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SECURITIES REGULATION—Nondisclosure of inside information which would have had substantial impact on market held violative of securities laws; release of material information to news media constitutes full disclosure. SEC v. Texas Gulf Sulphur Co. (S.D.N.Y. 1966).

In 1959, an exploration group in the employ of Texas Gulf Sulphur Company conducted aerial geophysical surveys over a Canadian area. Pursuant to the acquisition of several parcels of the surveyed land, the Company, between November 8, 1963 and April 15, 1964, conducted eight test drillings for sulphides. These tests revealed substantial deposits of minerals. During this period, certain directors, officers and employees of the Company purchased stock and calls on stock of Texas Gulf Sulphur; made recommendations to acquaintances concerning the purchase of the Company's securities; and accepted stock options in accordance with the Company's Stock Option Incentive Plan. On April 12, the Company issued a press release which minimized the results of the mining tests. On April 16, Texas Gulf Sulphur announced to the news media the discovery of a new copper mine.

The Securities and Exchange Commission instituted action\(^1\) against the Company and these directors, officers and employees for alleged violations of Section 10(b)\(^2\) of the Securities Exchange Act of 1934\(^3\) and Rule 10b-5\(^4\) promulgated thereunder. The basis for the charge

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\(^1\) The action was brought pursuant to the Securities Exchange Act of 1934 § 21(e), 48 Stat. 900 (1934), as amended, 15 U.S.C. § 78u(e) (1964), which authorizes the Commission to institute actions to enjoin existing or imminent violations of the act and to enforce any obligation or liability arising from the act or the rules and regulations enacted in its pursuance. Section 27 of the act, 48 Stat. 902 (1934), as amended, 15 U.S.C. § 78aa (1964), grants exclusive jurisdiction of such actions to the district courts of the United States.


It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange——

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.


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,
against Texas Gulf Sulphur was the issuance of an allegedly false and misleading press release regarding the mining developments in Canada. The tripartite foundation for the charge against the individual defendants lay in (1) the use of material information concerning these developments—prior to their being publicly disclosed and absorbed—to purchase the stock or the calls on stock; (2) the recommendation of such purchases to acquaintances; and (3) the acceptance of the stock options without revealing this information to the Directors' Committee which had granted the options. The defendants' actions, the Commission contended, were tantamount to engaging in a "course of business" which operated "as a fraud or deceit" upon the stockholders of the Company. 5

Upon trial before the district court, sitting without a jury, held: Two of the individual defendants, a secretary and an engineer, had violated section 10(b) and rule 10b-5 by purchasing shares of Texas Gulf Sulphur stock at a time when the undisclosed information of the drilling tests was "material." The activities of the other individual defendants had taken place either before the information had attained the degree of materiality or after the Company had made the announcement of the new mine. Further, since there was no showing by the SEC that the press release of April 14 had been made "in connection with the purchase or sale of any security," 6 the Company was not found to have violated the securities enactments. SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262 (S.D.N.Y. 1966).

The majority view espoused by the common law deemed the corporate insider to be a fiduciary only of the corporation; no duty was imposed upon him to disclose information when transacting purchases or sales in his company's stock. Failure to divulge known facts affecting stock value would not, therefore, give rise to a cause of action. 7 The severity of this view, and the cognizance of the need

5. Id. at subsection (c). The court, in footnote 7 of its opinion, stated that no distinction among the three subsections was made by the Commission either in its brief or at trial. However, as no evidence was offered to show that the defendants used "any device, scheme, or artifice" as proscribed by subsection (a) or made any representation prohibited by subsection (b), the court applied subsection (c). When a violation of the rule is alleged, no particular subsection need be invoked. List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir.), cert. denied, 382 U.S. 811 (1965).


to redress injuries suffered from such corporate practices, gave impetus to a minority doctrine. The courts adhering to this view placed the insider in a fiduciary relation to the stockholders, thus requiring disclosure of all pertinent facts that would affect a party's judgment in a securities transaction.  

A third group of courts accepted an intermediary position, looking upon the insider as not having a fiduciary duty in every transaction which was undertaken, but, nonetheless, imposing upon him an obligation in "special circumstances" to reveal information acquired by virtue of his position.

Under both the common-law minority view and the "special circumstances" or "special facts" doctrine, as it is better known, the want of disclosure, when necessary, amounted to fraud.  

It has been averred that, in actuality, the majority position at common law has been emasculated by its gradual envelopment within the "special facts" doctrine, with the latter becoming barely discernible from the minority concept. Though the "special facts" doctrine does not purport to accept the presence of a fiduciary relationship between insiders and stockholders, it "is manifestly based on the existence of a relationship between [them] . . . which is different from the relationship between arm's-length traders."

Prior to the enactment of the Securities Exchange Act of 1934, it appears that the United States Senate considered insiders as occupying a position of trust and confidence. The marked increase in unscrupulous speculative ventures by corporate directors, officers and

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Goulden, 130 Mich. 531, 90 N.W. 406 (1902); Carpenter v. Danforth, 52 Barb. 581 (N.Y. 1868); see Smith v. Hurd, 53 Mass. (12 Met.) 371 (1847) (The dictum in this case has been cited as providing the foundation for this view.).

8 Oliver v. Oliver, 188 Ga. 362, 45 S.E. 252 (1905); Hotchkiss v. Fischer, 136 Kan. 530, 16 P.2d 531 (1932); Jacquith v. Mason, 99 Neb. 509, 156 N.W. 1041 (1916); see 19 CORNELL L.Q. 103 (1933).


10 See cases cited notes 8 and 9 supra. In the "special facts" landmark decision, Strong v. Repide, the Supreme Court determined that the defendant-insider's position established sufficient facts to create liability. As a director of a corporation, he had negotiated for the sale of its assets; due to his position, he knew better than others the stock value to be achieved by such a sale. Consequently, his nondisclosure of this fact, when buying securities, effected a breach of duty which was fiduciary in nature by reason of his position. The "special facts" giving rise to similar obligations were no more strictly interpreted in other cases. III LOSS, SECURITIES REGULATION 1447-48 (2d ed. 1961).

11 III Loss, op. cit supra note 10, at 1447.

12 Ibid.
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major stockholders was deemed violative of "fiduciary" principles.\footnote{Report of Com. on Banking & Currency, Stock Exchange Practices, S. Rep. No. 1455, 73d Cong., 2d Sess. 55 (1934).} The use of undisclosed material information by insiders instilled in Congress a desire to safeguard the minority shareholders' interests, thus prompting, in part, the enactment of the 1934 legislation.\footnote{The principal purposes of the act were to control securities trading by insuring the disclosure of information to purchasers or sellers; to avert fraud in securities transactions by providing a remedy therefor; to govern practices in the securities markets; and to regulate the amount of national credit which flows into these markets. I Loss, op. cit supra note 10, at 130-31.} Although broad in scope, the act left the Commission, its created administrative body, devoid of an effective provision to deter fraudulent practices involving persons other than brokers. To rectify this inadequacy, the SEC promulgated rule 10b-5,\footnote{The SEC initially rendered an opinion applying rule 10b-5 in Ward La France Truck Corp., 13 S.E.C. 373 (1943), which involved the purchasing of corporate securities by officers for the corporation itself. These individuals neither notified the stockholders from whom they purchased that merger negotiations were being conducted, nor disclosed to them that the corporation was the buyer. The Commission held that such actions were clearly transgressive of the rule. The first judicial decision concerning the provision was Kardon v. National Gypsum Co., 73 F. Supp. 798 (E.D. Pa. 1947), wherein the court adjudged insiders' nondisclosure of a previous sale of corporate assets as a violation.} which expressly covers purchases or sales "by any person."\footnote{Note, 59 Harv. L. Rev. 769, 770 (1946). Antecedent to the rule, the only legislative weapons against fraud in the purchase or sale of securities were found in Section 17(a) of the Securities Act of 1933, which was limited to purchases only; and section 15(c) of the 1934 act, which proscribed fraudulent dealings by brokers in over-the-counter operations. The purpose of the rule, therefore, was to protect buyers and sellers from not only corporate insiders but from anyone who perpetrated a fraud. Bimbaum v. Newport Steel Corp., 193 F.2d 461, 465 (2d Cir.), cert. denied, 343 U.S. 956 (1952); see III Loss, op. cit supra note 10, at 1469.} 

The Texas Gulf Sulphur court adhered to the "special facts" doctrine, and applied it to the rule and section 10(b) of the act. Using material information, which remains undisclosed to minority shareholders, was held to be clearly within those unique circumstances that invoke the relationship closely paralleling that of a fiduciary. To gain financially, at the expense of those to whom loyalty is due, is most certainly proscribed by these securities provisions.

The issues that confronted the Texas Gulf Sulphur court, in determining whether section 10(b) and rule 10b-5 had been violated, were (1) whether the individual defendants were insiders; (2) whether the section and the rule apply only to privity transactions or whether they also encompass trading on the national exchanges; (3) whether the information used by the defendants was actually material in content; (4) whether buying Texas Gulf Sulphur secu-
rities immediately after the official announcement of the new mine was permissible; and (5) whether the Company’s press release of April 14 violated section 10(b) and rule 10b-5.\textsuperscript{17}

Historically, the term “insider” has been applied solely to directors, officers and major stockholders.\textsuperscript{18} However, since section 10(b) refers to “any person,” one not holding an enumerated position may, in certain instances, be considered an insider.\textsuperscript{19} These instances would cover situations where people acquire material information in the scope of their employment, thereby placing themselves in a position of trust and confidence toward the shareholders—a position analogous to that of a fiduciary.\textsuperscript{20} Consequently, “insiders” may include employees as well as corporate dignitaries.

Since one of the purposes of the securities legislation was to afford protection to the ordinary purchaser who deals primarily on the open market,\textsuperscript{21} liability under section 10(b) and rule 10b-5 must extend to

\textsuperscript{17} Texas Gulf Sulphur was a case of first impression regarding (1) the application of the term “insider” to those other than officers, directors and major stockholders in suits under federal securities law; (2) the question as to extending liability under rule 10b-5 to purchases on the national exchanges; and (3) the purchasing of securities immediately after an official announcement.

Early in its opinion, the court rejected two contentions made by the defendants: (1) that the common-law elements of fraud must be shown in proving violations of section 10(b) and rule 10b-5; and (2) that any liability incurred by insiders is limited to the sanctions provided in Section 16 of the Securities Exchange Act, which restricts the parties who may bring action to the corporation and, derivatively, to the stockholders. In an apparent reversal of its own jurisdictional requirements of proof, the court held that “recent cases” did not demand proof of fraud, the only requisite being proof of one of the acts which is prohibited by the securities legislation and the rules. 258 F. Supp. at 277. Accord, Stevens v. Vowell, 343 F.2d 374 (10th Cir. 1965); Royal Air Properties, Inc. v. Smith, 312 F.2d 210 (9th Cir. 1962); Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961). Contra, Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951) (requiring proof of fraud in actions brought pursuant to section 10(b)); Weber v. C.M.P. Corp., F. Supp. 321 (S.D. N.Y. 1951) (requiring proof of scienter); Barnett v. Anaconda Co., 238 F. Supp. 766 (S.D.N.Y. 1965) (necessitating proof of causation).

This reversal stemmed from the Supreme Court’s admonition that securities legislation should be construed as “enacted for the purpose of avoiding frauds” not technically or restrictively, but flexibly to effectuate . . . remedial purposes.” SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963). Section 16 was held inapplicable because it proscribes only short-swing profits realized within a six-month period. Hence, it was enacted to force insiders to abandon short-swing speculation by making it unprofitable, as all benefits accrue to the corporation. A section 16 action requires both a purchase and a sale of a listed security, whereas section 10(b) encompasses the purchase or sale of any security, and any action thereunder may be brought by the Commission or any party who claims to have been defrauded. 258 F. Supp. at 278.

\textsuperscript{20} Brophy v. Cities Service Co., 70 A.2d 5 (Del. Ch. 1949).
transactions which are conducted on the national securities exchanges. It is not limited, therefore, to face-to-face dealings, so as to make privity an essential element of a cause of action.\footnote{22}

However, violations of section 10(b) and the rule can only occur when the undisclosed information is material,\footnote{23} since "there is nothing in the Act which precludes insiders from purchasing stock of their company or from being beneficiaries of the company's incentive stock option plan. [Moreover] ... it is important under our free enterprise system that insiders ... be encouraged to own securities of their company."\footnote{24} It is only when an insider uses unrevealed information which is qualitatively material to his own personal advantage that he incurs liability. Resolving the question of materiality is without doubt the crucial factor in deciding alleged violations of section 10(b) and rule 10b-5.

The test for determining materiality, it has been said, is whether disclosure of the information would affect the other party's "investment judgment,"\footnote{25} or whether it would alter the market value of the company's stock.\footnote{26} Although this tenet of materiality is notably well accepted, its application to existing facts has not always been uniform.\footnote{27}

In applying materiality to the facts in the principal case, the court felt constrained to proceed conservatively, since "many actions under

\footnote{22} See List v. Fashion Park, Inc., 340 F.2d 457, 461-62 (2d Cir.), \textit{cert. denied}, 382 U.S. 811 (1965). The court in the principal case rejected the defendants' assertion that, on a stock exchange, it would be impossible for insiders to contact the party or parties with whom they were trading, noting as evident that there are methods of disclosure other than that of personal notification. As the Commission has expressed: "It would be anomalous indeed if the protection afforded by the anti-fraud provisions were withdrawn from transactions effected on exchanges, primary markets for securities transactions." Cady, Roberts & Co., 40 S.E.C. 907, 914 (1961).


\footnote{24} 258 F. Supp. at 280.


\footnote{26} Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963); see Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951), \textit{aff'd}, 235 F.2d 369 (3d Cir. 1956).

\footnote{27} In Strong v. Repide, 213 U.S. 419 (1909), knowledge of present negotiations for the sale of corporate assets was held to constitute material information; contrarily, in James Blackstone Memorial Library Ass'n v. Gulf, Mobile and Ohio R.R., 264 F.2d 445 (7th Cir.), \textit{cert. denied}, 361 U.S. 815 (1959), negotiations for such a sale were not construed as a basis for materiality. This later view appears to be adverse to the application given by the SEC in Ward La France Truck Corp., 15 S.E.C. 373 (1943), in which the Commission deemed as violative of rule 10b-5 the nondisclosure of merger negotiations. \textit{But see} Fleischer, \textit{Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceeding}, 51 VA. L. REV. 1271, 1289-90 (1965). The author expresses the opinion that the distinction lies in the degree, intensity and stage of the negotiations.
Section 10(b) are brought on the basis of hindsight.\(^{28}\) The obligation to disclose corporate facts should be limited to those unique situations where disclosure would \textit{substantially affect} the market price of the security.\(^{29}\) A less conservative interpretation than this would only place an onerous duty upon management, greatly retarding its securities transactions.\(^{30}\) This "substantial impact" test was consistent with the trial testimony of geophysicists, mining engineers and security analysts, who felt that the first two test drillings, although whetting the interest of the insiders, could not be the basis of a prediction as to the actual discovery of a mine. In addition, "from an investment point of view no significance could be attached to the results of a single drill hole, however rich."\(^{31}\) Furthermore, the court held that the "results of [the second test] . . . added to the information previously known but did not constitute material information."\(^{32}\) Evidently, had the public or the minority stockholders become aware of the mineralization encountered by the second drilling, they would not have altered the value given to the Company's stock. The results of the first drilling test were also thought to be too "remote," \textit{i.e.}, no substantial variation in the market would have occurred upon disclosure, in view of the range of Texas Gulf Sulphur's corporate activity, the volume of its shares and its expansiveness.\(^{33}\)

In opposing this view, the Commission contended that the results of the initial test achieved materiality as a consequence of the importance with which they were received. However, the court noted that an insider will most assuredly have better knowledge of the prospects of his company, and, hence, be in a better position to analyze its developments. To proscribe securities trading based upon "educated guesses" would place an insider in a dilemma: Should he, in reliance upon his educated guess, purchase stock in his company without effecting disclosure, he would be liable if his guess were proven correct; conversely, he would be subject to action upon making a dis-
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closure which proves erroneous. The fear of legal action would only cause a cessation of insider purchases, a result which, due to the desirability of giving insiders an incentive, would be injurious to corporate well-being.

The conclusion reached as to the inculpability of the defendants' purchases prior to the termination of the third drilling—the point at which the information became material—was also exonerative of the purchases made by the acquaintances who had received information of the developments of the first and second drilling tests. These "tippees" had not purchased Texas Gulf Sulphur stock with the aid of material information; consequently, any advice given them as to the ripeness of buying such stock could not be the basis of liability. Nor could the five defendants, who received the stock options pursuant to the Company's Stock Option Incentive Plan, be held in violation of the section and the rule. Although a stock option is a security within the ambit of the Securities Exchange Act, and although fraud may well be perpetrated upon a company by concealing information to one's own pecuniary gain, liability in such circumstances is founded upon materiality. Since, in the light of the court's factual analysis, the options were accepted months before the information waxed material, the defendants were not obligated to reveal their knowledge of the tests.

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34 258 F. Supp. at 284.
35 Though the court did not cite authority for imposing liability in situations involving erroneous educated guesses, it would most likely be found in the exceptions to immunity from liability for misrepresentation of opinion.

The courts have developed numerous exceptions to the rule that misrepresentations of opinion are not a basis for relief. Apparently all of these may be summed up by saying that they involve situations where special circumstances make it very reasonable or probable that the plaintiff should accept the defendant's opinion and act upon it, and so justify a relaxation of the distrust which is considered admirable between bargaining opponents. Thus where the parties stand in a relation of trust and confidence . . . it is held that reliance upon an opinion . . . is justifiable, and relief is granted. Prosser, Torts § 104, at 742 (3d ed. 1964).

36 Presently, there is an issue as to whether "tippees" may be personally liable for purchasing securities as a result of their receiving inside information. This issue was not implicated in Texas Gulf Sulphur, as the SEC sought to impose liability for the "tippees'" purchases upon the insider-defendants. Fleischer has stated that Cady, Roberts & Co. could be construed as the genesis of "tippee" liability. Fleischer, supra note 27, at 1282-83. However, the issue remains judicially undecided.


39 The defendants were granted the options on February 20, 1964. At that time they knew only that the first drilling test had reached completion; that substantial mineralization had been encountered; and that the corporation had begun acquiring
In view of what was held to be the present rule, section 10(b) and rule 10b-5 were not adjudged proscriptive of the securities acquisition which immediately followed the Company's April 16 press announcement. Citing Cady, Roberts & Co.\textsuperscript{40} and applying the accepted business standard, the Texas Gulf Sulphur court noted that purchasing securities subsequent to an official announcement is common procedure in the marketplace. The desire of the Commission to have the court establish a more effective announcement rule, so as to preclude the purchasing of securities before public absorption, was thwarted by the court's decision to refrain from judicially establishing a reasonable waiting period. Modifying the existing practice in this manner would only lead to difficulties, even though it might cause the desistance of after-announcement trading at a time when the public has yet to absorb the information. The court hypothesized such a modification, posing these consequent difficulties: If insiders were to be precluded from buying securities for a definite period, what would be the obligations of members of the news media? Would a news representative be liable if he were to order stock after attending the announcement conference but prior to telephoning his editor? A similar quandary was presented with respect to wire houses.\textsuperscript{41} The Commission's contention that a fairer practice should be invoked by judicial decision was deemed as leading only to dubiosity. Since a decision in one case would not be controlling in another with different facts, no insider would be able to ascertain whether he had forborne long enough from purchasing. If a more equitable period of abstention is to be established, it was the opinion of the Texas Gulf Sulphur court that it should originate from the SEC itself, or, should the Commission be wary of such promulgation lest it exceed its authority, from the legislature.\textsuperscript{42}

In its final analysis, the court held that the Company had not violated section 10(b) and rule 10b-5 by issuing its April 14 press release.\textsuperscript{43} The SEC maintained that Texas Gulf Sulphur knew that

\textsuperscript{40} 40 S.E.C. 907, 917 (1961).
\textsuperscript{41} 258 F. Supp. at 288-89.
\textsuperscript{42} 258 F. Supp. at 289.
\textsuperscript{43} The press release read in part:
During the past few days, the exploration activities of Texas Gulf Sulphur in the area of Timmins, Ontario, have been widely reported in the press, coupled with rumors of a substantial copper discovery there. These reports
a copper mine had been unearthed, and that the press release was materially misleading in delineating this discovery as a "prospect." Though the issuance of a false press release can be violative of the section and the rule, if its purpose is to manipulate the market value of the company's securities to the financial advantage of the company or its insiders, the Commission failed to evidence that such an advantage had inured to any of the defendants as a result of the press release, or that it had been issued with such an intent. The court further observed that the press release resulted in no appreciable market reaction, concluding that it had not been issued "in connection with the purchase or sale of any security"—a requisite in proving violations of rule 10b-5.

Texas Gulf Sulphur appears to have introduced a more stringent definition of materiality than those which have previously been applied. The "substantial impact" test, limited as it is to unique situations, is denotative of a more liberal rein for insiders in securities transactions. It would seem that insiders under this test are no longer required to punctiliously divulge facts which in "reasonable and objective contemplation might affect the value of the corporation's stock or securities . . . ." "Substantial impact" entails less onus than does the demand for disclosure of information that merely exaggerate the scale of operations, and mention plans and statistics of size and grade of ore that are without factual basis and have evidently originated by speculation of people not connected with TGS. The facts are as follows . . . . Numerous prospects have been investigated by geophysical means and a large number of selected ones have been core-drilled. . . . Most of the areas drilled . . . have revealed either barren pyrite or graphite without value; a few have resulted in discoveries of small or marginal sulphide ore bodies. Recent drilling on one property . . . has led to preliminary indications that more drilling would be required for proper evaluation of this prospect. . . . The work done to date has not been sufficient to reach definite conclusions and any statement as to size and grade of ore would be premature and possibly misleading. 258 F. Supp. at 292-93.

It is interesting to note that the press release termed the ore bodies "small or marginal," while the court in its opinion described the results of the tests as "substantial." A prospect was defined at the trial as "a property where there is no assurance that commercially mineable reserves exist." 238 F. Supp. at 295.

Theoretically, had the press release been issued in connection with the purchase or sale of securities, the court noted that the Commission had still not illustrated that it was false or misleading. The experts called by Texas Gulf Sulphur were of the opinion that the drilling tests at that time could not afford a basis for stating that there was continuity of mineralization in the test area. Furthermore, there could be no correlation between the results of the existing tests without further drilling. One of the Commission's witnesses acquiesced in the proposition that disparity of opinion could be had in the analysis of such matters. Thus, though the release appears pessimistic when viewed with the later developments, it was neither false nor misleading as dictated by the facts then existing. 258 F. Supp. at 296.

Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963) (Emphasis added.).
affects the judgment of the other transacting party.\textsuperscript{48} Even though one court has stated the disclosure test to be based upon information which would materially affect the other party’s judgment,\textsuperscript{49} the implication of \textit{Texas Gulf Sulphur} is even more restrictive.

Although it might be argued that minority stockholders should be the recipients of any educated guess which an insider may possess, thus allowing them to decide whether to sell at that time or wait until the guess is proven correct or erroneous, following the logic of \textit{Texas Gulf Sulphur} such an argument would be stultified. The “special facts” doctrine necessarily includes materiality, and imposes a relationship analogous to that of a fiduciary only when the insider has information which would affect the value judgment of the minority shareholder. Obviously, since educated guesses need not be disclosed, according to \textit{Texas Gulf Sulphur}, they cannot be viewed as establishing a “special facts” situation.

The court in the principal case was confronted with balancing the policy of encouraging insider investment against the need for controlling profit at the expense of minority shareholders. Whether an equitable balance has been achieved will undoubtedly be reviewed on the appeal which has been brought by the Commission.\textsuperscript{50}

The failure of the court to extend the announcement rule, however, presents a different problem. If an insider is in a position similar to one of trust and confidence, is it in accordance with fiduciary principles to permit him to purchase stock at the sacrifice of the interests of minority shareholders who have not had the benefit of absorbing the information with which the insider purchases? In reality, the insider is paradoxically allowed to conform to the fiduciary standard while acting in a manner antagonistic to the principles which serve as the standard’s foundation. In these situations, the insider occupies a position that is far from being analogous to a fiduciary’s, since under the guise of trust and confidence he acts to the detriment of minority shareholders.

The court’s illustration of the problems which would be met in an extension of the announcement rule is equally unpalatable. Should the courts permit insiders to relinquish their obligations merely because members of the news media or wire houses could also benefit

\textsuperscript{50} Appeal docketed, No. 30882, 2d Cir., 1966.
from an announcement? Although solely an illustration, it is illustrative of an "others do it" credo, manifesting privileges where none ought to exist.

Furthermore, if the courts are willing to impose a duty to exercise due and reasonable diligence in ascertaining what is material, and to reveal related information which is reasonably believed to be unknown to shareholders, can they not require forbearance from purchasing stock until insiders are reasonably certain that the information has been absorbed? The reasonable test is certainly not unique: Is it now inadequate in determining liability? A definite period of abstention would be as unworkable under certain circumstances as the court believed a judicially applied rule would be. The Commission has stated that in insider purchases "intimacy demands restraint lest the uninformed be exploited." Exploitation is not eradicated by the present holding.

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51 Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963).