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Securities—Liability of an Insider and His Investment Partnership for Profits Realized on a Short Swing Transaction—Section 16(b) of the Securities Exchange Act of 1934.—Blau v. Lehman

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accepted an application for membership, a contract for the sale of future goods[16] arose with the Club as seller, and the applicant was buyer. Since the member was to *receive* a gift each month for the period of his subscription, it appears title to the goods would not pass, and performance of the contract would not be complete until the goods were delivered. This conclusion would be inescapable under either the common law or the Uniform Sales Act.[17] The agreements with the foreign suppliers are the means through which the Club effectuates compliance with its obligations to the Club members. The legal effect of these agreements, as the court held, is that of a purchase contract by the Club. The transactions between the Club and its members are contracts of sale of future goods[18] which become retail sales upon delivery to the members, and thus, subject to the Federal Retailers' Excise Tax.

It is significant to note that, once the facts are so construed, a similar result would have been reached had the Uniform Commercial Code been applicable.[19]

DAVID W. CARROLL

Securities—Liability of an Insider and His Investment Partnership for Profits Realized on a Short Swing Transaction—Section 16(b) of the Securities Exchange Act of 1934.—*Blau v. Lehman.*[1]—Petitioner Blau, a stockholder in Tidewater Associated Oil Company, brought an action on behalf of his corporation to recover "short swing" profits from the respondents under section 16(b) of the Securities Exchange Act of 1934.[2] The respondents were Lehman Brothers, a partnership engaged in investment banking and the brokering and trading of securities, and Joseph A. Thomas, a member of Lehman Brothers and a director of Tidewater. The evidence showed that Lehman Brothers had earned profits out of short swing transactions in Tidewater securities while Thomas was a director. As to charges of deputization and wrongful use of "inside" information by Lehman Brothers, the evidence was in conflict. There was testimony that Thomas

16 N.J. Stat. Ann. §§ 46:30-1, 11(1) (1937).

17 U.S.A. § 19 is declaratory of the common law on this point. Cassinelli v. Humphrey Supply Co., 43 Nev. 208, 183 Pac. 523 (1919); 2 Williston, op. cit. supra note 14, at § 279a. If a contrary intent were not manifested, certain guides were established for ascertaining intent. As codified by the U.S.A. one rule stated: "If a contract to sell requires the seller to deliver the goods to the buyer . . . the property does not pass until the goods have been delivered. . . ." 1 Uniform Laws Ann. § 19, rule 5.

18 Supra note 16.

19 UCC § 2-401(2): "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . (b) if the contract requires delivery at destination, title passes on tender there." New Jersey has adopted the Uniform Commercial Code; it is effective January 1, 1963. N.J. Stat. Ann. §§ 12A:1-101 to 12A:10-106 (1961).

1 82 S. Ct. 451 (1962).

2 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1958).

mentioned to some of his partners that Tidewater was "an attractive investment" and under "good" management, but had never discussed the operating details of Tidewater affairs. There was further testimony that the firm bought 50,000 shares of stock of Tidewater solely on the basis of public announcements by Tidewater. The District Court, finding no evidence of deputization nor actual use of inside information, granted judgment for the firm, but held Thomas liable for his proportionate share of the profits. The Court of Appeals for the Second Circuit affirmed. On appeal, the Supreme Court of the United States also affirmed, two justices dissenting. HELD: Neither the partnership nor the partner-director is absolutely liable under section 16(b) for all the partnership's profits where the partner was not on the corporate board to represent the partnership and where the profits were made on the partnership's own initiative, independently of any "inside" knowledge given by such partner.

Before the enactment of section 16(b), most courts held that a corporate officer or director did not owe a fiduciary duty to stockholders to divulge advance undisclosed information, and aggrieved stockholders, therefore, had no right to recover from the insider.[3] Although the United States Supreme Court in *Strong v. Repide*[4] created a "special circumstances" doctrine, even this remedy was inadequate because of the difficult burden of proof imposed upon the stockholders.[5] In 1934, Congress enacted Section 16(b) of the Securities Exchange Act which provides that "short swing" profits realized by an officer, director, or ten percent stockholder on the purchase and sale, or sale and purchase, of an equity security of his corporation shall inure to the corporation. The primary purpose of the act was to ensure a fair and honest market, and section 16(b) was designed specifically to provide an effective remedy against trading within a six months' period by "insiders" with advance undisclosed information.[6]

Despite its seemingly simple prophylactic nature, Section 16(b) of the Securities Exchange Act of 1934 has been described as "the most subtle and least understood" provision of the act.[7] The Second Circuit, wherein most

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[3] E.g., Blabon v. Hay, 269 Mass. 401, 169 N.E. 268 (1929); Walsh v. Goulden, 130 Mich. 531, 90 N.W. 406 (1902); Seitz v. Frey, 152 Minn. 170, 188 N.W. 266 (1922).

See Hearings on S.84, S.56 and S.97 Before Senate Committee on Banking and Currency, 72d Cong., 2d Sess. (1933); 73d Cong., 1st & 2d Sess., 7741-42 (1934). See also S. Rep. No. 792, 73d Cong., 2d Sess. 9 (1934); S. Rep. No. 1455, 73d Cong., 2d Sess. 68 (1934).

[4] 213 U.S. 419 (1909).

[5] See Yourd, Trading in Securities by Directors, Officers and Stockholders: Section 16(b) of the Sec. Exch. Act, 38 Mich. L. Rev. 133, 139 (1939); Lake, The Use For Personal Profit of Knowledge Gained While a Director, 9 Miss. L.J. 427, 443 (1937).

[6] See Hearings on H.R. 7852 and H.R. 8720 Before the House Committee on Interstate Commerce and Foreign Commerce, 73d Cong., 2d Sess., 85 (1934); Hearings on S.84, S.56 and S.97, supra note 3, at 6557-59.

[7] Cook & Feldman, Insider Trading Under the Securities Exchange Act, 66 Harv. L. Rev. 385, 406 (1953); See Meeker & Cooney, The Problem of Definition in Determining Insider Liabilities under Section 16(b), 45 Va. L. Rev. 949, 950 (1959).

Although the act has been on the books for 27 years, Blau v. Lehman is the first Supreme Court decision concerning § 16(b).

of the cases under section 16(b) have arisen,[8] described the statute as intended to be "thorough going, to squeeze all possible profits out of [insider] stock transactions, and thus to establish a standard so high as to prevent any conflict [of interests]."[9] The judicial interpretations of section 16(b) reflect that the courts have not hesitated to strain the ordinary meaning of the terms used in the section in order to eliminate the opportunities for the insider to profit through such transactions.[10] The courts, as a result, have tended to give the section maximum effectiveness. However, to this uniform interpretation, there now appears to be one notable exception, the decision in *Blau v. Lehman*. The law appears to be settled, as a result of the instant case, that the mere fact that a partner's firm had a "short swing" transaction in the stock of a corporation in which he was a director at the same time is not sufficient to make the partnership liable for the profits thereon, nor the partner-director liable for the profits realized by his co-partners. Judge Clark, dissenting in the Court of Appeals, stated that this principle was "anomalous in granting exemption in the very cases where the incentive to take insiders' profits is strongest as a part of a trading firm's normal business. . . ."[11] The placement of partners on the boards of various corporations is a necessary requirement in the operations of an investment business.[12] Since investment firms are in a position to obtain confidential information from a partner-director and, furthermore, since the directorships are clearly accessible to the firms,[13] it would seem that holding these investment firms liable would "better effectuate the purposes of the statute and be more in accord with the liberal approach taken by courts in construing . . . section

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8 See Meeker, supra note 7, at 951.

9 Smolowe v. Delendo Corp., 136 F.2d 231, 239 (2d Cir.), cert. denied, 320 U.S. 751 (1943). See Blau v. Lehman, 286 F.2d 786, 793 (2d Cir. 1960) (dissent of Judge Clark).

10 See Note, 10 U. Pa. L. Rev. 463, 464 (1951); Adler v. Klawans, 267 F.2d 840 (2d Cir. 1959) (liable for sale of stock purchased prior to becoming a director); Colby v. Klune, 178 F.2d 872 (2d Cir. 1949) (employee in a position likely to obtain confidential information); Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958) (inactive director); Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir. 1947) (exercise of an option to convert preferred held a *purchase*); compare Ferraiolo v. Newman, supra, (forced conversion held not a purchase).

See also Fruncale v. Blumberg, 80 F. Supp. 387 (S.D.N.Y. 1948) (receipt of stock warrants in connection with employment contract found a *purchase*); compare Shaw v. Dreyfus, 172 F.2d 140 (2d Cir. 1949) (stock options not a *purchase*).

See § 3(a)(13), 48 Stat. 882 (1934), 15 U.S.C. § 78c(a)(13) (1958) (*purchase* includes "any contract to buy, purchase or *otherwise acquire*"); § 3(a)(14), 48 Stat. 882 (1934), 15 U.S.C. § 78c(a)(14) (1958) (*sale* includes "any contract to sell or *otherwise dispose of*").

11 286 F.2d at 793-94.

12 In United States v. Morgan, 118 F. Supp. 621, 715, 716 (S.D.N.Y. 1953), the court found that Lehman Bros. did have such a policy in order to support "their competitive efforts."

13 82 S. Ct. at 457, 460. See the approach of Judge Fahy in Lehman v. CAB, 209 F.2d 289, 292-94 (D.C. Cir. 1953), cert. denied, 347 U.S. 916 (1954). "Whenever the partner's acts as a director might further the interest of the partnership in accordance with the intended purposes of the firm in performing such acts, it must be concluded that the partner *represents* the firm." However, this case did involve a statute which has its own distinct language, purpose and history.

16(b)."[14] Such a result would not deter an admittedly necessary practice since it would only affect the "short swing" transaction. The harshness of total liability is certainly no greater than that of an individual insider who profits without actual use of undisclosed information.

In the concurring opinion in *Rattner v. Lehman*,[15] decided some years ago by the Court of Appeals for the Second Circuit, Judge Learned Hand suggested a potential remedy within the framework of 16(b), although it would require a subjective standard of proof. By establishing that the firm had "deputed a partner to represent its interests as a director on the board," the court would not be precluded from considering the firm an "insider" within the meaning of 16(b), on the theory that a partnership under certain circumstances may be treated as a "jural person."[16] The majority,[17] however, in the Court of Appeals decision of *Blau v. Lehman*, rejected the suggestion, reasoning that no amount of "deputizing" of a partner could render the partnership itself a "director" within the section. Unfortunately, Hand's dictum went untested when the Court of Appeals found evidence of "deputization" by the firm lacking. The Supreme Court, in contrast, did accept the proposition first intimated by Hand ten years previously, but due to the same fact deficiency, it is again only dictum. Mr. Justice Black, speaking for the majority, reasoned that a partnership could be a "director" and function through a deputy since section 3(a)(9) of the act [18] provides that " 'person' means . . . partnerships," and section 3(a)(7)[19] provides that " 'director' means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated."[20] But he concluded that "the findings of the two courts below, which we have accepted, preclude such a holding."[21] Mr. Justice Black further remarked that the intent of 3(a)(9) "is merely to make it clear that a partnership can be treated as an entity . . . not that it must be."[22] He thus rejected any possibility of regarding the firm as a "director" without resorting to the "deputization" theory.

The insertion by judicial implication of this subjective element (deputization) as a requirement of proof is open to the same criticism which dictated the objective form of the final enactment of 16(b), namely, the practical impossibility of enforcing a subjective standard of liability.[23]

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14 Note, 61 Colum. L. Rev. 926, 930 (1961).

15 193 F.2d 564 (2d Cir. 1952). Lehman Brothers also appeared as the defendant firm in this case, and the defendant partner was the predecessor of the present defendant partner.

16 Id. at 567.

17 286 F.2d at 789.

18 48 Stat. 883 (1934), 15 U.S.C. § 78c(a)(9) (1958).

19 48 Stat. 883 (1934), 15 U.S.C. § 78c(a)(7) (1958).

20 82 S. Ct. at 455.

21 Id. See Note, supra note 14, at 928-30, in which it is argued that "if the deputization theory has any vitality, it . . . seems that the facts of the instant case fall within its bounds."

22 Supra note 20.

23 See the testimony of Mr. Corcoran, chief spokesman for the draftsmen and

Therefore, no question of intention or subjective good faith is raised by the statute, and a corporation may recover such profits even though there had been no actual use of confidential information by the "insider."[24] This, in effect, imposes liability upon the mere showing of access to inside information which might be used. Similar difficulties of proof also would exist as to whether a partner has advised other members of his firm as to such information. It would appear that the "deputization" theory would be extremely impractical since, in essence, any partner-director represents his firm's interests in the corporate management.[25] A realistic appraisal would lead to the conclusion that a partner either actually knows what is going on in his firm or is content to leave action to his partners. In either instance it would be naive to believe that proof would not be practically insurmountable. As Mr. Justice Douglas pointed out in his dissenting opinion, "formal designation is no more significant than informal approval."[26] He felt that it would be easier to make the partnership a "director" than to hold the opposite. By stressing sections 3(a)(7) and 3(a)(9),[27] Mr. Justice Douglas emphasized that such a result "need not turn on a strained reading" of section 16(b).[28] In view of the objective standard employed by 16(b), it is entirely reasonable to apply the same standard to a partnership situation without actual proof that the partner was appointed as a director to benefit his partnership or that he actually transmitted confidential information to his colleagues. Finally, to give any other construction to the language of section 16(b) is to attribute to Congress an intent at variance with that to which it gave clear expression.

Judge Clark, dissenting in *Blau v. Lehman* in the Court of Appeals,[29] contended that the partner-director should be liable under section 16(b)

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proponents of the act, Hearings on S.84, S.56 and S.47, supra note 2, at 6557 wherein he stated: "You hold the director, irrespective of any intention . . . because it will be absolutely impossible to prove the existence of such intention . . . and . . . because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out in a short swing."

See Gratz v. Claughton, 187 F.2d 46, 49 (2d Cir.), cert. denied, 341 U.S. 920 (1951).

24 Smolowe v. Delendo Corp., supra note 9, at 239; Ferraiolo v. Newman, supra note 10, at 344; Walet v. Jefferson Lake Sulphur Co., 202 F.2d 433 (5th Cir.), cert. denied 346 U.S. 820 (1953).

25 Note, supra note 14. See note 13 supra.

26 82 S. Ct. at 458.

27 Supra notes 18-19.

28 In United States v. A.&P. Trucking Co., 358 U.S. 121 (1958), the Supreme Court held a partnership could be criminally liable under the Motor Carrier Act. Although the act had not explicitly subjected partnerships to criminal liability, the Court reasoned that Congress had "specifically included partnerships within the definition of 'person' in a large number of regulatory Acts, thus showing its intent to treat partnerships as entities." See, e.g., Civil Aeronautics Act, 52 Stat. 979 (1938), 49 U.S.C. § 401(27) (1958); Federal Communications Act, 48 Stat. 1066 (1934), 47 U.S.C. § 153(i) (1958); Shipping Act, 39 Stat. 729 (1916), 46 U.S.C. § 801 (1958); Tariff Act, 46 Stat. 708 (1930), 19 U.S.C. § 1401(d) (1958). This case is more severe in its impact since § 16(b) of Securities Exchange Act of 1934 is not penal, but of a remedial and deterrent nature.

29 286 F.2d at 794-95.

for the entire profit of his firm. He stressed traditional partnership law which gives each partner an undivided interest in the entire partnership profit. Under New York Partnership Law a partner is considered a co-owner[30] and, further, the partnership is charged with the knowledge of, or notice to, its partners.[31] Under any "literal legal reading" of the act, he argued, the partner was a co-owner and charged with knowledge of the transaction and, consequently, realizes the entire profit.[32] However, the Supreme Court, speaking through Mr. Justice Black, rejected this contention by stating that "liability under 16(b) is [not] to be determined . . . by general partnership law."[33] He felt that the section left no doubt that a director is only liable for "any profit realized by *him*."[34]

The contention of Judge Clark may appear to be harsh as to imposition of total liability. Admittedly the statute does operate stringently with resulting burdens to individuals in many cases, but, as Judge Clark stated, "that seems not a sound reason for excepting its operation in this important and natural field of operation."[35] Exemption in the investment firm area would be difficult to explain to the "ordinary small-scale director not so exempt and indeed to the investing public generally." Furthermore, an assumption of the risk factor is present in this area. No one is obliged to become a director, but, as soon as he does so, he accepts whatever limitations, obligations and conditions attached to the position. Thus, it may be argued that the partner-director accepts the apparent unfairness of total liability by becoming a director in the issuing corporation.

The petitioner also contended that even if the court were to conclude that a partnership could not be considered a director in the absence of proof of deputization and that the individual partner-director could not be held liable for the total profit made by the partnership, nonetheless, strong policy

[30] N.Y. Partnership Law §§ 12, 40, 43, 50-53. See Soloman Bros. & Hutzler v. Pedrick, 105 F. Supp. 210, 213 (S.D.N.Y. 1952); Kraus v. Kraus, 250 N.Y. 65, 164 N.E. 743 (1928).

[31] N.Y. Partnership Law § 23. Purchases and sales of securities by the partnership are in legal effect purchases and sales by all of its partners. N. Y. Partnership Law § 51. Section 42 requires the partner to disclose all pertinent information to his partnership.

[32] In an analogous situation in Walet v. Jefferson Lake Sulphur Co., supra note 24, an "insider" could not avoid liability for the full profit by alleging his wife's undivided one-half interest, under community property law. To the extent that the opinion in Walet is predicated upon the right of a husband to control a wife's half interest, its precedent value to the partnership situation is weakened. See Brief for the SEC as Amicus Curiae, p. 20, Blau v. Lehman, 82 S. Ct. 451 (1962).

[33] 82 S. Ct. at 457.

[34] The two courts below held that the partner's proportionate share was "realized" despite the fact that he had waived all interest in the transaction. The ineffectiveness of a waiver, not previously considered by the courts before Blau v. Lehman, was not challenged at the Supreme Court level. The Court therefore expressed no view on this question. Furthermore, there may be much significance in the holding of an individual partner-director liable for his share of the profit, not only where he made no use of inside information, but also where he was unaware of the actual transaction. However, the contention in the two courts below that he realized no profit at all was not argued at the Supreme Court level.

[35] 286 F.2d at 793.

factors required that section 16(b) be controlling. In other words, petitioner argued that the partnership should be liable even though it is neither a director, officer, nor a ten percent stockholder. It was urged that 16(b) should be expanded to cover partnerships in which a director is a member in order to carry out the congressionally declared purpose of "preventing the unfair use of information which may have been obtained by an [insider] . . . by reason of his relationship to the issuer."[36] Avoidance of the statute could be accomplished by the practice of the mere exchange of information among partners who are insiders of different corporations.[37] As Mr. Justice Douglas expressed, it allows "all but one partner to share in the feast" and "they in turn can offer feasts to him in the 99 other companies of which they are directors."[38] The incentive, therefore, to use confidential information might be enhanced since the loss would be minimal.[39]

These persuasive policy arguments might be limitless and, in effect, extended to include all persons realizing "short swing" profits who have access to "inside" information. The Supreme Court felt that this "very broadening of categories . . . was considered and rejected by Congress when it passed the Act." The original draft would have made all profits received by anyone, insider or not, to whom unlawful disclosure had been made recoverable by the corporation.[40] Congress realized that the Court of Appeals for the Second Circuit refused in the *Rattner* case to apply 16(b) under similar circumstances. From this the Supreme Court reasoned that the interpretation of the legislative history was supplemented by the fact that Congress could have but never did expressly provide for third person liability.[41]

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36 Securities Exchange Act, supra note 2.

For similar treatment of an analogous problem in the context of Chapter X of the Bankruptcy Act, see In re Midland United Co., 159 F.2d 340 (3d Cir. 1947); In re Los Angeles Lumber Products Co., 37 F. Supp. 708, 711 (S.D. Cal. 1941) (law firm not entitled to compensation when one of its partner-directors dealt with bonds of the debtor while reorganization proceedings were pending). Note, however, that § 16(b) does not have a catchall phrase as the phrase "other persons acting in the proceedings in a representative or fiduciary capacity" in § 249. Bankruptcy Act § 249, 52 Stat. 901 (1938), 11 U.S.C. § 649 (1958).

37 Cook & Feldman, supra note 7, at 629.

38 82 S. Ct. at 460.

39 Apart from any *moral* obligation it would appear that the partnership is *legally* obligated to reimburse the partner-director. Section 40(2) of the N.Y. partnership law requires indemnification by the partnership for "personal liabilities reasonably incurred by [the partner] in the ordinary and proper conduct of its business, or for the preservation of its business or property." The problem, therefore, is to determine whether liability incurred by Thomas falls within the language of § 40(2). At first glance, the violation of a federal statute should preclude his conduct from being classified as "ordinary and proper." However, Thomas was in no way a participant in nor was he aware of the transaction. It is apparent, as a result, that his conduct was "ordinary and proper."

40 See § 15(b)(3) of H.R. 7852 and S. 2693, 73d Cong., 2d Sess. (1934).

41 See Seventeenth Annual Report of the Securities & Exchange Commission, p. 62 (1952); Eighteenth Annual Report, p. 79 (1953). These reports were submitted to Congress.

It is possible that the legislative history would not warrant the Court's conclusion that third parties were intentionally omitted from coverage under the act. The hearings seem to indicate that Congress deleted the provision because of anticipated administrative difficulties of proving the use of inside information.[42] Thus, it is persuasive that Congress may have favored an automatic application of the statute without necessity of such proof.[43] As stated previously, the dictum in the present case forces the very step which Congress avoided, namely, a subjective standard of proof requiring a showing of actual unfair use of inside information. Furthermore, recognizing that "large areas of insider conduct was consciously left untouched by Congress for reasons dictated by practicalities rather than ethics or pure logic" and that section 16(b) must be interpreted to achieve fully its intended purposes, the Court of Appeals for the Second Circuit stated in *Alder v. Klawans*:

> [W]e must glean from the Statute as a whole rather than from isolated parts, we must consider the results which would flow from each of the two interpretations contended for . . . If we find one interpretation tends to carry out and the other to defeat the purposes of the Statute, the resolution of the issues becomes simple . . . [B]ut the consciously limited scope of the statute is no reason for us to seek yet further limitations of what is remedial legislation.[44]

In conclusion, however, Mr. Justices Black justifiably stated "that Congress is the proper agency to change an interpretation of the Act unbroken since its passage, if the change is to be made."[45] Unfortunately, he did approve the "deputization" test which also should have been left to legislative initiative. This leads to further problems of interpretation and policy. Assuming the firm did "deputize" a partner to represent its interests as a director on the board, would this imply that the director would have to be active in the purchase and sale by the partnership in order to view the firm as a "jural person" before treating the firm as the director and allowing full recovery? Would the result be the same if the director was a mere employee of the partnership? Would formal deputization be required or would it be sufficient, alone, that the partner was instrumental in effecting the transaction? How extensive must the knowledge and participation of the insider be to create complete liability on the firm or the insider-partner?

[42] See Hearings on H.R. 7852 and H.R. 8720, supra note 6, at 135 et seq. and Hearings on S.84, S.56 and S.97, supra note 6, at 6555, 6558, 6560-62.

[43] 286 F.2d at 794 (dissent of Judge Clark).

[44] 267 F.2d 840, 844-45 (2d Cir. 1959). See United States v. CIO, 335 U.S. 106, 112 (1948); SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943) (read and interpreted "so as to carry out in particular cases the generally expressed legislative policy"); Girouard v. United States, 328 U.S. 61, 69 (1946) ("treacherous to find in Congressional silence alone the adoption of a controlling rule of law"). Compare United States v. Great Northern Ry., 343 U.S. 562, 575 (1952) ("judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written").

[45] 82 S. Ct. at 457.

Should recovery be allowed where persons other than directors, officers, and ten percent stockholders who, because of their relationship to insiders, whether it be through marriage, friendship, partnership or other business associations, might be presumed to have access to confidential information? These difficulties lend themselves to legislative inquiry and enactments better than to judicial contortions. Quite clearly, Congress should act, since *Blau v. Lehman* has clearly established that there is no provision in the act to curb the transfer to and the use of confidential information by non-insiders and, especially, the investment brokerage firms.

RICHARD M. GABERMAN

Trade Regulations—Sherman Act—Conspiracy—Conscious Parallelism. —*Delaware Valley Marine Supply Co. v. American Tobacco Co.*[1]—The Delaware Valley Marine Supply Company was organized to sell tax-free tobacco and liquor to vessels engaged in foreign trade in the Port of Philadelphia. In order to purchase tax-free cigarettes a ship chandler must obtain a direct listing. The Supply Company applied for the listing to five major tobacco companies doing business in the Port. Each company had at least one distributor for the Port at that time, Lipschutz Bros. R. J. Reynolds and P. Lorillard also sold to a third distributor who dealt in all ship supplies. Two companies refused by letter, two did not reply and Philip Morris declined to grant the listing after a preliminary investigation. This precluded plaintiff from entering the sea stores business. Plaintiff brought this suit for treble damages alleging a conspiracy in violation of Section 1 of the Sherman Act.[2] The plaintiff did not introduce direct evidence of conspiracy but relied heavily on "conscious parallelism," claiming that the tobacco companies showed a consciously uniform business behavior by their refusals. It was common knowledge in the business that to sell sea stores, all the major brands of cigarettes must be procured. There was other evidence that the cigarette companies were adequately represented in this market, that their sales were increasing and that they had no financial interest in the competitor, Lipschutz, which would prompt the alleged behavior. The lower court granted the defendants a directed verdict on the ground that the plaintiff had not proved damage,[3] expressly avoiding the question of conspiracy.[4] The Court of Appeals affirmed. HELD: Even assuming the evidence supported the existence of conscious parallelism, the plaintiff had

[1] 297 F.2d 199 (3d Cir. 1961), petition for cert. filed, 30 U.S.L. Week 3267 (Feb. 20, 1962) (No. 734).

[2] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958). The section in substance provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

[3] Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440 (E.D. Pa. 1961).

[4] Id. at 449.