

## Beyond *Blue Chip*: Issuer Standing to Seek Injunctive Relief Under Section 10(b) and Rule 10b-5 Without the Purchase or Sale of a Security

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### I. INTRODUCTION

In *Blue Chip Stamps v. Manor Drug Stores*,<sup>1</sup> Justice Rehnquist, writing for the Court, stated, “When we deal with private actions under [section 10(b) and] Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.”<sup>2</sup> The Court in *Blue Chip* described the state of the law:

No language in [section 10(b) and Rule 10b-5] speaks at all to the contours of a private cause of action for their violation. . . . We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question.<sup>3</sup>

Put simply, because the private right of action under section 10(b)<sup>4</sup> and Rule 10b-5<sup>5</sup> is judicially implied, courts have wide discretion in determining who has standing to sue under these provisions.<sup>6</sup>

Standing to sue under section 10(b) and Rule 10b-5 can be determinative of whether an individual or entity has access to a wide

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<sup>1</sup> 421 U.S. 723 (1975).

<sup>2</sup> *Id.* at 737.

<sup>3</sup> *Id.* at 749.

<sup>4</sup> 15 U.S.C. § 78j (2000).

<sup>5</sup> 17 C.F.R. § 240.10b-5 (2005).

<sup>6</sup> *Blue Chip*, 421 U.S. at 749 (discussing the scope of the private right of action under section 10(b) and Rule 10b-5).

range of relief that these provisions can afford.<sup>7</sup> Section 10(b) and Rule 10b-5 have provided relief in cases of corporate misstatements and nondisclosures, insider trading, corporate mismanagement, improper mergers, dishonest corporate reorganizations, and a variety of other circumstances involving securities fraud.<sup>8</sup>

Although the private right of action under section 10(b) and Rule 10b-5 has grown far beyond the “legislative acorn,” the “judicial oak” is far from fully developed. This area of law continues to be refined, and the Supreme Court has left open a number of large issues regarding standing under section 10(b) and Rule 10b-5. For example, in *Blue Chip*, the Supreme Court held that standing to sue for monetary damages is limited only to plaintiffs who have purchased or sold securities in connection with an alleged manipulative or deceptive act.<sup>9</sup> The Court, however, did not answer the question whether a purchase or sale is required to confer standing to sue for injunctive relief under section 10(b) and Rule 10b-5, and if this standing exists, whether a corporate issuer can take advantage of this standing.

Current case law suggests that a corporate issuer may have standing to seek injunctive relief without the purchase or sale of a security.<sup>10</sup> Strong policy justifications support the existence of such an exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5. The Supreme Court, however, has never ruled on whether such an exception exists, and substantial obstacles stand in the way of the Court allowing such an exception.

This Article explores whether a corporate issuer has standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security. The remainder of this Part contains general statements regarding the timeliness of this topic. Part II provides background information regarding section 10(b) and Rule 10b-5, the purchaser-seller rule, and the possible exceptions to this rule. Part III examines the policy reasons for a corporate issuer having standing to seek injunctive relief under section 10(b) and Rule 10b-5 without a purchase or sale of a security, and Part IV discusses the obstacles that may impede a court from allowing a corporate issuer such standing. Finally, Part V contains concluding remarks and suggests

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<sup>7</sup> THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* § 12.3[3] (5th ed. 2005) (discussing the wide variety of contexts in which section 10(b) and Rule 10b-5 can provide relief).

<sup>8</sup> *Id.*

<sup>9</sup> 421 U.S. at 753–55.

<sup>10</sup> See *infra* note 151 (providing case law holding that a corporate issuer may have standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security).

that congressional action would be the best method to ensure issuer standing.

This Article is timely because it analyzes a little-known method for corporate issuers to protect themselves against stock manipulation, breaks fresh ground in legal scholarship, and discusses controversial issues that the Supreme Court will ultimately have to decide. If a corporate issuer has standing to seek injunctive relief under section 10(b) and Rule 10b-5, then the issuer has a sword to defend against stock manipulation and to protect the value of its securities. The purchase or sale of a security is viewed by many as an integral requirement for bringing an action under section 10(b) and Rule 10b-5. This Article is significant because it discusses a lesser known method for an issuer to defend against stock manipulation in cases in which the issuer neither purchased nor sold securities in connection with an alleged manipulative or deceptive act or omission.

This Article is also timely because it fills a unique void in current scholarship. Nearly four decades have passed since a major academic work has examined corporate issuer standing to bring an action for injunctive relief under section 10(b) and Rule 10b-5.<sup>11</sup> The last major examination of this topic occurred in a student comment that was published during 1967 in the *University of Pennsylvania Law Review*.<sup>12</sup> In the time since that student comment, the Supreme Court announced its decision in *Blue Chip Stamps v. Manor Drug Stores*,<sup>13</sup> which is the seminal case examining standing under section 10(b) and Rule 10b-5. *Blue Chip* definitively established that standing to sue for monetary damages under section 10(b) and Rule 10b-5 is available only to plaintiffs who have purchased or sold securities in connection with an alleged manipulative or deceptive act or omission.<sup>14</sup> *Blue Chip*, however, debatably left open whether a purchase or sale is required to have standing to sue for injunctive relief under section 10(b) and Rule 10b-5, and if this standing exists, whether an issuer can take advantage of this standing.

This Article examines issues that the Supreme Court will have to decide. Whether a corporate issuer has standing to pursue injunctive relief under section 10(b) and Rule 10b-5 must be bifurcated into two

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<sup>11</sup> Comment, *Private Enforcement Under Rule 10b-5: An Injunction for a Corporate Issuer?*, 115 U. PA. L. REV. 618 (1967).

<sup>12</sup> *Id.*

<sup>13</sup> 421 U.S. 723 (1975); see also *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 462 (2d Cir. 1952) (providing the rule that became the basis for the *Blue Chip* decision).

<sup>14</sup> *Blue Chip*, 421 U.S. at 753–55.

related questions: First, does an individual or entity who does not purchase or sell securities in connection with an allegedly manipulative or deceptive statement have standing to seek injunctive relief under section 10(b) and Rule 10b-5?<sup>15</sup> Second, if such standing does exist, does it extend to an issuer of stock?<sup>16</sup> Courts have reached greatly varied results in answering both of these questions.<sup>17</sup> Unless Congress acts first, the Supreme Court will have to resolve the state of the law regarding standing under section 10(b) and Rule 10b-5. This Article analyzes the considerations that the Court must address in adjudicating these issues.

## II. BACKGROUND

The first step in analyzing whether a corporate issuer has standing to seek injunctive relief under section 10(b) and Rule 10b-5 without a purchase or sale requires putting the issue in context. In this section, the history of section 10(b) and Rule 10b-5, the purchaser-seller requirement, and the possible exceptions to this requirement will be examined.

### A. *The History of Section 10(b) and Rule 10b-5*

To understand the history of section 10(b) and Rule 10b-5, it is necessary to review the advent of federal securities laws in the United States, the basic structure of section 10(b) and Rule 10b-5, and the recognition of a private right of action under section 10(b) and Rule 10b-5. The dawn of federal securities laws occurred in the 1930s. In the shadow of the stock market crash of 1929 and the ensuing depression, Congress enacted two major pieces of legislation designed to govern the sale of securities.<sup>18</sup> These two pieces of legislation, the Securities Act of 1933 ("1933 Act")<sup>19</sup> and the Securities Exchange Act of 1934 ("1934 Act"),<sup>20</sup> represent the first major federal attempts at securities regulation.<sup>21</sup>

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<sup>15</sup> See *infra* Part II.C (discussing the validity of the injunctive relief exception to the purchaser-seller rule).

<sup>16</sup> See *infra* Parts III, IV, V (analyzing issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security).

<sup>17</sup> See *infra* Parts II.C, III, IV.

<sup>18</sup> See *Blue Chip*, 421 U.S. at 727 (discussing the enactment of the Securities Act of 1933 and the Securities Exchange Act of 1934).

<sup>19</sup> 15 U.S.C. §§ 77a–77aa (2000 & Supp. II 2002).

<sup>20</sup> *Id.* §§ 78a–77mm.

<sup>21</sup> See *Blue Chip*, 421 U.S. at 727–28.

Congress created the 1933 Act with two primary purposes. First, Congress sought to require that investors be provided with material information regarding securities offered for public sale.<sup>22</sup> Second, Congress sought to prevent misrepresentation, fraud, and deceit in the sale of securities.<sup>23</sup>

The 1933 Act has extensive provisions governing registrations and prospectuses and provides express causes of action if these provisions are violated.<sup>24</sup> Section 11 of the 1933 Act provides a private right of action for “any person acquiring a security” based on a registration “contain[ing] an untrue statement of a material fact or omitt[ing] to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”<sup>25</sup> Section 12(a)(1) of the 1933 Act<sup>26</sup> provides a private right of action for any “person purchasing [a] security” against “any person who offers or sells a security” in violation of the registration and prospectus requirements found in section 5 of the 1933 Act.<sup>27</sup> Additionally, section 12(a)(2) of the 1933 Act provides a private right of action for any “person purchasing [a] security” against a person offering to sell a security based on a prospectus or oral communication containing “an untrue statement of a material fact or omit[ting] to state a material fact necessary in order to make the statements . . . not misleading . . . .”<sup>28</sup>

Congress created the 1934 Act for a variety of reasons relating to the “national public interest.”<sup>29</sup> These reasons include: the important relationship between fair and honest markets and interstate commerce, the dangers of market manipulation, and the fear of national emergencies created by unreasonable fluctuations in security prices.<sup>30</sup> The 1934 Act contains a variety of provisions dealing with the regula-

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<sup>22</sup> MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 1285 (8th ed. 2000) (discussing the public distribution of securities and the requirements of the 1933 Act).

<sup>23</sup> *Id.*

<sup>24</sup> See *Blue Chip*, 421 U.S. at 728 (discussing the content of the 1933 Act).

<sup>25</sup> 15 U.S.C. § 77k (2000) (providing civil liabilities on account of false registration statements).

<sup>26</sup> *Id.* § 77l(a)(1) (providing civil liabilities in connection with prospectuses and communications).

<sup>27</sup> *Id.* § 77e.

<sup>28</sup> *Id.* § 77l(a)(2) (providing civil liabilities in connection with prospectuses and communications).

<sup>29</sup> *Id.* § 78b (2000 & Supp. II 2002) (providing the “necessity” for the regulation contained within the 1934 Act).

<sup>30</sup> *Id.*

tion of securities, and section 4(a) of the 1934 Act established the Securities and Exchange Commission ("SEC").<sup>31</sup>

The 1934 Act also contains a number of express causes of action. Section 9(e) of the 1934 Act<sup>32</sup> provides a private right of action for "any person who shall purchase or sell any security at a price" that was affected by a variety of manipulative acts described in sections 9(a), (b), and (c) of the 1934 Act.<sup>33</sup> Section 16(b) of the 1934 Act provides a private right of action for recovery of short-swing, insider profits "by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit . . ."<sup>34</sup> Additionally, section 18(a) of the 1934 Act provides a private right of action to "any person . . . who . . . shall have purchased or sold a security" based on "false or misleading" statements made in filings to the SEC.<sup>35</sup>

Section 10(b) of the 1934 Act makes it unlawful for any person to "use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance . . ."<sup>36</sup> To enforce section 10(b), the SEC may promulgate "such rules and regulations . . . as necessary or appropriate in the public interest or for the protection of investors."<sup>37</sup> In 1942, by the authority granted in section 10(b), the SEC promulgated Rule 10b-5.<sup>38</sup> Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

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<sup>31</sup> 15 U.S.C. § 78d(a) (2000 & Supp. II 2002) (establishing and describing the SEC).

<sup>32</sup> *Id.* § 78i(e) (discussing persons liable in suits at law or in equity for manipulation of security prices).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* § 78p(b) (discussing civil liability for insider profits from the purchase and sale, or sale and purchase, of a security within the same six month period).

<sup>35</sup> *Id.* § 78r(a) (discussing liability for misleading statements made in SEC filings).

<sup>36</sup> *Id.* § 78j.

<sup>37</sup> 15 U.S.C. § 78j (2000).

<sup>38</sup> 17 C.F.R. § 240.10b-5 (2005).

(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.<sup>39</sup>

Section 21(e) of the 1934 Act expressly grants the SEC the power to enforce section 10(b) and Rule 10b-5 and the other provisions of the 1934 Act.<sup>40</sup> Section 27 of the 1934 Act grants federal courts jurisdiction over cases relating to section 10(b) and Rule 10b-5.<sup>41</sup>

Although no express private right of action is provided under section 10(b) or Rule 10b-5, courts have held that an implied private right action does exist. In *Kardon v. National Gypsum Co.*,<sup>42</sup> the United States District Court for the Eastern District of Pennsylvania became the first court to recognize a private civil remedy under section 10(b) and Rule 10b-5.<sup>43</sup>

In *Kardon*, Morris and Eugene Kardon (collectively the “Kardons”) sued Leon and William Slavin (collectively the “Slavins”) and National Gypsum Company (“National Gypsum”) for allegedly violating section 10(b) and Rule 10b-5.<sup>44</sup> The Kardons and the Slavins both owned stock in Western Board and Paper Company (“Western Board and Paper”) and Michigan Stock and Paper Company (“Michigan Stock and Paper”).<sup>45</sup> The Slavins secretly entered a deal to sell National Gypsum the assets of Western Board and Paper,<sup>46</sup> and the Slavins then purchased the Kardons’ stock in both Western Board and Paper and Michigan Stock and Paper without revealing the deal with National Gypsum.<sup>47</sup> The Kardons alleged that the Slavins and National Gypsum had violated section 10(b) and Rule 10b-5 by participating in a conspiracy to fraudulently misrepresent the truth to induce the Kardons to sell their stock at an artificially low value.<sup>48</sup> In determining whether the Kardons had standing to seek relief under section 10(b) and Rule 10b-5, the court relied on general tort law

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<sup>39</sup> *Id.*

<sup>40</sup> 15 U.S.C. § 78u(e) (2000 & Supp. II 2002).

<sup>41</sup> *Id.* § 78aa (2000).

<sup>42</sup> 69 F. Supp. 512 (E.D. Pa. 1946).

<sup>43</sup> *Id.* at 514.

<sup>44</sup> *Kardon v. Nat’l Gypsum Co.*, 73 F. Supp. 798, 800–01 (E.D. Pa. 1947) (providing the factual background for the 1946 opinion establishing a private right of action under section 10(b) and Rule 10b-5).

<sup>45</sup> *Id.* at 800.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 801.

<sup>48</sup> *Kardon v. Nat’l Gypsum Co.*, 69 F. Supp. 512, 513 (E.D. Pa. 1946).

principals.<sup>49</sup> Quoting section 286 of the Restatement of Torts, the court wrote:

“The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if; (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect.”<sup>50</sup>

Because section 10(b) and Rule 10b-5 had been enacted to protect those who had been the victim of stock manipulation, the court held that a private right of action does exist.<sup>51</sup>

The Supreme Court did not address the existence of a private right of action under section 10(b) and Rule 10b-5 until a quarter of a century later.<sup>52</sup> After twenty-five years without comment,<sup>53</sup> the Court simply stated in *Superintendent of Insurance v. Bankers Life & Casualty Co.*: “It is now established that a private right of action is implied under § 10(b).”<sup>54</sup> The Court reached this holding because numerous lower courts had reached this conclusion during the twenty-five years between *Kardon* and *Superintendent of Insurance*.<sup>55</sup>

#### B. Standing and the Purchaser-Seller Rule

After the United States District Court for the Eastern District of Pennsylvania held that a private right of action exists under section

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (quoting RESTATEMENT OF TORTS § 286 (1934)).

<sup>51</sup> *Id.*

<sup>52</sup> See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (noting that the Court did not address the existence of a private right of action under section 10(b) and Rule 10b-5 until twenty-five years after *Kardon*); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) (providing the first discussion by the Supreme Court of *Kardon* and a private right of action under section 10(b) and Rule 10b-5).

<sup>53</sup> In fact, the Supreme Court did not even first interpret section 10(b) and Rule 10b-5 until 1969. See *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 465 (1969) (“Although § 10(b) and Rule 10b-5 may well be the most litigated provisions in the federal securities laws, this is the first time this Court has found it necessary to interpret them.”).

<sup>54</sup> *Superintendent of Ins.*, 404 U.S. at 13 n.9 (citations omitted) (providing the Supreme Court’s one-line holding that a private right of action exists under section 10(b) and Rule 10b-5).

<sup>55</sup> See *Blue Chip*, 421 U.S. at 730 (stating that by the time *Superintendent of Insurance* was heard by the Court, “the overwhelming consensus of the District Courts and Courts of Appeals [was] that such a cause of action did exist.”); but see *infra* Part IV.A (suggesting that the Supreme Court probably would hold that no private right of action exists under section 10(b) and Rule 10b-5 if the issue reached the Court for the first time today).



10(b) and Rule 10b-5,<sup>56</sup> a plethora of questions were created regarding who has standing to seek relief. In 1951, the United States Court of Appeals for the Second Circuit took a major step by answering many of these questions in *Birnbaum v. Newport Steel Corp.*<sup>57</sup> *Birnbaum* held that standing to sue under section 10(b) and Rule 10b-5 is available only to plaintiffs who have purchased or sold securities in connection with an alleged manipulative or deceptive act or omission.<sup>58</sup>

Although the existence of exceptions is hotly debated and forms the basis of this Article, the purchaser-seller rule that was announced in *Birnbaum* remains in force today.<sup>59</sup> In *Birnbaum*, a group of shareholders sued on behalf of Newport Steel Corporation (“Newport Steel”) and other similarly situated shareholders for alleged violations of section 10(b) and Rule 10b-5.<sup>60</sup> The shareholders alleged that the president and various members the Newport Steel board of directors defrauded the shareholders by permitting the president to sell his forty percent of stock in Newport Steel for a large profit after rejecting a tender offer that would have been profitable to all of the shareholders.<sup>61</sup> The president and various other defendants moved to dismiss the complaint for failure to state a cause of action under section 10(b) and Rule 10b-5 because the shareholders and corporation did not purchase stock based on the alleged misrepresentation.<sup>62</sup> The United States District Court for the Southern District of New York agreed and dismissed the action.<sup>63</sup>

On appeal, the Second Circuit affirmed the district court and held that to have standing, a plaintiff must have purchased or sold securities in connection with an alleged manipulative or deceptive act or omission.<sup>64</sup> The court made its decision by interpreting section 10(b) and Rule 10b-5 in the context of the 1933 Act and the 1934 Act.<sup>65</sup> The court determined that the SEC had promulgated Rule 10b-5 to protect “against fraud on a seller of securities by the pur-

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<sup>56</sup> *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946).

<sup>57</sup> 193 F.2d 461 (2d Cir. 1952).

<sup>58</sup> *Id.* at 463.

<sup>59</sup> See *infra* Part II.C (discussing possible exceptions to the purchaser-seller rule).

<sup>60</sup> *Birnbaum*, 193 F.2d at 462.

<sup>61</sup> *Id.* at 462–63.

<sup>62</sup> *Id.* at 462.

<sup>63</sup> *Id.* at 463. The distinguished panel deciding *Birnbaum* consisted of Chief Judge Swan, Judge Learned Hand, and Judge Augustus Hand. *Id.* at 462. Judge Augustus Hand wrote the opinion of the court. *Id.*

<sup>64</sup> *Birnbaum*, 193 F.2d at 463.

<sup>65</sup> *Id.* at 463–64.

chaser if the latter was not a broker or a dealer.”<sup>66</sup> Prior to the enactment of Rule 10b-5, section 17(a) of the 1933 Act and section 15(c) of the 1934 Act represented the only prohibitions against fraud under federal securities law.<sup>67</sup> Section 17(a) of the 1933 Act makes it unlawful to use fraudulent methods against a *purchaser* in the sale or offer of any security,<sup>68</sup> and section 15(c) of the 1934 Act deals only with fraudulent practices by brokers and dealers in over-the-counter markets.<sup>69</sup> In short, the court viewed Rule 10b-5 as a gap filler to protect sellers of securities who are not brokers or dealers.<sup>70</sup> The court bolstered its holding by citing an SEC press release stating that Rule 10b-5 was created to “prohibit[] individuals or companies from buying securities if they engage in fraud in their purchase.”<sup>71</sup> Because Rule 10b-5 was designed to protect sellers of securities, the Second Circuit held that standing under Rule 10b-5 requires the plaintiff to have purchased or sold securities in connection with an alleged manipulative or deceptive act or omission.<sup>72</sup>

Notably, the court in *Birnbaum* rejected the argument that applying the purchaser-seller rule under Rule 10b-5 would render the words “in connection with” superfluous. The court held that when read in the context of the 1933 Act and 1934 Act, the meaning of

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<sup>66</sup> *Id.* at 463.

<sup>67</sup> *Id.*

<sup>68</sup> 15 U.S.C. § 77q(a) (2000).

<sup>69</sup> *Id.* § 78o(c).

<sup>70</sup> *Birnbaum*, 193 F.2d at 463.

<sup>71</sup> *Id.* (citations omitted) (quoting Securities Exchange Act Release No. 3230 (May 21, 1942), regarding the enactment of Rule 10b-5). Ironically, in the late 1960s and early 1970s, the SEC filed numerous amicus curiae briefs expressing its opposition to the purchaser-seller rule. See, e.g., *Mount Clemens Indus. Inc. v. Bell*, 464 F.2d 339, 341 (9th Cir. 1972) (stating that the SEC in an amicus curiae brief had taken the position that *Birnbaum* was incorrectly decided); *Drachman v. Harvey*, 453 F.2d 722, 738 (2d Cir. 1972) (“The Commission urges us to take this opportunity to review and repudiate the purchaser-seller requirement for 10b-5 actions which we enunciated in *Birnbaum* . . . .”); *Levine v. Seilon, Inc.*, 439 F.2d 328, 329 (2d Cir. 1971) (stating that the SEC has suggested that the Second Circuit should overrule the purchaser-seller requirement); *Iroquois Indus. Inc. v. Syracuse China Corp.*, 417 F.2d 963, 967 (2d Cir. 1969) (noting that the SEC has asked the Second Circuit to overrule *Birnbaum* and has asserted that *Birnbaum* has been weakened by a number of subsequent opinions). Prior to *Blue Chip*, the SEC also sought on two separate occasions, without success, to amend section 10(b) from “in connection with the purchase or sale of any security” to “in connection with the purchase or sale of, or any attempt to purchase or sell, any security.” *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732 (1975).

<sup>72</sup> *Birnbaum*, 193 F.2d at 463.

Rule 10b-5 was “not difficult to ascertain,” even though the rule was “somewhat loosely drawn [in] its meaning.”<sup>73</sup>

The Supreme Court waited over twenty years to address the rule announced in *Birnbaum*.<sup>74</sup> In the interim, numerous reported cases reaffirmed *Birnbaum*'s holding that a plaintiff must have purchased or sold securities in connection with an alleged manipulative or deceptive act or omission to have standing to sue under section 10(b) and Rule 10b-5.<sup>75</sup> In *Blue Chip Stamps v. Manor Drug Stores*, the Supreme Court adopted the purchaser-seller rule that was announced in *Birnbaum*.<sup>76</sup> Justice Blackmun, writing in dissent, went so far as to say that *Birnbaum* is regarded as the “Mother Court” in this area of the law.<sup>77</sup>

In *Blue Chip*, a company, Blue Chip Stamps, had been required to offer shares of its stock to a group of retailers as part of an antitrust consent decree.<sup>78</sup> One of the retailers who did not purchase stock later sued Blue Chip Stamps on the grounds that Blue Chip Stamps allegedly issued an overly pessimistic appraisal of its status and future prospects to dissuade potential purchasers.<sup>79</sup> The United States District Court for the Central District of California dismissed the complaint on the ground that the retailer had not purchased or sold stock based on the alleged deception.<sup>80</sup> A divided panel of the Ninth Circuit reversed the district court after reasoning that an exception to the purchaser-seller requirement was warranted under the circumstances.<sup>81</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> See *Blue Chip*, 421 U.S. at 731 (explaining that it took the Supreme Court over twenty years to address the purchaser-seller rule that was announced in *Birnbaum*). The Supreme Court declined the opportunity to rule on the purchaser-seller standing requirement in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.10 (1971). In fact, the Court had the opportunity to rule on the purchaser-seller standing requirement when it interpreted section 10(b) and Rule 10b-5 for the first time in 1969, but the Court opted to “enter . . . virgin territory cautiously.” *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 465 (1969) (providing the Court's first attempt at interpreting section 10(b) and Rule 10b-5).

<sup>75</sup> *Blue Chip*, 421 U.S. at 731–32 (“[V]irtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century have reaffirmed *Birnbaum*'s conclusion that the plaintiff class for purposes of § 10(b) and Rule 10b-5 private damage actions is limited to purchasers and sellers of securities.”); but see *infra* Part II.C (outlining various exceptions that developed in the interim between *Birnbaum* and the Supreme Court's adoption of the purchaser-seller rule in *Blue Chip*).

<sup>76</sup> *Blue Chip*, 421 U.S. at 731.

<sup>77</sup> *Id.* at 762 (Blackmun, J., dissenting).

<sup>78</sup> *Id.* at 726 (majority opinion).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 727.

<sup>81</sup> *Id.* at 731.

On appeal, the Supreme Court agreed with the district court and held that the retailer had no standing to seek relief under section 10(b) and Rule 10b-5 because the retailer had not purchased or sold based on the alleged deception.<sup>82</sup> The Court based its holding largely on policy considerations because, as Justice Rehnquist,<sup>83</sup> writing for the Court, put it, “neither the congressional enactment nor the administrative regulations offer conclusive guidance.”<sup>84</sup> The Court’s decision to grant standing to sue for damages only to plaintiffs who purchased or sold based on allegedly misleading statements turned heavily on the Court’s fear that vexatious litigation would increase dramatically without this requirement.<sup>85</sup> The Court was concerned that strike suits by plaintiffs seeking unjust enrichment would become commonplace without this requirement.<sup>86</sup> Also, the Court was concerned that without this rule, courts would become the adjudicators of numerous “hazy issues of historical fact the proof of which depended almost entirely on oral testimony.”<sup>87</sup>

C. *Exceptions to the Purchaser-Seller Rule*

Even though *Blue Chip Stamps v. Manor Drug Stores*<sup>88</sup> established that standing to sue for monetary damages under section 10(b) and Rule 10b-5 is limited only to plaintiffs who have purchased or sold securities, the Supreme Court left open the question of whether various exceptions to the purchaser-seller rule exist. This section examines a number of exceptions that developed between *Birnbaum v. Newport Steel Corp.*<sup>89</sup> and *Blue Chip*.

The Second Circuit announced the purchaser-seller rule in 1952, and the Supreme Court did not endorse this holding until 1975.<sup>90</sup> Before the Supreme Court’s adoption of the *Birnbaum* rule in

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<sup>82</sup> *Blue Chip*, 421 U.S. at 727, 753–55.

<sup>83</sup> Chief Justice Burger and Justices Stewart, White, Marshall, and Powell joined the opinion of the Court, delivered by Justice Rehnquist. *Id.* at 725. Justice Powell filed a concurring opinion, which was joined by Justices Stewart and Marshall. *Id.* at 755 (Powell, J., concurring). Justice Blackmun filed a dissenting opinion, which was joined by Justices Douglas and Brennan. *Id.* at 761 (Blackmun, J., dissenting).

<sup>84</sup> *Id.* at 737 (majority opinion).

<sup>85</sup> *Id.* at 737–49.

<sup>86</sup> *Blue Chip*, 421 U.S. at 741–43.

<sup>87</sup> *Id.* at 743.

<sup>88</sup> *Id.* at 753–55.

<sup>89</sup> 193 F.2d 461 (2d Cir. 1952).

<sup>90</sup> See *supra* note 74 and accompanying text (noting that it took the Supreme Court over twenty years to endorse the purchaser-seller rule).

*Blue Chip*, the purchaser-seller rule had begun to significantly erode.<sup>91</sup> In the interim between these two opinions, at least four exceptions to the purchaser-seller rule developed.<sup>92</sup> In fact, prior to *Blue Chip*, these exceptions lead some courts<sup>93</sup> and commentators<sup>94</sup> to question whether the purchaser-seller rule announced in *Birnbaum* had been rejected.<sup>95</sup>

The four major exceptions that developed in the interim between *Birnbaum* and *Blue Chip* are the aborted transaction exception, the forced seller exception, the de facto purchaser-seller exception, and the injunctive relief exception.<sup>96</sup> *Blue Chip* debatably left open whether three of these exceptions still exist.<sup>97</sup> The four possible exceptions to the purchaser-seller rule are examined below.

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<sup>91</sup> See *Bound Brook Water Co. v. Jaffe*, 284 F. Supp. 702, 708 (D.N.J. 1968) (“One noticeable trend [was] the expansion of the concepts of purchaser and seller. Another trend [was] the expansion of standing to sue on the part of non-sellers and non-purchasers where the allegedly wrongful activity [was] attributable to the controlling faction in the corporation, and the result of that activity works to the detriment of the corporation and the minority stockholders.”).

<sup>92</sup> See Comment, *Blue Chip Stamps v. Manor Drug Stores: Failure to Solve the Purchaser-Seller Problem*, 70 NW. U. L. REV. 965, 985–93 (1976) (discussing the various exceptions to the *Birnbaum* rule).

<sup>93</sup> See, e.g., *Eason v. Gen. Motors Acceptance Corp.*, 490 F.2d 654, 659 (7th Cir. 1973) (rejecting the purchaser-seller rule based in part because “[t]he course of judicial decision since 1952, when *Birnbaum* was decided, has actually recognized that the class of protected persons is broader than merely purchasers and sellers.”); *Young v. Seaboard Corp.*, 360 F. Supp. 490, 494 (D. Utah 1973) (rejecting the purchaser-seller rule in favor of a rule that “[a]ctions under rule 10b-5 must be founded in fraud touching a securities transaction and must exhibit a direct and causal relationship between that fraud and the claimed injury”); *Tully v. Mott Supermarkets, Inc.*, 337 F. Supp. 834, 839 (D.N.J. 1972) (“The thrust of defendants’ jurisdictional argument seeks to revive the spectre of the *Birnbaum* buyer-seller doctrine at a point in time when both courts and legal scholars are seeking to bury it.”); *Entel v. Allen*, 270 F. Supp. 60, 69 (S.D.N.Y. 1967) (stating that the Second Circuit cases after *Birnbaum* “seriously challenge[d], if not overrule[d]” the purchaser-seller requirement).

<sup>94</sup> See, e.g., Michael M. Boone & Patrick F. McGowan, *Standing to Sue Under SEC Rule 10b-5*, 49 TEX. L. REV. 617, 620 (1971) (“[R]ecent judicial interpretation has raised doubts about the present meaning and vitality of the [purchaser-seller] rule.” (footnote omitted)); Lewis D. Lowenfels, *The Demise of the Birnbaum Doctrine: A New Era for Rule 10b-5*, 54 VA. L. REV. 268, 275–77 (1968) (discussing the “demise” of the purchaser-seller rule); see also Note, *Standing Under Rule 10b-5 After Blue Chip Stamps*, 75 MICH. L. REV. 413, 414 (1976) (“The repeated modification, circumvention, and outright rejection of the *Birnbaum* rule by the lower courts clearly undermined its force and appeared to portend its demise.”).

<sup>95</sup> But see, e.g., *Rekant v. Desser*, 425 F.2d 872, 877 (5th Cir. 1970) (“Bloody but unbowed, *Birnbaum* still stands.”).

<sup>96</sup> See Comment, *supra* note 92, at 985–93.

<sup>97</sup> *Blue Chip* did confirm that one means of circumventing the purchaser-seller rule does exist by way of derivative suits in which a shareholder brings an action on behalf of a corporation that has purchased or sold a security in connection with an

The first exception to the purchaser-seller rule that developed in the interim between *Birnbaum* and *Blue Chip* is the aborted transaction exception. In a small number of cases, courts were willing to circumvent the purchaser-seller rule when an alleged violation of section 10(b) and Rule 10b-5 prevented<sup>98</sup> or delayed<sup>99</sup> the consummation of a purchase or sale of securities.

The Supreme Court rejected the aborted transaction exception in *Blue Chip*.<sup>100</sup> As explained previously, a company, Blue Chip

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alleged manipulative or deceptive act or omission. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 738 (1975) (“It has been held that [a] shareholder . . . may . . . circumvent the [purchaser-seller rule] through bringing a derivative action on behalf of the corporate issuer if the latter is itself a purchaser or seller of securities.”). This is not an exception to the purchaser-seller rule because the standing imbues to the corporation itself, rather than a shareholder who did not purchase or sell in connection with the alleged deception. See David W. Lamb, *Recent Developments, Securities Fraud—Standing to Sue in 10b-5 Actions Requesting Injunctive Relief—Requirement that Plaintiff be Purchaser or Seller*, 52 TENN. L. REV. 755, 758–59 n.22 (1985) (noting that standing to sue on behalf of the corporation that purchased or sold securities in connection with an alleged deception is not an exception to the purchaser-seller rule); see also *Rathborne v. Rathborne*, 683 F.2d 914, 919 n.16 (5th Cir. 1982) (“If a corporation has purchased or sold securities in a transaction tainted by fraud, the corporation may have a 10b-5 cause of action. However, the corporation’s shareholders do not have standing to directly assert a claim which ‘belongs to’ the corporation.”).

<sup>98</sup> See, e.g., *Neuman v. Elec. Specialty Co.*, No. 68-C-1817, 1969 U.S. Dist. LEXIS 13005, at \*11–12 (N.D. Ill. Dec. 31, 1969) (finding standing under section 10(b) and Rule 10b-5 because the alleged deceptions prevented the plaintiffs from selling their shares during a tender offer); *Commerce Reporting Co. v. Puretec, Inc.*, 290 F. Supp. 715, 718–19 (S.D.N.Y. 1968) (holding that standing under section 10(b) and Rule 10b-5 can be based on circumstances in which the defendant’s alleged fraud prevents a purchase or a sale); but see *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 593 (5th Cir. 1974) (holding that courts have “consistently” denied standing under section 10(b) and Rule 10b-5 to stockholders who have allegedly been fraudulently induced to not sell their stock).

<sup>99</sup> *Silverman v. Bear, Stearns & Co.*, 331 F. Supp. 1334, 1336 (E.D. Pa. 1971) (holding that a plaintiff had standing under section 10(b) and Rule 10b-5 to pursue a claim against a broker who allegedly delayed in selling the securities of the plaintiff’s partnership); *Stockwell v. Reynolds & Co.*, 252 F. Supp. 215, 219 (S.D.N.Y. 1965) (“If plaintiffs indeed wished to sell their . . . shares and were induced to defer the sale by the fraudulent representations of the defendants, with the result that they ultimately sold at a greater loss, it follows . . . that the fraud was in connection with the sale of securities as that term is used in Section 10(b) and Rule 10b-5.”).

<sup>100</sup> 421 U.S. at 749–55; see also *Gurley v. Documentation, Inc.*, 674 F.2d 253, 255–56 (4th Cir. 1982) (holding that in the wake of *Blue Chip*, courts have uniformly denied standing under section 10(b) and Rule 10b-5 based on alleged fraudulent inducement to retain securities); *O’Brien v. Cont’l Ill. Nat’l Bank & Trust Co. of Chicago*, 593 F.2d 54, 58 (7th Cir. 1979) (holding based on *Blue Chip* that the purchaser-seller requirement does not allow remedy to individuals who allege that they did not sell securities because of some fraudulent misrepresentation); *Sacks v. Reynolds Sec., Inc.*, 593 F.2d 1234, 1241 (D.C. Cir. 1978) (“*Blue Chip Stamps* does not permit recovery under Rule 10b-5 when alleged fraud causes an investor to retain ownership of

Stamps, had been required to offer shares of its stock to a group of retailers as part of an antitrust consent decree.<sup>101</sup> One of the retailers alleged that it had failed to purchase shares because Blue Chip Stamps issued an overly pessimistic appraisal of its status and future prospects to dissuade potential purchasers.<sup>102</sup> After reaffirming the purchaser-seller rule announced in *Birnbaum*, the Supreme Court refused to make an exception to the purchaser-seller rule based on the alleged pessimistic appraisal that had prevented the retailer from purchasing stock in Blue Chip Stamps.<sup>103</sup> In short, the Court held that the retailer's aborted transaction by no means gave it standing to pursue an action under section 10(b) and Rule 10b-5.<sup>104</sup>

The Court did note that the outcome would have been different if the retailer had possessed a contractual right to purchase or sell securities.<sup>105</sup> This, however, should not be viewed as a validation of the aborted transaction exception. Under section 3(a) of the 1934 Act, the terms "purchase" and "sale" are defined to include contractual rights to purchase and sell.<sup>106</sup> Thus, a person or entity who has a contractual right to buy or sell securities and fails to do so based on an alleged deception can still have standing to sue under section 10(b)

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securities."); *Abrahamson v. Fleschner*, 568 F.2d 862, 868 (2d Cir. 1977) (denying standing based on *Blue Chip* because the plaintiffs alleged that they were fraudulently induced not to sell their securities); *Williams v. Sinclair*, 529 F.2d 1383, 1389 (9th Cir. 1975) (denying standing under section 10(b) and Rule 10b-5 to a group of individuals who retained their securities after an alleged deception).

<sup>101</sup> *Blue Chip*, 421 U.S. at 726.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 749-55.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 749 ("[P]rior cases have held that persons owning contractual rights to buy or sell securities are not excluded by the *Birnbaum* rule."); see, e.g., *Walling v. Beverly Enters.*, 476 F.2d 393, 395-97 (9th Cir. 1973) (holding that alleged fraudulent failure to perform under a contract to sell securities provides a basis for standing under section 10(b) and Rule 10b-5); *Mount Clemens Indus., Inc. v. Bell*, 464 F.2d 339, 345-46 (9th Cir. 1972) (holding that a contractual right to purchase or sell securities qualifies a plaintiff as a statutory purchaser for purposes of determining standing under section 10(b) and Rule 10b-5); *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 395-97 (2d Cir. 1967) (holding that a stockbroker had standing to bring suit under section 10(b) and Rule 10b-5 for defendants' alleged fraudulent failure to pay for securities that they had entered into an agreement to purchase through the broker); *Opper v. Hancock Sec. Corp.*, 367 F.2d 157, 158 (2d Cir. 1966) (permitting a suit under section 10(b) and Rule 10b-5 for failure to carry out a contract for the sale of stock).

<sup>106</sup> 15 U.S.C. § 78c(a)(13) (2000 & Supp. II 2002) ("The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire."); 15 U.S.C. § 78c(14) (2000 & Supp. II 2002) ("The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of.").

and Rule 10b-5 without requiring an exception to the purchaser-seller rule.<sup>107</sup>

The second exception that developed between *Birnbaum* and *Blue Chip* is the forced seller exception. Under the forced seller exception, an individual or entity has standing under section 10(b) and Rule 10b-5 if the individual or entity sues when left with no option other than to sell or convert a security.<sup>108</sup>

For example, in *Vine v. Beneficial Finance Co.*,<sup>109</sup> the Second Circuit held that a shareholder had standing to maintain an action under the forced seller exception to the purchaser-seller rule even though an actual sale had not yet taken place.<sup>110</sup> The shareholder sued because an allegedly fraudulent short form merger had left the shareholder with no other option than to sell his stock for an inadequate price or retain stock in a corporation that no longer existed.<sup>111</sup> The United States District Court for the Southern District of New York dismissed the claim under section 10(b) and Rule 10b-5 for lack of standing on the grounds that the shareholder had not purchased or sold in connection with an alleged manipulative or deceptive act or omission.<sup>112</sup> The Second Circuit reversed and held that the shareholder was a “seller” for purposes of section 10(b) and Rule 10b-5 because the actual sale of the shares was a “needless formality” when the shareholder was left with no other option but to sell.<sup>113</sup>

The Supreme Court has never spoken on whether the forced seller exception survived the adoption of the *Birnbaum* rule in *Blue*

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<sup>107</sup> See *Blue Chip*, 421 U.S. at 749–55.

<sup>108</sup> See, e.g., *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 522–23 (8th Cir. 1973) (granting stockholders who did not sell their stock standing to sue under section 10(b) and Rule 10b-5 as “forced sellers” because an open market for their stock had ceased to exist and the only possibility for sale of the stock was to the defendants on the defendants’ terms); *Dudley v. Se. Factor & Fin. Corp.*, 446 F.2d 303, 308 (5th Cir. 1971) (holding that standing exists under section 10(b) and Rule 10b-5 when an “investment in a going enterprise has been commuted into a right . . . to a payment of money”); *Coffee v. Permian Corp.*, 434 F.2d 383, 386 (5th Cir. 1970) (holding that a shareholder will have standing under section 10(b) and Rule 10b-5 without a purchase or a sale if the shareholder “has no choice but to surrender his interest in the corporation and to exchange his shares for cash”); *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 798 (2d Cir. 1969) (holding that standing to sue exists under section 10(b) and Rule 10b-5 when one becomes a “forced seller” based on an alleged deception); see generally Richard B. Gallagher, Annotation, *Who is “Forced Seller” for Purposes of Maintenance of Civil Action Under § 10(b) of Securities Exchange Act of 1934 (15 USCS § 78j(b)) and SEC Rule 10b-5*, 59 A.L.R. FED. 10 (1982).

<sup>109</sup> 374 F.2d 627 (2d Cir. 1967).

<sup>110</sup> *Id.* at 633–35.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 633.

<sup>113</sup> *Id.* at 634.



*Chip*. A number of courts have reaffirmed this exception since *Blue Chip*,<sup>114</sup> and held that the forced seller exception to the purchaser-seller requirement is still valid law.<sup>115</sup>

A third exception that developed in the time between *Birnbaum* and *Blue Chip* is the de facto purchaser-seller exception. Under this exception, an individual or entity with only a beneficial interest in a security will have standing to sue under section 10(b) and Rule 10b-5 if the security is purchased or sold in connection with an alleged manipulative or deceptive act or omission.<sup>116</sup>

For example, in *James v. Gerber Products Co.*,<sup>117</sup> the Sixth Circuit held that an individual who benefits from a sale of a security is a de facto seller and has standing to pursue an action under section 10(b) and Rule 10b-5. In that case, the beneficiary of two testamentary trusts alleged that the trustee had committed a violation of section 10(b) and Rule 10b-5 by selling stock from the trusts at less than fair market value to Gerber Products Company.<sup>118</sup> The United States District Court for the Western District of Michigan dismissed the case because the beneficiary had neither purchased nor sold the stock herself.<sup>119</sup>

On appeal, the Sixth Circuit reversed and held that the beneficiary did have standing to sue because she was a de facto seller of the

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<sup>114</sup> 8 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 3741 (3d ed. 2004) (discussing the current state of the law relating to the forced seller exception).

<sup>115</sup> See, e.g., 7547 Corp. v. Parker & Parsley Dev. Partners, L.P., 38 F.3d 211, 228 (5th Cir. 1994) (“[W]e do not believe that the teachings of *Blue Chip Stamps* would preclude standing as section 10(b) ‘forced sellers’ to investors of merged companies who can show a substantial change in the nature of their investments.”); Mayer v. Oil Field Sys. Corp., 721 F.2d 59, 65–68 (2d Cir. 1983) (holding that the forced seller exception survived *Blue Chip*); Alley v. Miramon, 614 F.2d 1372, 1385–87 (5th Cir. 1980) (reaffirming the forced seller exception and holding that it does not undermine the policy objective of *Blue Chip*); see also Jacobson v. AEG Capital Corp., 50 F.3d 1493, 1499 (9th Cir. 1995) (“[T]he forced sale doctrine does not cut a wide swath. Although recognized by the Ninth Circuit, we have rarely encountered instances where it applies.”); but see Isquith v. Caremark Int’l, Inc., 136 F.3d 531, 535–36 (7th Cir. 1998) (questioning the continued existence of the forced seller exception).

<sup>116</sup> See, e.g., Heyman v. Heyman, 356 F. Supp. 958, 964–66 (S.D.N.Y. 1973) (holding that a trust beneficiary had standing to seek relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security because the beneficiary had been a de facto seller of the securities in the trust); but see Rippey v. Denver U.S. Nat’l Bank, 260 F. Supp. 704, 715–16 (D. Colo. 1966) (holding that trust beneficiaries could not maintain an action against a trustee because having a beneficial interest in the securities at issue did not allow them to be purchasers or sellers for purposes of section 10(b) and Rule 10b-5).

<sup>117</sup> 483 F.2d 944 (6th Cir. 1973).

<sup>118</sup> *Id.* at 945.

<sup>119</sup> *Id.* at 946.

securities.<sup>120</sup> The court reached its holding because conferring standing to the beneficiary was consistent with the interests served by section 10(b) and Rule 10b-5 to protect investors “from those who deal unfairly with them.”<sup>121</sup> The court stated that “novel or atypical transactions [were] not to be excluded from” the ambit of section 10(b) and Rule 10b-5.<sup>122</sup>

It is unclear whether the de facto purchaser-seller exception was overruled by *Blue Chip*. If *Blue Chip* provides a bright line rule, then the de facto purchaser-seller exception is likely invalid because de facto purchasers or sellers are not actual purchasers or sellers. A number of lower courts, however, have reaffirmed the de facto purchaser-seller exception since *Blue Chip*.<sup>123</sup> The validity of this exception will ultimately have to be addressed by the Supreme Court, unless Congress acts first.

The fourth exception to the purchaser-seller rule involves actions for injunctive relief to prevent prospective fraudulent conduct.<sup>124</sup> In the interim between *Birnbaum* and *Blue Chip*, a number of

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<sup>120</sup> *Id.* at 948–50.

<sup>121</sup> *Id.* at 948.

<sup>122</sup> *Id.* at 949.

<sup>123</sup> *See, e.g.*, *Grubb v. FDIC*, 868 F.2d 1151, 1161–62 (10th Cir. 1989) (finding standing to sue under section 10(b) and Rule 10b-5 without the purchase or sale of a security for a plaintiff who guaranteed a loan that was used by a holding company to purchase stock because the plaintiff was the actual party at risk); *Norris v. Wirtz*, 719 F.2d 256, 259–61 (7th Cir. 1983) (holding that a trust beneficiary that sold securities had standing to bring an action under section 10(b) and Rule 10b-5 because allegedly fraudulent misrepresentations had been made directly to the beneficiary who had the right to approve the sale and had experienced the direct impact of the alleged fraud); *Kirshner v. United States*, 603 F.2d 234, 240–41 (2d Cir. 1978) (holding that a trust beneficiary may sue a trustee under section 10(b) and Rule 10b-5 for frauds committed by a trustee); *Hackford v. First Sec. Bank of Utah, N.A.*, 521 F. Supp. 541, 549 (D. Utah 1981) (holding that trust beneficiaries have standing to bring actions under section 10(b) and Rule 10b-5 because the beneficiaries feel the impact of any fraud, rather than the trustee). Some courts, however, have declined to grant standing to trust beneficiaries when *total* investment authority has been delegated to a trustee. *See Congregation of the Passion, Holy Cross Province v. Kidder Peabody & Co.*, 800 F.2d 177, 181 (7th Cir. 1986) (holding that the court could not imply a violation of section 10(b) and Rule 10b-5 when the plaintiff had transferred full authority to make investment decisions to the defendant); *O'Brien v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 593 F.2d 54, 59–63 (7th Cir. 1979) (holding that a trust beneficiary does not have standing under section 10(b) and Rule 10b-5 to sue a trustee who has total discretionary power to purchase and sell securities because an alleged misrepresentation could not be “in connection with” the purchase or sale of a security).

<sup>124</sup> Courts have held that this exception does not apply when the fraud sought to be enjoined has already been completed. *See, e.g.*, *Doll v. James Martin Assocs. (Holdings), Ltd.*, 600 F. Supp. 510, 522 (E.D. Mich. 1984) (holding that the injunctive relief exception applies “only when plaintiff seeks ‘prophylactic relief’, i.e. a pro-

courts held that the purchaser-seller rule applied only to actions for monetary damages, rather than actions for injunctive relief.<sup>125</sup> *Blue Chip* left open whether the injunctive relief exception to the purchaser-seller rule still exists.

After *Blue Chip*, the circuit courts split on whether an individual or entity can have standing under section 10(b) and Rule 10b-5 to seek injunctive relief without the purchase or sale of a security.<sup>126</sup> A number of courts have reached the conclusion that actions for in-

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hibition against future violation of the securities laws"); *Bertozzi v. King Louie Int'l, Inc.*, 420 F. Supp. 1166, 1177 (D.R.I. 1976) (holding that the injunctive relief exception to the purchaser-seller requirement applies only "to prevent consummation of [the] resultant injury from an asserted § 10(b)/10b-5 violation"); *Petersen v. Federated Dev. Co.*, 387 F. Supp. 355, 358 (S.D.N.Y. 1974) ("Although a stockholder has been permitted to seek injunctive relief against threatened or continuing fraud, he lacks standing to seek injunctive relief once the fraud has been consummated." (citation omitted)); *Heyman v. Heyman*, 356 F. Supp. 958, 964 (S.D.N.Y. 1973) (holding that the injunctive relief exception to the purchaser-seller rule does not apply in situations in which the alleged fraudulent exchange has been fully completed); *see also infra* note 186 (citing case law holding that a corporate issuer will only have standing to seek injunctive relief under section 10(b) and Rule 10b-5 if the issuer can demonstrate that the continuation of the alleged deception will cause some injury to the issuer).

<sup>125</sup> *See, e.g.*, *Landy v. FDIC*, 486 F.2d 139, 156 (3d Cir. 1973) ("An injunction suit, as distinguished from an action for damages, will therefore, in appropriate circumstances, be permitted under [section 10(b) and Rule 10b-5] even though the complainant is not a purchaser or seller."); *Kahan v. Rosenstiel*, 424 F.2d 161, 173 (3d Cir. 1970) (holding that an individual or entity does not have to purchase or sell securities to have standing to bring an action for injunctive relief under section 10(b) and Rule 10b-5); *Britt v. Cyril Bath Co.*, 417 F.2d 433, 435-36 (6th Cir. 1969) (allowing an action for injunctive relief based on section 10(b) and Rule 10b-5 to proceed despite the fact that the plaintiff neither purchased nor sold stock based on the alleged deception); *Mut. Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 546-47 (2d Cir. 1967) (holding that plaintiffs had standing to pursue injunctive relief under section 10(b) and Rule 10b-5 without a purchase or sale of securities); *Moore v. Greatamerica Corp.*, 274 F. Supp. 490, 492 (N.D. Ohio 1967) (holding that a corporate issuer had standing to sue for injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security); *but see Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 791-92 (8th Cir. 1967) (applying the purchaser-seller rule to deny standing in an action under section 10(b) and Rule 10b-5 for injunctive relief and not commenting regarding possible differing treatment for standing in actions for injunctive relief, rather than actions for monetary damages).

<sup>126</sup> *See HAZEN, supra* note 7, § 12.7[2] ("There is authority to the effect that a person need be neither a purchaser nor a seller of securities in order to maintain an action for injunctive relief under Rule 10b-5. There is also some authority to the contrary." (footnotes omitted)); *Liberty Nat'l Ins. Holding Co. v. Charter Co.*, 734 F.2d 545, 557 n.27 (11th Cir. 1984) ("[C]ourts addressing the question of whether a cause of action exists for a non-purchaser-seller have come down on each side of the issue."). Even prior to *Blue Chip*, the circuit courts were divided on the existence of an injunctive relief exception. *See supra* note 125.

injunctive relief under section 10(b) and Rule 10b-5 are not subject to the purchaser-seller requirement.<sup>127</sup>

The Second Circuit, for example, has recognized that a plaintiff does not need to be a purchaser or seller to have standing to sue for injunctive relief.<sup>128</sup> The Southern District of New York has even stated that standing to sue for injunctive relief is “well-established” Second Circuit precedent.<sup>129</sup>

The Second Circuit first recognized the injunctive relief exception to the purchaser-seller requirement in 1967. In *Mutual Shares Corp. v. Genesco, Inc.*,<sup>130</sup> the Second Circuit held that an entity can have standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security. In that case, various shareholders of S.H. Kress and Company (“Kress”) sued Genesco, Inc. (“Genesco”) for damages and injunctive relief under section 10(b) and Rule 10b-5 based on an alleged “fraudulent conspiracy” to gain control of Kress.<sup>131</sup> The United States District Court for the Southern District of New York dismissed the claim based on lack of federal question jurisdiction for failing to state a claim under section 10(b) and Rule 10b-5.<sup>132</sup>

The Second Circuit reversed in part and held that the shareholders could pursue the claim for injunctive relief under section 10(b) and Rule 10b-5 without a purchase or sale of a security.<sup>133</sup> In reaching this conclusion, the court noted that although the SEC could bring an action to halt any fraudulent practices, shareholders could play a significant role in enforcement of section 10(b) and

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<sup>127</sup> See, e.g., *Davis v. Davis*, 526 F.2d 1286, 1290 (5th Cir. 1976) (holding that the purchaser-seller requirement does not apply to actions for injunctive relief); *Granada Invs., Inc. v. DWG Corp.*, 717 F. Supp. 533, 535 (N.D. Ohio 1989) (holding that “suits for prospective injunctive relief pursuant to Section 10(b) of the Exchange Act may be brought by plaintiffs who are not actual purchasers or sellers”); *USG Corp. v. Wagner & Brown*, 689 F. Supp. 1483, 1493–94 (N.D. Ill. 1988) (holding that a corporate issuer and a shareholder had standing to seek injunctive relief under section 10(b) and Rule 10b-5 because of the injunctive relief exception to the purchaser-seller rule); *Hanna Mining Co. v. Norcen Energy Res. Ltd.*, 574 F. Supp. 1172, 1198 (N.D. Ohio 1982) (holding that an issuer could maintain an action for injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security); *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1358–59 (N.D. Tex. 1979) (holding that the purchaser-seller rule announced in *Blue Chip* does not apply to actions for injunctive relief under section 10(b) and Rule 10b-5).

<sup>128</sup> See *infra* note 138.

<sup>129</sup> *Langner v. Brown*, 913 F. Supp. 260, 270 (S.D.N.Y. 1996).

<sup>130</sup> 384 F.2d 540 (2d Cir. 1967).

<sup>131</sup> *Id.* at 542.

<sup>132</sup> *Id.* at 543.

<sup>133</sup> *Id.* at 546–47.

Rule 10b-5 by allowing standing to seek injunctive relief without the purchase or sale of a security.<sup>134</sup> The court opted to treat injunctive relief differently from damages because injunctive relief does not suffer from the same issues regarding “proof of loss and the causal connection with the alleged violation of the Rule.”<sup>135</sup> The court also noted that injunctive relief helps to prophylactically prevent harm to continuing shareholders.<sup>136</sup>

The Second Circuit’s adoption of the injunctive relief exception is noteworthy because the Second Circuit was the “Mother Court”<sup>137</sup> for the purchaser-seller rule. *Mutual Shares* is just one in a long line of Second Circuit opinions applying this exception.<sup>138</sup>

All courts, however, have not adopted the injunctive relief exception to the purchaser-seller rule that was announced in *Blue Chip*. Some courts have yet to take a definitive position on the issue,<sup>139</sup> and

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<sup>134</sup> *Id.* at 547.

<sup>135</sup> *Id.*

<sup>136</sup> *Mut. Shares*, 384 F.2d at 547.

<sup>137</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting) (discussing the importance of *Birnbaum*).

<sup>138</sup> *See, e.g., Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 157, 170–71 (2d Cir. 1999) (holding that the purchaser-seller requirement does not apply in actions for injunctive relief); *United States v. Newman*, 664 F.2d 12, 17 (2d Cir. 1981) (“[T]his Court, and other Courts of Appeals as well, [have] held that a plaintiff need not be a defrauded purchaser or seller in order to sue for injunctive relief under Rule 10b-5.”); *Langner v. Brown*, 913 F. Supp. 260, 270 (S.D.N.Y. 1996) (holding that the injunctive relief exception to the purchaser-seller requirement is “well-established” in the Second Circuit); *Packer v. Yampol*, 630 F. Supp. 1237, 1241–42 (S.D.N.Y. 1986) (recognizing that plaintiffs who are seeking injunctive relief, rather than damages, need not satisfy the purchaser-seller requirement); *Fuchs v. Swanton Corp.*, 482 F. Supp. 83, 89 (S.D.N.Y. 1979) (“It has long been held in this Circuit that a suit for injunctive relief under Section 10(b) of the Exchange Act may be maintained by plaintiffs who are not actual purchasers or sellers of securities in connection with the challenged transactions.”); *Monheit v. Carter*, 376 F. Supp. 334, 342 (S.D.N.Y. 1974) (holding that a plaintiff does not need to be a purchaser or a seller of securities to seek injunctive relief under section 10(b) and Rule 10b-5).

<sup>139</sup> *See, e.g., Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 486 (3d Cir. 1998) (noting that the Third Circuit has not addressed whether the injunctive relief exception survived *Blue Chip* and opting to make that decision at some later time); *but see Foster Wheeler Corp. v. Edelman*, No. 87-4346 (GEB), 1987 U.S. Dist. LEXIS 16783, at \*9–12 (D.N.J. Dec. 9, 1987) (holding that an exception to the *Blue Chip* rule exists for injunctive relief until the Third Circuit states otherwise); *see also, e.g., Advanced Res. Int’l, Inc. v. Tri-Star Petroleum Co.*, 4 F.3d 327, 332 (4th Cir. 1993) (declining to decide whether the injunctive relief exception exists but placing restrictions on any exception to the purchaser-seller standing requirement that might exist); *Westinghouse Credit Corp. v. Bader & Dufty*, 627 F.2d 221, 223 (10th Cir. 1980) (reserving for future determination whether the purchaser-seller rule that was announced in *Blue Chip* applies to actions in which only injunctive relief is sought).

a number of courts have even held that no exception exists for plaintiffs seeking injunctive relief.<sup>140</sup>

The United States Court of Appeals for the District of Columbia Circuit, for example, has concluded that the injunctive relief exception did not survive the Supreme Court's holding in *Blue Chip*. In *Cowin v. Bresler*,<sup>141</sup> the D.C. Circuit held that the purchaser-seller rule is applicable regardless of whether a plaintiff seeks monetary damages or injunctive relief. In that case, a minority shareholder of Bresler & Reiner, Inc. alleged that the majority shareholders had violated section 10(b) and Rule 10b-5 by issuing deceptive reports to the shareholders and concealing material information regarding the corporation.<sup>142</sup> The minority shareholder did not assert that he purchased or sold based on the alleged deception, but he claimed that his stock was made less valuable based on the majority shareholders' misrepresentations to the investing public generally.<sup>143</sup> The minority shareholder did not seek monetary damages but sought injunctive relief requiring an end to the alleged deceptions and disclosure of past deceptions.<sup>144</sup> The United States District Court for the District of Columbia held that the minority shareholder had standing to assert his claims under section 10(b) and Rule 10b-5, but dismissed the claims on other grounds.<sup>145</sup>

On appeal, the D.C. Circuit held that the minority shareholder had no standing to pursue his action for injunctive relief under section 10(b) and Rule 10b-5 because he did not satisfy the purchaser-

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<sup>140</sup> See, e.g., *Cowin v. Bresler*, 741 F.2d 410, 424 (D.C. Cir. 1984) (holding that the purchase or sale requirement applies to both actions for damages and actions for injunctive relief); *Burlington Indus., Inc. v. Edelman*, No. C-87-274-G, 1987 U.S. Dist. LEXIS 9624, at \*4-7 (M.D.N.C. July 30, 1987) (holding that an issuer of stock could not have standing to sue for injunctive relief unless it was in connection with a purchase or sale based on the alleged misrepresentation); *Atl. Fed. Sav. & Loan Ass'n of Fort Lauderdale v. Dade Sav. & Loan Ass'n*, 592 F. Supp. 1089, 1092 (S.D. Fla. 1984) (denying standing to an issuer and stockholder under section 10(b) and Rule 10b-5 in an action for injunctive relief without mention of the injunctive relief exception because the issuer and the stockholder failed to allege that they were purchasers or sellers); *W.A. Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc.*, 466 F. Supp. 800, 805-06 (D. Neb. 1979) (holding that actions for injunctive relief under section 10(b) and Rule 10b-5 are subject to the purchaser-seller requirement); *Wright v. Heizer Corp.*, 411 F. Supp. 23, 34 (N.D. Ill. 1975) (holding that *Blue Chip* is applicable to both actions at law and at equity), *aff'd in part, rev'd in part*, 560 F.2d 236 (7th Cir. 1977).

<sup>141</sup> 741 F.2d at 423.

<sup>142</sup> *Id.* at 412.

<sup>143</sup> *Id.* at 419.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 413 n.1.

seller rule.<sup>146</sup> In reaching its holding, the court stated that most of the Supreme Court's reasoning for employing the purchaser-seller rule in *Blue Chip* applied regardless of whether a plaintiff is seeking damages or injunctive relief. Judge Bork, writing for the D.C. Circuit, also relied heavily on the text of section 10(b) and Rule 10b-5:

The scope of section 10(b) and Rule 10b-5 is limited to fraud "in connection with the purchase or sale of a security." Congress was asked on two different occasions to expand the jurisdictional reach of those provisions but chose not to. In contrast, Congress did choose to define the scope of other provisions in the 1933 and 1934 Acts in terms that clearly reflected a broader jurisdictional reach. Congress also limited standing in those instances where it did create express remedies under the Act to a class of persons including only purchasers or sellers.<sup>147</sup>

Judge Bork went on to say that fashioning a different concept for cases involving injunctive relief, rather than monetary damages would be "altogether too awkward to be persuasive."<sup>148</sup>

Simply put, courts are divided on the existence of an injunctive relief exception to the purchaser-seller rule that was announced in *Blue Chip*. Unless Congress acts, the Supreme Court will ultimately have to decide whether this exception and various other exceptions to the purchaser-seller rule continue to exist.

### III. CORPORATE ISSUER STANDING AND ITS POLICY JUSTIFICATIONS.

Most cases waiving the purchaser-seller rule have been brought by shareholder plaintiffs.<sup>149</sup> Some courts, however, are cautious but willing to grant corporate issuers standing under section 10(b) and Rule 10b-5 to seek injunctive relief without a purchase or a sale.<sup>150</sup>

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<sup>146</sup> *Id.* at 423–25.

<sup>147</sup> *Cowin*, 741 F.2d at 424.

<sup>148</sup> *Id.*

<sup>149</sup> *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 963 F. Supp. 395, 399 (D.N.J. 1997) (evaluating the existence and scope of the injunctive relief exception to the purchaser-seller rule).

<sup>150</sup> *See, e.g., Gen. Time Corp. v. Talley Indus., Inc.*, 403 F.2d 159, 164 (2d Cir. 1968) ("There are many practical advantages . . . in allowing a corporation in certain cases to enjoin manipulation of its stock, although courts must act both with speed and with caution lest such actions become vehicles for management to thwart purchases in the true interest of the stockholder."); *USG Corp. v. Wagner & Brown*, 689 F. Supp. 1483, 1493–94 (N.D. Ill. 1988) (allowing a corporate issuer to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security); *Foster Wheeler Corp. v. Edelman*, No. 87-4346 (GEB), 1987 U.S. Dist. LEXIS 16783, at \*8–12 (D.N.J. Dec. 9, 1987) (recognizing standing for an issuer to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security); *Hanna Mining Co. v. Norcen Energy Res. Ltd.*, 574 F. Supp. 1172, 1198

For instance, an issuer may have standing under section 10(b) and Rule 10b-5 to seek injunctive relief without a purchase or sale in circumstances in which an issuer has suffered or will suffer direct injury because of the alleged manipulation or in which the issuer would be the most appropriate party to assert a violation affecting all its shareholders.<sup>151</sup>

Courts have substantial power in determining whether a corporate issuer has standing to seek injunctive relief under section 10(b) and Rule 10b-5 without a purchase or a sale because the private right of action under these provisions is judicially implied.<sup>152</sup> In *Blue Chip*, the Supreme Court relied on policy considerations in adopting the purchaser-seller rule because “neither the congressional enactment nor the administrative regulations offer[ed] conclusive guidance.”<sup>153</sup>

Policy considerations will play a key role when the Supreme Court ultimately rules on whether any exception survived the adoption of the purchaser-seller requirement in *Blue Chip*.<sup>154</sup> Of course, the statutory schemes of the 1933 Act<sup>155</sup> and the 1934 Act<sup>156</sup> will need to be taken into account in any standing analysis,<sup>157</sup> but the Supreme Court has made clear that the implied right of action under section

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(N.D. Ohio 1982) (holding that an issuer could maintain an action for injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security); *see also* Standard Metals Corp. v. Tomlin, 503 F. Supp. 586, 600 (S.D.N.Y. 1980) (refusing to employ or extend the scope of the narrow exception to the purchaser-seller rule for issuers seeking injunctive relief because other grounds for relief were available); *but see* Liberty Nat'l Ins. Holding Co. v. Charter Co., 734 F.2d 545, 554–59 (11th Cir. 1984) (holding that an issuer does not have standing to bring an action for injunctive relief under section 10(b) and Rule 10b-5 without a purchase or a sale); W.A. Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc., 466 F. Supp. 800, 805–06 (D. Neb. 1979) (holding that an issuer must allege a purchase or sale of stock to bring an action for injunctive relief under section 10(b) and Rule 10b-5).

<sup>151</sup> *See, e.g.*, GAF Corp. v. Milstein, 453 F.2d 709, 722 n.27 (2d Cir. 1971) (“We do not foreclose the possibility, for example, that an issuer might have standing under 10b-5 to seek injunctive relief in circumstances where, despite the absence of a purchase or sale, it has suffered or will suffer direct injury because of the alleged fraud, or where it would be the most appropriate party to assert 10b-5 violations affecting all of its shareholders.”).

<sup>152</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748–49 (1975) (discussing the purchaser-seller rule and the possible existence of an injunctive relief exception).

<sup>153</sup> *Id.* at 737.

<sup>154</sup> *See supra* Part I (discussing the Supreme Court’s wide discretion in determining standing under section 10(b) and Rule 10b-5 because it is a judicially implied private right of action).

<sup>155</sup> 15 U.S.C. §§ 77a–77aa (2000 & Supp. II 2002).

<sup>156</sup> *Id.* §§ 78a–77mm.

<sup>157</sup> *See* Cowin v. Bresler, 741 F.2d 410, 424 (D.C. Cir. 1984) (“[I]n the process of implying private rights judges must take account of the statutory scheme.”).



10(b) and Rule 10b-5 has grown far beyond the text of the statute and the administrative rule.<sup>158</sup>

In determining whether a corporate issuer has standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security, strong policy justifications exist for such an exception to the purchaser-seller rule. Although the Supreme Court's holding in *Blue Chip* foreclosed a corporate issuer's standing to seek monetary damages without the purchase or sale of a security,<sup>159</sup> current case law suggests that the purchaser-seller rule might not apply in cases in which a corporate issuer seeks injunctive relief.<sup>160</sup> Such an exception is justified for a corporate issuer seeking injunctive relief because of the nature of injunctive relief, the injury to the issuer, and the role of the issuer as best champion of its shareholders. These policy justifications are examined below.

A. *The Nature of Injunctive Relief*

The first policy justification for allowing a corporate issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without a purchase or a sale of a security relates to the nature of injunctive relief in comparison to monetary damages. Injunctive relief is substantially different from monetary damages and merits different treatment by the courts. Allowing actions for injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security does not create the same concerns about unjust enrichment, is consistent with the purposes underlying the securities acts, and is consistent with the terms of the 1934 Act.

Actions for injunctive relief do not generate the same concerns as actions for monetary damages because injunctive relief does not create the same possibility for unjust enrichment. In *Blue Chip*, the policy justifications cited by the Supreme Court for adopting the purchaser-seller rule in actions involving monetary relief stemmed from concerns regarding the possibility of unscrupulous plaintiffs receiving windfall settlements and judgments.<sup>161</sup> Based on the fear of vexatious

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<sup>158</sup> See *Blue Chip*, 421 U.S. at 737 ("When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.").

<sup>159</sup> See *id.* at 731-32 (holding that the purchaser-seller rule requires plaintiffs to be purchasers and sellers "for purposes of § 10(b) and Rule 10b-5 private damage actions"); LOSS & SELIGMAN, *supra* note 114, at 3735 n.625 ("[A]n issuer that is neither a purchaser nor a seller lacks standing under § 10(b), at least to sue for damages.").

<sup>160</sup> See *supra* Part II.C (discussing the injunctive relief exception to the purchaser-seller rule).

<sup>161</sup> See *Blue Chip*, 421 U.S. at 739-49.

litigation,<sup>162</sup> the Supreme Court stated two policy justifications that mandated the adoption of the purchaser-seller rule.<sup>163</sup> The Court first cited its concern that strike suits would become commonplace in the absence of the purchaser-seller rule.<sup>164</sup> The Court was worried about expanding the class of plaintiffs under section 10(b) and Rule 10b-5 to allow actions that would have settlement value out of proportion to any prospective success at trial.<sup>165</sup> Second, the Court was concerned that allowing standing to sue for monetary damages under section 10(b) and Rule 10b-5 would subject the trier of fact to many “rather hazy issues of historical fact.”<sup>166</sup> In assessing this risk, Justice Rehnquist, writing for the majority, stated, “The very real risk . . . is that the door will be open to recovery of substantial damages . . . .”<sup>167</sup> In short, both of the Court’s policy justifications are chiefly based on the fear that allowing a plaintiff standing to seek monetary relief under section 10(b) and Rule 10b-5 without a purchase or a sale raises a substantial possibility of unworthy plaintiffs being unjustly enriched.

Allowing an issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security does not create the same danger of unjust enrichment that the Supreme Court used to justify its adoption of the purchaser-seller rule in actions for monetary damages. Although economic concerns are implicated in actions for injunctive relief, injunctive relief provides an across-the-board benefit to all shareholders of a corporation and promotes the well-being of the corporation itself.<sup>168</sup> Allowing an is-

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<sup>162</sup> See *id.* at 739 (“There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.”).

<sup>163</sup> *Id.* at 739–49.

<sup>164</sup> *Id.* at 740–43.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 743.

<sup>167</sup> *Blue Chip*, 421 U.S. at 746.

<sup>168</sup> Notably, allowing an issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security helps to protect various classes of individuals who would not be allowed to seek monetary relief under these provisions because of the purchaser-seller requirement. In *Blue Chip*, the Court outlined the three classes of potential plaintiffs who are barred by the purchaser-seller requirement:

First are potential purchasers of shares, either in a new offering or on the Nation’s post-distribution trading markets, who allege that they decided not to purchase because of an unduly gloomy representation or the omission of favorable material which made the issuer appear to be a less favorable investment vehicle than it actually was. Second are actual shareholders in the issuer who allege that they decided not to sell their shares because of an unduly rosy representation or a failure to disclose unfavorable material. Third are shareholders, creditors, and

suer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security does not create a windfall for unscrupulous plaintiffs, and the Supreme Court's policy justifications in *Blue Chip* do not apply because the possibility of windfall judgments and settlements is not present.<sup>169</sup>

In fact, allowing a corporate issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 is consistent with the purposes that underlie securities acts. As stated previously,<sup>170</sup> Congress promulgated the 1933 Act (1) to require that investors be provided with material information regarding securities offered for public sale and (2) to prevent misrepresentation, fraud, and deceit in the sale of securities.<sup>171</sup> Congress created the 1934 Act for a variety of reasons relating to the "national public interest," e.g., the important relationship between fair and honest markets and interstate commerce, the dangers of market manipulation, and the fear of national emergencies created by unreasonable fluctuations in security prices.<sup>172</sup> In short, Congress wanted to protect the integrity of securities transactions through fair disclosure of information regarding these securities.

Allowing a corporate issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without a purchase or sale of a security is consistent with the purposes of the securities acts because injunctive relief allows the issuer to help correct a manipulative or

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perhaps others related to an issuer who suffered loss in the value of their investment due to corporate or insider activities in connection with the purchase or sale of securities which violate Rule 10b-5.

*Blue Chip*, 421 U.S. at 737–38. By adopting the purchaser-seller requirement, the Court denied standing to these three classes of potential plaintiffs. *Id.* The Court admitted that some worthy plaintiffs would not be able to seek monetary damages under section 10(b) and Rule 10b-5 because of the purchaser-seller requirement, but the Court still adopted the requirement because of concerns regarding vexatious litigation without the requirement. *Id.* at 738–39. Allowing an issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security helps to protect the classes of plaintiffs who are denied relief by the purchaser-seller requirement because the issuer can correct an ongoing deceptive or manipulative act that would cause harm to all classes of potential plaintiffs, rather than just purchasers or sellers.

<sup>169</sup> *But see infra* Part IV.B (discussing possible misuse of section 10(b) and Rule 10b-5 by corporate directors for purposes of management entrenchment).

<sup>170</sup> *See supra* Part II.A (discussing the advent of federal securities laws).

<sup>171</sup> EISENBERG, *supra* note 22, at 1285 (discussing the public distribution of securities and the requirements of the 1933 Act).

<sup>172</sup> 15 U.S.C. § 78b (2000 & Supp. II 2002) (providing the "necessity" for the regulation contained within the 1934 Act).

deceptive act or omission.<sup>173</sup> For example, in *Moore v. Greatamerica Corp.*,<sup>174</sup> the United States District Court for the Northern District of Ohio held that an issuer had standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security because it was consistent with the public policy underlying the statute and the rule. In that case, The Glidden Company (“Glidden”) sought injunctive relief under section 10(b) and Rule 10b-5 against Greatamerica Corporation (“Greatamerica”) based on allegedly deceptive statements made in connection with a tender offer to purchase Glidden stock.<sup>175</sup> Even though Glidden had not bought or sold based on the allegedly deceptive statements, the court held that Glidden had standing to seek injunctive relief to keep Greatamerica from moving forward with the tender offer.<sup>176</sup> In reaching this holding, the court relied upon the “sound public policy” underlying section 10(b) and Rule 10b-5 to “protect the unwary and the inexperienced buyers and sellers” and “to eliminate any undesirable practices.”<sup>177</sup>

In contrast to actions for monetary damages under section 10(b) and Rule 10b-5, actions for injunctive relief should not be subject to the purchaser-seller rule because they directly serve the reasons Congress passed the securities acts. Damages actions under section 10(b) and Rule 10b-5 are backward-looking because they are remedial in nature. In contrast, actions for injunctive relief under section 10(b) and Rule 10b-5 are forward-looking because they seek to correct an ongoing fraud.<sup>178</sup> Simply put, actions for injunctive relief protect the integrity of securities transactions by forcing the fair disclosure of information regarding securities.<sup>179</sup> Allowing issuers standing to seek

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<sup>173</sup> See, e.g., *GAF Corp. v. Milstein*, 453 F.2d 709, 722 n.27 (2d Cir. 1971) (“The issuer, for example, may have standing to enjoin a manipulative scheme which had the effect of depressing the price of the issuer’s stock immediately prior to a contemplated issue of securities, or it may have standing to enjoin a fraud whose purpose was to inflate the market value of the stock of a company with which the issuer was negotiating a merger.”).

<sup>174</sup> 274 F. Supp. 490 (N.D. Ohio 1967).

<sup>175</sup> *Id.* at 492.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See *supra* note 124, *infra* note 186 (providing case law holding that the injunctive relief exception applies only to ongoing fraud).

<sup>179</sup> See, e.g., *Landy v. FDIC*, 486 F.2d 139, 156 (3d Cir. 1973) (holding that the injunctive relief exception to the purchaser-seller requirement is “premised on the policy of the Securities Exchange Act to eliminate deceptive and unfair practices in security trading and to protect the public from inaccurate, incomplete, and misleading information”); *Kahan v. Rosenstiel*, 424 F.2d 161, 173 (3d Cir. 1970) (recognizing standing for plaintiffs seeking injunctive relief under section 10(b) and Rule 10b-5

injunctive relief under section 10(b) and Rule 10b-5 dovetails into the purposes for which the 1933 Act and 1934 Act were created in a way that actions for monetary damages do not.

Additionally, allowing a corporate issuer standing under section 10(b) and Rule 10b-5 without a purchase or a sale is consistent with the terms of the 1934 Act. In *Blue Chip*, one of the arguments that the Court offered in favor of the purchaser-seller rule was that section 28(a) of the 1934 Act<sup>180</sup> required that any private damages action brought under the 1934 Act be limited to “actual damages.”<sup>181</sup> Section 28(a) in relevant part provides, “[N]o person permitted to maintain a suit for damages under [the 1934 Act] shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.”<sup>182</sup> In *Blue Chip*, the Court stated its concern that in the absence of the purchaser-seller rule, determining damages based on failure to purchase or sell would be highly speculative and uncertain.<sup>183</sup>

Section 28(a) does not pose a concern in actions for injunctive relief under section 10(b) and Rule 10b-5. The Supreme Court’s reasoning that section 28(a) validates the purchaser-seller rule is inapposite because actions for injunctive relief do not involve an award of “actual damages.”<sup>184</sup> In sum, injunctive relief varies greatly from actions for monetary damage, and different treatment for actions for injunctive relief and actions for monetary relief is not in conflict with the Supreme Court’s holding in *Blue Chip*.

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without a purchase or a sale because “[t]he thrust of the [1934] Act and the decisions interpreting it is to give the investing public the opportunity to make knowing and intelligent decisions regarding the purchase or sale of securities”); *Granada Invs., Inc. v. DWG Corp.*, 717 F. Supp. 533, 536 (N.D. Ohio 1989) (“The policies embodied in the Exchange Act of eliminating deceptive and unfair practices in securities trading and protecting the public from inaccurate and misleading information are clearly advanced by permitting aggrieved shareholders to bring suits to enjoin wrongful acts.”); *Moore v. Greatamerica Corp.*, 274 F. Supp. 490, 492 (N.D. Ohio 1967) (recognizing standing for an issuer to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security because it furthers the policies underlying the statute and rule).

<sup>180</sup> 15 U.S.C. § 78bb(a) (2000).

<sup>181</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734–35 (1975).

<sup>182</sup> 15 U.S.C. § 78bb(a) (2000).

<sup>183</sup> *Blue Chip*, 421 U.S. at 734–35 (“In contrast, a putative plaintiff, who neither purchases nor sells securities but sues instead for intangible economic injury such as loss of a noncontractual opportunity to buy or sell, is more likely to be seeking a largely conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff’s subjective hypothesis.”).

<sup>184</sup> *Id.*

*B. Irreparable Injury to the Issuer*

In *The Law of Securities Regulation*, Professor Thomas Lee Hazen writes, “[E]ven among those courts that do not require the plaintiff in an injunction action to have been a purchaser or seller, the plaintiff must still be able to show some direct injury resulting from the alleged Rule 10b-5 violation.”<sup>185</sup> A corporate issuer will only have standing to seek injunctive relief under section 10(b) and Rule 10b-5 if the issuer can demonstrate that the continuation of the alleged deception will cause some injury to the issuer.<sup>186</sup>

In *Avnet, Inc. v. Scope Industries*,<sup>187</sup> for example, because a corporate issuer had failed to plead any injury, the United States District Court for the Southern District of New York held that the issuer could not maintain an action for injunctive relief under section 10(b) and Rule 10b-5. In that case, Avnet, Inc. (“Avnet”) brought suit against a shareholder for an alleged manipulative scheme to gain greater control of the corporation.<sup>188</sup> Avnet requested that the shareholder be enjoined from further action, unless the shareholder corrected the alleged misrepresentations.<sup>189</sup> After recognizing a corporate issuer’s right to seek injunctive relief under section 10(b) and Rule 10b-5, the court held that the shareholder had failed to allege

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<sup>185</sup> HAZEN, *supra* note 7, § 12.7[2] (discussing standing to seek injunctive relief under section 10(b) and Rule 10b-5).

<sup>186</sup> See, e.g., *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 486 (3d Cir. 1998) (opting not to rule on the existence of the injunctive relief exception to the purchaser-seller requirement because the plaintiff had failed to establish any causal link between its alleged loss and the alleged violation of section 10(b) and Rule 10b-5); *Advanced Res. Int’l, Inc. v. Tri-Star Petroleum Co.*, 4 F.3d 327, 333 (4th Cir. 1993) (declining to decide whether an injunctive relief exception to the purchaser-seller rule exists and denying standing to seek injunctive relief under section 10(b) and Rule 10b-5 to a plaintiff whose injuries were “too far removed, causally, from the sale or purchase of securities . . . even under a relaxed rule applicable to injunctive relief cases”); *Granada Invs., Inc. v. DWG Corp.*, 717 F. Supp. 533, 535 (N.D. Ohio 1989) (“A plaintiff seeking injunctive relief must demonstrate, through the use of substantial and verifiable evidence, that he will be injured by the continuation of past and present wrongdoing.”); *Foster Wheeler Corp. v. Edelman*, No. 87-4346 (GEB), 1987 U.S. Dist. LEXIS 16783, at \*10-12 (D.N.J. Dec. 9, 1987) (holding that to have standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security a causal connection must be established between the alleged wrong and the harm suffered); *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1359 (N.D. Tex. 1979) (“A plaintiff requesting injunctive relief [under section 10(b) and Rule 10b-5] must demonstrate that the continuation of past and present practices will injure him.”); see also *supra* note 124.

<sup>187</sup> 499 F. Supp. 1121, 1128-29 (S.D.N.Y. 1980).

<sup>188</sup> *Id.* at 1123.

<sup>189</sup> *Id.*

sufficient injury to maintain its action.<sup>190</sup> The court wrote, “The complaint alleges market manipulation, but does not specify how that manipulation injured Avnet, why or how Avnet may be the best champion of its shareholders’ rights here, or any other reason to allow it to sue under Rule 10b-5 here.”<sup>191</sup> Put simply, without injury, an issuer has no standing.

When a corporate issuer seeks injunctive relief under section 10(b) and Rule 10b-5 without a purchase or a sale of a security, the injury to the issuer helps to justify standing and provides a reason to make an exception to the purchaser-seller requirement. Allowing an issuer standing to seek injunctive relief protects the issuer from being crippled by manipulative acts and mitigates damages from a fraud or deception.

A corporate issuer should be allowed standing under section 10(b) and Rule 10b-5 because securities manipulation may have crippling results. When Congress codified the “Necessity for Regulation” in the 1934 Act, it stated that securities markets “constitute an important part of the current of interstate commerce” and have a significant role in trade and industry.<sup>192</sup> When securities manipulation occurs, the damage to a corporation or other issuer of securities can be significant.<sup>193</sup> The issuer may face a devaluation of stock, decline in credit rating, inability to merge with other business entities, and a myriad of other problems.<sup>194</sup> If an issuer is injured by securities manipulation, it has a chilling effect on interstate commerce and negatively effects industry. Allowing an issuer standing to pursue injunctive relief under section 10(b) and Rule 10b-5 without a purchase or a sale is warranted because it is consistent with the policy justifications advanced for the existence of the 1934 Act.

Issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security also helps mitigate the damage created by a fraud or deception. When an issuer is injured by a manipulative or deceptive act, the holders of its securities are ultimately harmed.<sup>195</sup> The initial injury to the issuer is a first

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<sup>190</sup> *Id.* at 1128–29 (holding that Avnet had failed to plead fraud with particularity as required under Federal Rule of Civil Procedure 9(b)).

<sup>191</sup> *Id.* at 1128.

<sup>192</sup> 15 U.S.C. § 78b (2000 & Supp. II 2002) (providing the “necessity” for the regulation contained within the 1934 Act).

<sup>193</sup> Comment, *supra* note 11, at 629 (discussing the problems created by securities fraud).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (“[D]amage actions are an outgrowth from [section 10(b) and Rule 10b-5] to compensate those who have been injured when the damage was not prevented.”).

order harm that leads to the second order harm affecting holders of its securities.<sup>196</sup> If an issuer is able to enjoin or prevent the harm to itself, then the damage to the holders of its securities is lessened or does not occur.<sup>197</sup> Allowing an issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 is justified because it stops the harm to the issuer and potentially prevents the need for numerous damages suits.<sup>198</sup>

*C. The Corporate Issuer as Best Champion of Shareholders' Rights*

A corporate issuer should have standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security because the corporate form makes it uniquely capable to champion the rights of its shareholders. The corporate issuer is the best champion of its shareholders because it allows for collective action, possesses extensive resources, and prevents overburdening the SEC.

Allowing a corporate issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 in the absence of a sale is justified because the corporate form enables individuals to act collectively, rather than as fragmented segments. In *Cox & Hazen on Corporations*, Professors James D. Cox and Thomas Lee Hazen state, "The corporate form . . . facilitates a good amount of efficiency: Those with managerial skills and experience are entrusted with the capital of their investors . . . to make an optimal use of their energies by devoting themselves to their individual vocations."<sup>199</sup> In short, the corporate form enables individuals to act together with centralized management that has both experience and expertise.<sup>200</sup>

Allowing a corporate issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without a purchase or sale of a security enables all individuals who might potentially have been harmed by an alleged deception to sue as a unified group with most likely better legal counsel and more litigation experience. Moreover, allowing an issuer standing to seek injunctive relief also may prevent

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<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

<sup>198</sup> See also *supra* note 168 (discussing why allowing an issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security provides relief to deserving individuals who would not have standing to sue under these provisions).

<sup>199</sup> 1 JAMES D. COX & THOMAS LEE HAZEN, *COX & HAZEN ON CORPORATIONS* § 1.05 (2d ed. 2003) (discussing the virtues of the corporate form).

<sup>200</sup> See, e.g., *id.*; EISENBERG, *supra* note 22, at 100 (noting that centralized management is one of the characteristics of the corporate form).



numerous damages actions that may result if harm is allowed to continue without an action for injunctive relief.<sup>201</sup> One action for injunctive relief by a corporate issuer that did not purchase or sell based on an alleged deception is preferable to scores of damages suits that may result if a deception is not abated.<sup>202</sup>

Beyond the benefits of collective action, allowing an issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security is also justified because a corporate issuer likely has better resources to ensure that an action is properly litigated. An issuer's management is almost certain to have better information about the value of corporate assets, earning potential, future earnings, and a variety of other factors that determine the correct price of the issuer's stock.<sup>203</sup> Because of this, the issuer's management is in a better position to detect and potentially remedy a deception relating to the corporation's securities.

A corporate issuer also has better resources to ensure that an action for injunctive relief under section 10(b) and Rule 10b-5 is properly litigated because it likely has the capital necessary to bring a suit promptly before its shareholders are harmed.<sup>204</sup> One of the virtues of the corporate form is that it allows capital to be aggregated so that individuals can come together to weather the perils of business.<sup>205</sup> In almost every instance, the ability to aggregate capital allows the issuer to litigate claims under section 10(b) and Rule 10b-5 better than any individual shareholder.

Furthermore, a corporate issuer is the best champion of its shareholders' rights and should have standing under section 10(b) and Rule 10b-5 without a purchase or sale because allowing such standing will prevent overburdening the SEC with enforcement actions. Section 21(e) of the 1934 Act expressly gives the SEC the power to enforce section 10(b) and Rule 10b-5 without the purchase or sale of a security.<sup>206</sup> If a corporate issuer has standing to seek in-

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<sup>201</sup> See *supra* Part III.B.

<sup>202</sup> See *supra* Part III.B.

<sup>203</sup> Comment, *supra* note 11, at 628–29 (discussing why a “corporation is in a markedly better position to protect its shareholders’ interests than are the shareholders themselves”).

<sup>204</sup> See *id.*

<sup>205</sup> See, e.g., COX & HAZEN, *supra* note 199, § 1.05 (stating that the corporate form assembles and combines the amount of capital necessary to participate in modern business); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (“Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises”).

<sup>206</sup> 15 U.S.C. § 78u(e) (2000 & Supp. II 2002).

junctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security, then the SEC has numerous allies in fulfilling its obligations under the 1934 Act.<sup>207</sup>

Allowing an issuer standing under section 10(b) and Rule 10b-5 without a purchase or a sale makes sense because the most concentrated benefit of correcting a deception or fraud goes to the issuer of the securities. Although correcting a deception or fraud helps fulfill the underlying reasons for the 1933 Act and 1934 Act, the issuer and its shareholders gain the greatest benefit and should be charged with paying some of the expense for this benefit.

#### IV. OBSTACLES IN THE WAY OF ISSUER STANDING

Even though strong policy justifications exist for a corporate issuer to have standing to seek injunctive relief without the purchase or sale of a security, significant obstacles stand in the way of the Supreme Court holding that such standing is available. The Court does have substantial power in defining the contours of the private right of action under section 10(b) and Rule 10b-5 because it is judicially implied.<sup>208</sup> However, arguments against the existence of issuer standing without a purchase or sale can be founded upon the Supreme Court's aversion to broadening standing under section 10(b) and Rule 10b-5, the possible misuse of issuer standing by directors and officers, and interpretation of section 10(b) and Rule 10b-5 in the context of the 1933 Act<sup>209</sup> and the 1934 Act.<sup>210</sup>

##### A. *The Court's Aversion to Broadening Standing Under Section 10(b) and Rule 10b-5*

The Supreme Court has never addressed whether an issuer has standing to seek injunctive relief under section 10(b) and Rule 10b-5

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<sup>207</sup> See *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (holding that an implied private right of action exists under section 14(a) of the 1934 Act because private enforcement is a "necessary supplement" to SEC action); *Mut. Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 546-47 (2d Cir. 1967) (recognizing standing for stockholders seeking injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security in part because allowing standing helps the SEC to enforce the 1934 Act); *Granada Invs., Inc. v. DWG Corp.*, 717 F. Supp. 533, 536 (N.D. Ohio 1989) (holding that standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security allows plaintiffs to "protect their rights and assist in the enforcement of the federal securities laws").

<sup>208</sup> See *supra* Part I (discussing the Supreme Court's wide discretion in determining standing under section 10(b) and Rule 10b-5 because it is a judicially implied private right of action).

<sup>209</sup> 15 U.S.C. §§ 77a-77aa (2000 & Supp. II 2002).

<sup>210</sup> 15 U.S.C. §§ 78a-78mm (2000 & Supp. II 2002).

without the purchase or sale of a security, but a number of its opinions, including *Blue Chip Stamps v. Manor Drug Stores*,<sup>211</sup> create significant concerns about whether such standing exists. Supreme Court case law shows that the Court is generally opposed to broadening standing under section 10(b) and Rule 10b-5 and adverse to making exceptions to the purchaser-seller rule. Moreover, the Court adopted the purchaser-seller rule from a case that applied the rule to an action for injunctive relief.

Although the Supreme Court has consistently reaffirmed the existence of a private right of action under section 10(b) and Rule 10b-5,<sup>212</sup> the Court has been opposed to broadening that standing.<sup>213</sup> Since the mid 1970s, many implied private rights of action under the securities laws have been significantly narrowed.<sup>214</sup> Because of the Supreme Court's restrictive approach, lower courts have also become less willing to broaden any existing implied remedies.<sup>215</sup>

In terms of the private right of action under section 10(b) and Rule 10b-5, the Supreme Court has limited standing in damages actions to purchasers and sellers of securities,<sup>216</sup> required a showing of

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<sup>211</sup> 421 U.S. 723 (1975); *see also* *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 462 (2d Cir. 1952) (providing the rule that became the basis for the *Blue Chip* decision).

<sup>212</sup> *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (“Judicial interpretation and application, legislative acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of Section 10(b) and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act’s requirements.”); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (“The existence of this implied remedy [under section 10(b) and Rule 10b-5] is simply beyond peradventure.”); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1976) (holding that the implied private cause of action under section 10(b) and Rule 10b-5 is “well established”).

<sup>213</sup> Some commentators have gone so far as to suggest that if *Blue Chip* was decided today, the Supreme Court would hold that no private right of action exists under section 10(b) and Rule 10b-5. *See* ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW § 13.02[A] (1999) (“A fair guess is that if the issue were to arise for the first time today, the Supreme Court would hold that no private right of action exists, leaving enforcement of the rule to the SEC alone.”).

<sup>214</sup> *See* HAZEN, *supra* note 7, § 12.2[1] (discussing the general trend of limiting implied remedies under the securities laws).

<sup>215</sup> *See id.* § 12.2[2] (“There can be no doubt . . . that the restrictive trend in the Supreme Court has cut back on the lower courts’ willingness to create additional remedies. The overwhelming majority of recent cases has denied the existence of any other than the well-established implied remedies.” (footnotes omitted)).

<sup>216</sup> *Blue Chip*, 421 U.S. at 731–32 (holding that standing in damages actions under section 10(b) and Rule 10b-5 is limited to purchasers or sellers of securities).

scienter,<sup>217</sup> held that the conduct complained of must be “manipulative or deceptive,”<sup>218</sup> and ruled that a private right of action does not exist against aiders and abettors.<sup>219</sup> The Supreme Court did hold that an implied private right of action exists under section 10(b) and Rule 10b-5 even though other express remedies are available.<sup>220</sup> However, the Court has substantially limited the scope of the implied right of action under section 10(b) and Rule 10b-5.

The Court has great discretion in determining the contours of the private right of action under section 10(b) and Rule 10b-5,<sup>221</sup> and substantial policy justifications exist for allowing issuer standing to seek injunctive relief without a purchase or a sale.<sup>222</sup> Nevertheless, the existence of issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without a purchase or a sale is questionable because of the Supreme Court’s general opposition to broadening implied remedies under section 10(b) and Rule 10b-5.

*Blue Chip* demonstrates that the Supreme Court may be adverse to making exceptions to the purchaser-seller rule. In *Blue Chip*, the Supreme Court both adopted the purchaser-seller rule and refused to make an exception to that rule for aborted transaction cases in which the manipulative or deceptive act prevented the consummation of a purchase or a sale.<sup>223</sup> As previously discussed, the aborted transaction exception, the injunctive relief exception, and other various exceptions developed during the interim between the announcement of the purchaser-seller rule in *Birnbaum v. Newport Steel Corp.*<sup>224</sup> and the

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<sup>217</sup> *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194–214 (1976) (holding that a private cause of action under section 10(b) and Rule 10b-5 requires a showing of scienter on the part of the defendant).

<sup>218</sup> *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473–74 (1977) (holding that section 10(b) and Rule 10b-5 only apply to conduct that is either manipulative or deceptive).

<sup>219</sup> *Cent. Bank of Denver, N.A. v. Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191–92 (1994) (holding that a private right of action does not exist against those who aid and abet a violation of section 10(b) and Rule 10b-5).

<sup>220</sup> *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380–87 (1983) (holding that an implied cause of action exists under section 10(b) and Rule 10b-5 even though express remedies exist covering the same transaction).

<sup>221</sup> See *supra* Part I (discussing the Supreme Court’s wide discretion in determining standing under section 10(b) and rule 10b–5 because it is a judicially implied private right of action).

<sup>222</sup> See *supra* Part III.

<sup>223</sup> See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 754–55 (1975) (rejecting the aborted transaction exception); *supra* Part II.C (analyzing the development and rejection of the aborted transaction exception).

<sup>224</sup> 193 F.2d 461 (2d Cir. 1952).

adoption of the rule in *Blue Chip*.<sup>225</sup> The Supreme Court's rejection of the aborted transaction exception in *Blue Chip* suggests that the Court may ultimately reject all of the exceptions that developed to the purchaser-seller rule.

If *Blue Chip* implicitly rejected all exceptions to the purchase-seller rule, a corporate issuer will not have standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security. Of course, *Blue Chip* can also be read narrowly as applying the purchaser-seller rule only to actions for damages, which is why the question of issuer standing to seek injunctive relief remains open.

The fact that the Supreme Court adopted the purchaser-seller rule from a case that applied the rule to an action for injunctive relief also casts doubt on the existence of issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security. In *Blue Chip*, the Supreme Court adopted the purchaser-seller rule that was announced in *Birnbaum*.<sup>226</sup> The Court went so far as to state: "[W]e are of the opinion that *Birnbaum* was rightly decided."<sup>227</sup> Although not emphasized in the Second Circuit's opinion, *Birnbaum* was an action in equity under section 10(b) and Rule 10b-5.<sup>228</sup>

In fact, the plaintiffs in *Birnbaum* explicitly sought and were denied standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security.<sup>229</sup> As previously discussed, in *Birnbaum*, a group of shareholders of Newport Steel Corporation ("Newport") alleged that the president and various members of the board of directors of Newport defrauded the shareholders by permitting the president to sell his forty percent of stock in Newport to Wilport Company ("Wilport") for a large profit after rejecting a tender offer that would have been profitable to all of the shareholders.<sup>230</sup> Employing section 10(b) and Rule 10b-5, the shareholders

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<sup>225</sup> See *supra* Part II.C (discussing various exceptions to the purchaser-seller rule that were created between *Birnbaum v. Newport Steel Corp.*, 98 F. Supp. 506 (S.D.N.Y. 1951), and *Blue Chip*).

<sup>226</sup> *Blue Chip*, 421 U.S. at 731 (adopting the rule announced in *Birnbaum*).

<sup>227</sup> *Id.*

<sup>228</sup> See *Birnbaum*, 98 F. Supp. at 508; see also *Cowin v. Bresler*, 741 F.2d 410, 420 n.13 (D.C. Cir. 1984) ("Though not apparent from the Second Circuit's opinion, *Birnbaum* was a suit in equity seeking rescission of a sale allegedly violative of Rule 10b-5 and an accounting by the defendants."); *Liberty Nat'l Ins. Holding Co. v. Charter Co.*, 734 F.2d 545, 557 n.26 (11th Cir. 1984) ("*Birnbaum* . . . was a suit in equity, though this is not apparent from the court of appeals' opinion.").

<sup>229</sup> 98 F. Supp. at 508.

<sup>230</sup> *Id.*

requested rescission of the sale of the stock, injunction of certain individuals from causing any future sale of the stock to Wilport, and an accounting by various defendants.<sup>231</sup> The United States District Court for the Southern District of New York dismissed the case because the shareholders had not purchased or sold securities in connection with the alleged deception,<sup>232</sup> and the Second Circuit affirmed the lower court's opinion.<sup>233</sup>

When the Supreme Court adopted the purchaser-seller rule that was announced in *Birnbaum*, the Court may have implicitly answered whether an issuer or anyone else may have standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security. The Supreme Court may have already foreclosed the injunctive relief exception to the purchaser-seller rule because *Birnbaum* was a case directly applying the purchaser-seller rule to a plea for injunctive relief.

*Blue Chip*, however, did not explicitly address whether injunctive relief is available under section 10(b) and Rule 10b-5 without the purchase or sale of the security, so issuer standing may still be available. Notably, the injunctive relief exception to the purchaser-seller rule is well established in the Second Circuit, which is the court that decided *Birnbaum*.<sup>234</sup> Nevertheless, the Supreme Court's endorsement of the holding in *Birnbaum*, its aversion to making exceptions to the purchaser-seller rule, and its general opposition to expanding implied rights of action create significant concerns about whether an issuer will be able to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security.

*B. Possible Misuse of Section 10(b) and Rule 10b-5 by Corporate Directors*

Concerns about possible misuse of section 10(b) and Rule 10b-5 may also dissuade the Supreme Court from holding that issuers have standing to seek injunctive relief without the purchase or sale of a security. As mentioned previously, the Court's holding in *Blue Chip* was largely based on policy concerns because "neither the congressional enactment nor the administrative regulations offer conclusive guidance."<sup>235</sup> Although the Court's policy considerations for adopting the purchaser-seller rule in actions for monetary damage do not apply in

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 508–09.

<sup>233</sup> *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 464 (2d Cir. 1952).

<sup>234</sup> *See supra* note 138.

<sup>235</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

actions for injunctive relief,<sup>236</sup> the Court may find possible misuse by corporate directors a compelling reason to hold that an issuer does not have standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security.

In *Liberty National Insurance Holding Co. v. Charter Co.*,<sup>237</sup> for example, concerns about improper entrenchment by corporate management prompted the United States Court of Appeals for the Eleventh Circuit to hold that an issuer does not have standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security. In that case, Liberty National Insurance Holding Company (“Liberty National”) alleged that Charter Company and some of its subsidiaries (collectively “Charter”) had violated section 10(b) and Rule 10b-5 when Charter filed the required schedule 13D reporting statement after it began acquiring Liberty National stock.<sup>238</sup> Based on alleged misrepresentations in the 13D statement, Liberty National sought injunctive relief requiring Charter to divest itself of Liberty National stock.<sup>239</sup> The United States District Court for the Northern District of Alabama dismissed the claim because Liberty National had not purchased or sold based on the alleged deception.<sup>240</sup>

On appeal, the Eleventh Circuit affirmed the district court and held that an issuer cannot seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security as a means to fend off a corporate control contest.<sup>241</sup> The Court wrote, “[a] little knowledge of the delicate nature of the market for corporate control convinces us that there is no sound reason to provide an additional shield . . . with which entrenched management can fend off hostile takeover attempts.”<sup>242</sup> Other courts have reached similar conclusions when corporate issuers have attempted to use section 10(b) and Rule 10b-5 to defend against corporate control contests without the purchase or sale of a security.<sup>243</sup>

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<sup>236</sup> See *supra* Part III.A (explaining that the policy considerations for adopting the purchaser-seller rule in *Blue Chip* do not apply to actions for injunctive relief because the same concerns about unjust enrichment do not apply to actions for injunctive relief).

<sup>237</sup> 734 F.2d 545 (11th Cir. 1984).

<sup>238</sup> *Id.* at 547–48.

<sup>239</sup> *Id.* at 548.

<sup>240</sup> *Id.* at 553.

<sup>241</sup> *Id.* at 558–59.

<sup>242</sup> *Id.* at 559.

<sup>243</sup> See, e.g., *John Labatt Ltd. v. Onex Corp.*, 890 F. Supp. 235, 247–48 (S.D.N.Y. 1995) (holding that an issuer that is the target of a tender offer may not seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security).

Arguably, *Liberty National* only limits the exception to the purchaser-seller rule that allows an entity to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security. The Supreme Court could hold that an injunctive relief exception exists to the purchaser-seller rule except in cases in which the purpose is management entrenchment.

This interpretation of section 10(b) and Rule 10b-5 is highly tortured. Although section 10(b) and Rule 10b-5 have grown far beyond the statutory enactment and administrative rule,<sup>244</sup> and the Supreme Court has broad discretion in determining the contours of a judicially implied cause of action,<sup>245</sup> creating exceptions to exceptions may be beyond what the Court is willing to allow.

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ity); *Equity Oil Co. v. Consol. Oil & Gas, Inc.*, 596 F. Supp. 507, 514 (D. Utah 1983) (holding that an issuer does not have standing in corporate control contests to seek injunctive relief under section 10(b) and Rule 10b-5 without a purchase or sale because “entrenched management can use a suit for an injunction with voluminous discovery requests, for its delay value to defeat any takeover attempt, regardless of the merits of the case” (footnote omitted)); *Raybestos-Manhattan, Inc. v. Hi-Shear Indus., Inc.*, 503 F. Supp. 1122, 1134 (E.D.N.Y. 1980) (“[I]t would be senseless to allow target management to wield [Rule 10b-5] as a weapon in takeover bids when Congress has enacted Sections 13(d), 14(d), and 14(e) specifically to ensure fairness in battles for corporate control.”); *Treadway Cos. v. Care Corp.*, 490 F. Supp. 660, 666 (S.D.N.Y. 1980) (finding that an issuer did not have standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security in part because of the management’s interest in retaining control of the corporation); *Mosinee Paper Corp. v. Rondeau*, 354 F. Supp. 686, 697–98 (W.D. Wis. 1973) (holding that an issuer does not have standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security when management is involved in a fight to control the corporation). *But see* *USG Corp. v. Cottle*, 689 F. Supp. 1483, 1493–94 (N.D. Ill. 1988) (holding that an issuer had standing to enjoin the pursuit of a tender offer using section 10(b) and Rule 10b-5 without the purchase or sale of a security); *Foster Wheeler Corp. v. Edelman*, No. 87-4346 (GEB), 1987 U.S. Dist. LEXIS 16783, at \*8–12 (D.N.J. Dec. 9, 1987) (recognizing that an issuer had standing to seek injunctive relief in the context of a tender offer under section 10(b) and Rule 10b-5 without the purchase or sale of a security); *Hanna Mining Co. v. Norcen Energy Res. Ltd.*, 574 F. Supp. 1172, 1198 (N.D. Ohio 1982) (holding that the target of a corporate takeover had standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security); *Moore v. Greatamerica Corp.*, 274 F. Supp. 490, 492 (N.D. Ohio 1967) (granting an issuer standing in the context of a tender offer to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security to help “eliminate any undesirable practices” in the securities marketplace).

<sup>244</sup> See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (“When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.”).

<sup>245</sup> See *id.* at 748–49 (discussing the purchaser-seller rule and the possible existence of an injunctive relief exception).



C. *Statutory Interpretation of Section 10(b) and Rule 10b-5*

In *Cowin v. Bresler*,<sup>246</sup> Judge Bork, writing for the United States Court of Appeals for the District of Columbia Circuit, stated:

It is true, as the Court in *Blue Chip* acknowledged, that the question of what constitutes the proper plaintiff class under section 10(b) and Rule 10b-5 cannot be *conclusively* determined by resort to the text of those enactments; as one might expect, neither the statute nor the rule speaks directly to the question of who may sue since the right to sue was created afterwards by the judiciary. Still, in the process of implying private rights judges must take account of the statutory scheme. No better guidance exists than the language of the relevant statute and regulation.<sup>247</sup>

Although section 10(b) and Rule 10b-5 do not provide conclusive guidance regarding issuer standing to seek injunctive relief without the purchase or sale of a security, the Court may refuse to find the existence of such standing because of judicial restraint, the limitations placed on other express remedies in the 1934 Act, and the wording of section 10(b) and Rule 10b-5.

The Court may exercise judicial restraint and deny issuers standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security because the existence of such standing would require an extremely tortured interpretation of section 10(b) and Rule 10b-5. As the Court noted in *Blue Chip*, “the wording of § 10(b), making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action, not to purchasers and sellers of securities, but to the world at large.”<sup>248</sup> In *Cowin v. Bresler*, for example, the United States Court of Appeals for the District of Columbia Circuit denied standing under section 10(b) and Rule 10b-5 to individuals seeking injunctive relief without the purchase or sale of a security in part because fashioning such a remedy in light of the purchaser-seller rule for monetary damages would require a grossly strained reading of section 10(b) and Rule 10b-5.<sup>249</sup>

Even if the Court holds that an exception to the purchaser-seller rule exists for issuers seeking injunctive relief under section 10(b) and Rule 10b-5, the Court is still left with the problem of manage-

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<sup>246</sup> 741 F.2d 410 (D.C. Cir. 1984).

<sup>247</sup> *Id.* at 424 (citations omitted).

<sup>248</sup> *Blue Chip*, 421 U.S. at 733 n.5.

<sup>249</sup> *Cowin*, 741 F.2d at 424 (“Attempting to fashion a different concept of standing for cases [that concern injunctive relief under section 10(b) and Rule 10b-5] would involve us in distinctions altogether too awkward to be persuasive.”).

ment using this exception for purposes of entrenchment.<sup>250</sup> Ultimately, the Court would likely have to adopt an exception to the exception, which would require an even more strained reading of section 10(b) and Rule 10b-5.<sup>251</sup> The Court may not be willing to stretch so far beyond the words of section 10(b) and Rule 10b-5.

The limitations in other express remedies in the 1934 Act also suggest that the Court may be reluctant to grant an issuer standing under section 10(b) and Rule 10b-5. Section 9(e) of the 1934 Act provides a private right of action for “any person who shall purchase or sell any security at a price” that was affected by a variety of manipulative acts described in sections 9(a), (b), and (c) of the 1934 Act.<sup>252</sup> Section 18(a) of the 1934 Act provides a private right of action to “any person . . . who . . . shall have purchased or sold a security” based on “false or misleading” statements made in filings to the SEC.<sup>253</sup>

In both section 9(e) and section 18(a), standing is limited to those individuals who have purchased or sold based on the allegedly deceptive acts.<sup>254</sup> Section 10(b) and Rule 10b-5 also afford relief to individuals who have been victims of deceptive acts. The Court may hold that an issuer or individual seeking injunctive relief under section 10(b) and Rule 10b-5 must also be a purchaser or a seller to be consistent with other provisions of the 1934 Act.<sup>255</sup>

The Supreme Court examined this argument in *Blue Chip*, but failed to find it conclusive as to whether the purchaser-seller rule applied to actions for monetary damages.<sup>256</sup> The Court did state, how-

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<sup>250</sup> See *supra* Part IV.B (discussing possible misuse of section 10(b) and Rule 10b-5 by corporate directors for purposes of management entrenchment).

<sup>251</sup> See *supra* Part IV.B.

<sup>252</sup> 15 U.S.C. § 78i(e) (2000) (discussing persons liable in suits at law or in equity for manipulation of security prices).

<sup>253</sup> *Id.* § 78r(a) (discussing liability for misleading statements made in SEC filings).

<sup>254</sup> The express rights of action in the 1933 Act are also limited to individuals or entities purchasing or acquiring securities based on deceptive acts. See *supra* Part II.A.

<sup>255</sup> Notably, section 16(b) of the 1934 Act does provide a private right of action for recovery of short-swing, insider profits “by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit . . .” 15 U.S.C. § 78p(b) (2000). However, this provision differs significantly from sections 9(e), 10(b), and 18(a) because section 16(b) is a strict liability cause of action, whereas sections 9(e), 10(b), and 18(a) require a manipulative or deceptive act. Thus, a court is more likely to interpret the implied private right of action under section 10(b) in a similar manner to sections 9(e) and 18(a).

<sup>256</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (“[N]either the congressional enactment nor the administrative regulations offer conclusive guidance.”).

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ever, “[i]t would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.”<sup>257</sup> When coupled with the Court’s adoption in *Blue Chip* of the purchaser-seller rule for actions seeking monetary relief, the limitations in other express remedies in the 1934 Act may be enough for the Court to hold that the purchaser-seller rule also applies to actions for injunctive relief.<sup>258</sup>

Finally, the wording of section 10(b) and Rule 10b-5 suggests that the Court may be reluctant to hold that an issuer has standing to seek injunctive relief without the purchase or sale of a security. As stated previously, section 10(b) of the 1934 Act makes it unlawful for any person to “use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance . . . .”<sup>259</sup> To enforce section 10(b), the SEC promulgated Rule 10b-5.<sup>260</sup> Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (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.<sup>261</sup>

The words “in connection with the purchase or sale of any security” suggest that there must be some actual link between the purchase or sale of a security and the alleged fraudulent conduct. The Supreme Court may reject a more expansive construction of the “in connection with” requirement and refuse to allow an issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security. In fact, based on these grounds,

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<sup>257</sup> *Id.* at 736.

<sup>258</sup> *But see supra* note 255 (discussing section 16(b) of the 1934 Act, which provides a private right of action for issuers to recover short-swing, insider profits).

<sup>259</sup> 15 U.S.C. § 78j (2000).

<sup>260</sup> 17 C.F.R. § 240.10b-5 (2005).

<sup>261</sup> *Id.*

the Court may refuse to allow any individual standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security.<sup>262</sup>

Notably, after the purchaser-seller rule was announced in *Birnbaum v. Newport Steel Corp.* and before it was adopted by the Supreme Court in *Blue Chip*, Congress refused on two different occasions to amend the jurisdictional reach of section 10(b) and Rule 10b-5.<sup>263</sup> The lack of congressional action lends credibility to the argument that Congress endorses the purchaser-seller requirement and does not want an expansive class of plaintiffs with section 10(b) and Rule 10b-5 claims.

## VI. CONCLUSION

Although compelling policy justifications exist for allowing an issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security, substantial obstacles stand in the way of the Supreme Court holding that such standing exists. An exception to the purchaser-seller requirement is justified for a corporate issuer seeking injunctive relief because of the nature of injunctive relief, the injury to the issuer, and the role of the issuer as best champion of its shareholders. However, the Court will likely deny the existence of such standing because of the Supreme Court's aversion to broadening standing under section 10(b) and Rule 10b-5, the possible misuse of issuer standing by directors and officers, and interpretation of section 10(b) and Rule 10b-5 in the context of the 1933 Act and the 1934 Act.

The best solution may be for Congress to amend section 10(b) and Rule 10b-5 to allow an issuer standing to seek injunctive relief without the purchase or sale of a security. Based on previous attempts to amend the jurisdictional reach of section 10(b) and Rule 10b-5,<sup>264</sup> however, Congress may be reluctant to alter either of these provisions. Thus, how the judicial oak will grow remains uncertain.

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<sup>262</sup> See *Cowin v. Bresler*, 741 F.2d 410, 424 (D.C. Cir. 1984) (holding that no injunctive relief exception exists to the purchaser-seller rule, in part based on the statutory structure of the 1934 Act).

<sup>263</sup> *Id.* ("Congress was asked on two different occasions to expand the jurisdictional reach of [section 10(b) and Rule 10b-5] but chose not to."); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732 (1975) ("In 1957 and again in 1959, the Securities and Exchange Commission sought from Congress amendment of §10(b) to change its wording from 'in connection with the purchase or sale of any security' to 'in connection with the purchase or sale of, or any attempt to purchase or sell, any security.' . . . Neither change was adopted by Congress.").

<sup>264</sup> See *supra* note 263 and accompanying text.