What Is a Misleading Statement or Omission Under Rule 10b-5?

Arnold S. Jacobs

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol42/iss2/2

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
WHAT IS A MISLEADING STATEMENT OR OMISSION UNDER RULE 10b-5?

ARNOLD S. JACOBS*

I. INTRODUCTION

SECTION 10(b) of the Securities Exchange Act permits the Securities and Exchange Commission to promulgate rules to prohibit “any manipulative or deceptive device or contrivance.” The SEC effectuated the intent of that section by adopting rule 10b-5. The Rule is the most powerful and most widely-used tool in the federal arsenal of securities remedies. It prohibits a wide variety of conduct in many areas, including those of broker-dealers’ activities.


The author gratefully acknowledges the invaluable substantive suggestions of Ed Kaufmann and Fredric J. Klink, members of the New York Bar, the editorial aid of Ellen K. Jacobs and Ann S. Kheel, and the stenographic help of Mary Ann Assicurato.


2. The text of rule 10b-5 [hereinafter cited as “the Rule” or “10b-5”] is as follows:

“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 (1973).

manipulation,\textsuperscript{4} mismanagement,\textsuperscript{5} exchange offers and tender offers, and tipping of inside information. But by far the majority of 10b-5 cases arises under a sixth category—misrepresentations and omissions.

To state a 10b-5 cause of action, a successful plaintiff must demonstrate, among other things, that a statement or omission is misleading.\textsuperscript{6} The question of when an assertion or omission is misleading is the topic of this article.

Of 10b-5's three clauses, the second is on its face the most germane. It declares that it is unlawful

\begin{quote}
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.\ldots\textsuperscript{7}
\end{quote}

Although clauses (a) and (c) may seem less relevant, they also play an important role in the determination of misrepresentations and omissions. Courts do not rely strictly on the wording of the three clauses to ascertain the Rule's outer limits. Nevertheless, the word "untrue" in clause (b) could be considered narrower than the phrase "false or misleading" found in some other 1934 Act provisions.\textsuperscript{8} The difference is more apparent than real however,\textsuperscript{9} and in any event clauses (a) and (c) are broad enough to remedy any shortcoming in clause (b) arising from the absence of the phrase "false or misleading." Therefore, cases arising under remedies granted by other securities acts are persuasive authority with regard to whether or not the plaintiff was misled.

The Rule prohibits misrepresentations, half-truths, omissions, and concealments of after-acquired information.\textsuperscript{10} Deception may be accomplished either by words or by nonverbal conduct.\textsuperscript{11}
A misrepresentation is defined as a statement which conveys a false impression to a reasonable investor.\textsuperscript{12}

A half-truth is a statement which accurately discloses some facts but misleads the listener or reader by concealing other data necessary for a true understanding. One example of a half-truth is a statement that the value of a company's inventory increased without disclosure that the increase arose from an arbitrary revaluation.\textsuperscript{13} Half-truths are, perforce, usually more difficult to detect than outright lies.\textsuperscript{14}

Clause (b) of the Rule prohibits both misrepresentations and half-truths, but it alone may not reach the third category, complete silence. However, clauses (a) and (c) have been interpreted to proscribe complete silence when there is a duty to disclose.\textsuperscript{15} When this duty does exist, a plaintiff would be misled by defendant's failure to reveal facts of which plaintiff was unaware. The principal applications of the silence

\textsuperscript{12} See generally notes 22-30 infra and accompanying text regarding the definition of "misleading." Numerous cases have held that misrepresentations are actionable. See cases cited in Part II infra.


prohibition are to transactions in the over-the-counter market or on a national securities exchange, but, theoretically, it could also pertain when a trade is made in a face-to-face meeting.

The final type of misleading activity is the concealing of after-acquired information which indicates that a statement previously made was misleading. Certified independent public accountants have a duty to disclose after-acquired information, and issuers also may have this obligation.17

II. GENERAL RULES

The Rule prohibits a wide variety of misleading written and oral statements.18 The same standard for determining whether a statement is misleading is not applied to all types of statements; for example, courts tolerate a lower standard of accuracy for (and hence do not condemn as quickly) misstatements or half-truths in shorter, less formal statements prepared under the exigencies of time pressure.19 Thus, proxy statements and registration statements are usually viewed with a more


17. See Note, supra note 16, at 579-80; note 230 infra and accompanying text.

18. In discussing the standards for misleading statements, no distinction is drawn between oral and written representations since the same rules apply. Oral statements can be classified as either formal or informal, depending upon the circumstances, although they would usually be informal.

The majority of the text is directed to misrepresentations and half-truths, but the same principles apply to silence and concealment of after-acquired information. In addition, the concepts of whether a statement is misleading and of when a fact is material are sometimes confused but are nevertheless distinct questions. Some of the authorities mentioned here in the discussion of misleading statements also consider the concept of materiality at the same time.

critical eye than either press releases or letters to stockholders mailed
during a proxy fight or tender offer. Aside from practical considerations,
this flexible approach is based soundly on a desire not to impair the flow
of voluntarily-released corporate information by imposing too strict a
standard.\textsuperscript{20}

With this caveat in mind, we can explore a number of general rules
courts have used to judge whether or not a statement is misleading.
Later, we shall also discuss some standards for special applications.\textsuperscript{21}

In general, a statement can be misleading for either of two reasons:
the items disclosed do not describe the facts accurately, or insufficient
data are revealed.\textsuperscript{22} The Tenth Circuit summarized these two points
nicely:

The misleading, misrepresented or untruthful character of the release may appear
from the nature of the statement considered alone, or, when the facts are fully dis-
closed, from the half truths, omissions or absence of full candor concealed therein.\textsuperscript{23}

Regarding the first reason, the Second Circuit in 1968 equated the
questions of whether a press release was “misleading” with “whether it
conveyed to the public a false impression of the drilling situation at the
time of its issuance.”\textsuperscript{24} The court elaborated on the point when it re-
manded the case to the district court “for a determination of the character
of the release in the light of the facts existing at the time of the release,
by applying the standard of whether the reasonable investor, in the
exercise of due care, would have been misled by it.”\textsuperscript{25} Therefore, a

\textsuperscript{20} SEC v. Texas Gulf Sulphur Co., 401 F.2d at 882 (dissenting opinion); see Lester
v. Preco Indus., Inc., 282 F. Supp. 459, 464 (S.D.N.Y. 1965). This consideration, though,
relates only to corporate publicity, since registration statements, proxy statements, reports
filed with the SEC, and the like are mandatory. Therefore, any loosening of the standards
will relate to voluntary-type publicity.

\textsuperscript{21} See Part III infra.

\textsuperscript{22} The common law recognizes other types of misleading statements. According to
Restatement of Torts § 526 (1938), a misrepresentation is fraudulent if the maker:

“(a) knows or believes the matter to be otherwise than as represented, or
(b) knows that he has not the confidence in its existence or non-existence asserted by
his statement of knowledge or belief, or
(c) knows that he has not the basis for his knowledge or belief professed by his assertion.”

The concepts embodied in all three clauses should be equally applicable to the Rule.

\textsuperscript{23} Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90, 97 (10th Cir.), cert. denied, 404
U.S. 1004 (1971) and 405 U.S. 918 (1972) (emphasis added); accord, Gilbert v. Nixon,
429 F.2d 348 (10th Cir. 1970):

“The misrepresentation or omission must be misleading. This may appear from its nature
considered alone, or because it is not explained in a way to obviate its otherwise misleading
character.” Id. at 356.

\textsuperscript{24} SEC v. Texas Gulf Sulphur Co., 401 F.2d at 862.

\textsuperscript{25} Id. at 865. On the prior page, the court had observed that the “appropriate primary
statement might be misleading under the first reason because it was not understandable at all, it was unclear and hence was interpreted incorrectly, it contained a false statement, or it concealed data needed to make itself accurate.

Whether a statement is misleading for the second reason—failure to disclose sufficient data—depends on the context in which the statement is made. When securities are bought, sold, or held on the basis of the statement, sufficient facts must be disclosed so that an informed investment decision can be made. Similarly, a proxy statement sent to voting stockholders must make "full and fair disclosure of those facts that a stockholder might reasonably need in order to make an intelligent decision with respect to the proposal." The test in a tender offer or inquiry [should be] into the meaning of the statement to the reasonable investor and its relationship to truth.

Note that the court in Kaplan v. Vornado, Inc., 341 F. Supp. 212 (N.D. Ill. 1971) seemed to confuse two issues. The court properly observed that "[a] reasonable man, or, as it has been called, a reasonable investor standard is to be used in determining whether the contested representation is misleading or deceptive." Id. at 215. The judge then elaborated on the decision in City Natl Bank v. Vanderboom, 422 F.2d 221, 230-31 (8th Cir.), cert. denied, 399 U.S. 905 (1970), which is really a test for determining under what conditions the "in connection with" requirement of the Rule is satisfied by misrepresentations and omissions. The Eighth Circuit's intent in the Vanderboom case is evidenced clearly by its discussion in 422 F.2d at 229-30.


In Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544 (E.D.N.Y. 1971), the following test was espoused with regard to registration statements: "[T]he objectives of full disclosure can be fully achieved only by complete revelation of facts which would be material to the sophisticated investor or the securities professional not just the average common shareholder. But, at the same time, the prospectus must not slight the less experienced. They are entitled to have within the four comers of the document an intelligible description of the transaction." Id. at 566.

27. A proxy statement could also be the basis for a trading decision, in which case the test in the text accompanying note 26 supra would apply.

exchange offer is whether the security holder receives sufficient facts to make a reasoned decision whether or not to tender or exchange his certificates. 29 Finally, stockholders in a proxy contest must be well enough informed to be able to decide to whom to grant their proxy. 30

These general tests apply when the recipient of the statement is, depending upon the circumstances, a reasonable investor, reasonable voting stockholder, or reasonable security holder in a tender or exchange offer. 31 This is, therefore, a reasonable man standard, 32 and includes speculators and chartists. 33 But the Second Circuit has indicated that a statement is misleading only if it appears so to a reasonable investor who exercises due care. 34 This aspect should be distinguished from the reasonable or justifiable reliance which some courts have required. 35
As a corollary of this reasonable man standard, investors and stockholders can be presumed to have a general understanding of the business world when determining whether a statement is misleading. Courts must read this qualification neither too broadly, which would defeat otherwise valid claims, nor too narrowly, which would lead companies to issue statements containing much obvious, commonly-known information. This qualification is also clearly applicable to unspoken assumptions. For example, an announcement of a large new contract is not misleading merely because it omits a boilerplate sentence to the effect that "there can be no assurance that the contract will be profitable." Nor would a summary of the terms of a nonconvertible security be misleading if it failed to mention lack of convertibility, since a reasonable investor would properly assume that the security carried no conversion privilege. Similarly, disclosure of a prospective purchaser's rights is permissible without stating the rights he does not have. On the other hand, a statement is misleading if a reasonable investor would assume from the release that the underlying and undisclosed facts were typical, while in reality they were not. More difficult is the question of whether a misrepresentation, rather than an omission, can be so outlandish to a reasonable investor as to preclude the statement from being misleading. While there is no controlling authority, a strict application of the test pertains to the question of whether a reasonable man would believe the statement. For example, an assertion that the company's president had learned to fly by flapping his hands is misleading because it conveys a false impression, but it would not be believed because it is so outrageous.


39. In such a situation, disclosure must be made if the issuer is, or should be, aware of the facts.
for determining when a statement is misleading would prevent recovery. However, it does not follow that a naive plaintiff should never be able to sue successfully if the fact misrepresented is material. And a particular plaintiff may be prohibited from invoking the Rule if he knows, or perhaps if he should know, of the statement’s misleading nature. In short, a statement is not misleading if a reasonable investor knows, or perhaps in the exercise of due diligence should know, the truth concerning an omitted or misstated fact. Courts should make an exception to this rule and consider a statement misleading when the speaker knows the recipient will misconstrue it, although a reasonable investor would not.

A number of other principles supplement these tests for ascertaining when enough data are disclosed. First, the statement must always be materially misleading. This requirement does not arise from the Rule’s wording. Rather, courts have added it to preclude recovery for a minor error. For example, a corporation might issue a press release reporting earnings of $5.27 per share for the year when it knew the true figure was $5.26 per share. A person purchasing on that basis has relied on a misstatement (he received the wrong impression) of a material fact, but he should not be permitted to recover damages. Perhaps this is equivalent to saying the statement caused him no injury. Second, a series of minor imperfections can be cumulated to render a statement misleading. Judge Wright treated this issue under the guise of materiality, but his discussion better relates to the question of whether a statement is misleading:

It is proper to find a proxy statement . . . violated [section 14(a) of the 1934

40. See notes 24-25 supra and accompanying text.
41. In fact, only the unsophisticated investor could perhaps show reliance.
42. In considering the issue of materiality, one must ask if the misstated or omitted fact is material assuming the statement as made would mislead a reasonable investor. 3A H. Bloomenthal, Securities and Federal Corporate Law § 9.21, at 9-73 (1972).
43. Cf. Restatement of Torts § 538(b) (1938) (reaching same result in determination of materiality).
45. Earnings are almost always material, since they almost always affect the value of the corporation’s stock, which is the definition of materiality used in, e.g., List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir.), cert. denied, 382 U.S. 811 (1965); Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963).
Act, 15 U.S.C. § 78n(a) (1970) if one misstatement or omission influences another and to find the aggregate "material." After a further development of the facts, it may become apparent that although some or all of the alleged misstatements and omissions are only slightly inaccurate or misleading, the combination of these misstatements will amount to inadequate disclosure . . . .

This Court is of the view that [section 14(a) does not allow] a proxy [statement] to omit a factor or two here, disperse others through the proxy statement, make a slightly misleading statement there, and rest on the assumption that the drafter's task has been adequately performed if he can avoid blatant fraud and still keep the stockholder from discovering which shell the pea is under.46

Third, a difference of opinion has developed as to whether "puffing" or "sales talk" is permissible.47 The better view is that such statements should be considered misleading, even though the reliance requirement sometimes may render them immune from a successful damage action.


The aggregating of facts within a single document to determine if the document is misleading is different from the question whether a series of accurate statements closely related in time and dealing with the same subject can be cumulated to make the series misleading. Cf. AMEX Company Manual § 403(5), at 110 (1968) (when series of public announcements can be "unwarranted promotional activity"). One example would be announcements pertaining to a merger issued when negotiations commenced, when an agreement in principle was reached, when each of the boards approved the transaction, when stockholders of each constituent corporation voted, and when the merger was consummated. The theoretical basis for considering this a 10b-5 breach is not readily apparent. Perhaps an argument could be made that while each statement alone is accurate, the overall impression from so many statements is misleading.


Cases refusing to recognize puffing are cited in 6 L. Loss, Securities Regulation 3541-43 (Supp. 1969).
Fourth, the accuracy of a statement is measured at the time it is made.\textsuperscript{48} Accordingly, a defendant cannot defend successfully on the ground that a subsequent fortuitous event rendered a misleading statement true if plaintiff was committed to act prior to such event. But a plaintiff should not be permitted monetary recovery if he acted after, and knew of, the subsequent event, even though the defendant breached the Rule. Conversely, subsequent unforeseeable events cannot render misleading a statement which was true when made.\textsuperscript{49}

A number of circumstances have been cited as extrinsic evidence that a statement is misleading.\textsuperscript{50} Failure of one side in a proxy contest or contested tender or exchange offer to object to a statement by the other side has been held to be some evidence that the statement is not misleading.\textsuperscript{51} On the other hand, absence of insider trading should not demonstrate that a statement is true.\textsuperscript{52} Finally, market price movements have been inspected to ascertain whether a release was bullish or bearish.\textsuperscript{53} An increase in the market price of a corporation's stock after a statement is disseminated, absent an intervening event or market trend, is evidence that reasonable investors viewed the statement as favorable. Similarly, a decline in the price tends to show the announcement was viewed pessimistically. However, this standard must be applied judiciously when rumors are circulating or if the market has already discounted the occurrence of the event. In the latter situation, the market movement after a release probably would reflect a comparison between a reasonable investor's view of the release on the one hand, and the rumor or the anticipated scope of the event in the eyes of the investment community on the other.


\textsuperscript{49} For instance, an accurate announcement of the possibility of an ore strike is not rendered misleading by a subsequent earthquake. Texas Gulf Sulphur Comment, supra note 47, at 276-77. The result might be otherwise if the events were foreseeable to a reasonable issuer. Nevertheless, there might be a duty to correct the earlier release. On the other hand, it would be misleading to state a fact which was true at the time made if the speaker concealed that the situation would change. Compare Abrahams v. Aptman, [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. § 93,818, at 93,550 (S.D.N.Y., Mar. 9, 1973).

\textsuperscript{50} As a matter of proof, where a contract memorializes the transaction in question, that contract can be used as evidence of the understanding at the time of the signing. Bowers v. Columbia Gen. Corp., 336 F. Supp. 609, 626 (D. Del. 1971). The contract does not foreclose attack by the plaintiff, however. Id.

\textsuperscript{51} Cf. General Time Corp. v. Talley Indus., Inc., 403 F.2d 159, 162 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969) (construing 1934 Act § 14(a), 15 U.S.C. § 78n(a) (1970)) (it is evidence of lack of materiality if the other side does not object during proxy contest).

\textsuperscript{52} Id. at 863; id. at 866 (concurring opinion); id. at 880 (dissenting opinion).
other. It follows that a market decline after a release could mean either that the release was adjudged unfavorable, or that the release was believed favorable but not as bullish as the result the market had assumed would occur.\(^4\)

Whether an item is misleading is a fact issue.\(^5\) Ambiguities should be construed in favor of investors, tendering or exchanging security holders, and voting stockholders, since the securities laws are intended to protect them.\(^6\)

Merely because a statement is misleading does not mean the Rule has been violated.\(^7\) And even if an infraction has occurred, the plaintiff does not ipso facto have a cause of action for damages.\(^8\)

Judicial views have been expressed regarding the type of information which must be disclosed in a document. Courts have opined that only "facts,"\(^9\) and not conclusions or predictions,\(^10\) must be revealed. Indeed,

54. This type of comparison was made in the dissenting opinion in Texas Gulf Sulphur but not in the opinion of the court. Compare id. at 863 (majority opinion) with id. at 880 (dissenting opinion). Significant market reaction to a statement correcting a prior release should be evidence that the prior release was misleading.

See also Kohn v. American Metal Climax, Inc., 458 F.2d at 292-93 (concurring and dissenting opinion) (permissible to disclose "actual" state of affairs, although not technically true; however, case deals with atypical fact pattern).

55. See Kohn v. American Metal Climax, Inc., 458 F.2d at 293 (concurring and dissenting opinion); note 25 supra and accompanying text.


57. For instance, the information contained in the statement may be false—causing the statement to be misleading—but no violation would ensue if the facts were gathered by the issuer with due diligence.

58. One instance would be where a press release was misleadingly pessimistic and plaintiff bought securities as a result. Cf. Kohn v. American Metal Climax, Inc., 458 F.2d at 293 (concurring and dissenting opinion) (full disclosure would have given even more reason for the shareholders to vote as they did); List v. Fashion Park, Inc., 227 F. Supp. 906, 912 (S.D.N.Y. 1964), aff'd, 340 F.2d 457 (2d Cir.), cert. denied, 382 U.S. 811 (1965) (concealment of pessimistic fact when plaintiff sells). This is a question of reliance or causation.

59. See authorities cited in note 72 infra.

This is a different concept from the construction of the word "fact" in the context of "material fact." Thus, for instance, the SEC's position for many years has been that projections and forecasts cannot be placed in a prospectus, even if such information were material facts. See Daum & Phillips, The Implications of Cady, Roberts, 17 Bus. Law. 939, 954 (1962); Part III-G infra (regarding projections and forecasts). But projections are
disclosure of vague generalities rather than facts can be objectionable.\(^1\)

Naturally, a statement is not inherently misleading if facts as well as conclusions or future events are presented fairly, but liability may still flow from an erroneous conclusion or prediction.\(^2\) Thus a corporation need not reveal conclusory material such as: explanations made to establish anticipatory defenses to stockholders' claims;\(^3\) the possible social effects of business practices;\(^4\) arguments against an adequately described course of action or conflicting interpretations of the facts;\(^5\) alternative courses of action;\(^6\) or arguments against a proposal submitted to stockholders.\(^7\) Nor is there any need to prophesy future effects of a transaction where they are "remote, uncertain or possible consequences [and] beyond [the defendant's] control."\(^8\) Yet disclosure should be required of consequences which are relatively sure to flow from the transaction but may not be obvious to the reasonable investor.

\(^1\) SEC v. Texas Gulf Sulphur Co., 401 F.2d at 864 ("conclusory assertions of success" unnecessary); Green v. Jonhop, Inc., 358 F. Supp. at 418 (do not have to disclose accounting change if do not know if it will affect earnings); Prettner v. Aston, 339 F. Supp. 273, 290 (D. Del. 1972) (allow stockholders to evaluate facts; no need to prophesy). See also Allen v. Penn Cent. Co., 350 F. Supp. at 703-04 (proxy rules; speculations should not be placed in proxy statement since like a prediction which is prohibited by note to 1934 Act Rule 14a-9, 17 C.F.R. § 240.14a-9 (1973); wild guesses also should not be included). Explicit disclosures are preferred since they do not encourage a "rumor mill." SEC v. Texas Gulf Sulphur Co., 401 F.2d at 864 (quoting the lower court opinion, 258 F. Supp. 262, 296 (S.D.N.Y. 1966)). See also Nanfato v. Tekseed Hybrid Co., 341 F. Supp. 240 (D. Neb. 1972), aff'd, 473 F.2d 537 (8th Cir. 1973) (management does not have to interpret information or "provide an expert opinion as to all the possible ramifications." Id. at 243).

\(^2\) SEC v. Texas Gulf Sulphur Co., 401 F.2d at 863-64 (urgency no excuse for vagueness); see Texas Gulf Sulphur Comment, supra note 47, at 278 (do not give inferences and conclusions until "they have been reasonably substantiated").

\(^3\) See, e.g., Part III-G infra.


None of this permits announcement of bare facts if key issues are not clearly defined, nor does it justify beclouding a document. The drawback of disclosing facts but not conclusions or future effects is that the unsophisticated stockholder may be unable to evaluate the facts as well as sophisticated investors or insiders. Everyone has a relatively equal chance when, for example, news of a dividend cut is published, but the situation is quite different when a company announces an ore strike by summarizing an assay report. The most that can be said for mere disclosure of facts is that, while it places the average investor who needs the greatest protection at a disadvantage, it does satisfy the Rule's policy that investors be given equal access to information.

A related problem is, what facts must be disclosed? First, disclosure is required only of important facts. Placing all facts, however trivial, in a document would confuse the reader rather than aid him. Furthermore, the Rule is breached only by a misleading statement of a "material" fact. It follows that only the essence of a point need be disclosed, not the minute details. For example, it is sufficient if a buyer of a security is aware that the issuer has gone bankrupt because of unwise and now worthless investments; he need not know what the investments were or that the management was warned about the speculativeness of its holdings. Second, the important facts which must be disclosed are those which are known, or in exercise of due diligence should be known, by the maker of the statement. Thus, a release normally must contain

71. Texas Gulf Sulphur Comment, supra note 47, at 278; 35 Brooklyn L. Rev. 326, 332 (1969). But equal access is of course only one of many policies underlying the Rule.
up-to-date information. But this may be impossible when a fast-moving situation develops at a distant point. Under such circumstances, a document may be issued containing the most recently available facts if the inherent staleness of the data is made clear. This is part of the problem of timing press releases. A company runs risks if it discloses too soon or too late. Should hindsight indicate that a premature statement was misleading, the issuer is likely to be sued even if it distributes a clarifying release. On the other hand, insiders might trade or tip, and thus violate the Rule, while the release of important data is being delayed. And third, ordinarily the impact on the company is all that must be disclosed; but in a transaction with an insider, the benefits accruing to the insider also should be revealed.

Courts have split on whether a subjective or an objective standard should be used to determine which facts to include in a statement. Some opinions condone the use of reasonable business judgment or permit reliance on expert opinions. The better-reasoned conclusion, however, is to reject these defenses because investors and stockholders are entitled to full disclosure rather than to what the issuer believes is proper. It follows that some courts would not compel disclosures which naturally less broad in general than that of his employer. See Bahlman, Rule 10b-5: The Case for its Full Acceptance as Federal Corporation Law, 37 U. Cin. L. Rev. 727, 763 (1968).

75. SEC. v. Texas Gulf Sulphur Co., 401 F.2d at 863-64.

Giving a financial statement to a person when the facts have changed materially since the date of the statement would usually be a half-truth; however this is not always true. See Lane v. Midwest Bancshares Corp., 337 F. Supp. 1200, 1210 (E.D. Ark. 1972).

76. SEC. v. Texas Gulf Sulphur Co., 401 F.2d at 863-64; see Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90, 98 (10th Cir.), cert. denied, 404 U.S. 1004 (1971) and 405 U.S. 918 (1972).

77. See note 94 infra; cf. note 252 infra and accompanying text.

78. See SEC v. Texas Gulf Sulphur Co., 401 F.2d at 850 n.12.


would injure a corporation's business,\textsuperscript{82} whereas others correctly require the baring of all significant facts.\textsuperscript{83} Publicizing data which could injure the issuer's competitive position is one manifestation of this last point. Another example is a premature announcement in a proxy statement or registration statement of a contemplated closing of a major plant, which could lead to a wildcat strike. Still another example is a company's desire not to disclose in its balance sheet its holdings of stock of another issuer, because the company intends to acquire more shares without driving up the price.\textsuperscript{84} Permitting less than candid announcements because they were in accord with business judgment would open the floodgates, for a business reason for concealing a fact can almost always be manufactured.

Thoughts can be expressed in any of an infinite number of ways so long as the rules discussed above are met.\textsuperscript{85} In other words, courts will not act as a copy editor for statements which meet disclosure standards.\textsuperscript{86} The form of presentation is irrelevant if no other issue is resolved against the maker.\textsuperscript{87}

A related topic is that of a corporation's liability when erroneous statements about it are made by newspapers, magazines, financial reporting services (like the stock-market's broad tape), or other types of publications. Two fact patterns are possible. First, one court decided an issuer

\textsuperscript{82} Cf. SEC v. Texas Gulf Sulphur Co., 401 F.2d at 850 n.12.

\textsuperscript{83} See cases cited in notes 80-81 supra. But the data which must be disclosed need not include trade secrets or formulae; it is sufficient to announce the discovery. Schoenbaum v. Firstbrook, 268 F. Supp. 385, 395 (S.D.N.Y. 1967), aff'd, 405 F.2d 200 (2d Cir.), rev'd on other grounds on rehearing en banc, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969); Comment, The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b-5, 33 U. Chi. L. Rev. 359, 369 n.43 (1966).


\textsuperscript{87} But see Part III-A infra (placement of information in long documents).
was liable when the news media erroneously summarized the company's release. In that case, the press release could not easily be summarized. A different result should obtain where the press release is clear but the news media are negligent or make a clerical mistake. Second, cases have failed to hold a corporation legally responsible for inaccurate items appearing in the press when the items are not supplied by or attributed to it. Any other result would place a burden on companies to read numerous publications, and would force them to correct any misleading impressions at a time when they may desire not to make disclosure for business reasons and may be under no other legal duty to make an announcement. To take one extreme example, were the duty to correct extended to projections made in brokers' market letters, companies would probably be forced to issue their own projections continuously. On the other hand, this reasoning has been justly criticized. The best approach would be to require correction by the corporation if it learns of the statement and has no valid corporate reason for withholding the facts.

The reverse of these two situations occurs when a speaker relies on an outside source for some of his facts. Even if he cites his source, his statement would be misleading if he goes beyond the information given him by the source or if he knows (or in the exercise of due diligence should suspect) that the source's data were untrue.

88. SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 86 (S.D.N.Y. 1970), modified, 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); see Dayan, Correcting Errors in the Press, 5 Rev. of Secs. Reg. 941, 944 (1972). The press release here was "for immediate release," but this should not make a difference in result; see notes 75-78 supra and accompanying text. The court in Texas Gulf Sulphur made an impractical suggestion that a company should send press releases to stockholders if it wanted to insure that the release would not be distorted by the media. 312 F. Supp. at 86. A better rationale of the decision, which itself seems correct, is that the risk is on the issuer whenever the release can easily be misconstrued. Cf. Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 951 (2d Cir. 1969) (1934 Act § 14(e), 15 U.S.C. § 78n(e) (1970) (news-paper story based on interview initiated by reporter).

89. A clerical mistake might consist of reporting earnings at $190,000 rather than $910,000 because a typist at the news media transposed the numbers.


91. Dayan, supra note 88, at 943. In addition, stock exchange rules may require a company to correct rumors and the like not attributable to it. E.g., NYSE Company Manual § A2, at A-18 (1968); AMEX Company Manual § 403(3) (1968).

92. Comment, Negligent Misrepresentations Under Rule 10b-5, 32 U. Chi. L. Rev. 824, 843 (1965). A fortiori, failure to reveal a source would lead to liability, at least where a reasonable investor would not realize the speaker had received the information from an outsider.

The final issue is the maximum length of time—as measured between the publication of a misleading statement and plaintiff’s trade, vote, or tender based thereon—which will support a 10b-5 claim. Put another way, how long does a false statement survive after its issuance? It is clear that a statement which is still “alive” could not be the basis for a damage action after a correction is disseminated publicly and assimilated by the market. The length of time a misleading statement survives in the absence of a correcting release is not so clear. One possible view is that the erroneous statement continues indefinitely. Another is to limit the period, based on such factors as: the seriousness of the misrepresentation or omission, the type of data to which the statement relates, the importance of the statement, the degree of defendants’ negligence or scienter, the breadth of the statement’s distribution, and the frequency with which it continues to be quoted in the investment community. Whatever the appropriate period, it would start anew with each republication.

III. SPECIAL APPLICATIONS

In addition to the general rules regarding the misleading nature of a statement (discussed in the preceding section), several guidelines for special applications have been developed in the following specific areas: long documents (such as proxy statements and registration statements); financial statements; intention and promises; motive; concealment, disclosure, and fairness; implied statements; and opinions and forecasts. We will discuss each of these areas in turn.

A. Proxy Statements, Registration Statements, and Other Long Documents

In dealing with relatively long or complex documents, most commonly registration statements and merger proxy statements, courts in the past have applied two doctrines—the “buried fact” doctrine and

94. The time for the correction to be assimilated should be the same as would be required for an ordinary press release containing the same information to be absorbed, assuming the corrections were disseminated adequately. See Mitchell v. Texas Gulf Sulphur Co., 446 F.2d at 103, 105.
96. A wide variety of other statements may fall into this category. Kaplan v. Vornado, Inc., 341 F. Supp. 212, 216 (N.D. Ill. 1971) (face of debenture) is one other example of the applicability of the two doctrines mentioned in the text. Theoretically, they should apply to long and complex oral assertions too.
the "similar emphasis" doctrine. These doctrines are similar in that the underlying issue in both is whether or not a reasonable investor would have or should have discovered the real facts—for one doctrine, the question focuses on the "buried" facts and, for the other, on the data that were not given equal prominence.

In Gould v. American Hawaiian Steamship Co., the disclosure in a merger proxy statement of conflicts of interest of certain directors regarding the proposed merger was attacked by the court under both doctrines. First, a reading of various parts of the proxy statement was necessary to garner all the facts concerning the conflicts. Although all conflicts were revealed, they were not collected in one section. The court held that this was a violation of the "buried facts" doctrine:

The various facts listed previously which the defendants contend adequately reveal any conflict are interspersed throughout the proxy materials and could be gleaned only through a close and prolonged perusal. Under the buried facts doctrine, such disclosures are insufficient.

Other cases have condemned different manifestations of the "buried facts" doctrine: disclosing important data only in appendices to a lengthy document, even though a cross reference to the appendices appears in the body of the material; and placing facts where an investor is not apt to see them as, for example, at the end of a section or under an inappropriate heading. Accordingly, the "buried facts" doctrine prohibits both fragmentation of information and placement of important data where they are not likely to be found. All of this does not mean that each fact must be placed in bold face type on the cover page. But the doctrine does mandate that "[t]he more material the facts, the more they should be brought to the attention of the public."

---

98. 331 F. Supp. 981 (D. Del. 1971), modified, 351 F. Supp. 853 (D. Del. 1972). This was a case arising under the proxy rules, but the same doctrines are equally applicable to 10b-5 cases.


100. Cf. Kohn v. American Metal Climax, Inc., 458 F.2d at 267-68 (discussing both buried facts and similar emphasis doctrines). Compare id. at 297-300 (concurring and dissenting opinion).

101. Thus, a reference in the text to an appendix where a fact is disclosed would be insufficient if the fact were important and the cross reference were a bare one—such as "See Appendix B." By contrast, in Kohn, a textual cross reference which alerted the reader to the essence of the topic was sufficient for purposes of the similar emphasis doctrine. Id. at 267-68.


103. Kohn v. American Metal Climax, Inc., 322 F. Supp. at 1362. One indication of im-
Second, the court in *Gould* also attacked the proxy statement under the "similar emphasis" doctrine.\textsuperscript{104} This doctrine requires that a fact necessary to make a statement not misleading must be revealed with the same amount of prominence as that given to the statement itself.\textsuperscript{102} The most common application of this doctrine involves a board of directors' recommendation in favor of a proposition; in such a case, equal emphasis has to be given to any conflicts of interest,\textsuperscript{106} to whether any member of the Board dissented from the recommendation, and to suits for mismanagement filed against the directors.\textsuperscript{107} However, the "similar emphasis" doctrine does not prevent reasonable latitude in the form of presentation,\textsuperscript{108} nor does it preclude using bold face type for only some facts.\textsuperscript{109}

A statement can violate both the "buried facts" doctrine and the "similar emphasis" doctrine. The latter governs fewer situations, but is more demanding when applicable.\textsuperscript{110}

The SEC reviews all registration statements and most proxy statements. Yet courts generally have not accorded this review any weight when finding breaches of these two doctrines, although by their nature these breaches theoretically should have been detected by the Commission's staff.\textsuperscript{111}

In addition to these two doctrines, other rules govern disclosures in proxy statements and registration statements. With regard to the former, the proxy rules do not specifically require information to be updated between the time the material is mailed to stockholders and the meeting. Nevertheless, updated data should be supplied if the facts change ma-

\textsuperscript{104} 331 F. Supp. at 995. It also has been called the equal prominence rule. Kohn v. American Metal Climax, Inc., 458 F.2d at 267.


\textsuperscript{108} Kohn v. American Metal Climax, Inc., 458 F.2d at 267; id. at 300 (concurring and dissenting opinion).

\textsuperscript{109} Id. at 267; Kaplan v. Vornado, Inc., 341 F. Supp. at 216.

\textsuperscript{110} That is, although a fact may not be buried, it may nevertheless not be given similar prominence compared to the statement it is intended to offset.

\textsuperscript{111} No case other than Abramson v. Nytronics, Inc., 312 F. Supp. 519, 526 (S.D.N.Y. 1970), mentions this point.
In addition, the rules discussed below should apply *mutatis mutandis* to a merger proxy statement, which is considered by practitioners as the equivalent of a registration statement for both constituent corporations.\(^\text{113}\)

Registration statements pose other problems. The SEC has published a number of forms which instruct issuers to place certain information in a registration statement. A rebuttable presumption that a registration statement is misleading should arise from failure to comply with those instructions which are important under the circumstances; yet technical compliance with the form does not insure full disclosure.\(^\text{114}\) The commission also has promulgated guidelines for disclosures in registration statements;\(^\text{115}\) but non-observance of these guidelines does not ipso facto render the registration statement misleading, at least when the only issue is the location of data in the prospectus.\(^\text{116}\) It follows that some facts need not appear on the cover page so long as they are disclosed adequately elsewhere in the prospectus.\(^\text{117}\)

The period during which a registration statement must be accurate is another matter. Section eleven of the 1933 Act mandates that a registration statement be correct only on its effective date.\(^\text{118}\) The Rule imposes the same requirement; if the registration statement is misleading on the effective date, the Rule provides redress to persons purchasing securities.

112. Gould v. American Hawaiian S.S. Co., 351 F. Supp. at 868. In General Time Corp. v. Talley Indus., Inc., the second circuit assumed that 1934 Act Rule 14a-9, 17 C.F.R. § 240.14a-9 (1973), would require updating “although the words of [14a-9] are not exactly apt to that end.” 403 F.2d at 163. But it then decided no updating was necessary under the facts because the closer to the meeting date, the greater must be the materiality to warrant correction. Accord, Allen v. Penn Cent. Co., 350 F. Supp. at 705. Rule 14a-9 does, however, clearly require updating of data if further oral or written solicitation is undertaken. But see Prettner v. Aston, 339 F. Supp. at 284 (must judge in light of circumstances on date mailed).


117. Id. at 1288.

in the offering and also to those who trade in the after-market.\textsuperscript{110} The Rule also requires accuracy on each day during which securities are being distributed under the registration statement\textsuperscript{120} and during a ninety-day period after the effective date if the 1933 Act\textsuperscript{121} necessitates that dealers deliver a prospectus then.\textsuperscript{122} Updating corrections may be made by either affixing a sticker to the prospectus or amending the registration statement.\textsuperscript{123}

Two miscellaneous topics remain. First, a registration statement covering an exchange offer must disclose information concerning the target company since such facts are important to the investment decision of the target-company security holders.\textsuperscript{124} Second, terms of securities and contracts are frequently summarized in registration statements. Prefacing the summary with a statement somewhat as follows will afford some protection to a charge of inadequate disclosure:\textsuperscript{125} "The terms of the Debentures are governed by an Indenture, a copy of which is filed with the Securities and Exchange Commission as an exhibit to the Registration Statement of which this Prospectus is a part, and the following summary of those terms does not purport to be complete and is qualified in its entirety by express reference to the Indenture."

\textbf{B. Financial Statements}

Financial statements often are the crux of a securities document. They must conform to the general tests for determining if a document is misleading,\textsuperscript{126} but they also pose special problems of their own.


\textsuperscript{120} For shelf registration statements—where selling security holders dribble their securities into the market over an extended period—as well as for registration statements pertaining to warrants or a typical convertible Eurodollar bond, this imposes on the issuer an obligation to keep the prospectus up-to-date (or "evergreen") for an extended period.


\textsuperscript{123} See 1 L. Loss, Securities Regulation 293 (2d ed. 1961).


\textsuperscript{126} See Part II supra.
Accountants have formulated generally accepted accounting principles to which financial statements should conform. A number of cases have found disclosure adequate under the Rule if this standard is met.\textsuperscript{127} Yet financial statements are misleading even if prepared in accordance with those principles if the statements do not disclose adequately the true state of affairs. In that event, textual discussion supplementing the statements is necessary. In other words, with respect to disclosure by the company, any conflict between full disclosure and generally accepted accounting principles is resolved in favor of the former.\textsuperscript{128}

Applications of this rule are numerous. For instance, it is misleading to conceal that an earnings increase was due to a change in accounting practices;\textsuperscript{129} to show book values of assets in the balance sheet, without revealing the higher market value at some point in the document, if liquidation is intended or can reasonably be anticipated;\textsuperscript{130} to omit explanations of large variations from year to year in a multi-period income statement; or to fail to disclose seasonal factors after an income statement.\textsuperscript{131}

\textsuperscript{127} Kohler v. Kohler Co., 319 F.2d 634, 640 (7th Cir. 1963) (it is permissible to set up books in a certain way for sound business reasons, at least absent an intent to mislead); Colonial Realty Corp. v. Brunswick Corp., 337 F. Supp. 546, 551 (S.D.N.Y. 1971); Dolgow v. Anderson, 53 F.R.D. at 679-80.


An auditing accountant's obligations usually should be deemed satisfied if generally accepted accounting principles are applied correctly, but the accountant has a duty to investigate further and make full disclosure if his suspicions are aroused. Cf. United States v. Simon, 425 F.2d 796, 805-07 (2d Cir. 1969), cert. denied, 397 U.S. 1006 (1970) (may be very persuasive but not conclusive evidence that accountant acted in good faith and financial statements were not misleading).


\textsuperscript{130} Gerstle v. Gamble-Skogmo, Inc., 298 F. Supp. at 103. For a discussion concerning misstatement and concealment of intent to liquidate a corporation see notes 164-75 infra and accompanying text.

\textsuperscript{131} In registration statements and merger proxy statements, disclosures of variations among years and of seasonal differences customarily are placed in the text following the income statement. However, the explanation can be placed anywhere in the document without violating the Rule, so long as the buried fact and similar emphasis rules are followed. See notes 97-113 supra and accompanying text for a discussion of these rules.

In a release, the commission has stated:

"Among events and circumstances which may require additional disclosure to provide
It also follows that lack of conformity with generally accepted accounting principles is per se evidence that the statements are misleading.\textsuperscript{132} Thus, statements are deficient when earnings are arbitrarily manipulated by improper deferral techniques,\textsuperscript{133} debt of consolidated subsidiaries is omitted from a consolidated balance sheet,\textsuperscript{134} pooled results of operations for one year are compared against pre-pooled results for the prior year,\textsuperscript{135} or earnings per share are stated without noting the dilution of residual securities.\textsuperscript{136} And of course, financial statements containing inaccurate figures also are misleading.\textsuperscript{137}

\textsuperscript{132} Note, Accountants, Financial Disclosure and Investors' Remedies, 18 N.Y.L.F. 681 (1973) ("misleading presentations, misapplication of accounting principles or inadequate disclosure" actionable. Id. at 694); see Green v. Jonhop, Inc., 358 F. Supp. at 419 (failure to make reference to footnote elsewhere in financial statement); Koch Indus., Inc. v. Vosko, \textsuperscript{137} SEC v. Keller Indus., Inc., \textsuperscript{138} supra note 135, \textsuperscript{139} SEC Policy Statement on Conflicting Financial Reports and Earnings Computations, \textsuperscript{140} supra note 135, \textsuperscript{141} SEC Release No. 8336, supra note 135, \textsuperscript{142} supra note 133. The most famous example, which

\textsuperscript{133} SEC v. Keller Indus., Inc., \textsuperscript{134} supra note 135, \textsuperscript{135} supra note 135, \textsuperscript{136} supra note 135, \textsuperscript{137} supra note 135, \textsuperscript{138} supra note 135, \textsuperscript{139} supra note 135, \textsuperscript{140} supra note 135, \textsuperscript{141} supra note 135, \textsuperscript{142} supra note 135.
Cases also have provided guidance regarding particular balance sheet items. For example, the size of a reserve is unassailable if determined using reasonable business judgment or generally accepted accounting principles, but arbitrary conclusions will not be condoned. Similarly, a corporation must write down an investment's artificially-created carrying value when it has notice that the value is substantially in excess of market value; however, this rule does not necessarily apply to a carrying value determined in accord with conventional "transactional" accounting. Thirdly, contingent liabilities should be disclosed if material; one case, relying on SEC instructions for S-1 registration statements, used a figure equal to 15 percent of current assets as a guide to whether disclosure was needed. And municipal bonds should not be carried as current assets if the parties who agreed to buy the bonds from the issuer could not perform, interest payments on the bonds were delinquent, or no market for the bonds existed.

C. Intention and Promises

Not a few cases have held that a misrepresentation of one's intention is actionable. Yet this is but the beginning of the inquiry into the issue of intention and promises.


Intents can be classified as express, concealed, or implied. The first is exemplified by an announced intent to list a security on a specified national securities exchange or a statement by A to B that C intends to perform an act.146

Concealed intentions must be announced only if they constitute inside information and the defendant is under a duty to disclose.147 Thus, a purchase of stock by an issuer not revealing its intent to liquidate and realize on its undervalued assets would be actionable.148

Intentions also can be implied from defendant's actions or words. Hence, the defendant may make a statement or take actions which would be misleading unless his intent were disclosed. Rule 10b-5 decisions have recognized the implied intent arising when parties enter into a contract or understanding. The parties seldom express that they intend to fulfill their contractual obligations. For instance, a customer might instruct his broker to buy one hundred shares of I.B.M. stock for his account without stating that he intends to pay on the settlement date. Nevertheless, courts have permitted the broker to recover under Rule 10b-5 if the customer, when he placed his order, did not intend to pay for the stock if its value declined by the settlement date, and if in fact he did not pay.149 The duty to disclose inside information

(S.D.N.Y. 1964) (one's state of mind is a fact); see Allen v. H.K. Porter Co., 452 F.2d 675, 677-79 (10th Cir. 1971) (plaintiff did not prove that representation by defendant of intent to foreclose was false or that defendant concealed intent to inject new capital); Armstrong v. Sailboat Marine, Inc., [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,105 (E.D.N.Y. 1971) (no evidence that there was fraud "in the sense that [defendants] stated intentions that did not exist." Id. at 91,049); Lester v. Preco Indus., Inc., 282 F. Supp. 459, 462-64 (S.D.N.Y. 1965) (can have cause of action from misrepresentation of intent but no cause of action under these facts; plaintiff alleged concealment in registration statement of intent to carry out certain acts later); note 153 infra; cf. Oklahoma-Texas Trust v. SEC, 100 F.2d 888, 894 (10th Cir. 1939) (1933 Act § 8(d), 15 U.S.C. § 77h(d) (1970)).


148. See notes 164-75 infra and accompanying text.

149. As to purchases from broker-dealers, see, e.g., United States v. Bialkin, 331 F.2d 956, 957-58 (2d Cir. 1964). Intent not to pay for securities purchased from other persons has also been held to be actionable. Walling v. Beverly Enterprises, 476 F.2d 393, 396-97 (9th Cir. 1973); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1097 n.19 (2d Cir. 1972) (from underwriters); Richardson v. Salinas, 336 F. Supp. 997, 1001-02 (N.D. Tex. 1972) (from private citizen). Similarly, a seller concealing his intent not to sell is also in violation of 10b-5. See Commerce Reporting Co. v. Puretec, Inc., 290 F. Supp. 715, 719-20 (S.D.N.Y. 1968) (analyzing the situation along lines of lack of intent to perform).
is one possible justification for finding 10b-5 liability in such a case. Under traditional thinking, however, only an insider with inside information has the duty to disclose. The customer is not an insider, nor is his state of mind inside information. Therefore, he would have no duty to disclose his concealed intent. A better analysis is that his intent to perform his obligations—to pay the amount due in this situation—can be presumed from his entering into the contract. The Rule is breached if this presumption of intent to fulfill the contract’s terms was incorrect at the time the contract was made. The “in connection with the . . . sale of any security” clause of the Rule is satisfied when the defendant carries out his preconceived intent not to consummate the sale.

An express statement of intent must be correct when made and an implied intent must be true when it is implied. The Rule generally would not be violated merely because the representer subsequently changed his mind. But he should be liable for failing to convey his intent not to fulfill the terms of the contract. See note 158 infra and accompanying text. Cf. Entel v. Allen, 270 F. Supp. 60, 70 (S.D.N.Y. 1967), which seems to have gone too far, albeit reluctantly, in holding that any undisclosed breach of state contract law is actionable.

Despite the language about a contract in Voege v. American Sumatra Tobacco Corp., 241 F. Supp. at 374-75, this case also could be classified properly as an implied representation decision.

150. An insider is a short-hand designation of persons who have a duty to disclose, for example, corporate officers, directors, and controlling shareholders. 37 Fordham L. Rev. 483, 491 (1969).


152. Note that a concealed intent not to fulfill the terms of the contract would be material under any definition. On the other hand, disclosure of the intent not to perform would obviate any recovery by the other party to the agreement.

The same result regarding a breach of contract can be reached by viewing contracts as mutual promises to perform certain acts. Making a promise to perform an action is a 10b-5 infraction if the promisor had no intention of keeping the promise. See note 158 infra and accompanying text. Cf. Entel v. Allen, 270 F. Supp. 60, 70 (S.D.N.Y. 1967), which seems to have gone too far, albeit reluctantly, in holding that any undisclosed breach of state contract law is actionable.


Despite the language about a contract in Voege v. American Sumatra Tobacco Corp., 241 F. Supp. at 374-75, this case also could be classified properly as an implied representation decision.

change of heart to a plaintiff who thereafter made an investment decision, and whom the defendant knew or should have known was relying on his intent.\footnote{155} A defendant also violates the Rule if he defers or delays a planned course of action in order to cover up his misrepresented or concealed intent.\footnote{156}

Other types of statements are treated in the same way as intention, in that they must accurately represent the speaker's view when made. Thus, a person expressing an opinion must hold the opinion;\footnote{157} one predicting an event has to think the prediction will come true; a promisor must intend to perform his promise;\footnote{158} and a person recommending the purchase or sale of a security must believe his advice is correct.\footnote{159}

Intent cannot be proved by psychoanalysis; it is a question of fact to be determined by evaluation of external occurrences.\footnote{160} Events taking leaves unanswered the question whether breach of contract alone is sufficient to create liability; Richardson v. Salinas, 336 F. Supp. at 1001-02 (court does not decide whether failure to pay is breach of contract or 10b-5 claim, but does not dismiss complaint); Seward v. Hammond, 8 F.R.D. 457, 459 (D. Mass. 1948) (complaint characterized as one for breach of contract rather than for fraud under the securities law).


It seems to follow that promising to perform an act the promisor knows or should know is impossible should also be a 10b-5 violation if the impossibility is not readily apparent to the promisee.

159. See United States v. Grayson, 166 F.2d at 866.
place after defendant’s intent was represented can be used as evidence in finding whether his representation was true when made. Thus, in the absence of an intervening event which could justify the defendant’s change of heart, the more pronounced the alteration from the original intent and the shorter the period between the representation and the change, the stronger the inference that the original representation was false.

Events intervening between the time the intent was represented and the time when the defendant changed his mind could be either unforeseeable, unforeseen but foreseeable, or foreseen. An unforeseeable intervening event is the strongest evidence a defendant could present to justify his change of intent, while a foreseen occurrence is the weakest.

One type of intent deservedly has received a great deal of attention—the intent of a purchaser of a corporation’s stock to take advantage of the excess of the market value of the corporation’s assets over their book value. Misleading disclosure of such intent and, under certain cir-


162. 208 F. Supp. at 732, 740-42; cf. W. Prosser, Torts § 109, at 729-31 (4th ed. 1971). But a defendant will not be held liable merely because he changes his intent for what others may consider to be an inadequate reason. Restatement of Torts § 530, comment a (1933).

163. See Weisman v. Ashplant, 326 F. Supp. 825, 826-27 & n.2 (S.D.N.Y. 1971) (defendant stated intent to list a security, and received a preliminary indication of permission from the exchange; earnings then dropped and listing was denied; held that plaintiff failed to prove defendant’s lack of intent to list, although event was foreseeable); Were v. Mack, [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,956, at 90,523 (S.D.N.Y. 1971) (not misleading to state intent to list securities on American Stock Exchange when listing subsequently denied because of unpublished standards of the exchange; viewed in light most favorable to plaintiff, event foreseeable but not foreseen).

164. Of course, this concept is not limited to securities of corporations. And the same principles apply to debt securities where there is a question whether the underlying assets would be sufficient to pay the debt in full upon liquidation.

165. The same result would obtain when the market value of all assets exceeds book value, or when the disparity in value is found in only some assets regardless of whether a disparity exists in the assets as a whole.

Among the factors which can be used to determine whether market value exceeds book value are good faith offers of others to buy, and appraisals “by qualified experts [when the appraisals] have sufficient basis in fact.” Gentle v. Gamble-Skogmo, Inc., 298 F. Supp. at 92. The corporation’s own asking price is not of the same weight. Id.; accord, In re Brown Co. Sec. Litigation, 355 F. Supp. 574, 583-84 (S.D.N.Y. 1973).

Although a liquidation or other method of realizing on the discrepancy between the market value and book value is not planned by management, management can point out this discrepancy to stockholders to demonstrate the inadequacy of a tender offeror’s price. Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 356 F. Supp. at 1071.

The principles set forth here, as applicable to insiders when market exceeds book value, should also pertain when an insider sells knowing that there is an undisclosed excess of book value over market value and that a liquidation is imminent or can reasonably be expected.
circumstances, concealment of intent are both actionable.\textsuperscript{166} Misrepresentation of intent has assumed increased importance since 1968, when section 13(d) of the 1934 Act was adopted.\textsuperscript{167} Under that section, a person acquiring equity securities registered under the 1934 Act who thereafter owns more than five percent of the shares of a class must file a schedule\textsuperscript{168} disclosing his plans to liquidate the issuer, sell its assets, or merge it with another entity. Misrepresentations of plans in the schedule should be 10b-5 violations.

Whether a purchaser must disclose his intent when section 13(d) is inapplicable depends on two sets of variables: is he or is he not either an insider of the issuer or a person seeking to gain control; and does he or does he not intend to take advantage of the excess? A purchasing insider's intent to liquidate the corporation, sell its assets, merge or consolidate it with another entity, or engage in any other act to take advantage of the disparity in prices, is probably not inside information since he did not receive it by access to the corporation. But the disparity in asset values is inside information if he learned it because of his contact with the issuer and it is not publicly known. When inside information, not necessarily important by itself, becomes important in combination with other data (for example, the combination of the disparity in values with the insider's intent to liquidate), the combination is material inside information and therefore a purchasing insider must disclose both. The cases reach this result, although often without detailing the reasoning behind it.\textsuperscript{169} But an insider (and a fortiori an outsider) might be

\begin{itemize}
\item \textsuperscript{166} Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951).
\item \textsuperscript{167} 15 U.S.C. § 78m(d) (1970).
\item \textsuperscript{168} Item 4 to Schedule 13D under the 1934 Act, 17 C.F.R. § 240.13d-101 (1973). One case discussing this point is Electronic Specialty Co. v. International Controls Corp., 296 F. Supp. at 468 (motion for preliminary injunction).
\item \textsuperscript{169} In re Brown Co. Sec. Litigation, 355 F. Supp. at 583-84 (disclose only if intent to dispose of assets plus either third party's offer to purchase or appraisals); Gerale v. Gamble-Skogmo, Inc., 298 F. Supp. at 92 (proxy statement); Bosch v. Louart Corp., [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,231, at 97,066-67 (N.D. Cal. 1968) (plan of stockholders to purchase more shares); Speed v. Transamerica Corp., 99 F. Supp. at 825-26, 828 (written tender offer by majority stockholder); Ward La France Truck Corp., 13 S.E.C. 373, 378-80 (1943) (purchases by insiders). See also Address by former SEC Chairman William J. Casey before the Financial Executives Institute at Las Vegas, Nevada, Oct. 18, 1972, in [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,045, at 82,265 (management should consider disclosing supplementally that book value is less than market value, particularly if assets are liquid; no indication that tied into purchases by insiders).
\item Another method of approaching this problem is to consider the issuer's financial statements misleading because the excess is not shown, at least where there is an intent to realize on the excess. See notes 127-31 supra and accompanying text (explanation of financial statements needed in some circumstances).
\end{itemize}
able to purchase without disclosure if he does not intend to take advantage of the excess.\footnote{170}

A duty to disclose is more difficult to justify when an outsider seeking control intends to realize on the excess of market over book value. He has no duty when purchasing on the open market (or perhaps even pursuant to a formal cash tender offer, which contains no target-company financial statements), because none of his data is inside information.\footnote{171} However, if there are any relevant financial statements which are part of a registration statement or proxy statement used in an exchange offer or merger, and if realization on the excess of disparity in values is intended or can reasonably be anticipated, disclosure of the disparity must be made to correct the misleading impression created by the financial statements.\footnote{172} By contrast, an outsider not seeking to gain control need

\footnote{170. The fact would still be inside information vis-à-vis the insider, but the duty to disclose would turn on the issue of materiality. However, the question of materiality does not seem to explain the diverse results of the authorities on this point. In re Brown Co. Sec. Litigation, 355 F. Supp. at 583-84 (disclose only if intent to dispose of assets plus either third party's offer to purchase or appraisals; therefore, no duty to disclose when no intent to sell assets, no intent to liquidate, and no appraisals); Lewis v. Bogin, 337 F. Supp. 331, 337-38 (S.D.N.Y. 1972) (merger with parent; defendant did not know or have reason to believe that asset would be sold at higher value, so no duty to disclose in proxy statement); Kohler v. Kohler Co., 208 F. Supp. 808, 825-26 (E.D. Wis. 1962), aff'd, 319 F.2d 634 (7th Cir. 1963) (no duty to disclose on part of purchasing issuer where no intent to liquidate); Speed v. Transamerica Corp., 99 F. Supp. at 825-26 & n.9 (court: no duty of controlling stockholder to disclose increase in inventory where no intent to liquidate; SEC as amicus curiae: should disclose increase whether or not intent exists); Note, SEC v. Texas Gulf Sulfur Co.: The Inside and Outside of Rule 10b-5, 46 B.U.L. Rev. 205, 223 (1966) (intent to liquidate is what renders difference in value material); Note, Purchaser's Duty to Disclose Under Securities and Exchange Commission Rule X-10B-5, 40 Minn. L. Rev. 62, 70-71 (1955) (SEC's view in Speed preferable); Note, The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors, 59 Yale L.J. 1120, 1146 (1950) (should disclose important difference in values if sale of assets is likely or if difference is permanent); 55 Ill. B.J. 688, 701 (1967) (without intent to liquidate, probably do not have to disclose); see Becker v. Schenley Indus., Inc., [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. § 93,669, at 92,986-87 (S.D.N.Y. 1972) (court seems to indicate that disclosure is necessary only if negotiations have begun). See also CMC Corp. v. Kern County Land Co., 290 F. Supp. 695, 696 (N.D. Cal. 1968) (disclosure sufficient if it merely states assets are worth much more than book value).

\footnote{171. Mills v. Sarlem Corp., 133 F. Supp. 753, 764-65 (D.N.J. 1955). Courts have not implied a representation that no liquidation is planned. Compare notes 149-52 supra and accompanying text. As to the issue of whether a bid for stock at a given price is a representation that the bid is the true value, see notes 188, 196 infra and accompanying text.

Implying a duty on the outsider to correct a misleading impression created by the combination of the published target-company financial statements plus his intent to realize on the difference is one argument which plaintiffs could put forward.

\footnote{172. Brudney, A Note on Chilling Tender Solicitations, 21 Rutgers L. Rev. 609, 635 nn.59, 61 (1967) (permissible to buy through broker, but not through tender offer where...}
not disclose the excess when purchasing, since other outsiders can evaluate the situation as well as he can.  

Closed-end investment companies form a good example of a case where the difference between market value and book value is known publicly.  

Lacking some type of misstatement or half-truth, an insider or outsider purchasing shares in a fund which has a disclosed excess of net asset value over market value need not announce his intent to liquidate.  

D. Motive

The question of motive is closely related to that of intent.  

Misrepresentation of a defendant's motive should be actionable if the motive is material. Concealment of a motive can arise in any context, but has been discussed most often in mismanagement cases.  

The majority of opinions do not require that motives be disclosed so long as all the facts surrounding the transaction are revealed.  

For example, a buyer of a security could not complain if he knows all material facts about an

financial statement is made; should disclose to correct corporation's financial statements); see Gerstle v. Gamble-Skogmo, Inc., 298 F. Supp. at 91-92 (majority stockholder merging subsidiary into itself; question of adequate disclosure in financial statements which are part of merger proxy statement); notes 127-31 supra and accompanying text (disclosure in text sometimes necessary to supplement financial statements).

173. This assumes the outsider reached his conclusion based on his analysis of publicly available information. However, where he learned from an insider about the disparity in values or, perhaps, about the insider's intent to liquidate, the outsider would be a tippee to the extent he received "inside information." Similar data received by the outsider from another outsider could, at best, be considered "inside information" only when the original tippee had a duty to disclose.

174. Newspapers disclose daily the net asset value and market value of many mutual funds.

175. The argument concerning the material effect of the combining of intention to liquidate with the inside information regarding the disparity in values is not here tenable because the disparity is public information. See Fleischer & Mundheim, Corporate Acquisition by Tender Offer, 115 U. Pa. L. Rev. 317, 334-35 (1967) (need disclose only when board thinks there is a reasonable probability that there will be liquidation).

176. See Jacobs, supra note 5, for a discussion of Rule 10b-5 and mismanagement.

enterprise, even though he is not told that the seller's motive for the
transaction is to invest the proceeds in a better security of an unrelated
issuer. An evil motive is in no case actionable unless translated into
deeds.\footnote{178}

None of the foregoing permits concealment of management's conflicts
of interest.\footnote{179}

E. Concealment, Disclosure, and Fairness

Fairness can interact with concealment and disclosure in three situa-
tions: when adequate disclosure is not made of a fair transaction; when
all material facts about an unfair deal are revealed; and when a trans-
action is expressly represented to be fair.

The Supreme Court rejected the fairness of a transaction as a defense
to faulty disclosure under the proxy rules.\footnote{180} As the Court pointed out,
any other result would "insulate from private redress an entire category
of proxy violations—those relating to matters other than the terms of the
[deal]."\footnote{181}

The situation is more controversial where all material facts are dis-
closed but the unfairness of the transaction is not mentioned.\footnote{182} No one
seriously contends that a cause of action then arises if the transaction is
at arm's length: the buyer and seller have equal access to data, and
neither party reposes trust or confidence in the other. The same result
does not follow necessarily where one party is a fiduciary, has greater
access to facts, or enjoys the other's trust and confidence.\footnote{183} A brokerage
firm, for example, owes its customer a fiduciary duty, and the law in
effect requires it to disclose any unfairness to him;\footnote{184} however, this is
not controlling in other circumstances since 10b-5 places special obliga-

179. See note 106 supra and accompanying text.
(construing 1933 Act § 11, 15 U.S.C. § 77k (1970)). A fortiori, faulty disclosure of an un-
fair deal is also actionable.
181. 396 U.S. at 382.
182. This should be distinguished from a question raised in Lerman v. Tenney, 295 F.
that a partnership did not disclose that it paid too much for its only asset, a building. Thus,
the question of fairness related to a transaction in which the issuer engaged, and not the
purchase or sale of a security on which suit was brought. It is altogether proper to recognize
this as a 10b-5 claim since the essence of the allegation relates to the value of the issuer's
assets.
"market makers").}
The issue also has arisen in the mismanagement area, mainly with proxy statements. The Second Circuit has held that concealment of a merger's unfairness as such is not actionable even if a conflict of interests exists; however, lower courts in that circuit sometimes have reached a different result and other courts of appeals may disagree. The Second Circuit's decision suggests that an insider cannot be criticized for concealing the unfairness of the price at which he buys or sells securities. Yet, cases indicate that there may be an implied representation of fairness regarding a price at which trades are made by an insider, a person having greater access to facts, or someone occupying a position of trust. Perhaps these two apparently conflicting concepts can be reconciled as follows: an insider has no duty to disclose that a price is unfair if the price is established by the market or at the outsider's suggestion, but the insider may impliedly represent fairness when he sets the price.

The final situation is an express statement that a transaction is fair. Such a statement is an opinion governed by the rules pertaining to opinions generally. An opinion of an investment banking firm regarding the fairness to a company's stockholders of a merger or other transaction is one example of an express representation. Also, directors may represent that a deal is fair or state that in their opinion it is fair; however, a board's mere recommendation to stockholders to vote in favor of a transaction should not as such be an implied representation that the deal in fact is fair. A statement that a merger is fair is unassailable if

185. See generally Jacobs, supra note 3, at 871.
188. See note 196 infra and accompanying text (implied statements).
189. See Part III-G infra.
190. The issue of an investment banker's liability for his opinion on fairness was raised in Mills v. Sarjem Corp., 133 F. Supp. at 766-67, but the court did not directly decide whether the firm would be liable since it held the transaction was fair.
191. While the recommendation is not an implied representation of fairness, the proxy statement or the document would contain a half-truth if the board believed the deal to be unfair. See notes 13-14 supra and accompanying text, concerning half-truths.
the opinion accurately reflects the speaker's views, is based on a reasonable investigation, and the transaction is in fact fair.\textsuperscript{102}

F. \textit{Implied Statements}

Rule 10b-5 could cover two types of implied statements. First, a person should be responsible for inferences reasonable investors would draw from what he said or did. This is much akin to half-truths.\textsuperscript{103}

More difficult is whether the law will imply representations merely because of a person's position, without his specific words or acts as a basis. The "shingle theory" is a vehicle for implying a plethora of representations by broker-agents and by dealer-principals who have gained their customers' confidence.\textsuperscript{104} This concept cannot be imported into other areas covered by 10b-5, although it does serve as an analogy. The Supreme Court touched on this subject in a case where defrauded sellers sued bank employees who purchased securities from them. Relying on a broker-dealer case, the Court held:

The individual defendants [the bank employees], in a distinct sense, were market makers . . . . This being so, they possessed the affirmative duty under the Rule to disclose this fact to the . . . sellers. It is no answer to urge that . . . these defendants may have made no positive representation or recommendation. The defendants may not stand mute while they facilitate the . . . sales to those seeking to profit in the . . . market the defendants had developed and encouraged and with which they were fully familiar. \textit{The sellers had the right to know} that the defendants were in a position to gain financially from their sales and \textit{that their shares were selling for a higher price in that market.}\textsuperscript{105}

This quotation, along with whatever applicability the shingle theory has, suggests that representations might be implied where one party is a fiduciary of the other, has greater access to information, or enjoys the confidence of the other by virtue of their relationship or prior dealings. Courts have adopted this approach by indicating that an insider sometimes impliedly represents to the other person that the price at which

\begin{itemize}
  \item \textsuperscript{102} Nanfito v. Tekseed Hybrid Co., 473 F.2d 537, 542-43 (8th Cir. 1973).
  \item \textsuperscript{103} See notes 13-14 supra and accompanying text concerning half-truths, and note 56 supra and accompanying text concerning the practice of construing ambiguities against the speaker.
  \item \textsuperscript{104} For a discussion of the shingle theory see 3 L. Loss, Securities Regulation 1482-93 (2d ed. 1961); Jacobs, supra note 3, at 876-81.
  \item \textsuperscript{105} Affiliated Ute Citizens v. United States, 406 U.S. at 153 (emphasis added) (citations omitted). The Court made clear that this was not based on broker-dealer principles. Id. at 154 n.16. This quotation is, of course, on a somewhat different issue (i.e., whether disclosure must be made by a market maker of a market at a higher price), but it is still authority for the proposition for which it is cited.
\end{itemize}
they are trading is fair. Other representations have also been implied, but some courts have refused to do so in certain situations.


In List v. Fashion Park, Inc., the Second Circuit refused to consider plaintiff-seller's contention that the defendant-insider-buyer impliedly represented that the price was fair in an over-the-counter trade where plaintiff was unaware that the buyer was an insider. The court's rationale for failing to discuss the issue was that plaintiff raised it for the first time on appeal and the allegation "raises substantial issues of fact . . . such as the ascertainment of the true value of plaintiff's shares on [the date of the sale]." 340 F.2d at 461. This disposition suggests that the representation is implied in at least some circumstances; were it otherwise, the court could have disposed of the issue as a matter of law. The sales price in List was negotiated between the buyer and the seller. 227 F. Supp. at 907-08. If the representation was implied in the List case, arising in an over-the-counter trade where plaintiff did not know the buyer was an insider, a fortiori it would be implied in other outsider-insider cases where the parties knew one another. Cf. Chiodo v. General Waterworks Corp., 380 F.2d 860, 867 (10th Cir.), cert. denied, 389 U.S. 1004 (1967) (no representation to selling insider by buying outsider).

On the other hand, many reported cases involving purchases by insiders do not discuss the issue of implied misrepresentation. Yet occasionally in such opinions, the courts have been careful to point out that the selling stockholder initiated the trade and the result might have been different had the stockholder been approached initially by the purchasing insider or had he negotiated the price with the insider. Hafner v. Forest Laboratories, Inc., 345 F.2d 167, 168 (2d Cir. 1965); see Kohler v. Kohler Co., 208 F. Supp. 808, 821-22 (E.D. Wis. 1962), aff'd, 319 F.2d 634 (7th Cir. 1963).

197. Abramson v. Burroughs Corp., [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,456, at 92,254 (S.D.N.Y. 1972) (investor can assume he will get reasonable notice of redemption); E.L. Aaron & Co., Inc. v. Free, 55 F.R.D. 401, 402-03 (S.D.N.Y. 1972) (sub silentio that presentment of check is implied representation that check is good); SEC v. Manor Nursing Centers, Inc., 340 F. Supp. at 934 (implied representation that funds in account to back up check for payment of securities); Speed v. Transamerica Corp., 99 F. Supp. at 829 (citing cases); Peskind, Regulation of the Financial Press: A New Dimension to Section 10(b) and Rule 10b-5, 14 St. Louis U.L.J. 80, 89 (1969) (could imply representation of disinterestedness); see Reynolds v. Texas Gulf Sulphur Co., 309 F. Supp. at 558 ("implied misrepresentation can be just as fraudulent as an express one . . . ." Id.).

198. For example, while the presentation of financial statements usually carries with it the implied representation not only that they were true as of their date but also that there has been no material change since then, this is not always the case. Lane v. Midwest Bancshares Corp., 337 F. Supp. 1200, 1210 (E.D. Ark. 1972).
G. Opinions and Forecasts

The final category is a class of statements which might loosely be called opinions and forecasts. This includes recommendations to buy or sell a security, opinions or estimates as to the present or the future status of an event, projections and predictions of future occurrences, and representations that an incident will take place. The courts have begun to clarify the law in this area.

Each of these statements is a "fact" within the ambit of the Rule.¹⁹⁹


Contra, Chiodo v. General Waterworks Corp., 380 F.2d 860 (10th Cir.), cert. denied, 389 U.S. 1004 (1967) (statement "could not rise to the height of a false representation, it could be nothing more than an expression of opinion." Id. at 867). The result in Chiodo can perhaps be explained by the facts: the long-term owner of a business alleged he was misled by the buyer's representation of its worth; that is, an outsider misled an owner about the owner's own property. But the court's correct result when finding in favor of the buyer could better have been achieved by dismissing the complaint on the grounds of unjustified
so the issue of when they are misleading must be considered. Statements concerning the future are misleading if they are not believed by the speaker when made. They are also misleading if they do not have a reasonable basis, a point which bears further discussion. While a reasonable basis is necessary for all the statements mentioned above, the preponderance of 10b-5 opinions in this area concerns a broker-dealer recommending a security. Three separate duties comprise a reasonable basis: (1) to make a reasonable investigation; (2) to disclose lack of knowledge regarding the issuer, and (3) to reveal data indicating that the recommendation is incorrect. The first of the three, a reasonable reliance. In Rogen v. Ilikon Corp., 250 F. Supp. 112, 117 (D. Mass.), rev'd on other grounds, 361 F.2d 260, 267 (1st Cir. 1966), both courts concluded that an opinion, recognized as such, was not actionable where plaintiff showed no reliance. Therefore, although an opinion generally could be actionable, the plaintiff may not be able to demonstrate reliance to the extent necessary. See also Rochez Bros. v. Rhoads, 353 F. Supp. 795, 798 (W.D. Pa. 1973) (information equally accessible to both insiders). In Most v. Alleghany Corp., [1969-1970 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,583, at 98,665 (S.D.N.Y. 1970), the court held that an opinion as to the law is not actionable because the question is one of opinion but not fact. This result, reached by relying on common-law authorities, is questionable.

Projections of income and similar statements regarding the future meld with existing fact when they relate to the current period. This would be the case, for instance, when a calendar year company makes a projection in May for the first six months of the year. Cf. W. Prosser, Torts § 109 (4th ed. 1971) (common law concerning opinion and intention).

There is some authority that statements regarding the future may be opinions or facts, depending upon the circumstances. Myzel v. Fields, 386 F.2d at 734 n.8; Weinstein v. Zimet, [1961-1964 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,320, at 94,368 (S.D.N.Y. 1964). Those authorities do not elaborate on the significance of the distinction. The result seems too harsh if they are suggesting that some statements are facts and hence the speaker is liable regardless of how carefully facts were gathered and analyzed to reach the conclusion. On the other hand, the cases make quite clear that they do not intend to exclude opinion from the scope of the Rule. The Eighth Circuit in Myzel states that opinions are sometimes actionable. 386 F.2d at 734 n.8; accord, Weinstein v. Zimet, supra at 94,368.

200. Cf. notes 221-26 infra and accompanying text concerning opinions and estimates of existing facts.

201. See notes 157-59 supra and accompanying text.

202. Note that the test of reasonableness imposed on non-brokers does not depend upon whether negligence is recognized as a basis for a 10b-5 claim. Thus, the Second Circuit has recognized the reasonable basis test—e.g., in Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d at 363—even though it rejected negligence actions as a basis for suit under the Rule.

203. The SEC has indicated that a brokerage firm generally must have a reasonable basis for its recommendation. Mac Robbins & Co., 41 S.E.C. 116, 119 (1962), aff'd sub nom. Berko v. SEC, 316 F.2d 137 (2d Cir. 1963). One circuit has held that a broker violates 10b-5 when he makes a recommendation without a reasonable basis therefor. Hiller v. SEC, 429 F.2d 856, 858 (2d Cir. 1970); Hanly v. SEC, 415 F.2d 389, 596 (2d Cir. 1969); see 3A H. Bloomenthal, Securities and Federal Corporate Law § 12.09[2], at 12-50 (1972).
vestigation, can in turn be divided into a responsibility to gather facts and an obligation to evaluate them,\textsuperscript{204} both under a standard of reasonableness. Rules established for broker-dealers cannot be incorporated wholesale into all areas\textsuperscript{205} since brokers are held to a higher standard than other persons.\textsuperscript{206} This does not mean that a non-broker is excused from making a reasonable investigation before recommending a security.\textsuperscript{207} However, it does signify that the standard imposed on non-brokers usually should be less than that prescribed for broker-dealers.

The reasonableness of an investigation is, of course, a question of fact. Among the factors to be considered are the relationship between the parties, the nature of the security, the amount of money involved, the speaker's financial capacity to undertake an investigation, and his ability to obtain facts because of his position with respect to the issuer. The last two criteria indicate that the issuer should have a higher duty than an outsider, since its organization is best able to accumulate and analyze the facts about itself.\textsuperscript{208} A director or officer has freer access to facts than an outsider but usually cannot match the issuer in this regard, so his obligations should fall between those of the issuer and an outsider. Regardless of who makes the assertion, one further factor should be considered for statements other than recommendations to buy or sell a security. Such statements can pertain only to the corporation,\textsuperscript{209} to a

\begin{itemize}
\item \textsuperscript{204} Dolgow v. Anderson, 53 F.R.D. at 670, 676-79, contains an excellent, detailed discussion on one corporation's investigation to back-up its projections.
\item In the broker-dealer area, some information should tend to excite the broker's suspicion and he, therefore, may not rely on that data. This principle should be equally applicable to non-broker situations, though a lesser degree of financial sophistication on the part of the investigator should be taken into account.
\item Accordingly, to the extent possible broker-dealer opinions have not been used in this section.
\item See Jacobs, supra note 3, at 871.
\item Cf. Dolgow v. Anderson, 53 F.R.D. 664 (E.D.N.Y. 1971), aff'd per curiam, 464 F.2d 437 (2d Cir. 1972), where the court dismissed a claim relating to allegedly false projections made by a corporation because the internal estimates "were made honestly, were reasonable, and were the best estimates of the people in [the corporation] most qualified to make them." Id. at 676.
\item Examples would include earnings per share for the next year or the date on which a new product will be offered for commercial sale.
\end{itemize}
fact external to the issuer,\textsuperscript{210} or to a matter in between.\textsuperscript{211} The more closely the statement relates to the issuer, the higher the standard should be. This follows because the public has equal access to information necessary to evaluate facts external to the issuer, but data concerning a particular company are not as readily available.

Under these guidelines, a speaker's duty to investigate may range from very extensive to none at all. But no matter how little the extent of the investigation required, the speaker would still have to reveal his lack of knowledge regarding the company and convey any data indicating the incorrectness of his statement.\textsuperscript{212} As a corollary, he must disclose assumptions on which any statement concerning the future necessarily must be based only when they are different from what a reasonable listener would expect. For example, if a projection is based on the assumption that certain unannounced acquisitions would be made, that assumption should be disclosed.\textsuperscript{213}

Broker-dealer cases also indicate that there can be no reasonable basis for predictions of very substantial and specific market price rises for the stock of an unseasoned company, or for predictions of earnings for such enterprises.\textsuperscript{214} This theory should not be limited to brokerage firms. It also follows that a statement made without a reasonable basis is nevertheless a 10b-5 infraction even though it fortuitously comes to pass.\textsuperscript{215} Private recovery would be inappropriate here because no one could show injury, but the Commission could still bring suit. On the other hand, damages could not be recovered even though an inadequate investigation

\textsuperscript{210} The state of the economy would be an example. See Rogen v. Ilikon Corp., 361 F.2d at 267 (no recovery where opinion related only to state of market for stock).

\textsuperscript{211} One instance of this would be a prediction of a rise in the price of the issuer's stock. The rise would depend on internal factors (such as earnings and potential profits) and external circumstances (such as the state of the market place in general).


The SEC now proposes to have the underlying assumptions for projections set forth. Release 9984.

\textsuperscript{214} Similarly, in Were v. Mack, [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. § 92,956, at 90,523-24 (S.D.N.Y. 1971), the court noted it could be misleading to predict the market value of preferred stock to be issued in an exchange offer. Moreover, the SEC proposes to limit the class of issuers who can include projections in prospectuses and proxy statements to companies with a record or earnings and budgetary controls. Release 9984.

\textsuperscript{215} Cf. text accompanying notes 48-49 supra.
was conducted if a reasonable investigation would have failed to uncover the concealed data.\textsuperscript{216}

While the discussion of reasonable basis has been couched in terms of recommendations to buy or sell a security, the same principles apply to opinions and estimates of the future status of an event, projections and predictions of future occurrences, and representations that an event will take place.\textsuperscript{217} Those principles are also applicable to two other statements which are in the nature of a recommendation to buy or sell a security. First, management must have a reasonable basis when it suggests that stockholders approve a merger; tender their shares in a tender or exchange offer; or buy, sell, or (possibly) hold shares of the issuer.\textsuperscript{218}

\textsuperscript{216} Cf. Northway, Inc. v. TSC Indus., Inc., [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. \$ 93,646, at 92,899 (N.D. Ill. 1972) (duty to investigate buyer of control when on notice of irregularity). However, actions for injunctions or suits by the SEC should be permitted.


In Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 356 F. Supp. at 1070-71, the court held that management which informed stockholders that it believed a tender offer price was inadequate did not have to tell the basis for its opinion.

\textsuperscript{218} Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 803 (2d Cir. 1969), cert.
Second, it is a common occurrence that, on the basis of data supplied by the issuer and underwriter of bonds, a bond rating agency will rate bonds in light of its view of the issuer’s credit. The agency should be liable to investors purchasing bonds on the basis of its rating if it did not conform to the reasonable-basis rules. It follows that the reasonable investigation standard for a bond rating agency should be at least as stringent as that for a broker-dealer.

A statement made with a reasonable basis is not misleading merely because future events do not bear out the statement. However, if those future events were reasonably foreseeable, that fact alone should be some evidence that the original investigation was not sufficiently complete.

Unlike the other statements discussed in this section, opinions and estimates may relate to a presently existing fact, as well as to a future status. Present facts can be classified into those which can be ascertained with reasonable accuracy after a reasonable investigation (such as the number of items in the inventory of a small business), and those which cannot be so ascertained (such as the amount of ore in a newly-found gold mine). An opinion or estimate regarding an ascertainable fact (the former of the two classes) is the same as a representation of a present fact.


Somewhat related is the question of the necessity of disclosure by management of better offers made by the other party to a merger during the negotiating process, when the offers subsequently were withdrawn, or of items the issuer sought in the bargaining. Stedman v. Storer, 308 F. Supp. 881, 886-87 (S.D.N.Y. 1969) held that neither must be disclosed.

219. A broker’s fiduciary duty to his customers would suggest a higher standard for brokers, but the resources available to the bond rating agency, the reliance investors place on their opinions, and the large amounts of money to which the ratings relate indicate at least an equal standard for the rating agencies.

A seller using a prime rating on commercial paper when knowing or when he should know the rating was wrong violates the Rule, regardless of whether there was fraud in obtaining the rating. SEC v. Crofters, Inc., 351 F. Supp. 236, 255-56 (S.D. Ohio 1972).


In Kutner v. Gofen & Glossberg, [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,109 (7th Cir. 1971), the court held that an investment adviser’s hope of future return was not actionable when the return was not achieved. But the adviser should have been held liable if the hoped-for return was not reasonable when made.
fact. Therefore, a statement pertaining to ascertainable facts is misleading if the data are not as represented, even though it is couched in terms of an estimate or opinion. On the other hand, when the facts cannot be reasonably ascertained, the speaker nevertheless should have a reasonable basis for his opinion or estimate and should believe it true, like any opinion or estimate of a future event.221

Another type of opinion pertaining to the present is a legal opinion. The question of when a lawyer’s opinion is sufficiently inaccurate to be misleading has received little attention.222 Like any other opinion, it must represent accurately the views of the speaker. One case found an opinion letter misleading under a modified reasonable-basis standard because the statements went “enough beyond being mere mistakes in legal judgment . . . [and hence] constitute[d] probable violations . . . of the securities laws.”223 This is a less stringent standard than is applied

221. In Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544 (E.D.N.Y. 1971) (construing 1933 Act § 11(a), 15 U.S.C. § 77k(a) (1970)), the court rejected a defense based on the ground that “no one could be certain of precisely how much was involved” and suggested “an honest and open statement, adequately warning of the possibilities of error and miscalculation and not designed for puffing . . .” Id. at 549.


to other opinions, and seems to be another manifestation of the "rule" that everyone is presumed to know the law except attorneys.

A person's valuation of a security for which there is no established market is still another opinion of existing fact. Reliance is often an element which must be demonstrated in private damage actions. It will be more difficult to show reliance on an opinion or estimate than on a statement of fact. And reliance on an opinion of value might be hardest to demonstrate, since the law generally expects each of the parties to form his own conclusion on that matter.

Three issues which relate to publicizing opinions and forecasts remain. The first concerns a person's obligation to publish an opinion or forecast before trading. In general, a company need not disclose its internal projections and opinions concerning its future operations when it trades, so long as it reveals the underlying material facts. (However, the SEC is now seriously considering whether projections can be placed in prospectuses.) An insider or tippee must make the same disclosures as the corporation if he knows the company's projections or forms his own based on facts he gathered by virtue of his relationship to the company. But the insider or outsider who reaches a conclusion regarding the future from publicly known facts need make no disclosure when he trades. Second, to keep investors informed, publicized projections of future results must be updated promptly after the issuer revises its esti-


225. This explains the result in Myzel v. Fields, 386 F.2d at 736; Chiodo v. General Waterworks Corp., 380 F.2d at 867; Rochez Bros. v. Rhoades, 353 F. Supp. 795, 798 (W.D. Pa. 1973); Gordon v. Lipoff, 320 F. Supp. 905, 915 (W.D. Mo. 1970). In all cases, the speaker was less familiar, or equally familiar, with the company than the listener.

226. See Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 356 F. Supp. at 1071 (price of a stock determined partly by hunches of the market; therefore, adequacy or inadequacy of tender offer price is subjective and so should not condemn opinion of target company for inadequacy); cf. W. Prosser, Torts § 109, at 723-24, 726-28 (4th ed. 1971) (common law); Restatement of Torts § 543, comment f (1938).

As to whether an implied representation arises that a price quoted is fair, see notes 188, 196 supra and accompanying text.


228. Release 9984.

matters.\textsuperscript{230} Third, the issuer is precluded from disseminating statements regarding the future when it is in the process of registration.\textsuperscript{231}

IV. DISCLOSURE AND CURING

In the proper situation, a defendant might be able to sever the causal connection between his fraudulent activity and plaintiff's injury by disclosing the facts. Full disclosure might be defined as proper dissemination of a statement which conveys the true state of affairs to a reasonable investor.\textsuperscript{232} Passive behavior is not enough. Thus, mere readiness and willingness to disclose is ineffectual.\textsuperscript{233} And despite some early views to the contrary,\textsuperscript{234} the availability of information from corporate books (at least where the plaintiff is not an insider) and an offer to answer questions are likewise inadequate.\textsuperscript{235} Similarly, the Third Circuit has held that in a proxy contest, defects in one party's proxy material cannot be cured by disclosures in the other party's soliciting material.\textsuperscript{236} This result should be limited to proxy statements and registration statements which ought to be self-contained. In general, however, information can be disclosed by anyone as long as it becomes public knowledge.\textsuperscript{237}

\textsuperscript{230} Dayan, supra note 88, at 944 (must correct); see NYSE Company Manual § A2, at A-18, A-23 (1968) (correction required of rumors, etc.). One of the factors one court used to exonerate a corporation whose estimates turned out to be incorrect was that it reported supervening events and changes in predictions. Dolgow v. Anderson 53 F.R.D. at 677-79. The SEC would require updating of projections and reasons for deviations between projected and actual results. Release 9984.


\textsuperscript{232} This is patterned after the definition of a misrepresentation. See note 12 supra and accompanying text.

\textsuperscript{233} Stier v. Smith, 473 F.2d 1205, 1208 (5th Cir. 1973); Myzel v. Fields, 386 F.2d at 735, citing Dale v. Rosenfeld, 229 F.2d 855, 858 (2d Cir. 1956); Hughes v. SEC, 174 F.2d 969, 976 (D.C. Cir. 1949); Bowman & Bourdon, Inc. v. Rohr, 296 F. Supp. 847, 851 (D. Mass.), aff'd per curiam, 417 F.2d 780 (1st Cir. 1969); Masland, Fernon & Anderson, 9 S.E.C. 338, 347 (1941).

\textsuperscript{234} E.g., Mills v. Sarjem Corp., 133 F. Supp. at 766 (offer to give information).


\textsuperscript{237} Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d at 377 (misrepresenta-
The method of disclosure is also important. The controlling issue is whether the information is received by the persons to whom it is directed. Facts can be revealed to one person or a small group either by telephone, by delivery of a written statement, or during a face-to-face meeting. Disclosure to the public would be governed by the standards developed for determining whether a press release or other material is sufficiently disseminated.\textsuperscript{238} This rule is subject to one qualification—the public should not be presumed to have knowledge of information disseminated to correct previously circulated data unless the correcting release is given at least as extensive publicity as the misleading announcement.\textsuperscript{239}

The effect of properly disseminated, understandable disclosure depends upon whether or not the 10b-5 violation was substantive. Substantive breaches would include, for example, certain types of mismanagement of a corporation or manipulation of a market, and are to be distinguished from violations arising only from a misstatement or omission. Disclosure cannot cure substantive violations.\textsuperscript{240} Even when the only breach of the Rule is a misleading statement or omission, a comprehensible corrective announcement will preclude a damage action\textsuperscript{241} only if the recipients have not acted or were not irrevocably committed to act\textsuperscript{242} when they absorbed

\textsuperscript{238} See SEC v. Texas Gulf Sulphur Co., 401 F.2d at 854.

\textsuperscript{239} For an example of a suit brought by the Commission based on a false annual report to stockholders see SEC v. First Standard Corp., [1966-1967 Transfer Binder] CCH Fed. Sec. L. Rep. \textsuperscript{2} 91,824 (S.D.N.Y. 1966). The court required the corporation to send the "clarifying" release to all persons who received the report and to specified newspapers. Id. at 95,836. See also Rosenblatt v. Northwest Airlines, Inc., 435 F.2d 1121, 1128 (2d Cir. 1970) (failure to disclose great losses one year before proxy statement is remedied by placing losses in proxy statement).

\textsuperscript{240} This is evidenced further by other antifraud rules which are violated even though disclosure is made. See, e.g., 1934 Act Rules 10b-6 and 15c1-7, 17 C.F.R. \textsuperscript{2} §§ 240.10b-6, 240.15c1-7 (1973).

\textsuperscript{241} There is some indication that disclosure does not cure even a non-substantive violation. See Associated Investors Sec., Inc., 41 S.E.C. 160, 167 (1962) (offer to refund price with interest no defense); cf. SEC v. Great Am. Indus., Inc., 407 F.2d 453, 457 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 920 (1969) (apparently under 1934 Act § 13(a), 15 U.S.C. § 78m(a) (1970)). This apparent discrepancy can be explained by treating a proper, timely correction as precluding a damage action since no injury can be shown.

and evaluated the data contained in the announcement. Some schemes raise such serious 10b-5 questions that it is doubtful whether meaningful disclosure can be made. Assuming the correction is intelligible and timely, the burden of taking affirmative action can be shifted to voting or tendering stockholders by requiring them to change their vote or withdraw their securities if they so desire.

A few miscellaneous points remain. First, disclosure in mismanagement situations is somewhat complex. Second, a correction of a statement is itself some evidence that the statement was misleading when issued, particularly if no development intervened between the two announcements. Third, the change in market price after a correcting release can be used as evidence of the misleading nature of the prior statement. Fourth, the Second Circuit held that it is no defense in an action


243. But see Derrdarian v. Futterman Corp., 38 F.R.D. 178, 180 (S.D.N.Y. 1965) (settlement of class action for misleading statement; class terminates on date of issuance of correcting announcement).


246. See generally Jacobs, supra note 5, at 51-61, 67-75.


248. See notes 53-54 supra and accompanying text.
by the Commission that an erroneous 8-K report was corrected before it was placed in the public files; but the court noted that inadvertence in preparing the original filing and prompt correction after request "may affect liability for damages . . . ." Fifth, a successful suit cannot be precluded by stating in a misleading release that clarification will be issued later. Indeed, a cause of action could arise out of the confusion of the two announcements if the "clarifying" release is significantly different in content but closely related in time. Finally, selective disclosure constitutes tipping when the data are material. The New York Stock Exchange prohibits selective disclosure of even non-material facts, a position which may be stricter than the Rule.

V. CONCLUSION

This article has attempted to explain what may constitute a misleading statement or omission under Rule 10b-5. It should be obvious from an examination of the authorities cited that courts will differ on the question of whether a particular statement violates the Rule. The topic is far from settled, and so prediction is impossible, if not foolhardy. But patterns are discernable, and this article has pointed out some of them. What lies in the future depends on whether the courts continue to construe the Rule as broadly as they have in the past; if so, the scope of misleading statements may very well encompass statements heretofore thought immune.

250. Id. at 457.