Deputization Under Section 16(b): The Implications of *Feder v. Martin Marietta Corporation*

Carroll L. Wagner, Jr.†

I. Introduction

Congress enacted Section 16(b) of the Securities Exchange Act of 1934¹ to restrict the ability of corporate insiders to use their positions for the purpose of making short-swing profits in trading the corporation's shares. Insiders can benefit from advance information by purchasing or selling shares in their company prior to public disclosure of inside information, and reselling or repurchasing after the disclosure has the expected effect on the market price of the company's stock. Moreover insiders may use their positions to structure corporate policy in such a way as to manipulate the market price of the stock for a short period of time, in order to buy or sell their own stock during that time at artificially high or low prices. Section 16(b) provides that profits realized by the insider on the purchase and sale, or sale and purchase, within a six-month period, of equity securities of his corporation will inure to the corporation. The Act defines "insiders" as officers, directors, and ten per cent shareholders of the securities issuer. Either the issuer,

† A.B. 1966, Emory University; LL.B. 1969, University of Virginia.

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1. Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1964) provides:

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

or a shareholder of the issuer,² can institute a private suit to compel the insider to remit his short-swing profits to the company. This "crude rule of thumb"³ establishes simple, objective standards of proof. A showing of actual misuse of inside information or of actual manipulation is unnecessary to prove a violation of Section 16(b), and proof that there was no use of inside information or manipulation is not a defense.⁴

Because of its limited coverage, Section 16(b) does not eliminate all opportunities for profit from the use of inside information and manipulation. For example, the insider who holds the securities for six months escapes any Section 16(b) liability.⁵ Certain transactions may fall outside the statutory language of "purchase and sale" or "sale and purchase,"⁶ and the provision applies only to "equity securities," a term of ambiguous meaning in some instances.⁷ Any ten per cent shareholder, director or officer is conclusively presumed to have used his corporate position if he realizes short-swing profits; other persons are conclusively presumed to lack such advantages and are free from Section 16(b) liability.⁸

As might be expected, these presumptions encourage the de facto insider to remain outside the statutory definition of "insider." Accordingly some litigation and SEC rule-making since the enactment of

2. If the issuer-corporation does not file suit within sixty days after receiving a request to do so from a shareholder or if the issuer does not diligently prosecute the suit, then the shareholder can file suit in the issuer's behalf. *Id.*

3. *Smolowe v. Delendo Corp.*, 136 F.2d 231, 235 (2d Cir. 1943).

4. *E.g.*, *Western Auto Sup. Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736, 743 n.7 (8th Cir. 1965), *cert. denied*, 382 U.S. 987 (1966); *Smolowe v. Delendo Corp.*, 136 F.2d 231 (2d Cir. 1943).

5. The tax laws encourage holding stock for six months, since the stockholder can obtain the lower long-term capital gains tax rate on his profits. INT. REV. CODE OF 1954, § 1222(3).

6. *See, e.g.*, Note, *Short-Swing "Purchase and Sales" Under the Securities Exchange Act*, 61 NW. U.L. REV. 448 (1966); Meeker & Cooney, *The Problem of Definition in Determining Inside Liabilities under Section 16(b)*, 45 VA. L. REV. 949 (1959).

7. *E.g.*, *Chemical Fund, Inc. v. Xerox Corp.*, 377 F.2d 107 (2d Cir. 1967); *Jefferson Lake Sulphur Co. v. Walet*, 104 F. Supp. 20, 23 (E.D. La. 1952).

8. The arbitrariness of these presumptions is illustrated by the following example. Charles Bluhdorn's Gulf & Western Industries, a "hot" conglomerate, recently purchased 9.8 per cent of the stock of Armour & Co. in preparation for a takeover bid. Bluhdorn had purposely avoided becoming an insider by keeping his holdings in Armour under 10 per cent. The takeover was blocked and Armour management, offended by Bluhdorn's tactics, had its revenge by repurchasing Armour stock on the open market, eventually raising Bluhdorn's percentage holdings in the outstanding shares to 12.5 per cent, thus making him an insider under Section 16(b) and barring him from pocketing short-swing profits. Yet realistically Gulf & Western was anything but an insider since Armour was rather maliciously trying to penalize the company rather than providing it with any beneficial inside information. *See TIME*, Mar. 7, 1969, at 78, col. 3.

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Section 16(b) has centered around the issue of who is an "officer"⁹ and who is "directly or indirectly the beneficial owner of more than ten per centum of any class of any equity security" of the issuer.¹⁰ In contrast to the problems of interpreting the terms "officer" and "owner," after twenty years of Section 16(b) litigation two prominent securities scholars were able to report that "[t]he application of the section to directors has not caused nearly so much difficulty, and has involved no litigation."¹¹ The statute defines "director" as "any director of a corporation or any person performing similar functions with respect to any organization."¹² This was thought to be sufficiently descriptive to prevent any problems in its application.

Despite this apparent clarity, a line of cases developed suggesting that a director of an issuer, because of his relationship with another business entity, might serve that second entity under such circumstances that the second entity was, for purposes of Section 16(b) liability, also a director of the issuer.¹³ Until very recently these judicial suggestions were only dicta, but the ice was broken by the Second Circuit¹⁴ in *Feder v. Martin Marietta Corporation*.¹⁵ George M. Bunker, the president of Martin Marietta Corporation [Martin], served as a director of the Sperry Rand Corporation [Sperry], the issuer. During Bunker's tenure as a Sperry director, Martin purchased Sperry common stock and sold it at a profit within six months. Martin was not a Sperry officer, director, or ten per cent shareholder. Nevertheless, the Second Circuit overruled the district court's¹⁶ findings of fact¹⁷ and concluded that "Bunker, in fact, was a Martin deputy"¹⁸ and therefore "Martin Marietta was a director of Sperry Rand."¹⁹ Martin was

9. *Lockheed Aircraft Corp. v. Rathman*, 106 F. Supp. 810 (S.D. Cal. 1952) (assistant treasurer not officer); *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949); SEC Rule X-3B-2, 17 C.F.R. § 240, 3b-2 (1968).

10. *Chemical Fund, Inc. v. Xerox Corp.*, 377 F.2d 107 (2d Cir. 1967); *Ellerin v. Massachusetts Mut. Life Ins. Co.*, 270 F.2d 259 (2d Cir. 1959).

11. *Cook & Feldman, Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 400 (1953).

12. 15 U.S.C. § 78c(7) (1964).

13. *Blau v. Lehman*, 368 U.S. 403 (1962); *Rattner v. Lehman*, 193 F.2d 564 (2d Cir. 1952) (Hand, J., concurring); *Marquette Cement Mfg. Co. v. Andreas*, 239 F. Supp. 962, 967 (S.D.N.Y. 1965). See also *Molybdenum Corp. v. International Mining Corp.*, 32 F.R.D. 415, 418 (S.D.N.Y. 1963).

14. This particular jurisdiction is "where the so-called '16(b) bar' is located," R. JENNINGS & H. MARSH, *SECURITIES REGULATION* 1032 (2d ed. 1963), thus accentuating the impact of the decision.

15. 406 F.2d 260 (2d Cir. 1969).

16. *Feder v. Martin Marietta Corp.*, 286 F. Supp. 937 (S.D.N.Y. 1968).

17. See 406 F.2d at 263.

18. *Id.* at 266.

19. *Id.* at 264.

forced to give to Sperry its short-swing profits on Sperry stock which Martin purchased during Bunker's directorship.

The ramifications of *Martin Marietta* extend beyond its factual setting. Manufacturers like Martin rely primarily on the production of goods for their profits and are unlikely to be trading heavily in the securities market. On the other hand, financial firms such as banks, brokerage and underwriting houses, and various investment funds rely substantially upon securities investments in other businesses. When employees of these firms sit as directors of corporations, is a finding of deputization more likely? As Wall Street acknowledges, "[t]he decision has opened a whole new can of worms."²⁰

II. The Case Law

A. Before *Martin Marietta*

Judge Learned Hand originated the theory of deputization under Section 16(b) in *Rattner v. Lehman*.²¹ Lehman Brothers, an investment banking and brokerage partnership, realized short-swing profits on the common stock of Consolidated Vultee Aircraft Corporation while a Lehman partner, John Hertz, was a director of Consolidated. Hertz gave his proportionate share of the partnership's profits to Consolidated, but a Consolidated shareholder brought suit for the entire amount of the Lehman profits. The majority opinion exonerated the partnership itself on the grounds that Section 16(b) contained no requirement that partners of a director must account for their profits.²²

Judge Hand in his concurring opinion noted that the complaint alleged that Hertz "advised and caused the defendant Lehman Brothers

20. Wall Street Journal, Feb. 24, 1969, at 1, col. 6.

21. 193 F.2d 564, 566 (1952) (Concurring opinion).

22. The *Rattner* majority based its decision partially upon SEC Rule X-16A-3(b) which at that time required a partner to file a disclosure report under section 16(a) "only as to that amount of such equity security which represents his proportionate interest in the partnership." The SEC, which filed an amicus brief in *Rattner*, subsequently amended the Rule to read:

A partner who is required under § 240.16a-1 to report in respect of any equity security owned by the partnership shall include in his report the entire amount of such equity security owned by the partnership. He may, if he so elects, disclose the extent of his interest in the partnership and the partnership transactions.

SEC Rule X-16A-3(b), 17 C.F.R. § 240.16a-3(b) (Cum. Supp. (1961)). See 2 L. Loss, SECURITIES REGULATION 1102-04 (1961).

However, the SEC stated that this change was "not intended as a modification of the principles governing liability for short-swing transactions under Section 16(b) as set forth in the case of *Rattner v. Lehman*." SEC Release No. 4754 (Sept. 24, 1952). In 1961 Rule X-16A-3 was again amended to omit any requirement that partners report partnership holdings, but, in effect, the rule is intact in the SEC instructions to Forms 3 and 4 which are used to make § 16(a) disclosure reports.

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to purchase and sell 5000 shares of Vultee's stock."²³ Hand speculated as to the result if sufficient proof of this allegation had been submitted:

But I wish to say nothing as to whether, if a firm *deputed* a partner to represent its interests as a director on the board, the other partners would not be liable. True, they would not even then be formally "directors"; but I am not prepared to say that they could not be so considered; for some purposes the common law does treat a firm as a jural person.²⁴

The concept of deputization lay dormant for almost a decade, until in 1962 it was revitalized by the Supreme Court in *Blau v. Lehman*.²⁵ Joseph Thomas, also a partner of Lehman Brothers, was a director of the Tide Water Associated Oil Company when Lehman Brothers realized short-swing profits on common shares of Tide Water. Testimony was accepted at trial that Thomas did not disclose confidential information of Tide Water affairs to any member of Lehman Brothers, that Lehman Brothers purchased Tide Water stock solely on the basis of public announcements made by Tide Water, and that Thomas did not know of the initial purchase of Tide Water stock made by Lehman Brothers. The Supreme Court for the first time considered Hand's deputization theory, but felt that the lower court's finding precluded a holding that Thomas was the deputy of Lehman.

Consequently, Lehman Brothers would be a director of Tide Water, if as petitioner's complaint charged Lehman actually *functioned as a director* through Thomas, who had been *deputized* by Lehman to perform a director's duties not for himself but for Lehman. But the findings of the two courts below, which we have accepted, preclude such a holding. It was Thomas, not Lehman Brothers as an entity, that was the director of Tide Water.²⁶

In *Marquette Cement Manufacturing Co. v. Andreas*²⁷ the District Court for the Southern District of New York considered, for the first time, the applicability of the deputization theory to a corporate defendant. Andreas was the sole trustee for nineteen trusts holding all of the Andreas Corporation stock and was the trust beneficiary of 24.9 per cent of that stock. Most of the remaining beneficiaries were family members. The Andreas Corporation in turn was a substantial stock-

23. 193 F.2d at 566.

24. *Id.* at 567 (emphasis added).

25. 368 U.S. 403 (1962).

26. *Id.* at 410 (emphasis added).

27. 239 F. Supp. 962 (S.D.N.Y. 1965).

holder of the North American Cement Corporation. The Andreas family arranged with Marquette Cement Manufacturing Corporation to exchange the assets of North American for Marquette common stock.

In February, North American stockholders (including the Andreas Corporation) exchanged their shares for Marquette stock; in March, Andreas was elected to the board of directors of Marquette; and in April, the Andreas Corporation sold all of its Marquette stock on the open market. A Marquette stockholder filed suit to recoup the short-swing profits realized on the Marquette stock.

The plaintiff contended that Andreas was deputized by the Andreas Corporation and that therefore the Corporation was liable as a director of Marquette for all short-swing profits realized on Marquette stock. In a brief statement, the court held that there was insufficient evidence of deputization, despite the fact that Andreas effectively controlled the Andreas Corporation:

Andreas' control over the Corporation is one factor to be considered in determining whether he was actually deputized to represent Corporation interests on the Marquette Board. To hold as a matter of law that an insider with interest in another corporation cannot separate these roles would subvert the rationale of the *Rattner* and *Blau* cases.²⁸

The court in *Marquette* indicated that a finding of deputization requires something more than a showing that the corporation shared the inside information of a director. There can be no question that the Andreas Corporation had access to all the inside information available to Andreas himself; essentially, Andreas was the Andreas Corporation. Since Section 16(b) was not intended to apply to all persons who might have inside information, the court's decision is sound. A finding of deputization should require not that the director could make inside information available to his firm, but rather, as Judge Hand in *Rattner* and Mr. Justice Black in *Blau* suggested, that the director served his firm in such a way that the firm was the de facto director of the issuer. Thus, for a firm to be liable under Section 16(b) on a deputization theory, the early cases suggest that the firm must share the advantages of other directors—both access to inside information and power to manipulate the corporation.

28. *Id.* at 967.

B. Feder v. Martin Marietta Corporation

With these cases in the background, the Second Circuit in *Martin Marietta*²⁹ finally found deputization in a case arising under Section 16(b). An understanding of the basis and implications of the court's holding requires close scrutiny of the facts of the case.

On two previous occasions Bunker, the president of Martin Marietta, had refused invitations to serve on the Sperry Board. When Sperry asked him a third time, in March 1963, he finally accepted. The district court felt that the manner in which Bunker was invited onto the Sperry Board cut against a finding of deputization:

Both lower courts in *Blau v. Lehman* placed considerable weight on the fact that the invitation to join the Board was upon the initiative of Tide Water and not the defendant partnership. Similarly, here Sperry took the initiative. While such a showing does not preclude a finding of deputization, it is a factor to be considered along with the rest of the evidence bearing on this issue.³⁰

The Second Circuit apparently drew no independent conclusion.

During the period when Bunker was being approached about joining the Sperry Board, Martin was buying Sperry stock on the open market. When Bunker finally accepted, Martin owned over 700,000 shares of Sperry common stock. Pursuant to Martin policy, Bunker asked the Martin Board for permission to serve as a director of Sperry. The Second Circuit noted that at this time Bunker informed the Martin Board of Martin's substantial investment in Sperry. Bunker testified that he "thought the Board would draw the inference that his presence on Sperry's Board would be to Martin's interest."³¹ The district court concluded that "there was no evidence of any affirmative action by Martin to cause Bunker to be made a Sperry director; nor will the Board's conduct support even an inference that it deputized him to represent its interests on Sperry's Board."³² The Second Circuit, however, felt that the Martin Board's approval of Bunker's directorship of Sperry was at least probative of deputization: "surely such conduct by the Martin Board supports an inference that it deputized Bunker to represent its interests on Sperry's Board."³³

29. 406 F.2d 260 (2nd Cir. 1969).

30. 286 F. Supp. at 944.

31. 406 F.2d at 265, quoting 286 F. Supp. at 945.

32. 286 F. Supp. at 945.

33. 406 F.2d at 265-66.

Martin had a policy of placing representatives on the Boards of other corporations, particularly those in which Martin was a substantial shareholder or a parent. Martin expected "some association between the two companies" and actively participated in the management of the companies on whose Boards it had placed a director. Sometimes Martin told its representatives "what positions to take on various matters, and they report[ed] back to Martin what [was] going on in the companies on whose boards they [sat]."³⁴ However, there was no evidence that Bunker himself reported back to Martin and asked for instructions. The district court found the testimony as to Martin's policy inconclusive, but the Second Circuit determined that although

Bunker had no duty to report back to Martin, [o]therwise Bunker was a typical Martin deputy. In view of Bunker's position of almost absolute authority over Martin's affairs, such differences hardly suffice to refute the evidentiary value of the similarities between the functions of Bunker and those of Martin's representatives on other corporate boards.³⁵

While Bunker was a Sperry director, Martin purchased 101,300 additional shares of Sperry stock. Bunker had ultimate authority over Martin stock purchases³⁶ but did not necessarily "cause" the purchase of Sperry stock. Both courts noted that such conduct contrasted with that in *Blau v. Lehman*, where the court found that the stock of Tide Water was bought and sold by Lehman without any advice or concurrence of Thomas, and without his knowledge until after the transaction had taken place.³⁷

In addition, Bunker testified that he discussed Sperry matters with Martin officials, but that he "did not receive information that would affect an investment in any regard; rather most of the information he obtained while a director had to do with Sperry's 'operational situation.'"³⁸ Both courts held that, without more, the possibility that inside information was obtained or disclosed did not mandate that Bunker was Martin's deputy.³⁹ The Second Circuit, however, found that the Bunker-Martin relationship differed in significant respects from that in *Blau v. Lehman*:

34. 286 F. Supp. at 947.

35. 406 F.2d at 266.

36. 286 F. Supp. at 945.

37. 368 U.S. at 406.

38. 286 F. Supp. at 946.

39. 406 F.2d at 265; cf. 286 F. Supp. at 946.

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In contrast . . . the Lehman partner exercised no power of approval concerning the partnership's investment; was not consulted for advice; had no advance knowledge of Lehman Brothers' intention to purchase the stock of the corporation of which he was a member of the board of directors; and never discussed the operating details of that corporation's affairs with any member of Lehman Brothers.⁴⁰

The district court gave less weight to an anonymous memorandum in the Martin files entitled "Notes on Exploratory Investment in Sperry Rand Corporation," since much of it contained individual opinions and publicly available information. On the other hand, the Second Circuit found that the Memorandum "further indicates that Martin Marietta may have benefited, or intended to benefit, from Bunker's association with Sperry Rand."⁴¹

The Second Circuit also felt that the circumstances of Bunker's resignation from the Sperry Board were probative of deputization. The court attached great significance to one sentence of Bunker's letter of resignation: "When I became a member of the Board in April, it appeared to your associates that the Martin Marietta ownership of a substantial number of shares of Sperry Rand should have representation on your Board."⁴² While the district court preferred instead to accept testimony that neither Sperry nor Martin considered Bunker as Martin's deputy, the Second Circuit found that:

[C]ertainly the more logical inference from the wording of Bunker's letter of resignation is the inference that Bunker served on the Sperry Board as a representative of Martin Marietta so as to protect Martin's investment in Sperry.⁴³

On the basis of these findings, the Second Circuit decided that:

[T]he control possessed by Bunker, his letter of resignation, the approval by the Martin Board of Bunker's directorship with Sperry, and the functional similarity between Bunker's acts as a Sperry director and the acts of Martin's representatives on the other boards . . . are all definite and concrete indicatives that Bunker, in fact, was a Martin deputy.⁴⁴

Particularly in light of the fact that the district court drew the opposite conclusion from precisely the same facts, this language fails to provide

40. 406 F.2d at 265, citing 368 U.S. at 406.

41. *Id.* at 264.

42. *Id.* at 265.

43. *Id.*

44. *Id.* at 266.

clear standards for a determination of deputization on any given set of facts. The court's reliance on Bunker's control and Martin's policy of placing representatives on other boards suggests that Martin was actually functioning as a director of Sperry. Under *Blau* and *Rattner*, "functioning as a director" is the test of deputization. But the court's reliance on the inferences it drew from Martin's approval of the directorship and from Bunker's letter of resignation suggests that the court may be interpreting deputization to mean that Bunker served as Sperry's director with the intent of supplying Martin with inside information. That is to say, Bunker spied on Sperry for Martin or served as Martin's earpiece on Sperry's board, but Bunker did not attempt to influence Sperry's policy at Martin's direction.

The briefs for Martin Marietta strenuously objected to the appellant's suggestion that if Bunker served as a director of Sperry for the purpose of conveying information to Martin, then Bunker was Martin's deputy.⁴⁵ Bunker could have performed his duties as a director according to his personal judgment and yet still have provided Martin with inside information. Under such circumstances, Martin Marietta could hardly be said to have been acting as a director. Only where the corporation actively manages the issuer through its deputy does it truly function as a director.⁴⁶

45. "The presence or absence of some action amounting to 'deputization' by Martin is thus the crucial factual issue—not 'whether Bunker served as a Sperry director in order to serve Martin's interests.'" Brief for Appellee Martin Marietta at 12, *Feder v. Martin Marietta Corp.*, 406 F.2d 260 (2d Cir. 1969). In a petition for rehearing Martin again raised the issue:

The cardinal question, therefore, is whether Martin itself "actually functioned as a director" of Sperry or deputized Bunker to perform a director's duties not for himself but for Martin. The District Court held that there was no evidence of this kind of deputization. This Court's opinion, however, never considers whether Martin performed a director's function, but rather deals with a more nebulous concept of whether Bunker in some way "represent[ed] Martin's interests" on Sperry's Board.

Brief for Appellee Martin Marietta, Petition for Rehearing en Banc at 7, *Feder v. Martin Marietta Corp.*, 406 F.2d 260 (2d Cir. 1969). Martin also accused the Second Circuit of "[laying] down a *per se* rule of liability and [expanding] the definition of 'director' as used in the Act." *Id.* at 8; see *The Supreme Court, 1961 Term*, 76 HARV. L. REV. 54, 217 n.223 (1962).

46. The following hypotheticals may help make this distinction clearer:

(1) X, an officer of firm A, is a director of issuer B. X votes on the B Board in accordance with his sound business judgment of what will most benefit B. A owns under ten per cent of the stock of issuer B. X approves A's purchases of B stock. A has no influencing interest in B's management but does find it desirable to have an earpiece on B's Board who will give A advance warning of anticipated market gains or declines in B's stock so that A can maximize profits and minimize losses by timely purchases and sales.

(2) X is to disclose all important inside information to A and is to vote on crucial B matters as directed by A. A takes an active role in managing B through X. A is interested in more than merely having access to information relevant to its investment in B. This interest in the control of B is the result of one of the following relationships: A anticipates merger with B; B is a subsidiary of A; A and B have a customer-supplier relationship; A and B are competitors; A has recently underwritten a securities distribution for B; A is

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At times, the court seemed to draw inferences of deputization from evidence that Bunker provided Martin with information to protect Martin's investment in Sperry. One interpretation is that the Martin Board may have envisioned Bunker's directorship as desirable because he would be able to anticipate market fluctuations in Sperry stock. At least, there was no evidence to the contrary. To gain approval for his directorship, Bunker reminded the Martin Board of Martin's investment in Sperry stock, but Martin expressed no interest in acting as the functional director of Sperry. Bunker's approval of purchases of Sperry stock indicates Bunker's use of inside information to promote Martin's investment plans rather than his serving as Martin's deputy in the control of Sperry. The Martin memorandum confirms this interest in investment rather than in functional management.⁴⁷ Under such an interpretation, *Martin Marietta* is hardly distinguishable from *Andreas*. Martin may have had inside information, but this alone does not lead to the conclusion that Martin participated as a director.

The Second Circuit touched upon another possible rationale for concluding that Martin Marietta functioned as a director of Sperry. If Bunker's control over Martin was absolute, he could designate himself as the instrument by which Martin functioned as a director of Sperry. The district court noted that "Bunker was president, chief executive officer, director, and stockholder of Martin,"⁴⁸ but was not convinced that he had absolute control over Martin or that he had designated himself as the deputy of Martin. The Second Circuit focused on this issue when it remarked that:

heavily invested in the debt securities of *B*; or any one of a host of other relationships may exist. It is clear that *A* intends to "actually function as a director through [*X*] who had been deputized by [*A*] to perform a director's duties not for himself but for [*A*]." *Blau v. Lehman*, 368 U.S. 403, 410 (1962). In the first hypothetical, which is based on the facts of *In the Matter of Cady, Roberts & Co.*, 40 S.E.C. 907 (1961) only the investment interest is represented. In the second, the firm, *A*, is functioning as a director.

47. Other evidence, not discussed by the court, might have been more relevant to the issue of deputization. Murphy, *The Millions Under Martin Marietta's Mattress*, *FORTUNE*, Nov. 1963, at 135, indicates that at the time of the transactions in question Martin Marietta was actively soliciting a merger partner. Sperry was a likely candidate and Bunker probably hoped that his directorship might lead to a meeting of the minds and a subsequent merger. This evidence was highly relevant and should have been examined carefully. A corporation anticipating a possible merger will fill a directorship on the issuer's board primarily for the purpose of realizing a successful merger and only secondarily to realize insider profits. The merger would be top priority with the expectant corporation and it most likely would function as the issuer's director through its deputy to advance and facilitate the merger. If this evidence existed, it might have made out a clear case of deputization.

Plaintiff Feder attempted to put excerpts from the *Fortune* article into evidence in the lower court. However, the district court ruled that these statements were inadmissible hearsay. 286 F. Supp. at 941. Nevertheless, a close cross-examination of Bunker regarding the merger tactics might have born fruit for the plaintiff, even if the article could not be introduced.

48. 286 F. Supp. at 948.

A person in Bunker's unique position could act as a deputy for Martin Marietta even in the absence of factors indicating an intention or belief on the part of both companies that he was so acting.⁴⁹

We are not told what facts are necessary to a finding of self-deputization. A president of a corporation would normally be its chief executive officer, a director, and a shareholder. Does the existence of this power, by itself lead to Section 16(b) liability for the corporation? The Second Circuit said that power over the deputizing corporation was not enough to establish deputization, and proceeded to find other evidence. One wonders, however, if the court would have decided differently had there been no other evidence.

Perhaps a deeper inquiry into the degree of control Bunker exercised over Martin would have disclosed absolute power. Where total control does exist, a court might determine either that the controlling person could and did deputize himself, or that the actions of the corporation should not be recognized as distinct from the actions of the person who controls the corporation⁵⁰ when those actions circumvent Section 16(b) policy.⁵¹

49. 406 F.2d at 265.

50. The Second Circuit's suggestion resembles the alter ego theory, or "piercing the corporate veil". A corporation's existence as an entity distinct from its shareholders may sometimes be ignored for certain purposes, most notably when recognition of a separate existence would act as a fraud upon third parties. *E.g.*, *Minton v. Cavaney*, 56 Cal.2d 576, 15 Cal. Rptr. 641, 364 P.2d 473 (1961); *First Nat. Bank v. Gamble*, 134 Tex. 112, 132 S.W.2d 100 (1939). The corporate entity might be disregarded when failure to do so would allow the corporate entity to circumvent a statute. *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965). Usually the corporate entity is ignored only when majority stockholders have formed a corporation to avoid personal liability. However, other relationships might give rise to this refusal to recognize. For example, in *In re Tuttle's Estate*, 4 N.Y.2d 159, 173 N.Y.S.2d 279, 149 N.E.2d 715 (1958), the corporate entity was disregarded as distinct from the executors of the estate of the majority shareholder. The executor's control was the result of their unique position, namely that they were able to exercise effective control despite the lack of beneficial ownership of a majority of the corporation's stock.

51. To hold Martin Marietta liable the Second Circuit had to find not only that Martin deputized Bunker but also that section 16(b) applies to profits realized after Bunker resigned from the Sperry Board. Section 16(b) liability attaches to a "director [for] any profit realized by him from any purchase and sale, or sale and purchase." In *Adler v. Klawans*, 267 F.2d 840 (2d Cir. 1959), the Second Circuit held that this provision applies to the sale by a director who purchased before he became a director. But the *Martin Marietta* transactions are distinguishable. Section 16(b) holds the insider liable for "any profit realized by him" and this logically means "profit realized by him" while he is an insider since "him" is the pronoun referring to a "beneficial owner, director, or officer." Put another way, a person is not a "him" when he is not a "beneficial owner, director, or officer." The SEC recognized this distinction. Section 16(a), the reporting provision of Section 16, requires that an insider report his transactions in the issuer's stock while a director; no reports are required for transactions after the person ceases to be a director. SEC Rule 16a-10 provides that anyone who does not have to comply with the reporting requirements of Section 16(a) is "likewise exempted from section 16(b)." 17 C.F.R. § 240.16a-10 (1968). See 2 L. LOSS, *SECURITIES REGULATION* 1061 (2d ed. 1961). The Second

III. The Meaning of Deputization

The court's lack of clarity as to what constitutes deputization gives rise to the possibility that when employees or officers of a corporation serve on the board of the issuer for the purpose of conveying information to the corporation, the corporation will be held liable for short-swung profits even though it does not participate in the management of the issuer. Such an interpretation of 16(b) would conflict both with the way courts have understood deputization in the past and with the policies underlying the regulation of insider trading.

Courts considering deputization have had no problem theorizing that a corporation can be a director under Section 16(b). Section 3(a)(7)⁵² of the Securities Act of 1934 states that under the Act, "director" means any director of a corporation or any person performing similar functions with respect to any organization." "Person" is defined by Section 3(a)(9),⁵³ to include a corporation. Thus, a corporation that performs functions similar to those of a director would be a director under the statute. The Supreme Court in *Blau v. Lehman*⁵⁴ integrated the statutory test of directorship with its test of deputization when it asked whether "Lehman actually functioned as a director through Thomas who had been deputized by Lehman to perform a director's duties not for himself but for Lehman."⁵⁵ Thus both the statute and the test articulated by the Court require for a finding of deputization that a factual determination be made that the corporation performed the duties of, or functioned as, a director.

The corporation that has an "earpiece" director on the issuer's board, but does not function as a director, violates the policy of equal access to investment information for all investors when it receives and trades on advance corporate information. If this conduct, without more, constitutes deputization, judicial construction of Section 16(b) will conflict with unequivocal legislative history,⁵⁶ the statutory defi-

Circuit's holding is novel and open to question. One can now be a director when not clearly designated as such as well as after one's resignation has been tendered and accepted.

52. 15 U.S.C. § 78c(7) (1964).

53. 15 U.S.C. § 78c(9) (1964).

54. 368 U.S. 403 (1962).

55. *Id.* at 410.

56. Congress considered and rejected a provision that prohibited directors, officers, or five per cent stockholders from disclosing confidential information and provided that short-swung profits realized by "any person to whom such unlawful disclosure shall have been made is recoverable by the issuer." H.R. 7852, S. 2693, 73d Cong., 2d Sess. (1934). The interpretation of this provision is found in *Hearings before the Comm. on Banking and Currency on S. Res. 84*, 72d Cong., 2d Sess. (1934); S. Res. 56, 97, 73d Cong., 1st and 2d Sess. 6555, 6558, 6560-61 (1934); *Hearings before the Comm. on Interstate and Foreign Commerce on H.R. 7852 and H.R. 8720*, 73d Cong., 2d Sess. 135-37 (1934).

niton of a director,⁵⁷ and traditional notions of directorship.⁵⁸ Nevertheless, policy grounds might justify application of Section 16(b) if failure to apply that section to earpiece directors would result in the exoneration of improper conduct. However, since other provisions of the securities acts—most notably Section 10(b)⁵⁹ and SEC Rule 10b-5⁶⁰—impose civil and criminal liability for trading on inside information, application of 16(b) is unnecessary.

For example, in *In the Matter of Cady, Roberts & Co.*⁶¹ a brokerage firm partner who executed sell orders on the basis of inside information from a firm employee who sat on the issuer's board was held to have violated Rule 10b-5. Insiders in the position of Cady, Roberts & Co.

must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment. Failure to make disclosure constitutes a violation of the anti-fraud provisions.⁶²

While a director who is merely an earpiece might not be a deputy under Section 16(b), it is certain that his conduct is a violation of 10b-5. A showing that the issuer's director had advance information, that he relayed it to the defendant, and that the defendant realized short-swing profits on the basis of this information would satisfy both provisions if serving as an earpiece constitutes deputization under Section 16(b).⁶³

57. See p. 1163 *supra*.

58. See p. 1161 *supra*.

59. 15 U.S.C. § 78j(b) (1964).

60. 17 C.F.R. § 240.10b-5 (1968). Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1964), is identical to 10b-5, but applies only when the plaintiff has purchased securities. Section 17(a) seemed unnecessary after the SEC promulgated 10b-5, but recently it has been held that punitive damages may sometimes be recovered under Section 17(a). *Globus v. Law Research Service, Inc.*, 287 F. Supp. 188 (S.D.N.Y. 1968), thus making Section 17(a) more attractive to defrauded purchasers than 10b-5, which limits recovery to actual damages.

61. 40 S.E.C. 907 (1961). The implications of this case are thoroughly considered in Daum & Phillips, *The Implications of Cady, Roberts*, 17 BUS. LAW. 939 (1962).

62. 40 S.E.C. at 911.

63. More specifically, to succeed under 10b-5 the private plaintiff must show the following: (1) a purchase or sale, (2) an interstate contact, (3) the failure to disclose material inside information by the defendant, e.g., *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848-53 (2d Cir. 1968), (4) reliance on the nondisclosure, *List v. Fashion Park, Inc.*, 340 F.2d 457, 463 (2d Cir. 1965), and (5) resultant damages to the purchaser or seller. As *Cady, Roberts* demonstrates, a purchase from or sale to a corporate defendant who does not disclose material inside information received from an employee serving on the issuer's board violates 10b-5.

In applying 10b-5 to corporations who have their investment interests represented on the board of an issuer, the SEC and courts are holding "tippees" of an insider liable on the same basis that the insider would be liable under 10b-5. *Cady, Roberts* is a classic example of "tippee" liability. Other examples are *Ross v. Licht*, 263 F. Supp. 395, 410 (S.D.N.Y. 1967) ("If [defendants] were not insiders, they would seem to have been 'tippees' (persons give information by insiders in breach of trust) and subject to the same duty as

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In this context Rule 10b-5 implements desired securities policy more effectively than does Section 16(b). Under 10b-5, the purchaser or seller of the securities, rather than the corporate issuer, recovers damages.⁶⁴ The aggrieved purchaser or seller will more effectively enforce securities policy under 10b-5 than will the stockholders of corporate issuer under Section 16(b). The issuer, as in *Martin Marietta*, often resists suit against its director and its corporation.⁶⁵ Thus the initiative must come from the issuer's shareholders, who are not as seriously injured as a purchaser or seller and will be less disposed to bring suit.⁶⁶ Moreover, the SEC has injunctive and punitive powers under 10b-5⁶⁷ that do not exist under Section 16(b).⁶⁸

When the defendant corporation actually performs the functions of a director, there are sound policy reasons for using Section 16(b). "Section 16(b) can be rationalized as an antimanipulation device but not as an effective prohibition of insider trading."⁶⁹ Too many escapes from

insiders."); In the Matter of Blyth & Co. and Briggs, Sec. Ex. Act Rel. No. 8499 (1969); In the Matter of Merrill, Lynch, Pierce, Fenner & Smith, Inc., Sec. Ex. Act Rel. No. 8459 (1968); In the *Texas Gulf Sulphur* case, 401 F.2d 833, 852-53 (2d Cir. 1968), the SEC even charged that second generation "tippees" were liable, but neither court reached this issue. The Second Circuit did note in dictum that, although the "tippees" were not defendants in the action, "their conduct . . . certainly could be equally reprehensible." *Id.* at 853.

64. "[R]ecovery under the Section [16(b)] aids not the persons injured—those who bought from or sold to the insider—but the corporations, which suffered no injury." 2 L. LOSS, *SECURITIES REGULATION* 1088 (1961).

65. Sperry Rand was a party defendant in the action. Sperry filed a brief in Martin's defense that was "quite well documented." Letter from Mr. Cecil Wray, Jr. to Mr. Carroll L. Wagner, Jr., April 8, 1969. In all four cases where courts have considered the deputization issue, the suit was initiated by a shareholder of the issuer rather than the issuer itself. An issuer apparently is reluctant to bring suit against a corporation with which it has an interlocking directorship.

66. The timidity of the 16(b) plaintiff is evident from the fact that not until 1940 was a 16(b) action begun. As of 1951 only 30 such actions had been recorded.

67. 15 U.S.C. § 77u (1964). After the SEC invokes its injunctive and punitive power under 10b-5, a host of private plaintiffs may file civil suits. For example, after the SEC instituted action against *Texas Gulf Sulphur*, 49 private actions involving at least 475 plaintiffs were brought (as of 1966). 258 F. Supp. 262 at 267 n. 1 (S.D.N.Y. 1966). Of course, the private plaintiff is not compelled to await SEC action and usually does not delay.

68. In *SEC v. Texas Gulf Sulphur Co.*, 258 F. Supp. 262 (S.D.N.Y. 1966), the SEC proceeded against, among others, Thomas Lamont, a director of both TGS and Morgan Guaranty Trust Co., for allegedly informing Morgan Guaranty of advance TGS information so that the Morgan Trust department could purchase TGS stock before release of the information raised the market price. SEC Rule 10b-5 was relied upon rather than 16(b), so there were no allegations of deputization. The court found that the inside information was released to the public before Morgan was informed so that purchasers or sellers had equal access to the information. Nevertheless, the case further indicates the SEC's willingness to proceed under 10b-5 when a case of representation of investment interests is involved.

69. H. MANNE, *INSIDER TRADING AND THE STOCK MARKET* 30 (1966). Congress was particularly concerned with the prevalence of corporate manipulation when it drafted Section 16(b). Glaring examples of manipulative practices came to the attention of the Senate. In one instance, directors organized a syndicate to trade in their issuer's stock before the issuer had paid any dividends. Thereafter the directors caused the issuer to declare irregular dividends so that the syndicate could profit from the stock market fluctuations. Dividends were declared by the directors despite the fact that the issuer's

the arbitrarily-drawn provisions exist for it to rival Rule 10b-5 as a broad and equitable prophylactic to insider trading.⁷⁰ However, Section 16(b) can be effective to prevent manipulation of the corporation for the insider's short-swing gain. Artificial corporate manipulation, unlike insider trading, directly injures the corporate issuer and all of its shareholders. For this reason the insider's profits which may have resulted from manipulation should redound to the issuer rather than to the securities seller or purchaser.

Because of the difficulty of proving manipulation, antimanipulation policy is more effectively implemented by an arbitrary prohibition on trading by persons in a position to manipulate. A corporation can effectively manipulate an issuer by exercising de facto voting rights on the issuer's board. The corporation which seeks inside information only to promote its investment interest in the issuer cannot offend the antimanipulative policy of Section 16(b).⁷¹ It has violated the policy of 10b-5 and can accordingly be held liable under that provision. But in the absence of any possibility of manipulation the issuer cannot have suffered any harm and should not be allowed to recover damages, especially when another securities provision sanctions trading on inside information and rewards damages to the person who has suffered harm. "The Supreme Court's opinion in *Blau v. Lehman* is consistent with

earnings were insufficient to meet them and the issuer's capital surplus had to be used to make dividend payments. S. REP. NO. 792, 73d Cong., 2d Sess. 9 (1934).

Manipulation and stock options might be combined for profit, for example, by a board of directors' declaration of artificially high dividends, the placement of "calls" (option to purchase) on the market by the directors, and the subsequent public disclosure of the high dividends. The next quarter the directors might balance out their initial action by setting dividends inappropriately low, placing "puts" (option to sell) on the market, and announcing the low declaration. This combination of manipulation and options was on Congressional minds when it drafted section 16(b):

the granting of options . . . has been found to be at the bottom of most manipulative operations, because the granting of these options permits large-scale manipulations to be conducted with a minimum of financial risk to the manipulators.

H.R. REP. NO. 1383, 74th Cong., 2d Sess. 10-11 (1934).

70. [T]he one policy determination which Congress clearly made was that § 16(b) should operate as automatically—indeed, as arbitrarily—as possible, whether the result be to include or exclude. One cannot have both automaticity and equity. On proof of actual abuse of inside information, other remedies exist, both statutory (see especially Rule 10b-5 . . .) and judge-made . . .

2 L. LOSS, SECURITIES REGULATION 33 (Supp. 1962). Professor Loss agreed with the *Blau v. Lehman* outcome in that it avoided expansion of Section 16(b) coverage into an area where subjective elements determine liability. *Id.*

71. Similarly, only a functional director can be thought to owe any general fiduciary duty to the corporate issuer. Congress, in drafting Section 16(b), was also concerned with "the vicious practices unearthed at the hearings [which involved] the flagrant betrayal of their fiduciary duties by directors and officers." S. REP. NO. 1455, 73d Cong., 2d Sess. 55 (1934). The corporate trader who only has an earpiece on the issuer's board has violated no fiduciary duty since none can possibly be owed to the issuer in the absence of either *de facto* or *de jure* directorship. The informant, however, would stand in a different position.

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this explanation [T]he *Blau* decision limited that Section to serving this antimanipulation purpose.”⁷²

Section 16(b) was designed to prevent the misuse of the office of director both to manipulate the corporation and to garner inside information. The statute is not needed to prevent corporations from using inside information obtained from their employees who happen to be directors of other corporations, for that activity can be reached under 10b-5. The problems of proof, which caused Congress to authorize liability under 16(b) regardless of whether or not inside information was actually used, are not alleviated when applying 16(b) to a corporation that only receives inside information from an earpiece director. It would still be necessary to prove that information was transferred from deputy to deputizing corporation before 16(b) liability can be found. Thus there is no need to apply 16(b) under the deputization theory unless the deputizing corporation actually serves as a director. In that situation, the antimanipulative policy requires the application of 16(b) because 10b-5 may not apply and because manipulation will be very difficult to prove. But unless a corporation actually functions as a director, 16(b) should not be used.⁷³

IV. Deputization in Other Contexts

In the wake of *Martin Marietta* potential Section 16(b) plaintiffs may well survey all outside employment by directors of their issuer and contemplate suit against the primary employer of the outside director if that employer realizes short-term profits on the issuer's stock. Recovery from a deputizing director will depend to a large extent upon the criteria of deputization adopted by the courts. The courts may characterize as deputization for the purposes of 16(b) either (1) the designation of an employee to convey inside information that would affect the investment interests of his employer, (2) the use of that employee as a conduit for managerial decisions made by the employer,

72. H. MANNE, *INSIDER TRADING AND THE STOCK MARKET* 30 (1966).

73. When a director represents his corporation's investment interests on the issuer's board in the narrow sense that he assures that his constituent's transactions in the issuer's stock will be conducted with the benefit of advance information, this relationship should be relevant but not determinative of deputization. This is the way the district court treated the evidence of willingness to disclose inside information to Martin. 286 F. Supp. at 945-46. In *Blau v. Lehman*, 368 U.S. 403 (1962), the evidence demonstrated that the partnership was not the recipient of any inside information. This evidence is relevant to a defense against a deputization allegation since it is inconceivable that a company would function as a director of another company without garnishing the inside information that directors must have. Proof of nondisclosure should be a complete defense, but proof of disclosure should be insufficient, by itself, to prove deputization.

or (3) a mixed use of the employee as in *Martin Marietta*. The importance of the investment interest to the deputizing defendant and the importance of the defendant's involvement in the managerial decisions of the issuer will vary according to the nature of the defendant's business. For instance, a manufacturer-defendant is less likely to depend upon securities trading as a primary source of profit, and therefore may be less concerned with inside information than a defendant which relies almost exclusively on market investment for its profit. Since direct evidence of deputization will not often exist in any context, courts, as in *Martin Marietta*,⁷⁴ will have to draw inferences from circumstantial evidence. The nature of the defendant's business will be one factor on which the courts will rely. It may be helpful to speculate as to how an inference of deputization might arise in different business contexts.

A. *Trust Activities of Commercial Banks*

In 1968 the staff of the House Subcommittee on Domestic Finance of the Committee on Banking and Currency explored the trust activities of commercial banks.⁷⁵ Of the forty-nine banks surveyed "a total of 768 interlocking directorships with 286 of the 500 largest industrial corporations" were found to exist.⁷⁶ "One bank . . . reported 401 companies in which it held 5 per cent or more of one or more classes of stock. Another bank . . . reported 278 companies with which it has 326 director interlocks."⁷⁷ The study was particularly interested in "commercial bank involvement in the control of other corporations through trust department investments . . ."⁷⁸ The Staff Report recommended

[a]pplication of the prohibition against short-swing profits by corporate insiders as embodied in section 16(b) of the Securities Exchange Act of 1934 to securities dealings of trust departments which have director interlocks with corporations whose securities are registered with the Securities and Exchange Commission.⁷⁹

This recommendation was directed to the legislative and administrative

74. See 286 F. Supp. at 942.

75. SUBCOMM. ON DOMESTIC FINANCE OF THE HOUSE COMM. ON BANKING AND CURRENCY, COMMERCIAL BANKS AND THEIR TRUST ACTIVITIES: EMERGING INFLUENCE ON THE AMERICAN ECONOMY, 90th Cong., 2d Sess., vol. 1 (1968).

76. *Id.* at 3.

77. *Id.* at 4.

78. *Id.* at 8.

79. *Id.* at 9.

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branches of government.⁸⁰ However, the judiciary may be the first governmental branch to heed the call through the deputization concept.

Commercial banks sometimes advertise their willingness to become intimately involved in the management of loan customers. For instance, one large New York bank advertised its relationship with one of its clients:

We liked their ideas. We set up a \$500,000 line of credit. We investigated potential customers for them. As their business grew, we continued to supply working capital. They consulted us on selection of a New York investment banker. And when they went on the big board, they named us Transfer Agent.⁸¹

Another customer

used us for his first major capital expansion We used our European offices for advice and arranged Eurodollar financing for his expansion overseas. And he used our counsel when the time came to go public.

This man used us expertly from the beginning. He's using us today. We expect to be with him for his next idea. And the next. And the one after that.⁸²

This is the same bank that reported 326 director interlocks with 278 companies in 1968.⁸³ Under certain circumstances this relationship may give rise to deputization.

A corporation often relies upon a single bank for most of its banking needs. For example, this bank may provide credit, open accounts, and administer the corporation's pension and profit-sharing programs through its trust department.⁸⁴ It is advisable for a corporation to have a banker on its board of directors since his particular talents are of

80. *Id.*

81. *BUSINESS WEEK*, April 12, 1969, at 117.

82. *FORTUNE*, April, 1969, at 35.

83. See p. 1168 *supra*.

84. Included in the trust funds held by banks are the assets of eighty-one per cent of the pension and profit-sharing plans created by American corporations. *Id.* at 3. This concentration of funds with banks has been a particular source of concern:

The question of economic power in the pension funds becomes more urgent when we consider that their activities are not subject to the same degree of governmental regulation as are those of other financial institutions of comparable size. We find a greater concentration of control in the pension trust than among the mutual funds, the insurance companies, and, probably, the banks holding personal trusts. And yet, unlike the pension trusts, the mutual funds are subject to the regulation of the SEC, the insurance companies are rigidly governed by state agencies and the trustees of personal trusts have to account to beneficiaries (though this accounting may not amount to much as a preventive check). The bank trustees are therefore in a position to wield considerable economic power through their control of the pension trusts, a power which is further extended through their stockholdings for personal trusts.

P. HARBRECHT, *PENSION FUNDS AND ECONOMIC POWER*, 235 (1959).

special benefit to the company. The corporation normally would select a director from the bank which it uses for most of its banking needs, since this banker will have a greater knowledge of and interest in the company. The bank's trust assets will in part be invested in the equity securities of corporate issuers. Knowledge of a particular corporation's business and access to its advance corporate information will increase the "safety" of a bank's investment in that corporation and may thus induce the bank to include that corporation in its investment portfolio. Furthermore, the bank's interest in promoting the welfare of the corporation is not limited to the maximization of its trust investment profits; the bank also seeks to build good will in the business community generally, to assure repayment of its loans to the corporation, and to promote the growth of the loan customer so that its size and, concurrently, its banking needs will increase. If this relationship does exist, short-swing trading by the bank's trust department is inadvisable unless there is strong evidence of functional and communicative internal segregation of the director and the commercial and trust departments. If there is any evidence that the banker-director, before making a corporate board determination, consults the trust or commercial departments of his bank as to the impact of the company's action on the bank's interests in collecting loans or administering trust assets, then the bank would be functioning as a director and a case of deputization could probably be made out under current decisions.⁸⁵

B. *Brokers and Underwriters*

*Blau v. Lehman*⁸⁶ seemingly established the standards of behavior for insiders who are members of underwriter and brokerage firms. The Lehman partner disclosed no confidential information, and Lehman Brothers purchased the issuer's stock without the interlocking partner's knowledge. The defendants were exonerated because "the profits made by the partnership were on its own initiative, independently of any advice or 'inside' knowledge given it by director Thomas."⁸⁷ Presumably, if information had been divulged and the partner had approved the purchases, deputization would have been established. *Martin Marietta* may suggest a more difficult barrier to proof of deputization, despite the opposite results, if the case is interpreted to mean that a deputizing corporation must function as a director. Under this inter-

85. See note 64 *supra*.

86. 368 U.S. 403 (1962).

87. *Id.* at 409.

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pretation, *Blau* and *Martin Marietta* suggest that receipt and use of inside information by an underwriter-broker may constitute deputization, whereas more may be required to prove deputization by a non-broker defendant. If subsequent cases do reflect this distinction, it will probably be grounded in a general attitude that brokers and underwriters, because of their greater intimacy with the securities market, should be held to higher standards of conduct. Of course, there is no statutory basis in Section 16(b) for this distinction.

The danger of functional directorship by the underwriting firm will exist most frequently when the firm is underwriting a new securities distribution for the issuer. From the time a distribution is planned until it is successfully completed many decisions of the issuer's board of directors will be made in light of the distribution. Dividend declarations, expansion plans, and other vital corporate decisions must be made with an awareness of their impact on the distribution. The issuer's underwriter will be best able to predict the impact of a decision and will of necessity be frequently consulted. Especially if the underwriting is on a "firm offer" basis, the underwriter will be interested in decisions which may mean success or failure to the distribution, and it will attempt to influence relevant corporate decisions. "In the past, [the underwriter] has often insisted upon putting one or more of his nominees on the board of directors" ⁸⁸ If the underwriter involves itself intimately in the issuer's business—as it must to guarantee a successful distribution and to prepare an accurate registration statement—short-swing trading in the outstanding securities of the issuer would almost certainly give rise to section 16(b) liability through deputization.

C. *Investment Funds*

Since their success depends directly upon their performance in the securities market, investment funds (mutual funds, non-profit foundations, insurance companies, and the like) will be encouraged to obtain access to inside information, possibly through directorships. However, with few exceptions, these organizations will not want to function as a director or actively manage the issuers in whose securities they trade. The extracurricular activities which encourage functional directorship (such as underwriting, banking, and conglomeration) are foreign to investment funds. Most mutual funds and insurance companies prefer

88. Folk, *Civil Liabilities Under the Federal Securities Acts: The BarChris Case*, 55 VA. L. REV. 1, 55 (1969).

to move freely in the market without becoming too involved with any particular corporation. Some non-profit foundations invest heavily in particular companies, but such investments usually exceed ten percent, so that a showing of deputization is not required to bring them under Section 16(b). Insurance companies, and to a lesser extent mutual funds, sometimes invest heavily in the debt securities of a company, and creditors may be more interested in deputizing an employee to serve on the board of their debtor. When such a heavy investment exists, short-swing trading in the equity securities of the company is inadvisable. The extent to which Section 16(b) will be applied to various investment funds will depend upon the relative weights given by the courts to evidence of earpiece directorship and functional directorship.

V. Conclusion

Much remains to be learned about the viability of the deputization theory under Section 16(b). The *Martin Marietta* decision has been appealed. Should the Supreme Court grant certiorari in *Martin Marietta*,⁸⁹ more exact knowledge of the breadth of deputization may be obtained. Some guidance as to the weight that should be accorded evidence of receipt and use of inside information is imperative. If a showing of directorship and use of inside information is sufficient to prove a case of deputization, a precisely limited statute will be virtually rewritten into a broad prophylactic measure much like that rejected by the legislative framers of Section 16(b). Other provisions of the securities acts are better designed to accomplish whatever functions might be performed by such judicial policy, and the benefits of these provisions inure to the party that has suffered real injury. The Supreme Court is not deaf to this dilemma. In *Blau v. Lehman*, the first case in which the Supreme Court considered the deputization theory under Section 16(b), the court wrote:

The argument of petitioner and the Commission seems to go so far as to suggest that § 16(b)'s forfeiture of profits should be extended to include all persons realizing "short swing" profits who either act on the basis of "inside" information or have the possibility of "inside" information. One may agree that petitioner and the Commissioner present persuasive policy arguments that the Act should be broadened in this way to prevent "the unfair

89. *Petition for cert. filed*, 37 U.S.L.W. 3452 (May 27, 1969).

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use of information” more effectively than can be accomplished by leaving the Act so as to require forfeiture of profits only by those specifically designated by Congress to suffer those losses. But this very broadening of the categories of persons on whom these liabilities are imposed by the language of § 16(b) was considered and rejected by Congress when it passed the Act. . . .

Not only did Congress refuse to give § 16(b) the content we are now urged to put into it by interpretation, but with knowledge that in 1952 the Second Circuit Court of Appeals refused, in the *Rattner* case, to apply § 16(b) to Lehman Brothers in circumstances substantially like those here, Congress has left the Act as it was. . . . Congress can and might amend § 16(b) if the Commission would present to it the policy arguments it has presented to us, but we think that Congress is the proper agency to change an interpretation of the Act unbroken since its passage, if the change is to be made.⁹⁰

It is also necessary to determine what liability under a deputization theory augurs for other duties and liabilities under the securities acts. Concern for the broader implications of the *Martin Marietta* decision has already engrossed Wall Street:

The case opens up all kinds of new perils in intercorporate relationships. “This really creates a lot of problems,” says one. “If Martin Marietta were the director rather than Bunker, should Martin Marietta file insider trading reports? And who should sign a securities registration statement if Sperry wants to issue stock? Martin Marietta, Bunker or both?”⁹¹

90. 368 U.S. at 411-12.

91. Wall Street Journal, Feb. 24, 1969, at 1, col. 6.

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STEPHEN HOCHBERG

Business Secretaries

M. OLIVE BUTTERFIELD, PAMELA WILLMOTT

Student Contributors to This Issue

Paul D. Gewirtz, *Methadone Maintenance for Heroin Addicts*

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