* at 44.
reference to *Blue Chip* strongly suggests that the Supreme Court recognized the applicability of the purchaser-seller requirement to Rule 10b-6 private actions.\(^{14}\) Such a position also can be inferred from the Court’s discussion of the statutory origin of Rule 10b-6 in *Piper*. The Court noted the “close relationship” between section 9 of the ’34 Act\(^{16}\) and Rule 10b-6, and found that section 9 provided an express cause of action in favor of any person who purchases or sells any security at a price affected by unlawful market activity.\(^{17}\) The language of section 9 focuses on the amount actually paid by an investor for stock affected by manipulation.\(^{18}\) Because Chris-Craft complained of lost opportunity for control of *Piper*, and not that it paid an unfair price, Chris-Craft’s complaint was “beyond the bounds of the specific concern of Rule 10b-6.”\(^{19}\) By denying standing to Chris-Craft on this basis,\(^{20}\) the Court implicitly recognized that relief would be available to an investor who asserts that the price paid in his transaction was affected by Rule 10b-6 violations. Such emphasis on price necessarily requires that the plaintiff have purchased or sold the affected security and thus implies a purchaser-seller limitation on Rule 10b-6 plaintiffs.

Bangor Punta’s purchases of *Piper* stock during the exchange offer were

\(^{14}\) Since *Blue Chip* sustained the purchaser-seller requirement for private actions under Rule 10b-5, the *Piper* Court’s reference to *Blue Chip* indicates that it viewed the reasoning in *Blue Chip* as applicable to Rule 10b-6.


\(^{17}\) 430 U.S. at 45.

\(^{18}\) Id. The Court’s reasoning that § 9 focuses on the price of the affected security suggests that damages allowed for Rule 10b-6 private actions may be limited to the pecuniary loss suffered as a result of the violations. The Court did not discuss the issue of what the proper measure of damages would be in a successful action under Rule 10b-6. The Court’s emphasis on the price paid, however, would seem to favor recovery of the difference between the fair market value of the securities at the time of the violation and the actual consideration paid. This out-of-pocket theory is the most common measure of damages under Rule 10b-6. Ross v. Licht, 263 F. Supp. 395, 410 (S.D.N.Y. 1967). Another possible measure of damages is the difference between what the seller received and the fair value of what he would have received had there been no fraudulent or deceptive conduct. Affiliated Ute Citizens v. United States, 406 U.S. 128, 155 (1972). See generally Jacobs, *The Measure of Damages Under Rule 10b-5*, 65 Geo. L. Rev. 1093 (1977).

\(^{19}\) 430 U.S. at 45.

regulated by Rule 10b-6 when the alleged violations occurred. Besides prohibiting participants in a distribution from purchasing any distributed stock, Rule 10b-6 also prohibits the purchase of "rights to purchase" such stock.\textsuperscript{151} The position of the SEC is that the stock of the target company in an exchange offer constitutes rights to purchase the acquiring company's stock and thus purchases of target-stock outside the exchange offer are prohibited.\textsuperscript{152} Rule 10b-13\textsuperscript{153} now expressly covers tender offers and exchange offers, and the SEC maintains that the Rule, as applied to exchange offers, is a codification of interpretations of Rule 10b-6 as it applied to exchange offers.\textsuperscript{154} Thus, Rule 10b-13 prohibits any person who makes a tender offer or exchange offer from purchasing either securities of the target company or of the acquiring company.\textsuperscript{155} The central purpose behind Rule 10b-13's codification of the SEC's interpretation of Rule 10b-6 appears to be to insure fair treatment of all stockholders of the target company.\textsuperscript{156} Because of this close relationship between Rules 10b-6 and 10b-13, any analysis of standing under Rule 10b-13 is particularly relevant to Rule 10b-6 private actions.

The right of private parties to sue for violations of Rule 10b-13 was analyzed fully in \textit{Warren v. Bokum Resources Corp.}\textsuperscript{157} In \textit{Warren}, Bokum Resources Corp. sent a tender offer and exchange offer to the plaintiffs. After the plaintiffs tendered their shares pursuant to the offers, they alleged violations of Rule 10b-13.\textsuperscript{158} The defendants moved to dismiss the Rule 10b-13 claim on the ground that no private action may be implied under the Rule. The district court denied the motion, holding that a private remedy was proper\textsuperscript{159} for reasons similar to those advanced by the Supreme Court in other private action cases.\textsuperscript{160} The \textit{Warren} decision also parallels the Supreme Court's approach to Rule 10b-6 standing issues in \textit{Piper}.\textsuperscript{161}

The court in \textit{Warren} applied the \textit{Cort v. Ash}\textsuperscript{162} test to determine

\textsuperscript{151} 17 C.F.R. § 240.10b-6(a)(2) (1977).
\textsuperscript{153} 17 C.F.R. § 240.10b-13 (1977).
\textsuperscript{155} 17 C.F.R. § 240.10b-13 (1977).
\textsuperscript{156} Certain substantial holders of target stock are prevented from receiving greater consideration for their shares than lesser stockholders receive. Lowenfels, supra note 154, at 1395.
\textsuperscript{157} 433 F. Supp. 1360 (D.N.M. 1977).
\textsuperscript{158} Id. at 1366-67.
\textsuperscript{160} 430 U.S. at 42-46; see text accompanying notes 139-156 supra.
\textsuperscript{161} 422 U.S. 66 (1975). In \textit{Cort v. Ash}, the plaintiffs alleged that the directors of Bethlehem Steel Corp. had violated a federal election campaign contribution law. The plaintiff-shareholders sought damages on behalf of the corporation, contending that a derivative cause of action for shareholders could be implied under the relevant statute. The Supreme Court
whether a private right of action could be implied from Rule 10b-13. In 
Cort v. Ash, the Supreme Court held that in order to determine if a federal 
statute implies a private cause of action, a court must decide whether the 
plaintiff is a member of the class for whose especial benefit the statute was 
enacted," whether the statute indicates any explicit or implicit legislative 
intent either to deny or create a private action, whether an implied cause 
of action would be consistent with the underlying purposes of the legisla-
tive scheme, and whether the cause of action is one traditionally rele-
gated to state law. The origin and purpose of the statute must be examined to discover 
whether the plaintiff is a member of the class for whose especial benefit 
the statute was enacted. Relying on an SEC release that accompanied 
the adoption of Rule 10b-13, the Warren court found that the Rule was 
enacted expressly to protect investors and to safeguard the interests of persons who have tendered their securities in response to a tender or ex-

held that such a remedy would be improper because the statute showed no concern for 
individuals in the plaintiff's position, id. at 78-83, the legislative history suggested no congres-
sional intent to vest in shareholders a federal right to damages, id. at 82-84, a private remedy 
would not further the purpose of the statute, id. at 84, and the cause of action was one 
traditionally relegated to state law. Id. at 84-85. Although Cort v. Ash concerned the implication of a private right from a criminal statute, the Supreme Court and lower federal courts 
have held that the analysis is applicable to civil statutes as well. See Piper v. Chris-Craft 
Indus., Inc., 430 U.S. at 37-42; Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 
1977); Mason v. Belieu, 543 F.2d 215, 221 (D.C. Cir. 1976); Michigan Dist. Council No. 77 
Chase Inv. Serv., 434 F. Supp. 171, 179-84 (N.D. Cal. 1977). See generally McMahon & 
Rodos, Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment, 80 
DICK L. REV. 167 (1976); Mowe, Federal Statutes and Implied Private Actions, 55 ORE. L. 
REV. 3 (1976); Comment, Impling Private Causes of Action From Federal Statutes: Amtrak 
and Cort Apply the Brakes, 17 B.C. INDUS. & COM. L. REV. 53 (1975) [hereinafter cited as 
Implying Private Causes of Action].

The distinction between whether the plaintiff is a member of the class for whose 
especial benefit the statute was enacted and whether there is any legislative intent to create 
or deny a remedy is difficult to perceive. In fact, these two tests essentially may be alternative 
ways for the plaintiff to show that a private cause of action would be consistent with legisla-
tive intent. Impling Private Causes of Action, supra note 162, at 62-63; see text accompanying 
notes 176-79 infra.

The reason usually advanced to support the third part of the Cort v. Ash test is that 
courts should pay deference to legislative intent and not engage in "judicial legislation." See 
Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 895 (10th Cir.), cert. denied, 409 U.S. 1042 
(1972); Note, 77 HARV. L. REV. 285, 291 (1963). Further, if a statutory scheme of enforcement 
is ineffective to achieve the statute's purpose, implied private rights of action are desirable 
as a matter of policy. J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); see Note, The 
Implication of a Private Cause of Action Under Title III of the Consumer Credit Protection 

The fourth component of the Cort v. Ash test illustrates the Supreme Court's concern 
for the interests of federalism. 422 U.S. at 78.

Id.

FED. SEC. L. REP. (CCH) ¶ 77,745.
change offer. The plaintiffs in Warren were investors who had so tendered their securities. Thus, the court concluded that they were clearly in the class for whose "especial benefit" Rule 10b-13 was adopted.

The second inquiry necessary under the Cort v. Ash test concerns whether any implicit or explicit legislative intent to create or deny a private remedy exists. The Warren court noted that while Rule 10b-13 does not explicitly create a private remedy, the SEC gave no indication that it did not intend to create such a right of recovery. The court then relied on language in Cort v. Ash stating that in situations where a statute clearly grants rights to a certain class of persons, a showing of express intent to create a private cause of action is unnecessary. Such reasoning must assume that the creation of a class of rights for certain persons automatically implies the requisite intent. Since Rule 10b-13 gives persons who tender their securities the right to be assured that the offeror will not purchase on different terms elsewhere, the Warren court concluded that a demonstration of intent to create a remedy was unnecessary.

This analysis by the district court merges the second inquiry of Cort v. Ash into the first inquiry when no legislative intent to create or deny a remedy can be demonstrated. Determining whether the relevant statute has granted a class of persons certain rights necessitates essentially the same inquiry as determining whether the statute was enacted for the benefit of an "especial class." The second inquiry would only become relevant if an "especial class" was found but the statute evidenced an intent to deny a private cause of action. Such a negative intent would control. Unless an "especial class" and a "clear grant of certain rights" can be differentiated, the first and second tests are alternative ways for a plaintiff to show that the implication of a private right in his favor would be consistent with legislative intent.

The Warren court buttressed its finding that such a right would be consistent with the legislative intent by drawing a parallel between Rule 10b-13 and section 14(a) of the Securities Exchange Act of 1934. Because section 14(a) has among its chief purposes the "protection of investors,"

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169 433 F. Supp. at 1366.
170 Id., citing Cort v. Ash, 422 U.S. at 78.
171 422 U.S. at 78.
173 Id. at 1367.
174 The assumption that the creation of a class of rights for certain persons automatically implies a private right, however, would be defeated if an explicit intent to deny such a private right is shown. 422 U.S. at 82.
175 433 F. Supp. at 1367.
176 See text accompanying notes 163-164 infra.
177 Implying Private Causes of Action, supra note 162, at 62.
178 422 U.S. at 82. If the plaintiff is a member of the protected class and the statute already provides private remedies, the remedies created by the statute are exclusive. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974).
179 See Implying Private Causes of Action, supra note 162, at 62.
the Supreme Court implied a right to the availability of a private right of judicial relief. The Warren court concluded that since Rule 10b-13 was also enacted for the protection of investors, judicial relief was similarly appropriate.

The third relevant factor under the Cort v. Ash analysis is whether an implied remedy would be consistent with the underlying purposes of the statute. Reasoning that the threat of damages against a tender offeror would provide additional protection for the investor, that any damages awarded would benefit those investors intended to be protected, and that the remedy would be available only to the protected class, the Warren court concluded that allowing a private right would further the purpose of Rule 10b-13. Such reasoning appears sound when compared to the Supreme Court’s treatment of this third factor in Piper.

The final inquiry under the Cort v. Ash test is whether the cause of action is one “traditionally relegated to state law.” The Warren court concluded that resort to state law would not protect the interests Rule 10b-13 was intended to safeguard, noting the comprehensive federal legislation in this area and the major role played the SEC in securities regulation. Since no comparative state statutory or common law prohibits the purchase of target securities outside a tender or exchange offer, no state

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182 433 F. Supp. at 1367. An analysis similar to that applied by the Warren court with respect to Rule 10b-13 would also be appropriate to determine whether a private right is implied in Rule 10b-6. The purpose of Rule 10b-6 is to eradicate manipulation that would create an unjustifiable impression of market activity and consequent higher prices. SEC v. Scott Taylor & Co., 183 F. Supp. 904, 907 (S.D.N.Y. 1959). Thus, the Rule protects purchasers of distributed securities from buying at artificially high prices. Weitzen v. Kearns, 271 F. Supp. 616, 623 (S.D.N.Y. 1967); Miller v. Steinbach, 268 F. Supp. 255, 280 (S.D.N.Y. 1967). Rule 10b-6 can be viewed as protecting purchasers (the especial class) and assuring these purchasers that the price paid for a distributed security is not the product of prohibited market manipulations. See Piper v. Chris-Craft Indus., Inc., 430 U.S. at 45-46; Weitzen v. Kearns, 271 F. Supp. at 623; Miller v. Steinbach, 268 F. Supp. at 280.
183 422 U.S. at 78.
184 The Warren court’s enumeration of factors that demonstrate the consistency of an implied right of action with Rule 10b-13’s purposes are relevant to a similar inquiry under Rule 10b-6. The threat that damages might be assessed against the participant in a distribution would provide additional protection for investors, a major purpose of the statute. See note 138 supra. If a purchaser-seller limitation is applied to Rule 10b-6 actions as suggested by Empress and Piper, see text accompanying notes 122-148 supra, then the remedy would be available only to the protected class and any damages awarded would benefit those intended to be protected. Cf. Piper v. Chris-Craft Indus., Inc., 422 U.S. at 39 (remedy for defeated tender offeror inappropriate because damage award would not benefit protected class nor would remedy be available to persons within protected class).
185 433 F. Supp. at 1367.
186 422 U.S. at 39. The Supreme Court in Piper held that a private remedy for defeated tender offerors like Chris-Craft would not be consistent with the Williams Act’s purpose of protecting target shareholders. Id.
187 422 U.S. at 78.
188 433 F. Supp. at 1367.
189 Id.