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## Securities Regulation--Standing to Sue under Rule 10b-5-Supreme Court Adopts Birnbaum Doctrine

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the lack of time to obtain a warrant and the easily destructible nature of the narcotics.

The second ground relied on by the majority in *Wiley* was that the police could continue a criminal investigation to confirm an anonymous tip and determine whether the suspect should be detained or released. As the dissent argued, this is completely untenable.<sup>46</sup> The majority's reasoning would completely nullify the warrant requirement because anytime the police wanted to continue a criminal investigation they would be allowed to make a warrantless search.<sup>47</sup> Continuing a criminal investigation has never been recognized as an exception to the warrant requirement.<sup>48</sup>

In *Wiley* the Missouri Supreme Court adopted the destruction/removal exception to the warrant requirement. Unfortunately the court chose the wrong vehicle to give its approval to the exception, because the facts in *Wiley* do not satisfy the limitations placed on the exception by the federal courts. If *Wiley* is taken literally, police will have an unfettered discretion to search whenever there is even a remote possibility of removal or destruction of evidence. Because such a possibility almost always exists, the exception would abrogate the warrant requirement.<sup>49</sup>

A. WAYNE CAGLE, JR.

## SECURITIES REGULATION--STANDING TO SUE UNDER RULE 10b-5--SUPREME COURT ADOPTS BIRNBAUM DOCTRINE

### *Blue Chip Stamps v. Manor Drug Stores*<sup>1</sup>

In 1963 the United States sued Blue Chip Stamp Company and nine co-defendants, charging them with conspiracy to restrain trade and with monopolizing the trading stamp business in California.<sup>2</sup> A consent decree was entered providing for the merger of Blue Chip Stamp Company into a new corporation, Blue Chip Stamps. The new corporation agreed to divest itself of 55 percent of its outstanding shares by offering these shares, consisting of common stock and debentures, to nonshareholding retail users

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46. 522 S.W.2d at 298.

47. *Id.*

48. *Id.*

49. White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 Sup. Cr. Rev. 165, 182.

1. 95 S. Ct. 1917 (1975).

2. The nine co-defendants together owned 90 percent of the shares of Blue Chip Stamp Company (Old Blue Chip). The original cause of action was based on alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2 (1970).

of the stamps in proportion to their past usage.<sup>3</sup> All shares not purchased by the retail users were to be sold on the open market. This had the effect of reducing the holdings of the majority shareholders of Blue Stamp Company (Old Blue Chip). The existing shareholders of Old Blue Chip registered the offering with the SEC and issued a prospectus that allegedly fraudulently underestimated the new company's earnings and worth.<sup>4</sup> By discouraging offerees from accepting this "bargain offer" the shares could later be sold on the open market at a higher price. Manor Drug Company, an offeree, filed an action in district court alleging violations of Securities and Exchange Commission Rule 10b-5,<sup>5</sup> as enacted under section 10 (b) of the Securities and Exchange Act of 1934.<sup>6</sup> Manor's complaint stated that it had relied on the misleading prospectus, thereby *failing to purchase* the units offered.

The district court dismissed the complaint for failure to state a claim upon which relief could be granted.<sup>7</sup> The United States Court of Appeals for the Ninth Circuit reversed.<sup>8</sup> The Supreme Court granted certiorari and reversed the decision of the Ninth Circuit. The only issue before the Supreme Court was whether Manor had standing to bring the 10b-5 action "without having either bought or sold the shares described in the allegedly misleading prospectus."<sup>9</sup>

Rule 10b-5 was promulgated by the Securities and Exchange Commission to implement legislation which was a result of the New Deal era. The two basic statutes enacted for the purpose of regulating securities were the

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3. 492 F.2d 136, 139 (9th Cir. 1973). The offering price made to the retailers was \$101 per unit. Each unit consisted of three shares of common stock and one debenture. The fair market value of each unit was \$315.

4. 95 S. Ct. at 1921.

5. Rule 10b-5, 17 C.F.R. § 240.10b-5 (1969), provides:

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

6. 15 U.S.C. § 78j (b) (1970). The section provides:

It shall be unlawful for any person, directly or indirectly . . .

- (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. . . .

7. 339 F. Supp. 35 (C.D. Cal. 1971).

8. 492 F.2d 136 (9th Cir. 1973). The only issue that plaintiff pursued on appeal was rule 10b-5. See text accompanying notes 43-45 *infra*.

9. 95 S. Ct. at 1921.

Securities Act of 1933<sup>10</sup> and the Securities Exchange Act of 1934,<sup>11</sup> designed to prevent fraud and inequitable and unfair practices, respectively. Whereas the 1933 Act provided expressly for private civil actions,<sup>12</sup> neither section 10 (b) of the 1934 Act nor rule 10b-5 provided for such actions. However, an implied right of action was recognized in *Kardon v. National Gypsum Company*,<sup>13</sup> enabling defrauded investors to bring suit for their losses. In *Kardon* plaintiffs alleged that defendant corporation fraudulently induced plaintiffs to sell stock they owned in two corporations for less than its true value. In ruling that defendant's conduct gave rise to liability under the 1934 Act and rule 10b-5, the court held that although no express provision existed for allowing private causes of action, "in view of the general purpose of the Act, the mere omission of an express provision for civil liability [was] not sufficient to negative what the general law implies."<sup>14</sup>

Standing to bring such private actions has been the subject of great controversy. Lacking any specific statutory standards, courts have resorted to the legislative history of the 1934 Act to determine the intent of Congress, as well as the express language of rule 10b-5.<sup>15</sup>

The landmark case in this area is *Birnbaum v. Newport Steel Cor-*

10. 48 Stat. 74, as amended, 15 U.S.C. § 77a et seq. (1970).

11. 48 Stat. 881, as amended, 15 U.S.C. § 78a et seq. (1970). It should be noted that these two acts respond to different problems. Whereas the 1934 Act is primarily aimed at regulation of the trading markets, the 1933 Act concerns itself more with the problems surrounding the issuance of shares to the public.

12. Section 11 (a) gave a right of action by reason of a false registration statement to "any person acquiring" the security, and § 12 gave a right to sue the seller of a security who had engaged in proscribed practices with respect to prospectuses and communication to the person purchasing the said security from him.

95 S. Ct. at 1922.

13. 69 F. Supp. 512 (E.D. Pa. 1946). See also 1 A. BROMBERG, SECURITIES LAW: FRAUD § 2.4 (1967). Bromberg states that the implied right of a civil cause of action is primarily derived from two theories, statutory tort liability and statutory voidability. Statutory tort liability is derived from the common law doctrine that a person should be entitled to recover from injuries sustained as a result of a violation of a statute enacted "for the benefit of persons in his position." *Id.* See 2 RESTATEMENT OF TORTS, § 286 (1934).

14. 69 F. Supp. at 514. Bromberg also refers to the *Kardon* decision as a basis for his second theory, that of statutory voidability. A. BROMBERG, *supra* note 13, at § 2.4 (1) (b). The *Kardon* court recognized that the implied right of action could also be based upon section 29 (b) of the 1934 Act which provided that contracts made in violation of any provision of that Act would be void.

It seems to me that a statutory enactment that a contract of a certain kind shall be void almost necessarily implies a remedy in respect of it. The statute would be of little value unless a party to the contract could apply to the Courts to relieve himself of obligations under it or to escape its consequences.

69 F. Supp. at 514. See *Dasho v. Susquehanna Corp.*, 380 F.2d 262 (7th Cir.), cert. denied, 389 U.S. 977 (1967) (shareholder's derivative action asserting a claim for damages based on section 10 (b) of the 1934 Act and rule 10b-5; held, plaintiffs allowed to bring the action belonging to the corporation due to their status as stockholders).

15. See Note, 8 GA. L. REV. 487, 490-91, nn.21 & 24 (1974).

poration.<sup>16</sup> That case firmly established a limitation on standing known as the *Birnbaum* doctrine, requiring plaintiffs to be either purchasers or sellers of securities before they can assert a 10b-5 claim. *Birnbaum* was an action against the president of Newport Steel by the corporation's shareholders. Defendant had rejected a merger offer<sup>17</sup> which would have been beneficial to the corporation. He then sold his stock to Wilport Corporation at twice the market value for the sole purpose of making Newport a captive subsidiary of Wilport at a time when there was a market shortage of steel. The Second Circuit affirmed the dismissal of plaintiff's complaint. The court reasoned that plaintiff lacked standing to sue under rule 10b-5 because neither the corporation nor the stockholders were "purchasers" or "sellers" of securities. The court based its ruling upon the purpose behind the adoption of rule 10b-5. It noted that prior to the adoption of the rule, the only provision concerning fraud with respect to the purchase or sale of securities was found in section 17 (a) of the 1933 Act, which only made it unlawful to defraud purchasers of securities. Because there was no protection for sellers, the Commission adopted rule 10b-5.<sup>18</sup> Also, except for the substitution in rule 10b-5 of the words "any person" for "the purchaser," and the addition of a final clause, "in connection with the purchase or sale of any security," section 17 (a) was identical to rule 10b-5. Citing section 16 (b) of the 1934 Act, the court also noted that when Congress wanted to provide a remedy to stockholders for corporate mismanagement, it had no trouble in doing so expressly.<sup>19</sup>

Since the *Birnbaum* decision in 1952, courts have avoided an express ruling on the validity of the purchaser-seller limitation. By finding various ways to categorize plaintiffs as purchasers or sellers, the impact of *Birnbaum* was apparently weakened.<sup>20</sup> The doctrine has been relaxed somewhat in suits for injunctive relief<sup>21</sup> and in other cases courts have circumvented

16. 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956 (1953).

17. Defendant was also chairman of the board and controlling stockholder of Newport Steel.

18. See SEC Release No. 3230 (May 21, 1942).

19. 193 F.2d at 464.

20. See Note, 8 LOYOLA L. REV. 171, 174 n.7 (1975).

21. *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967). The court granted standing to seek injunctive relief even though plaintiffs were neither buyers or sellers of securities. Applying the rationale of *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), which held that in a suit for equitable or "prophylactic" relief, all the elements required in damage suits need not be established, the court recognized that suits for injunctive relief had nothing to do with the issue of causation. Therefore, there was no need to apply the *Birnbaum* doctrine. The court noted that injunctive relief might "cure harm suffered by continuing shareholders" and "afford complete relief" against rule 10b-5 violations in the future without experiencing the problem of proof inherent in a damage suit. 384 F.2d at 547. See also *Kahan v. Rosentiel*, 424 F.2d 161 (3d Cir.), cert. denied, 398 U.S. 950 (1970). Some courts have interpreted *Kahan* as applying only to suits for injunctive relief. *Edelman v. Decker*, 337 F. Supp. 582, 584 (E.D. Pa. 1972). Others have followed its rationale in damage suits. *Tully v. Mott Supermarkets, Inc.*, 337 F. Supp. 834, 841 (D.N.J. 1972).

the doctrine by classifying plaintiffs as "forced" sellers or purchasers of securities.

In *Vine v. Beneficial Finance Co.*<sup>22</sup> plaintiff was classified as a seller even though no shares were transferred. Plaintiff had refused to exchange his shares of *A* corporation (which had merged into *B* corporation) for shares of *B* corporation. The court granted plaintiff standing. The court recognized that his only option, other than selling his stock to *B* corporation at less than its true value, was to keep stock in a nonexistent entity. The court said: "(I)t is precisely because [Beneficial] gives no choice to Vine under the statute and the latter must now exchange his shares for cash that [Vine] can now be deemed a seller."<sup>23</sup> The court noted that it was "all part of a single fraudulent scheme" and that the policies of section 10 (b) and rule 10b-5 justified the holding that the fraud was "in connection with" the forced sale to *B* corporation. However, the court did not overrule the purchaser-seller limitation because the plaintiff was found to be a seller.<sup>24</sup>

The forced purchaser situation arose in *A.T. Brod and Co. v. Perlow*.<sup>25</sup> Plaintiff alleged fraud in connection with defendant's refusal to pay for stock which he had authorized plaintiff to purchase, after the market value of the stock had declined. Referring to *SEC v. Capital Gains Research Bureau, Inc.*,<sup>26</sup> which said that securities laws should be construed "flexibly to effectuate . . . their remedial purpose," the court stated:

We believe that Section 10b and Rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.<sup>27</sup>

However, the court refused to consider the *Birnbaum* rule with respect to the Commission's view that the doctrine was too narrow.<sup>28</sup> Even though the court was liberal in finding standing, it did not abandon the purchaser-seller limitation, because plaintiff was found to be a purchaser.<sup>29</sup>

In addition to the forced seller and purchaser decisions, other courts recognized an abortive purchaser-seller exception where plaintiffs estab-

22. 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970 (1970).

23. 374 F.2d at 635.

24. *Id.* Cf. *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), applying the rationale of *Vine* to a tender offer and merger situation.

25. 375 F.2d 393 (2d Cir. 1967).

26. 375 U.S. 180 (1963).

27. 375 F.2d at 397 (emphasis omitted).

28. "We need not consider that contention since appellant is clearly a purchaser of securities." *Id.* at 397 n.3.

29. For a good discussion of the methods used to modify the purchaser-seller limitation, see Boone & McGowan, *Standing to Sue Under SEC Rule 10b-5*, 49 TEX. L. REV. 617, 629-46 (1971). See also *The Purchaser-Seller Rule: An Archaic Tool For Determining Standing Under Rule 10b-5*, 1 SEC. L. REV. 447, 450 (1969).

lished that, but for the defendant's fraud, their purchase would have been completed.<sup>30</sup>

While these courts were expanding the standing doctrine, others were narrowing it, producing inconsistent results.<sup>31</sup> Some commentators argued that the *Birnbaum* doctrine had been completely eliminated<sup>32</sup> while others awaited a Supreme Court ruling on the matter.<sup>33</sup> The Court had such an opportunity in *Superintendent of Insurance v. Banker's Life and Casualty Company*.<sup>34</sup> However, the Court expressly declined to rule on the purchaser-seller requirement.<sup>35</sup> According to Professor Bromberg, *Banker's Life* did eliminate two other restrictions established by *Birnbaum*, thereby leaving only the purchaser-seller requirement as a limitation on standing.<sup>36</sup>

It was arguable that *Banker's Life* had abandoned the *Birnbaum* doctrine altogether. However, Bromberg recognized that even though the Court expressly approved *Brod's* expansion of section 10 (b) to include "all fraudulent schemes" having to do with the purchase or sale of securities, by declining to rule on the standing limitation, the validity of that limitation was left to later interpretation.<sup>37</sup>

30. *Commerce Reporting Co. v. Puretec, Inc.*, 290 F. Supp. 715, 718-19 (S.D.N.Y. 1968) (defendant's fraud prevented the consummation of an agreement to purchase securities). *But see* *Keers v. American Steel & Pump Corp.*, 234 F. Supp. 201, 203 (S.D.N.Y. 1964) (the abortive-seller distinction was rejected as a basis of conferring standing).

31. *Compare* *Iroquois Industries, Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970), *with* *Crane v. Westinghouse*, 419 F.2d 787 (2d Cir. 1969). *See also* *Mount Clemens Industries v. Bell*, 464 F.2d 339 (9th Cir. 1972). Plaintiff brought an action under rule 10b-5 claiming defendant prevented plaintiff's sale by a misrepresentation that the securities were worthless. In refusing to grant the plaintiff standing, the court denied that the *Birnbaum* doctrine had been eroded by later decisions, stating that the doctrine has been interpreted "flexibly, not technically and restrictively" to promote the congressional purpose in the rule's enactment. 464 F.2d at 341.

32. Lowenfels, *The Demise of the Birnbaum Doctrine: A New Era For Rule 10b-5*, 54 VA. L. REV. 268 (1968). For lower court cases rejecting the *Birnbaum* doctrine, see *Young v. Seaboard*, 360 F. Supp. 490 (C.D. Utah 1973); *Tully v. Mott Supermarkets, Inc.*, 337 F. Supp. 834 (D.N.J. 1972).

33. *See* *Boone & McGowan*, *supra* note 29, at 649.

34. 404 U.S. 6 (1971).

35. *Id.* at 13-14.

36. *See* A. BROMBERG, *supra* note 13, at § 4.7.

37. Bromberg breaks the *Birnbaum* decision down into three restrictions. The first is that section 10 (b) was directed "solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities." 193 F.2d at 464. Bromberg states this was rejected by *Brod*, which expanded the scope to include "all fraudulent schemes in connection with the purchase or sale of securities, whether . . . a garden type variety of fraud . . . or a unique form of deception." 375 F.2d at 397. The second restriction was that rule 10b-5 was not directed "at fraudulent mismanagement of corporate affairs." 193 F.2d at 464. A. BROMBERG, *supra* note 13, at § 4.7. The third restriction was that rule 10b-5 extended protection only to the defrauded purchaser or seller. 193 F.2d at 464. The Court in *Banker's Life* approved the *Brod* court's rejection of the first restriction. 404 U.S. at 11. It undermined the second, deeming irrelevant the fact that the fraud was perpetrated by an officer of the company. 404 U.S. at 10. It declined to consider the third. Bromberg stated: "After *Banker's Life* then, *Birnbaum* survives significantly *only* for the buyer-seller requirement which has

After *Banker's Life*, the Seventh Circuit in *Eason v. General Motors Acceptance Corp.*<sup>38</sup> rejected *Birnbaum* in favor of a more liberal standard emphasizing causation.<sup>39</sup> The court rejected previous arguments that *Birnbaum* should be retained to "forestall an unmanageable flood of federal litigation"<sup>40</sup> and "to preserve national consistency"<sup>41</sup> with respect to federal securities law. The court firmly stated that the *Birnbaum* doctrine "is not part of the law in this circuit."<sup>42</sup>

In *Blue Chip*<sup>43</sup> the Ninth Circuit based its decision to grant standing for the class of injured offerees on the existence of "objective evidence" of causation. The court noted that earlier decisions granting standing to non-purchasers and non-sellers found such evidence in the contractual relationship between parties.<sup>44</sup> The majority opinion stated that a consent decree served "the same function" as a contractual relationship.<sup>45</sup>

In reversing, the Supreme Court found the *Birnbaum* rule applicable. The Court based its decision on five principles. First, the Court argued that Congress' failure to reject *Birnbaum*, when coupled with past judicial decisions supporting it, evidenced congressional acquiescence in the doctrine.<sup>46</sup> Secondly, extrinsic evidence from the 1933 and 1934 Acts, although not conclusive, supported *Birnbaum*.<sup>47</sup> Third, policy considerations favor acceptance of the rule.<sup>48</sup> The Court believed that vexatious litigation would result if the class of plaintiffs who could sue under rule 10b-5 were expanded<sup>49</sup> and also feared that strike suits would result if standing were

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been much reduced by later decisions." A. BROMBERG, *supra* note 13, at § 4.7 (emphasis added). Regardless of whether Bromberg's analysis is accurate, the fact is that the validity of the purchaser-seller limitation was left open by the Court, subject to later interpretation.

38. 490 F.2d 654 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

39. The emphasis on the injured party's status as an investor indicates that the protection of the rule extends to persons who in their capacity as investors, suffer significant injury as the direct consequence of fraud in connection with a securities transaction, even though their participation . . . did not involve either the purchase or the sale of a security.

*Id.* at 659.

40. The court noted that the amount of 10b-5 litigation has already expanded and will continue to do so regardless of the adherence to *Birnbaum*. *Id.* at 660.

41. *Id.* at 661.

42. *Id.*

43. 492 F.2d 136 (9th Cir. 1973).

44. *Id.* at 141-42. The court's basis for this reasoning was that objective evidence of the plaintiff's intent to purchase "but for" the defendant's fraud can be siphoned from such contracts, thus establishing causation.

45. *Id.* at 142.

46. 95 S. Ct. at 1924. The Court noted that the SEC has twice asked Congress to change the wording of section 10(b) from "in connection with the purchase or sale of any security" to "in connection with the purchase or sale of, or any attempt to purchase or sell any security." Because Congress failed to adopt the change, acquiescence in *Birnbaum* may be inferred.

47. *Id.* at 1924-26. The Court pointed to section 17(a) of the 1933 Act, just as the *Birnbaum* court had done. See text accompanying note 19 *supra*.

48. *Id.* at 1926-32.

49. *Id.* at 1927-32. One of the arguments of the Court was that absent the



granted under rule 10b-5 on the basis of an offeree's word that he failed to buy stock (and thus lost out on a bargain purchase) due to a misrepresentation of the seller. Fourth, the Court was of the opinion that a consent decree did not serve the same function as a contract.<sup>50</sup> Those who had contractual rights to purchase securities have been recognized as "purchasers" or "sellers" because of the express provisions of the 1934 Act, and not because they were "similarly situated" to actual purchasers or sellers.<sup>51</sup> Fifth, the Court emphasized the fact that affirming the Ninth Circuit's decision would expose the doctrine to a case by case erosion which they believed would be an unsatisfactory means of establishing liability for "the conduct of business transactions."<sup>52</sup>

Justice Powell's concurring opinion gave further support to the *Birnbaum* doctrine by emphasizing that there is nothing in any provision of the 1934 Act or in its history to support the proposition that the term "sale" in section 10 (b) included "offers to sell."<sup>53</sup> Such an inference would make for highly speculative issues with respect to the testimony of plaintiffs who were mere offerees.<sup>54</sup>

Three members of the Court dissented, criticizing the "arbitrary principle of standing" laid down by the majority.<sup>55</sup> They were of the opinion that the test for standing should be based upon the existence of a "logical nexus between the alleged fraud and the sale or purchase of a security."<sup>56</sup>

The Court's decision signifies a halt to the liberalizing trend which has been underway since the *Birnbaum* decision in 1952. Unfortunately, it is not certain what effect this case will have in the future. Clearly there has been an affirmance of the purchaser-seller limitation on standing, but it is not clear when the limitation will be applicable. The Court did not expressly overrule the forced purchaser and seller distinctions expressed by the Second Circuit in *Vine* and *Brod*. Thus, there is reason to believe

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*Birnbaum* limitation, the suit would have settlement value which could frustrate or delay normal business activities. Abuse of the federal discovery rules would also be likely in addition to the many "bad" cases which would add to the already crowded dockets.

50. *Id.* at 1932. The Court distinguished a consent decree from a contract by stating that consent decrees are not enforceable by those who are not parties to them. Because the decree was between the United States and Blue Chip Stamps, plaintiff had no enforceable right under it.

51. *Id.* at 1932-33. Section 3(a)(13) of the 1934 Act, 15 U.S.C. § 78c(a)(13) (1970) states: "The terms 'buy' and 'purchase' each include *any contract* to buy, purchase, or otherwise acquire." (Emphasis added). Section 3(a)(14) of the 1934 Act, 15 U.S.C. § 78c(a)(14) (1970), states: "The terms 'sale' and 'sell' each include *any contract* to sell or otherwise dispose of." (Emphasis added). Congress left out the language of "offers" which originally appeared in the two above-quoted sections. The Court used this in support of its decision upholding the *Birnbaum* doctrine.

52. 95 S. Ct. at 1934.

53. *Id.* at 1935.

54. *Id.* at 1936.

55. *Id.* at 1937.

56. *Id.* at 1940, 1942.

that this circuit will continue to grant standing to those meeting the requirements of these cases, limiting the application of *Blue Chip*.<sup>57</sup>

*Blue Chip* can also be interpreted as the mere failure of the Court to apply a recognized exception to the *Birnbaum* doctrine to the facts before it. As previously noted, where a contract to purchase securities exists, *Birnbaum* has been held not to apply.<sup>58</sup> The *Blue Chip* Court refused to equate contracts to purchase with consent decrees, thus rendering the exception inapplicable.

The decision in *Blue Chip* does not prevent a plaintiff from bringing an action in state court for common law fraud. However, he will still have to meet certain standing requirements. In Missouri such a plaintiff would have to meet *nine* requirements in order to state a common law cause of action for fraud, one of those being a showing of injury.<sup>59</sup> It is questionable whether such injury could be found in *Blue Chip* because plaintiff did not act to his detriment, but merely failed to act for his own benefit.

Theoretically, it seems that the dissent's approach of considering such standing questions on a case by case basis, using the "logical nexus" test, is desirable. This would insure proper plaintiffs a chance to recover for injuries sustained due to fraudulent practices, irrespective of whether plaintiff actually bought or sold the security. However, in practice, those plaintiffs who suffer injuries but fail in their attempt for compensation due to the *Birnbaum* limitation will be small in number. There probably will be few deserving plaintiffs bringing their complaints to the courts who will not be purchasers or sellers, at least within the prevailing definition of the terms. The cost represented by those whose otherwise compensable injuries go unremedied<sup>60</sup> is far outweighed by the benefit inherent in the prevention of massive litigation by non-deserving plaintiffs.

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57. See *Walner v. Friedman*, CCH FED. L. REP. ¶ 95,318 (S.D.N.Y. 1975). This case, decided after the Supreme Court decision in *Blue Chip*, was a shareholder's derivative action under rule 10b-5 where neither plaintiff-shareholders nor their corporation were purchasers or sellers of securities. The court noted the affirmance of the *Birnbaum* doctrine in *Blue Chip*, but distinguished cases relied on by plaintiffs including *Vine* and *Brod*. This indicates the court's willingness to continue to apply *Vine* and *Brod* to limit the *Birnbaum* doctrine, should the circumstances so warrant.

58. See note 44 and accompanying text *supra*.

59. See *Toenjes v. L. J. McNeary Const. Co.*, 406 S.W.2d 101, 106 (St. L. Mo. App. 1966) (substantial injury and damage must be proven in order to recover for fraud in Missouri). See also *John T. Brown, Inc. v. Weber Implement & Auto Co.*, 260 S.W.2d 751 (Mo. 1966); *Dolan v. Rabenberg*, 360 Mo. 858, 231 S.W.2d 150 (1950).

60. Bromberg indicates that non-purchasers and non-sellers might still be able to gain something in a suit for injunctive relief:

Although a major justification for dropping the buyer-seller requirement in injunction suits is that they are preventive rather than compensatory, they may have significant monetary aspects. They may support pendent jurisdiction for state damage claims. . . . And establishing a violation in a derivative or class suit for injunction may entitle plaintiff