1-1-1987

The Second Circuit's Approach to the "In Connection With" Requirement of Rule 10b-5

Barbara Black
University of Cincinnati College of Law, barbara.black@uc.edu

SECURITIES

COMMENTARY

THE SECOND CIRCUIT'S APPROACH TO THE "IN CONNECTION WITH" REQUIREMENT OF RULE 10b-5

*Barbara Black**

Not every fraud involving a security is securities fraud for the purpose of section 10(b) of the Securities Exchange Act of 1934[1] and its Rule 10b-5 (the rule).[2] The rule requires that the fraud be "in connection with" a purchase or sale of a security.[3] In its 1971 decision, *Superintendent of Insurance of New York v. Bankers Life & Casualty Co.*,[4] the Supreme Court held that a Rule 10b-5 claim was stated where the fraud involved the misappropriation of the proceeds of a sale of securities, because the seller "suffered an injury as a result of deceptive practices touching its sale of securities as an investor."[5] Subsequently, the

---

* Professor of Law, Pace University School of Law.

[1] 15 U.S.C. § 78j(b) (1982).

[2] 17 C.F.R. 240.10b-5 (1986).

[3] Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1986).

The "in connection with" language also requires that the plaintiff in a private action must be a purchaser or seller of securities. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

[4] 404 U.S. 6 (1971).

[5] 404 U.S. at 12-13. The facts of *Bankers Life* are complicated but well known. The purchaser of all the stock of Manhattan Casualty Co. paid for the stock with the pro-

necessary connection was often described as a "de minimis touch test"[6] and, prior to 1984, the "in connection with" requirement was not generally viewed as posing a significant obstacle in establishing a securities fraud case.

The Second Circuit, however, in its 1984 decision, *Chemical Bank v. Arthur Andersen & Co.*,[7] made it clear that something more than "de minimis" was required.[8] Some district courts in the Second Circuit read *Chemical Bank* as requiring that the misrepresentation relate to the security's value in order to satisfy the "in connection with" requirement.[9] However, *SEC v. Drysdale Securities Corp.*,[10] decided in the Second Circuit's 1985-86 term, made it clear that the misrepresentation need not involve the investment characteristics of the securities in order to be sufficiently connected to the securities transaction. Nevertheless, what "in connection with" requires remains a source of uncertainty. Since 1984, the "in connection with" requirement has been described both as "broad"[11] and as "stringent."[12]

Courts address the "in connection with" requirement in the context of two different issues. First, the lack of the requisite connection goes to the question of federal jurisdiction. Thus, even though there may be a security involved, the alleged misconduct may not have occurred in a securities transaction. Rather, properly analyzed, the plaintiff's allegations consist of common-law fraud claims involving a breach of fiduciary duty or commercial fraud and, hence, are outside the scope of federal securities fraud jurisdiction. In this situation, the "in connection with" requirement is necessary to limit Rule 10b-5 jurisdiction

---

ceeds of the sale of the corporation's own treasury bonds. The Supreme Court held that the plaintiff, representing the corporation, could bring a Rule 10b-5 action as seller of the bonds, since it was defrauded by the misappropriation of the proceeds.

[6] *E.g.*, Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1028 (6th Cir. 1979) ("the alleged deceptive practice only need be 'touching' the sale of securities") (citing *Banker's Life*, 404 U.S. at 12-13).

[7] 726 F.2d 930 (2d Cir. 1984).

[8] *See id.* at 943. ("The Act and Rule impose liability for a proscribed act in connection with the purchase or sale of a security; it is not sufficient to allege that a defendant has committed a proscribed act in a transaction of which the pledge of a security is a part.") *See* text accompanying notes 17-23 *infra.*

[9] *See, e.g.*, SEC v. Drysdale Sec. Corp., 606 F. Supp. 295, 297 (S.D.N.Y. 1985), *rev'd*, 785 F.2d 38 (2d Cir. 1986). *See also* notes 44-49 and accompanying text *infra.*

[10] 785 F.2d 38 (2d Cir. 1986).

[11] United States v. Carpenter, 791 F.2d 1024, 1033 (2d Cir. 1986).

[12] Crummere v. Smith Barney, 624 F. Supp. 751, 754 (S.D.N.Y. 1985).

so that the rule does not encompass all of common-law fraud.

Second, even though there is a securities transaction that is more closely linked to the fraud, nevertheless, the court may determine that the fraud did not cause the injury complained of, and therefore it was not "in connection with" the securities transaction. The Second Circuit analyzes this requirement in terms of "loss causation"[13] while other circuits use the traditional "proximate cause."[14] Only private plaintiffs need to establish "loss causation." The requirement stems from Rule 10b-5's resemblance to the common law tort of deceit[15] and the courts' perception that it is necessary to limit damages.[16] In these cases, the fraud may have induced the stock purchase, but it did not relate to the security's value, or was not otherwise foreseeably related to an injury arising from a securities transaction and, therefore, is not actionable under Rule 10b-5.

Thus, while the "in connection with" and causation requirements are analytically distinct, they are related to each other, and discussion of the first requirement may merge with discussion of the second. As the securities transaction becomes more removed from the fraudulent conduct, it becomes less likely that the damages suffered resulted from the securities transaction. This Commentary examines the evolution of the "in connection with" requirement within the Second Circuit, focusing on cases decided in the 1985-86 term. It attempts to illustrate the direction the Circuit has taken in dealing with complex issues of securities fraud.

I. The *Chemical Bank* and *Drysdale* Decisions

In *Chemical Bank v. Arthur Andersen & Co.*,[17] four banks made a series of loans to Frigitemp Corp. and its wholly owned subsidiary, Elsters, Inc. As part of one transaction, Frigitemp pledged the stock of Elsters. The banks alleged that they en-

[13] *See* Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974). *See also* notes 73-75 and accompanying text *infra*.

[14] *See, e.g.*, Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), *modified*, 495 U.S. 375 (1983).

[15] 6 L. Loss, Securities Regulation 3880 (1969).

[16] *See* Titan Group, Inc. v. Faggen, 513 F.2d 234, 239 (2d Cir. 1975); Globus v. Law Research Serv., 418 F.2d 1276, 1292 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir. 1965).

[17] 726 F.2d 930 (2d Cir. 1984).

tered into the transaction in reliance on Frigitemp's financial statements certified by the defendant, the corporation's auditor Arthur Andersen & Co. (Andersen), which materially misstated Frigitemp's financial health. The district court denied Andersen's motion to dismiss for lack of federal jurisdiction.[18] It found that the pledge of the Elsters stock was a sale of the stock and, relying on *Bankers Life*, that the alleged fraud occurred "in connection with" the pledge.

The Second Circuit agreed with the district court that a pledge of stock was a sale of securities. It found, however, that there was no connection between the fraud and the pledge. Judge Friendly did not view these loans as securities transactions, but rather as commercial transactions, which happened to involve the pledge of securities. Thus, the court emphasized the incidental nature of the pledge transaction and questioned whether any significant advantage to the banks' position was achieved by the pledge.[19]

Subsequently, some district courts in the Second Circuit read *Chemical Bank* as requiring that the misrepresentation relate to the security's value in order to satisfy the "in connection with" requirement.[20] While the *Chemical Bank* panel emphasized that no alleged misstatement related to the Elsters common stock,[21] this served to underscore the court's view that the pledge was an incidental and insignificant transaction. Judge Friendly demonstrated the attenuated connection between the alleged misstatements about Frigitemp and the pledge of Elsters stock by describing the banks' argument in terms of causation: if the accounting firm had not made misstatements about Frigitemp, the banks would not have made the loans to Frigitemp and Elsters and hence would not have taken the securities as collateral for the loan. He stated, however, that "[s]uch 'but-for' causation is not enough."[22]

---

[18] 552 F. Supp. 439 (S.D.N.Y. 1982).

[19] 726 F.2d at 943 n.21.

[20] *See* SEC v. Drysdale Sec. Corp., 606 F. Supp. 295, 297 (S.D.N.Y. 1985), *rev'd*, 785 F.2d 38 (2d Cir. 1986); Crummere v. Smith Barney, 646 F. Supp. 751, 755 (S.D.N.Y. 1985); Moran v. Kidder Peabody, 617 F. Supp. 1065 (S.D.N.Y. 1985); Kimmco Energy Corp. v. Jones, 603 F. Supp. 763 (S.D.N.Y. 1984). *See also* notes 43-49 and accompanying text *infra*.

[21] 726 F.2d at 943.

[22] *Id.* "[T]he Banks' 'but-for' allegation merely established 'transaction causation' . . . they have failed to establish the 'loss causation' necessary for a legally sufficient

> It would be anomalous to hold that commercial bank loans procured by fraud are generally not within § 10(b) and Rule 10b-5, but that they become so, even though of a sort that no one would have considered to constitute a security, if collateralized with a security, although no misrepresentation was made with respect to the latter.[23]

In *Securities and Exchange Commission v. Drysdale Securities Corp.*,[24] the SEC sued the broker-dealer, three of its principals, and a partner in the accounting firm that prepared financial statements for Drysdale. The SEC claimed that the accountant prepared financial statements that concealed the firm's substantial capital deficit. Drysdale was in the government securities business in both the cash market and the repurchase agreements (repos) market. The latter constituted two types of transactions: Drysdale engaged in sale and repurchase agreements (repos) which it structured as sales of the securities by Drysdale subject to an agreement to repurchase them at a fixed price at a later date. Drysdale also engaged in reverse sale and purchase agreements (reverse repos), which it structured as purchases by Drysdale of the securities subject to an agreement to resell them at a fixed price at a later date. The SEC did not contend that the repos or reverse repos were securities.

The district court dismissed the complaint, holding that the case was governed by *Chemical Bank*.[25] According to the district court, *Chemical Bank* required a direct link between the misrepresentation and the securities involved in the transaction, a connection that was absent here.[26] Because the misstatements did not relate to the value of the government securities themselves, but to the financial position of the firm, the court held that the alleged fraud was not "in connection with" the purchase or sale of securities.[27]

The Second Circuit reversed.[28] In its opinion, the court concentrated on distinguishing *Chemical Bank*. The court did not accept the defendants' view that Drysdale's repo was the same

---

claim under § 10b and Rule 10b-5." *Id.* at n.23. *See also* text accompanying notes 33-35 *infra*.

[23] 726 F.2d at 944.

[24] 785 F.2d 38 (2d Cir. 1986).

[25] 606 F. Supp. 295 (S.D.N.Y. 1985).

[26] *Id.* at 299.

[27] *Id.*

[28] 785 F.2d at 38.

as the short-term collateralized loan in *Chemical Bank.* Unlike the traditional collateralized loan involved in *Chemical Bank,* in these repo and reverse repo transactions, the holder of the securities was free to deal in them. In a reverse repo transaction, the firm's obligation to resell the securities to the other party depended upon the firm's financial ability to repurchase identical securities in the marketplace, since the common practice was to sell the securities upon entering the reverse repo agreement. Similarly, the firm's obligation in a repo transaction to repurchase the securities at a later date depended more on the securities' appreciation in value than it otherwise would have, given the firm's insolvency. Finally, the securities held by Drysdale were assets available for satisfaction of its debts and thus could be seized by creditors. Hence, what this arrangement was worth to the party on the other side of the transaction depended substantially on the financial health of Drysdale. Therefore, unlike *Chemical Bank,* misrepresentations about the financial health of the company were closely linked to the transfers of the securities involved.[29] The Second Circuit concluded that:

> [u]nlike a pledge of securities in a traditional secured financing, in which the financial health of the lender is irrelevant to the value of both the pledged securities and the pledge itself, [Drysdale's] financial strength was essential to the value received by the other party in a securities transaction.[30]

The Second Circuit took a different approach in *Manufacturers Hanover Trust Co. v. Drysdale Securities Corp.*[31] *Manufacturers Hanover* was an action for private damages involving the same defendants and allegations as in the SEC action against Drysdale. The bank obtained a judgment against the defendants for $17 million after a jury trial. In affirming this decision, the appeals court had no difficulty finding that there was a sufficiently close connection with a securities transaction to satisfy the jurisdictional requirement.[32] Rather, the court focused on the issue of loss causation, *i.e.,* causation not merely in inducing the plaintiff to enter into the transaction, but causation of

[29] *Id.* at 42.

[30] *Id.* For the conclusion of the SEC litigation, see SEC Litigation Rel. No. 11318, 6 Fed. Sec. L. Rep. (CCH) ¶ 73,523 at C3, 398-13 (S.D.N.Y. Dec. 22, 1986).

[31] 801 F.2d 13 (2d Cir. 1986).

[32] *Id.* at 20.

the actual loss suffered.[33] Loss causation requires that the damage complained of be one of the foreseeable consequences of the misrepresentation.[34] The court held that loss causation was shown, even though the misrepresentation did not relate to the government securities, because:

> although the misrepresentation in the present case did not go to the *investment characteristics* of the underlying government securities — and, under our holding in *Drysdale*, this was not required — it did go to the *investment quality* of the repos since, presumably, [Manufacturers Hanover] would not have contracted with [Drysdale] to purchase and sell government securities had [Manufacturers Hanover] known of the misrepresentation regarding [Drysdale's] finances, particularly given that the . . . statements [by Arthur Andersen & Co.] were in part a response to the financial community's concern regarding [Drysdale's] stability.[35]

II. The Requirement of Securities Fraud

Rule 10b-5 provides a cause of action for securities fraud only; the rule does not redress injuries occasioned by other forms of misconduct. Courts have had difficulty in distinguishing securities fraud from other types of fraud in two areas: breach of fiduciary duty claims (including corporate mismanagement) and commercial transactions. In addition, a recent Second Circuit case illustrates the difficulty in distinguishing two kinds of federal fraud — securities and commodities.[36] Apart from the court's statement in *Chemical Bank* that the involvement of securities must be more than incidental, the courts have provided little guidance on how to determine, in borderline situations, whether the alleged fraud occurred in a securities transaction. Indeed, the cases repeatedly warn of the dangers of generalization and stress the need to decide the issue on a case-by-case basis.[37]

Set forth below is an analysis of other recent Second Circuit opinions discussing the "in connection with" requirement, divided into breach of duty, commercial transactions, and com-

---

[33] *Id.*

[34] *Id.* at 20-21.

[35] *Id.* at 22.

[36] *See* Saxe v. E.F. Hutton & Co., 789 F.2d 105 (2d Cir. 1986). *See* text accompanying notes 70-71 *infra.*

[37] *E.g.*, Smallwood v. Pearl Brewing Co., 489 F.2d 579, 595 (5th Cir. 1974).

modities fraud categories. In some instances, the courts found that no securities transaction had taken place at all. In others, the securities transaction was distant in time to the alleged misconduct. In still others, the securities transaction was an insignificant part of the conduct that was the basis of the complaint. In all three situations the fraud alleged was not deemed to be securities fraud.

A. *Breach of Fiduciary Duty*

Claims involving breach of fiduciary duty accompanied by material misstatements where the connection between the fraud and the securities transaction is remote should not be actionable under Rule 10b-5.[38] Yet a number of significant cases evidence the continuing difficulty in drawing the line between common-law breach of duty claims and federal securities fraud claims. In some of these cases, the courts have found that, while there are securities involved in the alleged fraud, there is no "purchase or sale." Thus, a claim based on theft or conversion of securities is not recognizable under Rule 10b-5.

Pross v. Katz[39] illustrates the Second Circuit's refusal to allow a plaintiff to recast breach of fiduciary duty claims into federal securities claims. Over an eight-year period, the plaintiff purchased a number of limited partnership interests in real estate ventures at the defendant's urging. Later, the defendant allegedly committed various fraudulent acts that divested the plaintiff of his ownership interest in the investments. The court did not discuss specifically the nature of the plaintiff's divestment of his ownership interest, and it did not ever consider that the divestment itself could be the basis for federal jurisdiction. Instead, the Second Circuit emphatically stated that "the com-

[38] This is consistent with the Supreme Court's decision in *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977). In *Santa Fe Industries*, minority shareholders challenged, as fraud under Rule 10b-5, a short-form merger between the majority shareholder of the corporation, which allegedly accomplished a freezeout of the minority shareholders at an inadequate price. In holding that claims under Rule 10b-5 require more than a showing of corporate misconduct, rather, that they require a showing of manipulative or deceptive conduct, the Supreme Court expressed concern about extending Rule 10b-5 jurisdiction over "a wide variety of corporate conduct traditionally left to state regulation." *Id.* at 478-79. The Court expressed fear that such an extension of the federal securities laws would result in an increase in unnecessary and vexatious litigation in the federal courts, as well as inappropriate interference with state-law regulation. *Id.* at 478-79.

[39] 784 F.2d 455 (2d Cir. 1986).

plaint here alleges no more than a conversion of property that happened to involve securities. We are unwilling to extend the reach of the securities law to every conversion or theft of security."[40]

The Supreme Court's opinion in *Bankers Life*[41] is, of course, the leading case on drawing the line between breach of fiduciary duty and securities fraud by reason of the "in connection with" requirement and affords an instructive contrast with *Pross.* In *Bankers Life,* the Second Circuit had affirmed the district court's dismissal of the complaint on the ground that it stated nothing more than breach of fiduciary duty. The Second Circuit stated that "there is a structural difference between the sale of the corporation's bonds at a concededly fair price and the subsequent fraudulent misappropriation of the proceeds received."[42] Thus, the Second Circuit found that where the plaintiff alleged theft, albeit theft of the proceeds of stock sales, the securities transaction was incidental to the fraud. The corporation would have suffered the same injury if the defendants had misappropriated the proceeds of a sale of any other property. The Supreme Court, however, took the view that where the link between the securities sale and the fraud is close in time and where the sale is crucial to the fraud, the securities transaction is not merely incidental to the fraud, and, therefore, there is jurisdiction under Rule 10b-5.[43] Thus, while under *Bankers Life,* a conventional sale of securities followed by misappropriation of the proceeds is fraud in connection with a securities transaction, under *Pross,* the ore direct conversion or theft of securities is not securities fraud because of the absence of a securities transaction.

The distinction between a sale of stock, followed by conversion of the proceeds, and conversion of the stock itself is a fine one, but it is one that can be justified as necessary, after *Bankers Life,* to establish the boundary between common-law fraud

---

[40] *Id.* at 459. In contrast, the Fifth Circuit has held that a brokerage firm's occasional liquidation of a customer's securities account to finance unauthorized trades in its commodities account made out a Rule 10b-5 claim, "in light of the broad interpretation that courts lend to the 'in connection with' requirement." Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 785 F.2d 1274, 1277 (5th Cir. 1986).

[41] 404 U.S. 6 (1971). The facts are summarized at note 5 *supra.*

[42] 430 F.2d 355, 360 (2d Cir. 1970).

[43] *Bankers Life,* 404 U.S. at 12.

and securities fraud.[44] Some district courts in the Second Circuit, however, have obliterated that distinction and have in effect overruled *Bankers Life* by relying on *Chemical Bank*. Curiously, these cases involved customers' complaints against brokers for alleged misconduct in the handling of their accounts. Although the connection between the fraud and the trading process makes a securities fraud claim appropriate, these courts have ruled that the complaints state only common-law claims.

In *Crummere v. Smith Barney, Harris Upham & Co. Inc.*,[45] the plaintiff charged that her broker persuaded her to sell off some securities and then converted the proceeds. Without citing *Bankers Life*, the district court dismissed the complaint, treating it as a simple conversion claim. Moreover, it held that misstatements made by the broker to conceal the fraud were not a basis for jurisdiction under Rule 10b-5, because the court read *Chemical Bank* as requiring that the misstatements relate to specific securities.[46] Similarly, in *Moran v. Kidder Peabody & Co.*,[47] the district court dismissed a customer's Rule 10b-5 claim against his broker for unauthorized trading in his account, stating that "[w]hether or not a broker faithfully performs a customer's orders is an agency question."[48] The trend in the district courts to dismiss actions against brokers in reliance on *Chemical Bank* has continued, despite the fact that the Second Circuit made it clear in *Drysdale* that misrepresentations need not pertain to the securities themselves.[49]

---

[44] *Cf.* IIT v. Vencap, Ltd., 519 F.2d 1001, 1014 n.26 (2d Cir. 1975): "[a] line must be drawn somewhere . . . ."

[45] Crummere v. Smith Barney, Harris Upham & Co. Inc., 624 F. Supp. 751 (S.D.N.Y. 1985). *See also* Bosio v. Norbay Sec., Inc., 599 F. Supp. 1563, 1567-68 (E.D.N.Y. 1985) ("bootstrapping" of a conversion claim not permitted). In contrast, the Sixth Circuit has held that a brokerage firm's wrongful refusal to return plaintiff's bonds, which had been pledged as collateral, made out a Rule 10b-5 claim. Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017 (6th Cir. 1979).

[46] *Crummere*, 624 F. Supp. at 755.

[47] 617 F. Supp. 1065 (S.D.N.Y. 1985). *Contra* Jaksich v. Thomson McKinnon Sec., 582 F. Supp. 485, 494 (S.D.N.Y. 1984) (where achievement of a fraud is directly related to the trading process, the "in connection with" requirement is met).

[48] 617 F. Supp. at 1068. *See also* Schwartz v. Gordon, 761 F.2d 864, 869-70 (2d Cir. 1985) (request to amend complaint to state a Rule 10b-5 claim against broker for unauthorized investment of Keogh funds in high risk bonds denied); Baum v. Phillips, Appel & Walden, Inc., 648 F. Supp. 1518, 1526 n.5 (S.D.N.Y. 1986) (unauthorized trading by broker does not state a Rule 10b-5 claim).

[49] *See, e.g.*, Nevitsky v. Manufacturers Hanover Brokerage Serv., 654 F. Supp. 116, 119 n.12 (S.D.N.Y. 1987) ("a misrepresentation concerning the mechanics of a securities

As an alternative to finding no "purchase or sale" as a means of limiting the scope of the federal securities laws, courts may find the requisite connection too remote where the purchase or sale was either distant in time to the fraud or an insignificant aspect of the fraud.[50] For example, in *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*,[51] the plaintiff, the reorganization trustee for Investors Funding Corporation of New York (IFC), alleged that corporate management mismanaged and converted proceeds from the sale of stock. Without deciding the question, the court expressed doubt as to whether there was an "adequate connection" between the securities sales and any damage suffered by IFC.[52] Since every corporation issues stock, allowing the plaintiff to trace the proceeds to an act of mismanagement could inappropriately convert every state-law derivative claim of corporate mismanagement into a federal securities claim. Furthermore, since every act of corporate mismanagement would adversely affect the stock's market value, an overly broad interpretation of the "touch" test would encompass all these claims brought by traders in the stock as well.[53]

The district court's decisions in the IFC litigation[54] illustrate the difficulties in formulating workable principles. The dis-

transaction, without particular regard to the nature of the securities themselves, is not actionable under section 10(b)."); Bochicchio v. Smith Barney [1986-87 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,024 at 95,118 (S.D.N.Y. Nov.. 17, 1986). In contrast, the Third and Ninth Circuits have held that a broker's misrepresentations about the risks in buying stock on margin make out a Rule 10b-5 claim. *See* Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939 (3d Cir. 1985); Arrington v. Merrill Lynch, Pierce, Fenner & Smith, 651 F.2d 615 (9th Cir. 1981).

[50] For an excellent example of a situation where the securities transaction was an insignificant part of the transaction, see Head v. Head, 759 F.2d 1172 (4th Cir. 1985). In *Head*, the defendant's former wife unsuccessfully attempted to challenge their property settlement agreement on securities fraud grounds. The only securities involved in the transaction were defendant's shares of his closely-held corporation, which had been placed in escrow to secure payment of his obligations to the plaintiff. The defendant duly satisfied the obligation, the stock was returned to him, and it was subsequently sold for $45 million. Not surprisingly, the Fourth Circuit found no connection between the pledge of stock and any alleged fraud.

[51] 754 F.2d 57 (2d Cir. 1985).

[52] *Id.* at 61. *Accord* Rochelle v. Marine Midland Grace Trust Co., 535 F.2d 523, 529 (9th Cir. 1976) ("[t]he nexus between the securities transaction and the alleged losses due to mismanagement is too attenuated in this case to use as a predicate for section 10(b) liability").

[53] Natowitz v. Mehlman, 567 F. Supp. 942, 946 (S.D.N.Y. 1983).

[54] *In re* Investors Funding Corp. Litig., 523 F. Supp. 533 (S.D.N.Y. 1980); 566 F. Supp. 193 (S.D.N.Y. 1983).

trict court drew a distinction between the trustee's claims based on looting of the proceeds and those based on improvident investing of the proceeds. While the former claims might meet the "in connection with" requirement on the basis of *Bankers Life*, the latter did not, since they were precisely the kind of corporate mismanagement and breach of fiduciary duty claims that are regulated by state law.[55]

Similarly, in *Pross v. Katz*,[56] the court refused to find a link between the plaintiff's purchases of the limited partnership interests and the subsequent fraud that was close enough to meet the "in connection with" requirement. The court found that:

> [a]n intent to cause a conversion of ownership interests at some uncertain future time and through uncertain means does not bring federal law into play, even though that intent is held at the time a purchase or sale of securities occurs. The steps to be taken to effectuate the fraud are not integral to the purchase and sale of the securities in question and are to occur only well after the securities transaction has been completed. Other transactions or events may intervene and cause the plan to be abandoned.[57]

On the other hand, the court noted that if the original sale to the plaintiff had involved conduct that facilitated the later fraud, then the requisite connection would have been present. "We believe a securities transaction that entails as one of its integral steps the fraudulent securing of blank signature pages for purposes of a later conversion alleges a fraud 'in connection with' the purchase or sale of securities."[58]

In contrast to the above-mentioned breach of duty claims, in the insider trading area, the Second Circuit has continued to refuse to characterize misappropriation of confidential information for illicit stock gains as merely a breach of fiduciary duty. In *United States v. Carpenter*,[59] the Second Circuit summarily rejected as "frivolous" the defendant's contention that his misconduct was not connected with securities transactions. The defendant, a columnist for the Wall Street Journal, was convicted of misappropriating information about the timing and content of certain columns, as a participant in a trading ring that traded on

---

[55] 523 F. Supp. at 538-39.
[56] 784 F.2d 455 (2d Cir. 1986).
[57] *Id.* at 459.
[58] *Id.*
[59] 791 F.2d 1024 (2d Cir. 1986).

the information in advance of its publication. The Second Circuit thus followed its 1981 decision in *United States v. Newman*,[60] where the lack of connection argument was quickly rejected, "since appellee's sole purpose in participating in the misappropriation of confidential takeover information was to purchase shares of the target companies."[61]

It is not possible to generalize on the requisite closeness of the connection between the misconduct and the securities transaction, except to say that the securities transaction must be more than incidental to the fraud, or as one court phrased it, the securities transaction must be "an integral or helpful component" of the fraud.[62] The limitless possibilities of fact variations that might make the securities transaction more or less remote from the alleged fraud explain why the courts feel incapable of deciding the cases except upon specific facts.[63]

B. *Commercial Transactions*

The distinction between a securities investment and a commercial loan is a continuing difficulty, as the treatment of notes

---

[60] 664 F.2d 12 (2d Cir. 1981), *cert. denied*, 464 U.S. 863 (1983).

[61] *Id.* at 18.

[62] Natowitz v. Mehlman, 567 F. Supp. 942, 947 (S.D.N.Y. 1983).

[63] The most significant case outside the Second Circuit discussing both the "in connection with" and causation requirements is Ketchum v. Green, 557 F.2d 1022 (3d Cir. 1977). Plaintiffs, the majority shareholders, directors and former officers of a close corporation, sued the other shareholders, directors and officers, charging that the defendants schemed to oust them from their officerships. A shareholders' agreement provided that only employees of the corporation could be shareholders and set forth a formula for the purchase price of the shares upon termination of employment. The Third Circuit, in affirming the district court's dismissal of the complaint, first held that the "in connection with" requirement was not met. What was alleged was basically an intra-corporate dispute over management; the plaintiffs' basic grievance was the termination of their officerships. Moreover, the Third Circuit also held that the requisite causation was missing. There were a number of intervening steps between the fraud and the sale of securities, and the defendant's scheme was undertaken to oust the plaintiffs as officers, not to bring about the surrender of their stock. Thus, the securities transaction was only an indirect consequence of the fraud.

The Fifth Circuit later distinguished *Ketchum* in Brown v. Ivie, 661 F.2d 62 (5th Cir. 1981). In *Brown*, the plaintiff was ousted from his officership by the defendants and required to sell his shares under a shareholders' agreement. Unlike *Ketchum*, however, the Fifth Circuit found a direct connection between the fraud and the securities transaction. In *Brown*, the defendants, by reason of their ownership of a majority of the stock, did not have to use fraud to oust the plaintiff from his office. They did, however, deceive him into signing a second shareholders' agreement, since the original one was invalid, and so the fraud was effected to divest him of his shares.

under the federal securities laws demonstrates.[64] The *Chemical Bank*[65] and the *Drysdale Securities Corp.*[66] cases explore this dichotomy in the context of the "in connection with" requirement. Thus, Judge Friendly's holding in *Chemical Bank* rested on his belief that the transaction involved a commercial loan, which happened to include a pledge of securities.[67] On the other hand, the court, by the time of the second *Drysdale* decision, was convinced that a transaction involving repos was a securities transaction.

Rand v. Anaconda-Ericsson, Inc.[68] is an excellent example of a plaintiff's attempt to convert allegations of "purely" commercial fraud into securities fraud, which the court properly thwarted. Shareholders of Teltronics, a bankrupt corporation, sued one of its creditors alleging that the defendant's press release, which stated that Teltronics was in default under a loan agreement, ultimately led to Teltronics' bankruptcy and the "forced sale" of the shareholders' stock. Even if the "forced sale" had constituted a securities transaction, and the court held that it did not, it is hard to see any connection between the press release and the forced sale, except that the press release started a chain of events that eventually led to the bankruptcy of the corporation. This in no way sounds like the kind of fraud that Rule 10b-5 is intended to cover. In *Chemical Bank*, the pledge of securities as an incidental part of a loan transaction

---

[64] Exchange Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126 (2d Cir. 1976), *cert. denied*, 469 U.S. 884 (1986), provides an extensive discussion of the definitional issue, including the various tests applied by the courts. The *Touche* court suggested that where a note does not bear a resemblance to a typical "mercantile" transaction and has a maturity exceeding nine months, it should be deemed a security governed by the Securities Exchange Act of 1934. *Id.* at 1138. The test applied by the Fifth Circuit was whether the note was "issued in the context of a commercial loan transaction." 544 F.2d at 1135 (citing Bellah v. First Nat'l Bank of Hereford, 495 F.2d 1109 (5th Cir. 1974). The Tenth Circuit test is whether the notes were to mature in less than nine months. *Id.* at 1134 (citing Zabriskie v. Lewis, 507 F.2d 546, 550-52 (10th Cir. 1974). The Ninth Circuit test appears to be whether the issuer has superior access to and control of information material to the investment decision. *Id.* at 1136 (citing Great Western Bank & Trust v. Katz, 532 F.2d 1252, 1261 (9th Cir. 1976) (E. Wright, concurring).

[65] *See* notes 17-23 and accompanying text *supra*.

[66] *See* notes 21-32 and accompanying text *supra*.

[67] Judge Friendly contrasted the facts in *Chemical Bank* with those in Weaver v. Marine Bank, 637 F.2d 157 (3d Cir. 1980), *rev'd on other grounds*, 455 U.S. 551 (1982). In *Weaver*, misrepresentations led to the pledge, while in *Chemical Bank*, misrepresentations led to a loan secured by a pledge. *Chemical Bank*, 726 F.2d at 944.

[68] 794 F.2d 843 (2d Cir. 1986).

was not sufficient to transform a commercial transaction into a securities transaction. Similarly, in *Rand*, alleged misstatements made in a commercial transaction would not give rise to a securities fraud claim, even if the misstatements had eventually brought about a "forced sale." It is significant that in each case the only securities transaction alleged was an atypical one: a pledge and a liquidation.

A more difficult case is *Bennett v. United States Trust Co. of New York*.[69] In *Bennett*, a bank lent money to the plaintiffs for the purchase of securities and allegedly made misrepresentations about the margin requirements. While the Second Circuit treated this case as a loss-causation case, it is more properly analyzed as a case involving a commercial transaction. Even though the bank allegedly made misstatements about the margin requirements applicable to the securities, the plaintiffs' use of the loan proceeds to purchase securities can be viewed as peripheral to the loan transaction because the bank did not induce the plaintiffs to purchase the securities.

There is less difficulty in applying the "in connection with" requirement in the commercial area than in the breach of duty area. The distinction between a commercial transaction and a securities transaction is generally drawn by determining whether a "security" is present, which involves distinguishing commercial notes from investment notes. In drawing the distinction between a breach of duty claim and a securities fraud claim, on the other hand, the inquiry focuses on the degree of the connection between the wrong and the securities transaction, since these situations typically involve an undisputed security.

C. *Commodities Fraud*

As investors continue to diversify their investments, jurisdictional disputes over the nature of the alleged fraud can be expected. *Saxe v. E.F. Hutton & Co.*[70] is an excellent example of this difficulty. The plaintiff sued both a securities and a commodities firm, charging that he was induced by fraudulent misstatements about the commodities advisor and his trading program to liquidate his stock portfolio and invest those funds into

---

[69] 770 F.2d 308 (2d Cir. 1985).

[70] 789 F.2d 105 (2d Cir.), *cert. denied*, ___ U.S. ___ (1986).

a commodities account. The Second Circuit found that no claim was stated under Rule 10b-5, since the sale of the securities was merely incidental to any fraud that may have occurred in the reinvestment of these funds in the commodities account. Since all the misrepresentations related to the commodities futures investments program, there was no fraud "in connection with" a securities transaction. At best, only the "but-for" causation found insufficient in *Chemical Bank* was present here. Indeed, since, according to the complaint, the plaintiff had already determined to close out his stock portfolio, even "but-for" causation was absent. The plaintiff stated a federal claim, but the claim was for fraud under the Commodities Exchange Act, not the Securities Exchange Act.[71]

III. Loss Causation

The requirement of loss causation derives from the tort concept of proximate causation. Loss causation serves to limit the damages flowing from a securities fraud and " 'in effect requires that the damage claimed be one of foreseeable consequences of the misrepresentation.' "[72] In *Schlick v. Penn-Dixie Cement Corp.*,[73] the Second Circuit viewed the element of causation as borrowed from common-law tort principles. In recent cases, however, courts have viewed the causation requirement as an aspect of the "in connection with" requirement.[74]

In *Schlick*, the plaintiff, a minority shareholder of Continental Steel Corp., charged the defendant, the majority shareholder, with exercising its control over the corporation to defraud the minority shareholders. He alleged that Penn-Dixie manipulated and depressed the market value of Continental's stock in relation to Penn-Dixie's stock by using Continental's assets for the benefit of Penn-Dixie, and that Penn-Dixie then caused Continental to enter into a merger agreement with Penn-Dixie, at an unfair exchange ratio. In connection with the

[71] *Id.* at 108-09. *But see* Smoky Greenhaw Cotton v. Merrill Lynch, 785 F.2d 1274 (5th Cir. 1986), discussed at note 40 *supra*.

[72] Manufacturers Hanover Trust Co. v. Drysdale Securities, 801 F.2d at 20-21 (quoting Marbury Management, Inc. v. Kohn, 629 F.2d 705, 708 (2d Cir. 1980)).

[73] 507 F.2d 374 (2d Cir. 1974).

[74] *See, e.g.*, Nevitsky v. Manufacturers Hanover Brokerage Serv., 654 F. Supp. 116, 119 (S.D.N.Y. 1987).

merger, Penn-Dixie issued a proxy statement that failed to disclose how Penn-Dixie had inflated the value of its shares.

In *Schlick*, the Second Circuit distinguished between Rule 10b-5 claims based on misrepresentations and omissions, on the one hand, and those based on a more comprehensive fraudulent scheme, on the other. The court held that where the Rule 10b-5 claim is based solely on material misrepresentations or omissions, there must be a showing of both loss causation — that the misstatements caused the economic harm — and transaction causation — that the misstatements caused the plaintiff to engage in the securities transaction. The court held that loss causation was demonstrated by proof of some form of economic damage — in *Schlick*, the unfair exchange ratio. Transaction causation, however, required substantially more. In a case involving misrepresentations, the plaintiff must establish reliance. In a case involving omissions, the plaintiff must establish the materiality of the undisclosed facts. However, proof of transaction causation was deemed to be unnecessary where, as in *Schlick* the plaintiff alleges a fraudulent scheme including more than misstatements; in these cases, loss causation is sufficient.[75]

In *Chemical Bank*, transaction causation could be proved: the banks could establish that they relied on the misrepresentations, and that the omissions were material, by establishing that had they known the truth about Frigitemp's financial condition, they would not have made the loan, including the pledge of stock. Nevertheless, Judge Friendly said, while this "but for" causation established transaction causation, it was not sufficient to establish loss causation because there was no economic damage resulting from the pledge.[76]

In the simplest Rule 10b-5 claim, where, for example, a purchaser of securities claims that he paid too much because of misrepresentations overstating the value of the stock, the dual requirements of loss and transaction causation are easily satisfied. In transactions which are indisputably securities transactions, economic damage resulting from the transaction is easily proved; the stock was not worth what the purchaser paid. Because the misrepresentation relates to the investment quality of the security, reliance is usually not an issue. In situations like *Chemical*

[75] *Id.* at 380-81.
[76] 726 F.2d at 943-44.

Bank, however, where the securities transaction is incidental to the overall transaction, even though the plaintiff can establish transaction causation — that he would have acted differently had he known the truth — what he would have done differently is not enter into a loan transaction. Accordingly, plaintiffs cannot establish loss causation, because the economic damage results from a bad loan, not from the stock pledge. As the court stated in *Drysdale*, "[t]he standard for liability in a civil action under section 10(b) is causation not merely in inducing the plaintiff to enter into a transaction or series of transactions, but causation of the actual loss suffered."[77]

Thus, in situations where there is no doubt that there is a securities transaction, courts may take a more relaxed view of the causation requirement, as illustrated in the pre-*Chemical Bank* opinions, *Marbury Management, Inc. v. Kohn*[78] and *Competitive Associates, Inc. v. Laventhol, Krekstein, Horwath & Horwath*.[79] On the other hand, where it is a close question as to whether there is federal securities jurisdiction, the court may focus on the causation issue and require a closer relationship between the misstatement and the economic harm, as by insisting that the misstatement relate to the investment characteristics of the security. This is the approach taken in *Chemical Bank* and *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*.[80]

In *Marbury Management, Inc. v. Kohn*,[81] the Second Circuit held that the plaintiffs could recover for losses incurred on securities purchased on the defendant's recommendations. The defendant, a trainee at a brokerage firm, had told the plaintiffs that he was a stock broker and a "portfolio management specialist." The trial court found that there was no fraud with respect to his recommendations. Nevertheless, since the plaintiffs purchased the securities and held on to them while their market value declined because of their belief that the defendant was an expert, their losses were proximately caused by the defendant's

[77] Manufacturers Hanover Trust Co. v. Drysdale Sec. Corp., 801 F.2d 13, 20 (2d Cir. 1986).

[78] 629 F.2d 705 (2d Cir. 1980). *See* text accompanying notes 81-83 *infra*.

[79] 516 F.2d 811 (2d Cir. 1975). *See* text accompanying notes 84-85 *infra*.

[80] 754 F.2d 57 (2d Cir. 1985). *See* text accompanying notes 51-55 *supra* & 86-90 *infra*.

[81] 629 F.2d 705 (2d Cir. 1980).

misrepresentations.[82] The majority opinion denied that the decline in the market value of the securities was an intervening event breaking the chain of causation:

> Differentiating transaction causation from loss causation can be a helpful analytical procedure only so long as it does not become a new rule effectively limiting recovery for fraudulently induced securities transactions to instances of fraudulent representations about the value characteristics of the securities dealt in. So concise a theory of liability for fraud would be too accommodative of many common types of fraud, such as the misrepresentation of a collateral fact that induces a transaction.[83]

In *Competitive Associates, Inc. v. Laventhol, Krekstein, Horwath & Horwath*,[84] a mutual fund charged that the defendant, an accounting firm, knowingly certified the false financial statements of a private investment fund managed by one Yamada, in order to induce the plaintiff to hire Yamada to manage part of its portfolio, in a scheme to facilitate Yamada's stock manipulation. As a result, the plaintiff lost several million dollars because of Yamada's unlawful securities transactions. Reversing the district court's grant of summary judgment for the defendants, the Second Circuit emphasized that the "plaintiff here alleges that the accountants accepted payoffs and otherwise actively collaborated with Yamada for the specific purpose of influencing investors to authorize Yamada to carry out security transactions on its behalf."[85]

Competitive Associates provides a useful comparison with the *Chemical Bank* and *Drysdale Securities* cases. In *Chemical Bank*, misrepresentations about Frigitemp simply did not cause the banks to suffer any injury from the stock pledge, whereas in *Competitive Associates*, misrepresentations about Yamada's investment company caused the mutual fund to suffer losses from his stock manipulation. Moreover, just as in *Competitive Associates*, the accountants could foresee (in fact, they intended) the resulting injury, so, in the *Drysdale* cases, the accountants could foresee the resulting injury. The accountants certified Drysdale's financial condition when the marketplace was expressing con-

---

[82] *Id.* at 708.
[83] *Id.* at 710 n.3.
[84] 516 F.2d 811 (2d Cir. 1975).
[85] *Id.* at 815.

cern over the firm's financial condition; indeed, the financial statements were furnished to provide assurance on this point.

While *Marbury Management* and *Competitive Associates* lessen the significance of loss causation as an independent element in a Rule 10b-5 claim, they do so in cases where there is no question that the damages resulted from securities transactions, and where the foreseeability of the particular damage suffered is apparent. *Chemical Bank* does not overrule these cases and insist that loss causation be established only by misrepresentations that relate to the investment characteristics of the securities.

The Second Circuit's decision in *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*[86] is another illustration of the court's recognition that the "in connection with" and causation requirements are related. The trustee for IFC sued the attorneys who prepared IFC's registration statements and other disclosure documents that allegedly misstated or omitted information about corporate mismanagement and looting. The court expressed doubt that the "in connection with" requirement was met, but found it unnecessary to decide this question, since the trustee failed to show that the law firm's alleged misconduct caused injury to the corporation. The mismanagement and looting of the proceeds from the stock sales was not a direct or foreseeable result of the law firm's activities.[87]

The lower court opinions in the IFC litigation provide more extensive analysis of both the "in connection with" and causation requirements.[88] As discussed previously, the district court determined that the looting charges met the "in connection with" requirement, but the mismanagement charges did not.[89] In the looting charges brought against the corporate officers and another individual who actively participated in the fraud, the court found that causation was established, but causation was lacking where the defendants were the accounting firm and the lawyers[90] and the alleged misconduct was recklessness in preparing the disclosure documents.

---

[86] 754 F.2d 57 (2d Cir. 1985). *See* notes 51-55 and accompanying text *supra.*

[87] *Id.* at 62.

[88] *See In re* Investors Funding Corp. Sec. Litig., 523 F. Supp. 533 (S.D.N.Y. 1980); 566 F. Supp. 193 (S.D.N.Y. 1983).

[89] *See* note 55 and accompanying text *supra.*

[90] 566 F. Supp. 193 (S.D.N.Y. 1983).

Two other post-*Chemical Bank* district court opinions illustrate the difficulties that courts are having with the issue of loss causation. In *First Federal Savings & Loan Association v. Oppenheim, Appel, Dixon & Co.*,[91] the plaintiffs were former customers of Comark, a now insolvent dealer in government securities. Securities purchased for the plaintiffs were left with the dealer for safekeeping, and Comark represented that the securities would be segregated from its own securities. The clearing agent for Comark made overnight loans that, notwithstanding the dealer's representations, were secured by the plaintiffs' securities. When the dealer became insolvent, the clearing agent liquidated the plaintiffs' securities. The plaintiffs alleged that the defendant accounting firm knew about Comark's financial problems and the fact that it had pledged the customers' securities and fraudulently misrepresented this information. The court granted the defendant's motion to dismiss the Rule 10b-5 claim as to primary liability.[92]

Although expressing some uncertainty, the court at least tentatively concluded that the "in connection with" requirement was met on the basis of *Bankers Life*, since Oppenheim, Appel, Dixon & Co.'s (OAD's) fraudulent misrepresentations, which induced the subsequent securities purchases, were nearly contemporaneous with the dealer's conversion of the securities.[93] On the question of loss causation, the court distinguished this case from *Chemical Bank*:

> OAD's alleged misrepresentations did not relate only to the financial condition of Comark, with a securities transaction occupying only an incidental place in a larger fraudulently induced transaction. Rather, the amended complaint alleges that the misrepresentations went to the very fraud that later resulted in the loss of plaintiffs' securities, and the direct purchases of securities from Comark constituted the entire fraudulently induced transaction.[94]

Nevertheless, the court concluded that "the separation between the purchases and the harm is too great to support a cause of action for securities fraud, at least as to OAD's primary liabil-

[91] 29 F. Supp. 427 (S.D.N.Y. 1986).
[92] *Id.* at 442.
[93] *Id.* at 441.
[94] *Id.* at 441-42.

ity."[95] The court reached this conclusion because the plaintiffs were not injured by the securities purchases, but by the pledge of the securities to the clearing agent.[96]

This decision appears wrongly decided in light of the complaint's allegations that the accountants knowingly participated in the fraud. The court, however, refused to dismiss the complaint against the defendant on a theory of aiding and abetting the securities fraud committed by the dealer, so it appears that the plaintiffs have another road to the same destination.

Finally, in *Kimmco Energy Corp. v. Jones*,[97] the plaintiffs were also unsuccessful in establishing loss causation. They had invested in two partnerships managed by the defendant. According to the plaintiffs, the defendant misrepresented a number of significant facts about the activities of the first partnership, the apparent success of which led them to invest in the second partnership. In granting the defendant's motion to dismiss the Rule 10b-5 claim, the court found that the plaintiffs' allegations were inadequate to establish loss causation. It noted that while the plaintiffs established transaction causation by their allegations that the misrepresentations about the first partnership induced them to invest in the second, there were no allegations that the defendant was aware, at the time of the misrepresentations, that a second partnership would be formed. Thus, there was nothing to show that the securities transaction was a foreseeable consequence of the misstatements.[98]

CONCLUSION

It is clear, after *Chemical Bank*, that the securities transaction must have a more than incidental involvement with the alleged misconduct to satisfy the "in connection with" requirement for the purpose of establishing jurisdiction under Rule 10b-5. The *Drysdale* opinions make it clear that loss causation does not require that misrepresentations made in a securities transaction relate to the investment characteristics of the spe-

---

[95] *Id.* at 442.

[96] *Id.*

[97] 603 F. Supp. 763 (S.D.N.Y. 1984).

[98] *Id.* at 766-67.

cific securities. Rather, the test remains the same — proximate cause, — and the determination of this will continue to be made, necessarily, on a case-by-case basis.