1976

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Recommended Citation
AN ESSAY IN SUPPORT OF THE SECOND CIRCUIT'S DECISIONS IN MARSHEL v. AFW FABRIC CORP. AND GREEN v. SANTA FE INDUSTRIES

Mordecai Rosenfeld*

I. INTRODUCTION

"Since the time to which the memory of man runneth not to the contrary the human animal has been full of cunning and guile." The quote is not from an itinerant fundamentalist preacher damning the devil in rural Tennessee, but from the heretofore secular United States Court of Appeals for the Second Circuit in Green v. Santa Fe Industries.¹ Both Green and a closely related decision, Marshel v. AFW Fabric Corp.,² have stirred the usually staid world of corporation law. In recent years the federal courts, reflecting the general perspective of a conservative national administration, have tended to narrow the scope of the federal securities laws by limiting the federal rights of shareholders.³ In that context, Marshel and Green represent a sharp depa-

* A.B., 1951, Brown University; LL.B., 1954, Yale University. Member of the New York Bar. The author practices law in New York City. He is involved in at least one litigation that would be benefited if the court of appeals' decisions in Green v. Santa Fe Indus. and Marshel v. AFW Fabric Corp. are not reversed.

¹ 533 F.2d 1283, 1287 (2d Cir. 1976), cert. granted, 45 U.S.L.W. 3222 (U.S. Oct. 4, 1976) (No. 75-1753).

² 533 F.2d 1277 (2d Cir. 1976), vacated and remanded 45 U.S.L.W. 3273 (U.S. Oct. 12, 1976) (No. 75-1782). The Court remanded to the Second Circuit to consider whether the case is now moot.

³ See Ernst & Ernst v. Hochfelder, 96 S. Ct. 1375 (1976) (scienter required to establish certain violations of Rule 10b-5); United States v. NASD, 422 U.S. 694 (1975); Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) (corporation, not having shown irreparable harm, could not enjoin a purchaser of more than five percent of its outstanding stock from voting such stock even though the purchaser had not complied with the filing requirements of the Williams Act, § 13(d) of the Securities Exchange Act); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (only actual purchaser or seller of securities has standing to bring private damage claim under Rule 10b-5); City of Detroit v. Grinnell, 495 F.2d 448 (2d Cir. 1974) (limiting the award of counsel fees in class actions); Gordon v. New York Stock Exchange, Inc., 366 F. Supp. 1261 (S.D.N.Y. 1973), aff'd, 498 F.2d 1303 (2d Cir. 1974), aff'd, 422 U.S. 659 (1975) (fixed commissions as charged for certain New York Stock Exchange transactions do not violate §§ 1 or 2 of the Sherman Antitrust Act).

Compare these cases with decisions of the Warren Court, such as Mills v. Electric Auto Lite Co., 386 U.S. 375 (1970), where the Court held that a good claim is pleaded.
ture from the current trend. The Second Circuit characterized the two opinions as ones of "extraordinary importance" and asked the Supreme Court to grant certiorari. The purpose of this article is to demonstrate not only that Green and Marshel are consistent with the common law development of the past 50 years, but also that they correctly reflect the underlying purpose of the federal securities laws.

II. THE FACTUAL BACKGROUND

A. The Concord Merger

Concord Fabrics, Inc. ("Concord") was a private corporation owned by two brothers, Frank and Alvin Weinstein. In 1968, the Weinsteins did what many other large family businesses were doing: they "went public." Concord sold 300,000 of its shares to the public that year at $15 per share. The next year the Weinsteins sold an additional 200,000 Concord shares from their own personal accounts to the public, this time at $20 per share. As a result of those sales, the Weinstein family holdings were reduced to 68 percent of Concord's outstanding stock; the Weinstein coffers were increased by $4 million. In February 1975, when Concord's stock was selling at about $2 per share on the American Stock Exchange, the company nimbly reversed its field and announced that it was now "going private;" all public shares would be purchased at $3 per share. Those who were dissatisfied were advised that they could pursue their remedy in an appraisal proceeding pursuant to section 910 of the New York Business Corporation Law.

under § 14(a) of the Securities Exchange Act if it is alleged that the challenged statement is materially false and misleading, and it is no defense to such claim to assert that the merger terms are fair; Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966), where the named plaintiff in a derivative action was not required to have personal knowledge of the wrongs alleged in order to verify the complaint pursuant to FED. R. Civ. P. 23(b) (now Rule 23.1).

It should be noted that by the time of the Mills decision, supra, Chief Justice Warren and Justice Fortas had been succeeded by Chief Justice Burger and Justice Marshall.


7. Id.

8. Id.
In order to carry out the proposed transaction the Weinsteins formed their own private holding company, AFW Fabric Corporation ("AFW"), in January 1975. The Weinsteins put all their Concord stock—1,226,549 shares—into the holding company, which was then going to merge with Concord. As a result of the merger, each public, i.e., non-Weinstein, shareholder of Concord would receive $3 per share; the Weinsteins would receive 1,226,549 shares of Concord, which is what they had owned after their 1969 sale. The effect of the AFW-Concord merger would be to eliminate the public’s interest in Concord at $3 per share. To those who had purchased the stock at $15 or $20 per share a few years earlier, Concord’s announcement that all their stock was being redeemed at $3 per share was a sober reminder of the hazards and vagaries of Wall Street trading.

Several shareholders sought to enjoin the merger in federal court, framing their complaints in the fraud and manipulation language of Section 10(b) of the Securities Exchange Act and Rule 10b-5. These shareholders claimed that it was a fraud and manipulation to “go public” at $15 and $20 per share and then, several years later, to “go private” at $3 per share. It must be emphasized that plaintiffs did not allege that the Weinsteins or Concord had made any materially false or misleading statements in connection with the proposed AFW-Concord merger. Indeed, obviously relying on Popkin v. Bishop, the proxy statement issued by defendants in connection with the merger was a confession of the penitent. The company acknowledged and proclaimed that there was no corporate purpose to the merger. It admitted that the only purpose of the merger was to benefit the Weinsteins, who would be able to transmute their 68 percent interest in Concord into 100 percent without any additional personal invest-


It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or 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.
10. 464 F.2d 714 (2d Cir. 1972).
ment. The district court denied plaintiffs' motion for an injunction, holding that "Rule 10b-5 simply does not encompass these alleged wrongs." The district court held that appraisal under state law was the only remedy available to dissatisfied Concord shareholders. Furthermore, the district court relied on the report submitted by the investment banking house of Shearson Hayden Stone, Inc., which had formally advised Concord "that a price of $3 per share is fair and equitable." The Shearson Hayden Stone report, in the form of a letter to Concord's board of directors, stated:

Based upon our review and analysis as set forth above, it is our opinion that a price per share of $3.00 is fair and equitable with respect to public shareholders.

The merger would have been consummated on April 1, 1975, except that the Attorney General of the State of New York obtained an injunction in state court which was upheld on appeal. The state trial court noted that "it appears that the appraiser was the son of a director of Concord." The New York State Attorney General was proceeding under the Martin Act, Article 23-A of the New York General Business Law. The relevant provision, section 352 of the General Business Law, empowers the Attorney General to act against anyone who is "about to employ any device, scheme or artifice to defraud" the investing public. The language, of course, is the same as that of Rule 10b-

12. Shareholders Notice, supra note 5, at 5.
17. The statute, originally enacted in 1921, is New York's Blue Sky Law.

The purpose of the law is to prevent all kinds of fraud in connection with the sale of securities and commodities and to defeat all unsubstantial and visionary schemes in relation thereto whereby the public is fraudulently exploited. (Hall v. Geiger-Jones Co., 242 U.S. 539). The words "fraud" and "fraudulent practice" in this connection should, therefore, be given a wide meaning so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive
5, the federal antifraud provision. The court carefully noted that "[t]he fraudulent practices, which are the target of the Martin Act, need not be fraud in the classic sense . . . ." The court then concluded that, notwithstanding "that full disclosure of the aims of the Weinstein group have been articulated," the proposed AFT-Concord merger would be enjoined:

What is disquietingly evident here is the fact that a group of insiders who are directing the reacquisition program, even controlling the appraisal of the stock[,], are the very ones who made the company public originally, and will be the surviving shareholders in the proposed privately-held enterprise. Adding to the odium of the scheme is that fact that no real corporate purpose has been demonstrated and that the credit of a now public corporation will be used to finance a merger for the benefit of a private group.

Equity mandates fairness in all human transactions.

In the federal court litigation, plaintiffs appealed the district court's adverse ruling. The Second Circuit unanimously reversed:

We hold that when controlling stockholders and directors of a publicly-held corporation cause it to expend corporate funds to force elimination of minority stockholders' equity participation for reasons not benefiting the corporation but rather serving only the interests of the controlling stockholders such conduct will be enjoined pursuant to Section 10(b) and Rule 10b-5 which prohibits "any act, practice, or course of business which operates or would operate as a fraud . . . in connection with the purchase or sale of any security."

In short, the court of appeals labeled the Concord-AFW merger a "scheme to defraud," hence a violation of section 10(b) and Rule 10b-5. In so doing, the court noted:

The controlling shareholders of Concord have devised a scheme to defraud their corporation and the minority shareholders to

19. For the text of Rule 10b-5 see note 9 supra.
23. Id. at 1282.
whom they owe fiduciary obligations by causing Concord to fi-
nance the liquidation of the minority's interest with no justifica-
tion in the form of a valid corporate purpose. The federal securi-
ties law does not confer jurisdiction for instances of corporate mismanagement or self-dealing absent fraud intrinsic to a se-
curities transaction. Here, however, a purchase and sale of se-
curities is at the heart of the fraudulent scheme.

B. The Santa Fe Merger

The facts in Green are more prosaic.\textsuperscript{24} Santa Fe Industries, a Delaware corporation, owned 95 percent of Kirby Lumber Corpo-
ration. It opted for a short-form merger under Delaware law which would automatically extinguish the interests of the minor-
ity shareholders.\textsuperscript{25} According to the terms of the Santa Fe-Kirby Merger, Kirby's public (i.e., non-Santa Fe) shareholders would receive $150 per share; those dissatisfied could seek an appraisal under section 262 of the Delaware Corporation Law.\textsuperscript{26}

Shareholders of Kirby Lumber Company sued in the United States District Court for the Southern District of New York under section 10(b) and Rule 10b-5. The essence of plaintiffs' claim was that the merger served no legitimate corporate purpose, and that the financial statements issued by Santa Fe in connection with the proposed merger showed that Kirby Lumber had a book value of $772 per share. Plaintiffs did not allege that they had been given false or misleading information; indeed, they were relying on the data circulated by Santa Fe.

Defendants moved under Federal Rules 12(b)(1) and (6) for an order dismissing the complaint for failure to state a claim. Interpreting Popkin v. Bishop\textsuperscript{27} to mean that deception was the sine qua non of a Rule 10b-5 action, the district court granted defendants' motion to dismiss.\textsuperscript{28} In the background was the fact that the investment banking house of Morgan Stanley & Co. had concluded that $125 per share was fair.\textsuperscript{29}

\begin{thebibliography}{99}
\bibitem{effect} The effect of a merger pursuant to section 253 of the Delaware Corporation Law is discussed in Green v. Santa Fe Indus., Inc., 391 F. Supp. 849 (S.D.N.Y. 1975).
\bibitem{appraisal} It has been held that one who seeks an appraisal does not thereby waive any rights under the federal securities laws. See J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Merrit v. Libby, McNeill & Libby, 533 F.2d 1310 (2d Cir. 1976); Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972); Voege v. American Sumatra Tobacco Corp., 241 F. Supp. 369 (D. Del. 1965).
\bibitem{opinion} 464 F.2d 714 (2d Cir. 1972).
\bibitem{sure} Id. at 851. The opinion of investment bankers has not always proven to be a sure
\end{thebibliography}
The circuit court, which had reversed the Concord case five days earlier, again reversed the district court. The court of appeals held that a good claim under Rule 10b-5 is asserted if it is alleged that (a) there is no justifiable business purpose for the merger and (b) the price offered the shareholders "is substantially lower than the appraised value reflected in the Information Statement." Whether or not a charge of inadequate consideration alone would suffice to state a claim under section 10(b) remains an open question.

Judge Moore raised several points in his vigorous dissent. He argued that since "the sovereign state of Delaware" had enacted the short-form merger statute in its "legislative wisdom," "Erie R.R. Co. v. Tompkins" prevents a federal court from positing standards of fiduciary conduct which are inconsistent with those of the state.

Stating that "the essence of fraud is deliberate deception or concealment," Judge Moore further argued that no section 10(b) action can lie where the material facts are fairly revealed. Thus, even if one were to assume that the Kirby Lumber financial statements showed that the shares were each worth $772 (whereas Santa Fe was offering $150 per share), that discrepancy alone would not create a section 10(b) claim. In contrast with Judge Moore's restrictive views on a cause of action under Rule 10b-5

Guide to a stock's value. When National Student Marketing Corporation proposed a merger with Interstate National Corporation, whereby Interstate's shareholders would receive National Student Marketing's stock, Interstate sought the opinion of the investment banking firm of White, Weld & Co. In a report dated Sept. 22, 1969, White, Weld & Co. rendered its opinion that the terms of the merger were fair. SEC v. National Student Marketing Corp., 360 F. Supp. 284 (D.D.C. 1973). The merger was consummated on Oct. 31, 1969, at which time National Student Marketing's stock was trading at approximately $50 per share. Subsequently, the SEC, in a complaint, alleged that National Student Marketing's financial statements were materially false and misleading and that much of its reported business was nonexistent. The complaint is set forth at [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,360. As noted at paragraph eight of the complaint, the stock had declined to approximately $2.25 per share as of Feb. 1, 1972 (immediately prior to the filing of the SEC complaint).

Most merger terms are approved by an investment banking firm. If such approvals were given substantial weight, the issues before the court would be considerably narrowed.

31. Id. at 1300 (Moore, J., dissenting).
32. Id.
33. 304 U.S. 64 (1938).
35. Id. at 1301.
is the majority opinion which held that a federal claim was stated if, in addition to a gross discrepancy, the complaint alleged that no corporate purpose was served by the merger. Judge Moore's final point was that, absent fraud, appraisal is "both adequate and exclusive" under the Delaware law.36

As previously noted, the Second Circuit denied an en banc review of the Concord and Santa Fe cases "because they are of such extraordinary importance"37 that they merit Supreme Court review. The court's decisions in Concord and Santa Fe, however, focus basically on one issue presented by the two cases: whether there can be a violation of section 10(b) and Rule 10b-5 if all material facts are disclosed. In effect, is there a fraud or manipulation under the statute if shareholders are told in plain language that they are being cheated? Judge Moore would maintain that the appraisal remedy offers a complete defense against that wrong. The effectiveness of that remedy will be examined later. Before debating the pros and cons of the Concord and Santa Fe opinions in the narrow light of Popkin, it may be fruitful to look at those decisions from a different vantage point.

III. THE COMMON LAW BACKGROUND

In analyzing whether the wrongs alleged in Concord and Santa Fe violated the federal securities laws, it might be well to examine first the alleged wrongs in the broad context of a common law principle that evolved in the 1920's and 1930's. Specifically, may fiduciaries terminate their cestui que trust's investment in midstream? A discussion of that principle necessarily involves these questions: Who owns a company? What is a company? Can one separate a company's past and present from its future, giving the public only the "has been" and the "now," but giving to the corporate insiders its tomorrow and its hopes? Meinhard v. Salmon38 is best known for its oft-quoted language describing fiduciary duties:39

Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

36. Id. at 1306.
37. Id. at 1309.
38. 249 N.Y. 458, 164 N.E. 545 (1928).
39. Id. at 464, 164 N.E. at 546.
As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions (Wendt v. Fischer), 243 N.Y. 439, 444. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

The facts in Meinhard bear an interesting relationship to the facts in Concord and Santa Fe. Meinhard invested in a real estate venture which Salmon managed. The subject of the investment was a 20-year lease that terminated in 1922. The enterprise first faltered, then became profitable. "For each, the venture had its phases of fair weather and of foul. The two were in it jointly, for better or for worse."40 Toward the end of the lease, a third party approached Salmon, the managing partner of the venture, with plans to develop the site when the lease period ended. Salmon and the third party thereupon contracted to develop the site. Although Salmon's new contract was to begin only when the lease that he and Meinhard jointly held had ended, the court nonetheless found that Meinhard's interest could not be extinguished: "Joint adventurers, like copartners, owe to one another while the enterprise continues the duty of the finest loyalty."41 Although the opinion is couched in the technical language of real estate, the effect of the holding in Meinhard is this: an investor under the common law cannot have his interest snuffed out by the will of those who manage the business. As the court in Meinhard expressed it:42

To say that a partner is free without restriction to buy in the reversion of the property where the business is conducted is to say in effect that he may strip the good will of its chief element of value, since good will is largely dependent upon continuity of possession. Equity refuses to confine within the bounds of classified transactions its precept of a loyalty that is undivided and unselfish. Certain at least it is that a "man obtaining his locus standi, and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligation to his co-partners in such dealings not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them." Certain it is also that there may be no abuse of special

40. Id. at 462, 164 N.E. at 546.
41. Id. at 463-64, 164 N.E. at 546.
42. Id. at 467, 164 N.E. at 547-48 (citations omitted).
opportunities growing out of a special trust as manager or agent. If conflicting inferences are possible as to abuse or opportunity, the trier of the facts must make the choice between them. There can be no revision in this court unless the choice is clearly wrong. It is no answer for the fiduciary to say "that he was not bound to risk his money as he did, or to go into the enterprise at all." . . . "He might have kept out of it altogether, but if he went in, he could not withhold from his employer the benefit of the bargain."

We have no thought to hold that Salmon was guilty of a conscious purpose to defraud.

We note that Meinhard was held to have an interest in the continuing enterprise, even though the specific 20-year lease in which he had invested had ended. A fortiori, an investor should be protected when he invests in an enterprise, such as Concord Fabrics or Kirby Lumber Company, which appears to have a permanent existence.

The same general result that was reached in Meinhard was asserted in Irving Trust Co. v. Deutsch, where a corporation (Acoustic) had the opportunity to invest in a company that owned patents which were essential to Acoustic's business. But according to Acoustic's directors, the company "by reason of its financial straits had neither the funds nor the credit to make the purchase." The directors, who had the means, bought the stock for themselves. The directors were sued for breaching their fiduciary duty to the company. The Second Circuit Court of Appeals, reversing the lower court, held that Acoustic could recover from the directors any profit that had been made from their purchase of the stock. As for defendants' argument that the corporation was unable to make the purchase, the court held: 44

If directors are permitted to justify their conduct on such a theory, there will be a temptation to refrain from exerting their strongest efforts on behalf of the corporation since, if it does not meet the obligations, an opportunity of profit will be open to them personally.

Irving Trust is important to the cases at bar because the court held, in effect, that investors were protected against their directors who would personally attempt to divert business opportunities that became available to their corporation. An investor

43. 73 F.2d 121 (2d Cir. 1934).
44. Id. at 124.
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is entitled to partake in the enterprise and all its hopes for the future; the directors, as fiduciaries acting on behalf of the shareholders, cannot announce that, henceforth, the entire enterprise is theirs. Since the directors could not divert a business opportunity to themselves even where the company was in a dire financial condition, surely the fiduciaries in Concord and Santa Fe ought not have been allowed to divert those opportunities to themselves at a time when those companies were continuing on their own, if not prospering.

The same broad result was, arguably, reached in Perlman v. Feldmann⁴⁵ where a controlling insider sold his stock at a large premium. The Second Circuit held that, in effect, the insider had trafficked for his own profit in an asset that belonged to his company, the Newport Steel Corporation. The asset, however, was an intangible one: Newport Steel’s ability, in a period of steel shortage occasioned by the Korean War, “to build up patronage” so that it could compete when the war conditions ended. The court held that since a fiduciary could not divert such a corporate opportunity to himself, he could not sell that corporate opportunity to others. In Concord and Santa Fe, the fiduciaries bought, rather than sold, the intangible corporate asset that is at the heart of Perlman. That is, in both Concord and Santa Fe the fiduciaries bought for themselves all the future business opportunities that, arguably, they should have shared with the minority shareholders.

One other case relevant to this issue is Guth v. Loft.⁴⁶ Guth controlled Loft, a large retailer of candies and other sweets. He also invested in Pepsi Cola, then a struggling syrup maker; access to Loft’s retail outlets would make the struggle easier. And so Guth, seeing that Pepsi Cola had a future that was “bubblier” than its past, became a large owner of Pepsi stock. A shareholder of Loft sued in the Delaware Chancery Court alleging that the opportunity to own Pepsi belonged not to Guth, but to Loft. After reciting the broad rule of fiduciary duties, the court held that no officer or director can compete with his own company for a business opportunity. All such opportunities belong, necessarily, to the corporation. Hence Guth had to return to Loft his full interest in Pepsi, which had grown during the course of the litigation into a large and prospering company.

⁴⁵. 219 F.2d 173 (2d Cir. 1955).
⁴⁶. 23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939).
The essence of Guth is that a fiduciary cannot take business opportunities for himself that might be profitable to his company. In Santa Fe and Concord the entire future of the business was simply bought by the controlling insiders at a price that reflected, not the value of the businesses being bought, but a deep and broad stock market decline.

It is recognized, of course, that Meinhard, Irving Trust, Perlman and Guth involved factual situations wholly different from the facts of the two cases being discussed. But one underlying theme is expressed throughout: minority investors have the right to share in their company's future. That right is dramatically underscored in Concord. In February 1975, when the announcement of the AFW-Concord merger was made, Concord's stock was selling at about $2 per share on the American Stock Exchange. The proxy statement dated March 17, 1975, reported earnings that were spotty at best; it described earnings for the 13-week period ending December 1, 1974, in this unenthusiastic way:47

The decrease in profits for the 13 weeks ended December 1, 1974 from the comparable prior period was primarily attributable to a reduction in the gross profit margin from 23.9% to 17.7%, which, in management's opinion, was caused principally by a mark-down of knit and woven inventories to reflect lower replacement costs during the period and also by a general weakness in selling prices due to severe competition and customer resistance to prices. The provision for doubtful accounts was increased after a review of the accounts receivable in light of uncertain economic conditions.

Specifically, Concord's earnings for the December 1, 1974, quarter were reported to be 1 cent per share, compared to the 23 cents earned in the like period in 1973. The proxy statement, although reporting improved earnings in early 1975, depicted Concord rather sorrowfully. Although Concord's stock price was, necessarily, affected by the general stock market malaise, a reader of Concord's March 17, 1975, proxy statement might conclude that Concord's prospects were not dramatically undervalued by the stock market price of $2 per share.

The plan was to effect the AFW-Concord merger by April 1, 1975; thereafter, Concord would no longer report its earnings publicly, and no one would know whether its fortunes were up or

47. Shareholders Notice, supra note 5, at 13.
down. But the merger was thwarted by the state court injunction, and Concord has reported its postproxy statement results: for the 13 weeks ended June 1, 1975, earnings were 49 cents per share, compared with 16 cents per share in the 1974 period.\textsuperscript{48} For the 13-week period ended November 30, 1975, Concord's earnings were $1.03 per share, or 103 times the 1 cent per share reported for the same quarter in 1974.\textsuperscript{49} As Judge Cardozo wrote in \textit{Meinhard}, an investor and his manager are partners in "fair weather and . . . foul."\textsuperscript{50} The wisdom of that decision is demonstrated in \textit{Concord}, where the public investors were to be squeezed out just when earnings were about to soar. For the record, Concord's stock reached 5\% per share in 1975. Its 1976 high has been 16\%. For the 12 months ended February 29, 1976, Concord earned $4.02 per share,\textsuperscript{51} more than the $3 per share offered in the "going private" merger. A cynic might wonder at the timing of that proposed merger.

\textit{Concord} and \textit{Santa Fe} are not concerned, however, with whether common law fiduciary duties have been violated, but with whether the federal securities laws have been violated. Of course, none of the foregoing corporate common law cases—\textit{Meinhard, Irving Trust, Perlman or Guth}—would have violated section 10(b) of the Securities Exchange Act of 1934\textsuperscript{52} or Rule 10b-5, because in none of those cases did the corporation itself buy or sell any security. Those cases have been discussed in order to show that \textit{Concord} and \textit{Santa Fe} are but part of the long and developing common law history dealing with fundamental questions: Who owns the corporation? How can control be bought or sold? Who owns the corporation's opportunities? Although the common law has raised serious questions about a fiduciary's right to purchase a reluctant minority's shares, there is no question, of course, that some state merger statutes may have given large

\begin{itemize}
  \item \textsuperscript{48} Wall St. J., July 9, 1975, at 18, col. 1.
  \item \textsuperscript{49} Wall St. J., Jan. 19, 1976, at 21, col. 4.
  \item \textsuperscript{50} Meinhard v. Salmon, 249 N.Y. 458, 462, 164 N.E. 545, 546 (1928).
  \item \textsuperscript{51} Concord earned 49 cents per share in the 13 weeks ended June 1, 1975 (Wall St. J., July 9, 1975, at 18, col. 1.), $1.27 per share in the 13 weeks ended Aug. 31, 1975 (Wall St. J., Nov. 18, 1975, at 36, col. 1.), $1.03 per share in the 13 weeks ended Nov. 30, 1975 (Wall St. J., Jan. 19, 1976, at 21, col. 4.), and $1.24 per share in the 13 weeks ended Feb. 29, 1976 (Wall St. J., Apr. 7, 1976, at 27, col. 1.). For the 12-month period, earnings round out to $4.02 per share. It should be noted that Concord's business is, by its nature, extremely cyclical, and the author knows of no evidence that Concord actually knew that its earnings would increase.
  \item \textsuperscript{52} 15 U.S.C. § 78 (1971).
\end{itemize}
shareholders the apparent right to merge small minorities out of existence.\textsuperscript{53}

The merger statutes, such as those involved in \textit{Concord} and \textit{Santa Fe}, are automatic. There is, typically, no hearing on fairness unless an appraisal right is sought. Although the State of New York did enjoin the Concord-AFW merger, that remedy was unique; in every other instance (unless there is deception and the more typical proxy statement fraud) the merger is consummated on whatever terms are proposed. Although Judge Moore's \textit{Santa Fe} dissent termed the appraisal remedy to be "both adequate and exclusive,"\textsuperscript{54} it is, in fact, inadequate to the point of nonexistence.

IV. THE APPRAISAL REMEDY

If the appraisal remedy were exclusive, there would be no remedy at all for small shareholders. The SEC has long recognized the inadequacy of appraisal as a means of protecting the interest of small dissenting shareholders:\textsuperscript{55}

\textit{[T]he remedy by appraisal is an inadequate one. The statutes do not require that stockholders be informed of their right of appraisal. . . . Even if stockholders are cognizant of their right to an appraisal, the procedure prescribed by the statutes for obtaining it is highly technical and costly. . . . "It is a remedy which does not prevent or set aside inequitable corporate readjustments. . . ."}

The economic fact is that a small shareholder can rarely challenge merger terms successfully in an appraisal proceeding. The cost of experts and lawyers would exceed any possible benefit. In the \textit{Santa Fe-Kirby Lumber} merger, for instance, a shareholder would have to establish the value of Kirby Lumber's natural resources, the value of Kirby Lumber as a going enterprise, and the value of Kirby Lumber's securities under a variety of conditions. An objecting shareholder would have to retain foresters, investment bankers, security analysts and industrialists to testify. Under section 262(h) of the Delaware Corporation Code,

\begin{itemize}
\item \textsuperscript{53} The 38 states with short-form merger statutes are listed in Green v. \textit{Santa Fe Indus.}, Inc., 533 F.2d 1283, 1299 n.1 (2d Cir. 1976) (Moore, J., dissenting), cert. granted, 45 U.S.L.W. 3222 (U.S. Oct. 4, 1976) (No. 75-1753).
\item \textsuperscript{54} \textit{Id.} at 1306.
\end{itemize}
shareholders might also have to pay for "the cost of any appraisal, including the reasonable expenses of the appraiser." In addition, they would have to pay counsel, both in the appraisal proceeding and on appeal to the courts. If there were an appeal, they would have to pay for the printing of a voluminous record. Therefore, appraisal is feasible only if the dissenting shareholders have a substantial interest in the company, and if, in addition, they have a substantial fund for prosecuting the case. It is a procedure beyond the means of the ordinary shareholder.

The fact that the appraisal procedure is beyond the means of most shareholders is not the only factor that makes appraisal an inadequate remedy. More telling is the fact that the appraisal remedy is not designed to protect a person shorn of his or her stock. Judge Mansfield's opinion in Green makes a point that is particularly relevant in terms of the common law cases — Meinhard, Irving Trust, Perlman and Guth. He discusses the Delaware appraisal statute, which he describes as "typical," in the following terms:56

Yet in determining the value of the "frozen out" shares, the appraiser may not award the public shareholders any gain resulting from the merger itself or the expectation thereof. . . . The appraiser's focus must be entirely retrospective: "The determination must be based upon historical earnings rather than on the basis of prospective earnings."

Thus the typical appraisal statute not only authorizes the extinguishment of all minority interests at any time suitable to the controlling majority, but it also prevents the minority from receiving any compensation for future expectations. The appraisal statutes, in that light, encourage controlling stockholders to "squeeze out" the minority interests whenever it is expected that the corporation's fortunes are going to improve. In the context, for instance, of Concord's dramatically improved earnings after its proposed merger was frustrated, it appears as if the appraisal statutes afford no relief even to those who are rich enough to use them. The diversion of corporate opportunities by fiduciaries, without any payment to the minority, is diametric to the holdings in Meinhard, Irving Trust, Perlman and Guth.

The "exclusive" appraisal remedy is, therefore, a nonexistent one. If a merger would be unfair to the minority shareholders, there may be no meaningful remedy except as may be provided by the federal securities laws.

V. **The Federal Securities Laws**

A. **The Economic Purpose of the Laws**

Although the common law recognizes an investor's right not to have his or her interests purchased at the whim of a fiduciary, state merger statutes appear to have limited the remedies available to a small dissenting shareholder. As a result, small shareholders have sought the protection of the federal securities laws. The legislative history of those laws supports the argument that the federal securities laws were enacted to remedy precisely this type of wrong.

The broad purpose of the federal securities legislation was to "foster a higher degree of public confidence in the stock exchange . . . ."57 Public confidence had been eroded. The following facts were presented to the Congress during the debate on the federal securities laws:58

**MR. PETTENGILL.** Mr. Chairman, from September 1929 to June 1932 the market value of bonds listed on the New York Stock Exchange alone depreciated $9,387,000,000. In this same period of time and on that one exchange, brokers' loans were liquidated to the extent of $8,308,000,000. In the same period of time and on that one exchange only, of the twenty-and-odd exchanges in the country, the market value of listed stocks shrank $74,034,000,000. This is a total destruction of values and liquidation in 34 months of $91,729,000,000 on one exchange. . . .

This loss and liquidation to the investors of America averaged $2,800,000,000 a month for 34 consecutive months. This liquidation and destruction of values to the American investors averaged $100,000,000 a day for 3 long years. . . . The loss was three times the national debt, and it started in the New York Stock Exchange because we did not have means to put a brake upon that south sea bubble that has gone down into infamous history as the Coolidge bull market.

The hopes of Congress were expressed on the floor of the House:59

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57. 78 Cong. Rec. 7925 (1934) (remarks of Mr. Chapman).
58. 78 Cong. Rec. 7926 (1934) (remarks of Mr. Pettengill).
59. 78 Cong. Rec. 7925 (1934) (remarks of Mr. Chapman).
It is believed that the enactment of this bill into law will foster a higher degree of public confidence in the stock exchange and help preserve it as a necessary and legitimate market place for the sale of securities; will afford a larger measure of protection to honest corporate business; will make more secure the holdings of the average citizen and insure greater confidence and safety to the investor in securities.

The white light of publicity is the surest protection to the public against manipulation of the market, the unfair practices of designing men, and all the tricks of financial legerdemain which scheming minds can devise.

Senator Fletcher stated:

We propose by this measure to establish, through Federal regulation of the methods and the mechanical functions and practices of the stock exchange, an efficient, adequate, open, and free market for the purchase and sale of securities; also to correct abuses we know of and others which may exist; to prohibit and prevent, if possible, their recurrence; to restore public confidence in the financial markets of the country; to prevent excessive speculation to the injury of agriculture, commerce, and industry; to outlaw manipulation and unfair practices and combinations by which to exploit the public and misrepresent values, such as pools, wash sales, fictitious transactions, and the like; to oblige disclosure of all material facts respecting securities traded on the exchanges, which disclosure is essential to give the investor an adequate opportunity to evaluate his investment.

The Concord and Santa Fe decisions focus on the literal meaning of the statutory words "fraud" and "manipulation." But perhaps some attention should be given to the economic considerations raised by the extinguishment of all minority interests in Concord Fabrics and Kirby Lumber Companies. Who would invest in a security if the issuing company had the unconditional right to repurchase the security at any time at a price that reflected only market conditions at the time of repurchase? If a company were to have an automatic call on its own stock, it is doubtful that the company would be able to sell its stock in the capital markets. The purchase of such a security, even if issued by a thriving company with unlimited prospects, would be sheer speculation. Certainly Concord could not have gone public at $15

60, 78 Cong. Rec. 8163 (1934) (remarks of Mr. Fletcher).
per share if the public had considered that the stock might later be repurchased at Concord’s option, at a price which reflected only the stock’s then current (and fluctuating) market price.

If a call provision is not disclosed in the security, members of the investing public have no reason to assume that such a right exists. Indeed, part of the legislative history of the federal securities laws reveals the need to have stock prices geared to a company’s business fortunes, not temporary market conditions. As one report, submitted to Congress during discussion on the federal securities laws, stated:

61. So far as possible, the aim should be to try to create a condition in which fluctuations in security values more nearly approximate fluctuations in the position of the enterprise itself and of general economic conditions—that is, tend to represent what is going on in the business and in our economic life rather than mere speculative or “technical” conditions in the market . . . .

It is suggested here that if companies have the right to call their own securities at any time at prices that relate only to stock market prices, the capital markets could not function. This would be particularly true with smaller companies where insiders often hold a large percentage of the stock even after a public offering; the ability and temptation for such companies to “go private” is hence greater. As a result, smaller companies might find it even more difficult to raise equity money. Viewed in this context, the Concord and Santa Fe decisions correctly reflect one purpose of the federal securities laws, that is, the stability of the capital markets.

The legislative history of the securities acts also reveals a specific wrong that, by analogy, is related to the wrongs alleged in Concord and Santa Fe. One of the most distressing practices uncovered by the Congressional investigations were pools. Pools involved transactions whereby large investors bought and sold large blocks of stock, taking advantage of swings in the market. One pool, in the stock of Warner Brothers, is analogous to the cases at bar:


In the early part of 1930, Warner Bros. owned 303,480 shares of the company's stock. During the year 1930, in the manner indicated, Warner Bros., sold 305,350 shares of their stock at a price totaling $16,520,986; and they bought back 326,500 shares of stock at a price totaling $7,544,481.50, showing a net profit to them on the transaction of $8,976,504.50 in cash and an increase of their holdings of 21,150 shares which at the then approximate value made an additional profit for them of $274,950.

Without question, one of the vices of the Warner Brothers pool was its secrecy. In Concord the defendants did not hide their activities; rather, they proclaimed them. The final results, however, are not very different. In Warner Brothers, the corporation made a profit of $8.9 million by buying and selling its own stock. Concord and the Weinsteins sold 350,000 shares to the public at a total price of $8.5 million; they wanted to buy it all back for $1.5 million, which would have yielded a profit of $7 million. This is not to suggest that Concord is as flagrant as the pools of the 1920's and 1930's. There is, nevertheless, a disquieting similarity between them.

B. Fraud and Manipulation in the Context of the Law

One of Judge Moore's main arguments in his dissent is that deception is the essence of fraud. He maintained that since Kirby Lumber's shareholders were given the facts, there was no deception; therefore, there was no section 10(b) violation. Shareholders may have been cheated, but alas! they were not deceived. It is here argued that such a narrow reading of the word "fraud" is warranted neither by the language of section 10(b), by the definitions of "fraud" found in other contexts, nor by the development of the securities laws themselves. Section 10(b) makes it unlawful:

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 in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The phrase "any manipulative or deceptive device or contrivance" is clearly as all encompassing (but as imprecise) as any bill that could have been drafted. "Manipulation," "deceptive device" and "contrivance" are somewhat like the term "pornography"—difficult to define precisely, but as Justice Stewart has
said: “I know it when I see it.” By passing a broad but vague law Congress most likely desired a flexible law. The “rules and regulations” prescribed by the Commission—Rule 10b-5—are no more precise. The prohibit “any device, scheme or artifice to defraud,” and “any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.” Note that the word “fraud” does not appear in section 10(b), but only in Rule 10b-5. The SEC, in adopting Rule 10b-5, was clearly trying to go as far as Congress would allow in order to outlaw “any manipulative or deceptive device or contrivance.” Since the word “fraud” does not appear in the statute, it is not logical to assume that the SEC sought to limit section 10(b) by requiring a kind of deception that the statute itself does not require.

Furthermore, even the word “fraud,” while it usually does connote deception, is necessarily vague. As one court phrased it in a criminal case: “The law does not define fraud, it needs no definition; it is as old as falsehood and as versatile as human ingenuity.” Since the federal laws were enacted as a protection against “all the tricks of financial legerdemain which scheming minds can devise,” a “scheme” in which the victims are forthrightly told that they are being despoiled ought not to be excluded from the protection of the securities laws.

Although the term “fraud” has roots deep in the law, the word “manipulation” has developed only as part of the securities law. “Manipulation” is a species of “fraud” that describes the

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63. See the concurring opinion of Mr. Justice Stewart in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).
64. Weiss v. United States, 122 F.2d 675, 681 (5th Cir.), cert. denied, 314 U.S. 687 (1941).
65. See note 59 supra.
66. It is interesting to note that the term “fraud” is discussed for an entire page in Black’s Law Dictionary (4th ed. 1988) whereas no separate entry exists for the term “manipulation.” Similarly, there is no entry for the term in The Cyclopedia Law Dictionary (2d ed. 1922), or in The Collegiate Law Dictionary (1925). Only Ballentine’s Law Dictionary (3d ed. 1969) includes a separate entry for “manipulation.” It is a reference, however, to “manipulation of prices” as it pertains to the price of securities. There is no reference to “manipulation” other than in the securities context.

The fixing of stock prices was described as “fraud” under the common law before the term “manipulation” became a part of the federal securities acts. See Scott v. Brown, [1892] 2 Q.B. 724, 733, where a contract to maintain a fictitious securities price was held to be unenforceable as against public policy, although the word “manipulation” was not used. See Harper v. Crenshaw, 82 F.2d 845 (D.C. Cir.), cert. denied, 298 US. 685 (1936); Livermore v. Bushnell, 5 Hun 285 (N.Y. 1st Dep’t 1875).
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fixing of securities prices at an artificial level. The legislative history shows the context of the word:67

To insure to the multitude of investors the maintenance of fair and honest markets, manipulative practices of all kinds on national exchanges are banned. The bill seeks to give investors markets where prices may be established by the free and honest balancing of investment demand with investment supply.

The purpose of the Act is . . . to purge the securities exchanges of those practices which have prevented them from fulfilling their primary function of furnishing open markets for securities where supply and demand may freely meet at prices uninfluenced by manipulation or control.

When the price of a stock declines precipitously, at least in part because of a general stock market decline, it is, arguably, a market “manipulation” to freeze the stock at a price that is historically low (in terms of price-earnings ratio, expectations, and the other factors that contribute to the price of a stock) and force all stockholders to sell their stock at the frozen price level. Such a force-out is at odds with the “open market” required by the antimanipulative language of Rule 10b-5. It is true that “manipulation” has usually been described as the clandestine fixing of prices. But a manipulation that is bold and open has the same effect; stock is bought or sold at an artificial price favorable to the insider.

In order to come within the ambit of section 10(b) and Rule 10b-5, the alleged wrong must involve (1) a security and (2) a fraud, contrivance, manipulation or scheme. While Judge Moore has sought to impose a very restrictive definition on the necessarily vague “fraud” and “manipulation” part of the equation, the courts have been expansive in defining the heretofore rather precise word “security.”

The Supreme Court, seeking a broad interpretation in order to avoid making the securities laws too narrow a net, has cautioned against a strict definition of the term “security”:68

[T]he reach of the Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached . . . .

More specifically, the Supreme Court has held that the definition of “security”

embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.

In another case, the Supreme Court said:

[I]n searching for the meaning and scope of the word “security” in the Act, form should be disregarded for substance and the emphasis should be on economic reality.

If the rather technical word “security” can be reshaped in order to comport with the spirit of the federal securities laws, why should the vague words “fraud” and “manipulation” be given a rigid interpretation that would defeat the spirit of those same laws?

It is hard to see why individuals should be exempt from the securities laws because they disclose outright, without being misleading, that they are taking advantage of defenseless shareholders. But Judge Moore’s narrow view of “fraud” and “manipulation” is only a reflection of his narrow view of the federal securities laws.

V. JUDGE MOORE’S JURISPRUDENTIAL ARGUMENTS

Underlying Judge Moore’s restrictive reading of the federal securities laws is his basic philosophical argument against national encroachment in what he perceives as a local matter. This is an argument, however, that was rejected when the securities laws were enacted over 40 years ago.

Judge Moore argues that the legality of the proposed Santa Fe-Kirby Lumber Company merger must be determined by the “sovereign state of Delaware,” citing Erie R.R. Co. v. Tompkins.


We note, parenthetically, that Delaware was thought to have surrendered her sovereignty in 1787, when it became the first state to ratify the Constitution. As for the merit of the argument that securities laws are inherently local, the same claim was made in the 1930's by those who opposed enactment of the federal securities laws. The following colloquy took place between Senator Carey and Mr. Thomas Corcoran, one of the drafters of the securities laws:

Senator Carey. Does that mean that any law of New York State affecting the New York Stock Exchange would become inoperative after this law became effective?

Mr. Corcoran. Insofar as it was inconsistent with this law.

Senator Gore. The bankruptcy law, for instance?

Mr. Corcoran. Like the Federal bankruptcy laws superseding State insolvency laws, the national law drives out all systems in so far as they are inconsistent. That is a situation you always have. A State can legislate additionally to the Federal law, but it cannot legislate inconsistently with it.

Mr. Richard Whitney, president of the New York Stock Exchange, objected to the legislation by noting that if state “corporate procedures” were inadequate, Congress should pass “a national incorporation law applicable to all companies,” rather than rely on securities laws to be administered by a federal agency. A broad attack on the national power to regulate the stock market was voiced by Thomas B. Gay, an attorney appearing on behalf of the New York Stock Exchange, who relied upon the tenth amendment of the Constitution as if McCulloch v. Maryland had never been decided:

May I preface what I shall have to say by a reference to the Tenth Amendment to our Federal Constitution, which provides that—“The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively and to the people.”

72. The Constitution of the United States of America, Analysis and Interpretation, Doc. No. 92-82, 92d Cong. 2d Sess., p. XL.
73. Hearings on S. Res. 84, and S. Res. 56 & S. Res. 97 Before the Committee on Banking and Currency, 73d Cong., 1st Sess. at 6577 (1934).
74. Id. at 6583-84.
76. Hearings on S. Res. 84, and S. Res. 56 & S. Res. 97 Before the Committee on Banking and Currency, 73d Cong., 1st Sess. at 6587 (1934).
Because of this constitutional provision we have a dual system of government, dual in the sense that some powers are delegated to and exercised by the Federal Government, and those not so delegated are administered by the States through the voice of the people.

Ours is not a national government. It is a Federal Government. It is not national in the sense that it possesses inherent power. It is Federal in the sense that it exercises only delegated power, powers which must be expressly found in the instrument or necessarily implied for the purpose of exercising those expressly conferred.

The importance of keeping in mind these constitutional principles is quite necessary it seems to me in view of Mr. Corcoran's explanation of the objects of this bill.

Mr. Gay further noted that buying and selling of stock was "peculiarly local," hence not an appropriate concern for federal legislation:77

The New York Stock Exchange is, of course, located on Wall Street. The buying and selling of securities on that exchange is done by its members on the floor of the exchange. The securities themselves which are so bought and sold are required to be delivered and paid for through the Stock Securities Corporation, a subsidiary of the exchange, or at the offices of members of the exchange within the immediate neighborhood. The business, in other words, is in the nature of its transaction peculiarly local. I may also say that every bond listed on the exchange and traded in by its members under the rules of the exchange must be payable as to principal and interest in the city of New York; and that every share of stock traded in by its members must be capable of transfer and registration in the city of New York.

The question of whether securities legislation should be national in scope or local was settled when the laws were enacted in the 1930's. With supersonic jets, high speed computers, composite tapes and as many as 30 million shares traded on a single day on the New York Stock Exchange, the economy and the securities market are now more national than ever. Judge Moore's view that the federal securities laws should be subordinated to local law is an argument that is at least 40 years too late. The fact that 38 states have short-form merger statutes that might be questioned if Concord and Santa Fe are affirmed is not relevant.

77. Id. at 6590.
Either the challenged transactions violated federal law or they did not; the fact that the mechanics of a merger are prescribed by state laws ought not to make them immune from attack under the federal laws.

In a recent case, the Supreme Court invalidated a Virginia statute that restricted the dissemination of drug price information, although it was argued that 33 other states had similar statutes. By striking the Virginia law, the Court in effect struck down the laws of 34 states. In Concord and Santa Fe the result was less drastic; the merger statutes of New York and Delaware were not challenged or declared illegal. Rather, the court held that mergers which complied with those technical statutes were not thereby necessarily immune from challenge under the federal laws. As a significant purpose of the federal law is to provide a single national standard for all securities transactions, how can one justify the supremacy of local law?

This brings us to Erie. By citing Erie Judge Moore must have meant that where a local law is applicable, the federal law is inapplicable. Under that theory, the federal securities laws would be superseded by the merger laws of 38 states and, possibly, by various provisions of the Blue Sky Laws of each of the 50 states. Yet, the purpose of Erie was to promote “uniformity in the administration of the law.” The thrust of Erie was not that deference to local laws was an end in itself (as Judge Moore suggests) but that there should be only one law governing. In Erie, where the dispute involved a Pennsylvania common law rule concerning the liability of the Erie Railroad to a person who walked along the railroad tracks at Hughestown, Pennsylvania, deference to Pennsylvania’s local rule was clearly appropriate. Not satisfied with that local common law rule, however, the lower federal courts in Erie R.R. Co. v. Tompkins had applied their version of a “general law.” The result was confusion because cases in the federal court based upon diversity of citizenship applied one rule, and cases in the state court applied another. In striving for a uniform rule, Erie made the state common law rule applicable in the federal courts as well. Erie held that the law must be applied uniformly, and thus supports the Second Circuit’s decisions in Concord and Santa Fe. The essence of Concord and Santa

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80. Id. at 75.
Fe is that, as in Erie, there must be a uniform application of the laws that does not vary with the forum.

VI. CONCLUSION

Concord and Santa Fe are cases involving federal jurisdiction. The complaints allege that by virtue of corporate mergers, minority shareholders are being grossly underpaid for shares that they do not want to sell. The legislative history and case law interpretation of the securities laws confirm that the federal securities laws apply to the wrongs alleged. Judge Moore's argument that without deception there is no federal jurisdiction is premised on the availability of a fair appraisal. The appraisal remedy, however, is clearly illusory. Therefore, in view of the avowed purposes of the securities laws, investors who are being forced to surrender their stock at unfair prices must be protected, notwithstanding even the most revealing corporate disclosures. Although the law is a maze of trends and crosscurrents, to argue that the local rules of sovereign states should govern the legality of securities transactions that result from mergers is to ignore much that has taken place since the abandonment of the Articles of Confederation.