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Making Sense of Rules 10b-5 and 14e-3

Susan Lorde Martin

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I. Introduction

Now that the "go-go" eighties are gone and Michael Milken and Ivan Boesky and other high profile securities traders have served time in jail, the relative calm in Wall Street "wheeling and dealing" presents a wonderful opportunity for Congress to finally clarify insider trading law. Although the newspapers have been full of insider trading stories and numbers of highly publicized insider trading cases have come before the courts, Congress has never clarified what insider trading is and what specific behavior should be prohibited. Leaving these "details" to the Securities and Exchange Commission (SEC) and the courts has resulted in wrangling between the former and the latter and in a body of law that does not make much sense.

This article will first discuss the Congressional purpose and methods for prohibiting insider trading. Then, SEC Rules 10b-5 and 14e-3 will be explained and compared. The comparison will show that the statutes authorizing the SEC to promulgate those rules are not identical and, therefore, the letter of the law does not require those rules to be interpreted identically. Nevertheless, there is no policy reason to have rules prohibiting insider trading vary depending on whether or not the securities being traded are the subject of a tender offer. Therefore, this article concludes that Congress, in order to create coherent insider trading law, should explicitly indicate which of the two rules has been properly interpreted by the courts. Application of the rules is difficult enough without having the additional burden of incongruous policy.

II. Prohibiting Insider Trading

Congress has made clear its intention to stop insider trading as well as other market practices it considers abusive in order to maintain public confidence in the fairness of the securities markets. The stock market crash

*Assistant Professor of Business Law, Hofstra University School of Business
of October 19, 1987 magnified the importance of encouraging public confidence in the securities markets. That event, together with the dramatic increase in insider trading cases in the 1980's and a public perception that inside traders are not caught, made Congress intent on doing battle against insider trading.

Peculiarly, although legislating against insider trading, Congress has purposefully declined to define statutorily what insider trading is. The House Committee on Energy and Commerce has defined insider trading as "trading in the securities markets while in possession of 'material' information (generally, information that would be important to an investor in making a decision to buy or sell a security) that is not available to the general public." The rationale for refusing to enact into law this or any other definition is to avoid restricting the reach of securities laws and to avoid facilitating schemes designed to circumvent the intent of the laws. Using general antifraud provisions rather than a specific definition has, as noted approvingly by the House Committee, permitted courts to construe the prohibitions broadly and the SEC to use its rulemaking authority creatively. Moreover, according to the House Committee, court decisions and SEC actions have sufficiently clarified principles of insider trading law.

Unfortunately, since that House Committee report in 1984, the law has become more confusing rather than more clear. This is particularly so because a recent opinion of the United States Court of Appeals for the Second Circuit interpreting Rule 14e-3 is at odds with the United States Supreme Court's interpretations of Rule 10b-5.

III. Rule 10b-5

Section 10(b) of the Securities Exchange Act of 1934 provides, in pertinent part, that

\[(a) \quad \text{it shall be unlawful for any person ...}
\]

(b) 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.

Pursuant to that section the SEC promulgated Rule 10b-5 which provides, in pertinent part, that

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\]

(b) 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.

Chief Justice Burger, in dissent, asserted the theory that those, like Chiarella, who misappropriate material, nonpublic information have an affirmative duty to disclose the information before trading. Such a theory, he opined, would not limit legitimate professional securities activities, but would prohibit the use of information inaccessible to others by legal means. Justice Blackmun, in dissent, also asserted that "persons having access to confidential material information that is not legally available to others generally
are prohibited by Rule 10b-5 from engaging in schemes to exploit their structural informational advantage through trading in affected securities. To hold otherwise ... is to tolerate a wide range of manipulative and deceitful behavior."

In Dirks v. SEC, the Supreme Court reiterated that "mere possession of nonpublic information does not give rise to a duty to disclose or abstain; only a specific relationship does that." The Court also repeated its rejection of a parity of information rule which would require that traders refrain from trading if they are in possession of information unavailable to others. The Court held that a tippee, one who receives information from an insider, has a duty to disclose or abstain from trading that derives from the duty of the insider. Thus, a tippee's duty not to trade on material, nonpublic information arises from an insider's duty to shareholders and attaches only when the tippee knows or should know of the insider's breach of duty.

What is clear from Chiarella and Dirks is that Rule 10b-5 liability requires the breach of a duty by one who trades on material, nonpublic information; mere possession of material, nonpublic information by one who trades on that information in the securities markets is not enough for liability. The misappropriation theory of liability outlined by former Chief Justice Burger adheres to this general test. It requires that the breach be a duty owed to buyers or sellers of securities. The breach may be of a duty owed to an employer, to a patient or to a relative, for example. Rule 10b-5 liability, according to this theory, attaches when people engage in securities transactions using material, nonpublic information they have misappropriated from any owner of that information in violation of a fiduciary duty or other relationship of trust and confidence. The misappropriation theory has been adopted by the Second, Third, Seventh and Ninth Circuits. It has not been definitively approved by the United States Supreme Court.

In 1991 the United States Court of Appeals for the Second Circuit, sitting in banc, decided United States v. Chestman, a case that illustrates the difficulties courts have in making sense of insider trading law as it currently exists. The occurrences that gave rise to the lawsuit began in November 1986 when Ira Waldbaum, the president and controlling shareholder of Waldbaum, Inc., a publicly traded company, negotiated the sale of the company to the Great Atlantic and Pacific Tea Company, Inc. (AAP). Mr. Waldbaum told his sister, Shirley Waldbaum Witkin, that he would tender her shares of Waldbaum stock as part of the sale so that she could avoid the complications of tendering after the public announcement. He warned her not to discuss the impending sale with anyone. On November 24 Mrs. Witkin gave her stock certificates to her brother. Later that day, Mrs. Witkin told her daughter, Susan Loeb, in response to questions about her whereabouts that morning, that she had gone out to turn over her Waldbaum stock to her brother. Mrs. Witkin also told her daughter that it was important that she not tell anyone except her husband because it could jeopardize the sale. Mrs. Loeb told her husband, Keith, and warned him not to tell anyone.

On November 26 Keith Loeb called Robert Chestman, a stockbroker and financial advisor for Gruntal & Co., a brokerage house. Loeb had been doing business with Chestman since 1982 and Chestman knew that Loeb's wife was Ira Waldbaum's niece. According to Loeb's testimony, some time between 9 and 10:30 in the morning he told Chestman that he had "some definite, some accurate information" that Waldbaum was being sold at a "substantially higher" price than the market value of the stock. Between 9:49 a.m. and 12:35 p.m. that day Chestman purchased 11,000 shares of Waldbaum stock (including 3000 for himself, 1000 for Loeb, and 7000 for his other discretionary accounts) at prices ranging from $24.65 to $26.00 per share. Chestman denied having spoken to Loeb that morning. At the close of trading on November 26 the tender offer was announced and on November 27 the price of Waldbaum shares rose to $49.00.

During an SEC investigation into the Waldbaum transactions, Loeb agreed to cooperate with the government, paid a $50,000 fine, and disgorged the profits from the transactions. Chestman was convicted of violating Rule 10b-5. Chestman denied any wrongdoing, claiming he did not know the details of the sale. Chestman was sentenced to three years in prison, fined $320,000, and was barred from the securities industry for ten years. Chestman appealed to the Second Circuit, which also reversed his conviction. In United States v. Chestman the Second Circuit Court of Appeals held that a three-judge panel found the convictions were reversed by a three-judge panel of the Second Circuit Court of Appeals.

After the SEC and federal prosecutors complained that the Chestman decision would hamper their efforts to prosecute other insider trading cases, the Second Circuit agreed to the unusual measure of a full court review. The court heard oral arguments in banc on September 25, 1990, and handed down its opinion on October 7, 1991. The full court vacated the panel's decision on, inter alia, the Rule 14e-3 and Rule 10b-5 questions and then affirmed the convictions for fraudulent trading in connection with a tender offer, but reversed the Rule 10b-5 convictions. Judge Meskill, writing for the court, concurred with four other judges and filed his own concurrence. Five judges concurred in the Rule 14e-3 convictions but dissented from the reversals of the Rule 10b-5 convictions. One judge concurred with the Rule 10b-5
reversals but dissented from the Rule 14e-3 affirmances. 11

Chesman's Rule 10b-5 convictions had been based on (1) his purchase of Waldbaum stock forKeith Loeb "aiding and abetting Loeb's misappropriation of nonpublic information in breach of a duty Loeb owed to the Waldbaum family and to his wife in that, (2) his purchase of Waldbaum stock for himself and other clients resulting from his being a tippee of the misappropriated information." Based on the past Rule 10b-5 jurisprudence of Chiarella, Dirks and the misappropriation theory of the full court concluded that Chesman could not be convicted of violating the Rule unless Keith Loeb had breached a duty owed to his wife and/or her family because of a fiduciary-like relationship of trust and confidence, and Chesman knew of Loeb's breach. 13 The court then concluded that kinship alone does not create the required relationship and that there was no evidence offered that Loeb had a fiduciary-like relationship with his wife or her family nor that he had expressly agreed to keep confidential the information about the impending sale of the family business. Without Loeb's having breached a duty by disclosing the information about Waldbaum's to Chesman, Chesman could not be liable for violating Rule 10b-5. 14

Nevertheless, the Second Circuit affirmed Chesman's convictions for violating Rule 14e-3. The court was able to so affirm while reversing the Rule 10b-5 convictions because of the different language of the two Rules and their authorizing statutes, as supported by other evidence of Congressional intent.

IV. Rule 14e-3

Section 14(e) of the Securities Exchange Act of 1934, 15 which was enacted as part of the Williams Act in 1968 16 and amended to its current version in 1970, 17 provides that

shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request for or invitation to tender for, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Section 10(b) and Section 14(e) are similar. The former prohibits the use of manipulation or deception in connection with the purchase or sale of securities. The latter prohibits manipulation or deception or fraudulent or manipulative practices in connection with a tender offer. Both sections specifically authorize the SEC to promulgate rules designed to prevent the prohibited activities.

Faced with the difficulty of prosecuting insider trading cases after the Chiarella decision because of the duty requirement, the SEC promptly promulgated Rule 14e-3 pursuant to Title 14(f) of the Act. 18 In October 1978, the SEC publicly traded insider trading cases involved buying shares of publicly traded companies just before tender offers for those shares were made public and then selling the shares at a substantial profit after the offer was announced. 19 If Section 10(b) required the SEC to prove that such traders were breaching a duty in using the nonpublic information for personal gain or that they obtained their information from others who were breaching a duty for personal advantage, then the SEC would use Section 14(e) instead to prosecute such insider trading cases. Contrary to the requirements of the Supreme Court established in Chiarella for a Section 10(b), Rule 10b-5 prosecution, Rule 14e-3 says that in a situation involving a tender offer, trading by persons in possession of material, nonpublic information which they know or should know was acquired from insiders constitutes prohibited conduct. 20 There is no specification that such trading is prohibited only if the insider is breaching a duty created by some relationship of trust and confidence and the trader knows of the breach.

In Chesman, the Second Circuit addressed the validity of Rule 14e-3. 21 The court emphasized the deference given to an administrative agency's regulation promulgated under an express Congressional delegation unless the regulation is "arbitrary, capricious, or manifestly contrary to the statute." 22 The court then considered whether Congress authorized the SEC to enact Rule 14e-3. 23 After analyzing the plain meaning of the words of Section 14(e), the legislative history of the Section and subsequent legislation, it concluded that Congress did so authorize.

Section 14(e) directs the SEC to "define ... such acts and practices as are fraudulent, deceptive, or manipulative," Congress' specific use of the term "define", rather than "explain" or "give examples of" or "enumerate" or "identify and regulate," must mean that the SEC is being authorized to determine what acts and practices are fraudulent in the context of tender offer activity. In this connection, where the concern is maintaining securities markets that are fair, and appear to be fair, to the investing public, there is no purpose for requiring a breach of a fiduciary duty by any particular person or corporation as an element in a trading violation. The Congressional purpose in prohibiting insider
trading is to have the securities markets be fair so that the investing public will have confidence in their integrity and keep investing in them. 1 Thus, it is reasonable to assume that Congress would have authorized the SEC to tinker with the definition of fraudulent acts and practices to make it suit the particular problem addressed by the Williams Act. The Second Circuit concluded that the word "instance," specifically "instance," was "manifestly unreasonable" to apply to insider trading. At the very least, that would make it difficult to conclude that Rule 14e-3 is "arbitrary, capricious, or manifestly contrary to the statute." 2

In addition, Judge Meskill, writing for the court, noted support for his interpretation of Section 14(e) in the legislative history of the 1970 amendment. He also pointed to legislative activity since the promulgation of Rule 14e-3, specifically the Insider Trading and Securities Anti-Tampering Act of 1984 (ITSA) and the Insider Trading and Securities Fraud Enforcement Act (ITSEFA), as indicative of the Rule's validity. The legislative histories of ITSA and ITSEFA specifically mention Rule 14e-3 with tacit approval. In fact, the House Energy and Commerce Committee noted its intention that the SEC adopt a rule under ITSA similar to Rule 14e-3. 1

Nevertheless, critics have argued that Section 14(e) cannot be significantly distinguished from Section 10(b) and, therefore, interpretations of the latter also set precedent for the former. The argument asserts that when the United States Supreme Court in Chiarella ruled that there can be no Rule 10b-5 violation by trading on material, nonpublic information absent a duty to speak, the Court was creating law that also applies to Rule 14e-3. 3

V. Reconciling Rule 10b-5 and Rule 14e-3

Because the language of Sections 10(b) and 14(e) are not the same, it is not a stretch to conclude, as the Second Circuit did, that Chiarella's interpretation of the former does not necessarily set precedent for the latter. Section 14(e) instructs the SEC to "define . . . acts and practices . . . as fraudulent . . . to a much more compelling legislative delegation" than exists in Section 10(b). This strong, clear language combined with Congress' subsequent extended consideration of insider trading law and passage of ITSA make it hard to disavow the statute's intent to eliminate insider trading and to allow the SEC a great deal of flexibility in pursuing that objective. That intent supports the validity of Rule 14e-3.

Unfortunately, acceptance of Rule 14e-3 as a valid exercise of SEC authority, although making it easier for the SEC to prosecute insider trading cases, creates an incoherent conflict of insider trading law and practice. If the Congressional purpose in enacting insider trading law is to maintain public integrity of financial markets so that outsiders will keep investing, then there is no reason to have liability attach with greater retroactivity under Rule 10b-5 than under Rule 14e-3 merely because the latter regulatory scheme is the "definer" of the "definer." 5

The issues are indeed difficult, and the recent court opinions reflect the strain in the recent years to consider the issues. 

It is reasonable for both Rule 10b-5 and Rule 14e-3, in view of the Congressional purpose of achieving fairness and the perception of fairness in the securities markets, to create liability for trading on material, nonpublic information whenever it is acquired in a way that is not legally available to the general investing public. The idea of unfair information advantage serving as the basis for insider trading violations has been circulating for more than a decade. This theory responds to the basic Congressional purpose and to the psychology of investors. It obviates the need for creating artificial theories of liability that do not reflect the aim of protecting investors, in order to catch inside traders who seem to elude standard interpretations of fraud.
The practical problem is, however, that a significant body of law, relying on common law definitions of fraud, already exists for Rule 10b-5.\[1\] The Second Circuit's solution in Chestman was to interpret Rules 10b-5 and 14e-3 differently relying on the differences in language in their authorizing statutes, but eschewing a discussion of policy reasons for the varying interpretations.

VI. Conclusion

It is time for Congress to define fraud, or to expressly empower the SEC to do so, in the context of all insider trading securities transactions. There is no policy reason for Sections 10(b) and 14(e) and the rules promulgated under them to be interpreted differently. There is no policy reason for the rules of common law fraud to govern securities law liability. There is no policy reason for insider trading to be illegal only when a duty is breached. The actual threat to public participation in security markets is the perception that insiders and their friends have access to information that puts all others at a disadvantage when transacting purchases or sales in the securities markets.

Therefore, liability under Rules 10b-5 and 14e-3 should attach when the method of acquisition of the information is wrongful. Achieving an informational advantage should be wrongful when it is the result of some special relationship and, therefore, is not lawfully available to the investing public. An informational advantage achieved through mere good fortune, or extra diligence or superior intelligence could be traded on lawfully without prior disclosure. Commentators' clear statement to this effect would help to achieve the goal of fair securities markets and would clarify for investors when disclosure before trading is required.


4. Supra note 3 & infra note 5.

22. Id.


25. Id. at 911-12.
28. Id. at 227-28.
29. Id. at 229-30.
30. Id. at 232.
31. Id. at 224.
32. Id.
33. Id. at 231.
34. Id. at 236.
35. Id. at 240.
36. Id. at 240-43.
37. Id. at 251.
39. Id. at 656 n. 15.
40. Id. at 657.
41. Id. at 659.
42. Id. at 660.

In Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), the United States Supreme Court analyzed the language and legislative history of Section 10(b) and concluded that Rule 10b-5, which is authorized by Section 10(b), cannot prohibit merely negligent conduct, that proof of scienter is required. Id. at 212-14.


45. United States v. Willis, 737 F. Supp. 269 (S.D.N.Y. 1990) (psychiatrist breached duty to patient, trading on information obtained from patient in analysis sessions).

46. United States v. Redd, 601 F. Supp. 685 (S.D.N.Y.), rev'd on other grounds, 773 F.2d 477 (2d Cir. 1985) (son breached duty to father who was corporate director).


48. It was an evenly divided Court which affirmed the securities fraud convictions based on the misappropriation theory in United States v. Carpenter, 484 U.S. 19, 24 (1987).

49. 947 F.2d 551 (2d Cir. 1991).


51. Id.
52. Id.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id.
59. Id. at 77-78.
60. Id. at 78.
61. Id.
62. Id.
Transactions in securities on the basis of material, nonpublic information in the context of tender offers.

(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know has been acquired directly or indirectly from (1) the offering person, (2) the issuer of the securities sought or to be sought by such tender offer, or (3) any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

... (d)(1) An act reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, it shall be unlawful for any person described in paragraph (d)(2) of this section to communicate material nonpublic information relating to a tender offer to any other person under circumstances in which it is reasonably foreseeable that such communication is likely to result in a violation of this section except that this paragraph shall not apply to a communication made in good faith.

(i) To the officers, directors, partners or employees of the offering person, to its advisors or to other persons, involved in the planning, financing, preparation or execution of such tender offer;

(ii) To the issuer whose securities are sought or to be sought by such tender offer, to its officers, directors, partners, employees or advisors or to other persons, involved in the planning, financing, preparation or execution of the activities of the issuer with respect to such tender offer; or

(iii) To any person pursuant to a requirement of any statute or rule or regulation promulgated thereunder.

(d)(2) The persons referred to in paragraph (d)(1) of this section are:

(1) The offering person or its officers, directors, partners, employees or advisors;

(ii) The issuer of the securities sought or to be sought by such tender offer or its officers, directors, partners, employees or advisors;

(iii) Anyone acting on behalf of the persons in paragraph (d)(2)(i); and

(iv) Any person in possession of material information relating to a tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from any of the above.

63. Id.


68. Id. at 571.

69. Id. at 554, 582.

70. Id. at 571.

71. Id. at 583.

72. Id. at 564.

73. Id.

74. Id. at 567-70.

75. Id. at 571.

76. Id.


80. Id.

81. Supra notes 19-20 and accompanying text.

82. Supra notes 77 & 80 and accompanying text.

83. Supra notes 19, 20, 77, 80 and accompanying text.

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86. Supra note 64.

87. Chestman, 947 F.2d at 556.

88. Id. at 557 (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984)).

89. Id. at 558.

90. Id. at 557-60.


92. The dissent in Chestman claims the only power given to the SEC is to "identify and regulate" the "acts and practices" that are "fraudulent, deceptive, or manipulative." 947 F.2d at 564.


94. Chestman, 947 F.2d at 558.

95. Id. at 557 (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984)).

96. Id. at 559 (noting remarks of Senator Williams and Chairman of SEC).


99. Chestman, 947 F.2d at 560.


102. H.R. Rep. No. 910, supra note 100; H.R. Rep. No. 355, supra note 100. But see Brent G. Stahl, Note, Rule 14e-3: Invalid in the Criminal Context, 16 Am. J. Crim. L. 367, 376-77 (asserting that legislative histories of ITSA and ITSFEA do not support validity of 14e-3). The Note's reliance on the small quantity of references in the histories to the Rule to prove that they do not indicate Congress' intent with reference to the Rule is misplaced. Those references must be interpreted in light of the general tenor of the histories and the resulting legislation. Viewed from that perspective, Congress' outrage at highly publicized inside traders, their intent to proceed vigorously against all inside traders, and their reliance on the SEC to use broad authority in so doing is patent.

103. See, e.g., Chestman, 947 F.2d at 556 (Mahoner, J., dissenting).

104. Id.

105. 15 U.S.C. § 78n(e) (emphasis added).

106. Chestman, 947 F.2d at 558 (2d Cir. 1991).

107. Supra notes 97-102 and accompanying text.

108. Chestman, 947 F.2d at 571.

109. The definitive work is Victor Brudney, Insiders, Outsiders, and Informational Advantages under the Federal Securities Laws, 93 Harv. L. Rev. 322 (1978); See also Chiarella, 445 U.S. at 251 (Blackmun, J., dissenting).

110. For example, the misappropriation theory was advanced by Chief Justice Berger in his dissent in Chiarella, 445 U.S. at 240. Under that theory, one is liable for trading on material, nonpublic

Under a constructive insider theory one "who knowingly receives nonpublic material information from an insider has a fiduciary duty to disclose before trading." Dirks, 463 U.S. at 656. See Phillips & Zutz, supra note 93, at 93-96.

The breach of duty under each of these theories, however, is not to the investing public and, therefore, each is a rather roundabout way of protecting the public. Under the misappropriation theory the wrong is to the rightful possessor of the information. Under the constructive insider theory the wrong is to the corporate shareholders.


112. An example of "mere good fortune" is inadvertently, while waiting on line at the movies, overhearing a conversation about a particular corporation's business, and then, in reliance on the overheard information, buying shares of the corporation's stock. The corporate information on which Chiarella traded, on the other hand, was not obtained because of Chiarella's "mere good fortune." It was available to him because of his special relationship as an employee of the corporation's printing contractor.

CAN DEMAND NOTES REALLY BE DEMANDED?

by

Peter M. Edelstein*

Introduction

Facts: ABC Bank lends $100,000 to B. Benny. B. Benny executes and delivers to the bank a negotiable promissory note payable "on demand." ABC later demands payment. B. Benny refuses. ABC sues B. Benny for $100,000. B. Benny defends on the grounds that reasonable notice was required and not given.

Issue: Whether a holder of a demand note can demand payment at any time?

Decision: Maybe?

A "demand note" is an instrument payable on demand and includes those payable at sight or on presentation and those in which no time for payment is stated. By its nature, and as reflected in long accepted case law and in the U.C.C., a demand note entitles the holder to freely determine the time for payment. In fact, such a note is actually due on the date it is made, and it has been suggested that its name is misleading in that no actual prior demand is necessary to enforce payment.

Questions concerning a holder's ability to require payment of a demand note at any time arise because of two apparently inconsistent rules of law and because the intent of the parties is not always clear. A two step analysis is called for: (1) what is the effect of the applicable provisions of the Code? and, (2) what is the intent of the parties?

*Professor of Law, Pace University, Pleasantville, New York. Member of Edelstein & Lochner, Armonk, New York.