Standing Under Section 10(b) and Rule 10b-5: The Continued Validity of the Forced Seller Exception to the Purchaser-Seller Requirement

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I. Introduction

Congress drafted section 10(b) of the Securities and Exchange Act of 1934 as a “catchall” antifraud provision to combat a wide variety of manipulative and deceptive activities that can occur in connection with the purchase or sale of a security. Based upon the power granted under section 10(b), the Security and Exchange Commission (“SEC”) enacted Rule 10b-5, and these provisions have become powerful tools in fighting securities fraud. Section 10(b) and Rule 10b-5 have been used to combat insider trading, corporate misstatements and nondisclosures, improper mergers, fraudulent liquidations, corporate mismanagement, and a variety of other forms of securities fraud. Although Congress explicitly charged the SEC with


2 At the legislative hearings prior to the passage of the Exchange Act, Thomas G. Corcoran, one of the drafters of the Act, described the provision that ultimately became section 10(b) as a “catch all” that is designed to prevent manipulative and deceptive devices associated with securities fraud. Hearing on H.R. 7852 and H.R. 8720 Before the H. Comm. on Interstate and Foreign Commerce, 73d Cong. 115 (1934) (statement of Thomas G. Corcoran, Counsel, Reconstruction Finance Corporation) (“[Section 10(b)] is a catch-all clause to prevent manipulative and deceptive devices I do not think there is any objection to that kind of a clause. The commission should have the authority to deal with new manipulative devices.”). Based on Thomas Corcoran’s committee statement, the Supreme Court of the United States has referred to section 10(b) as a “catchall” in a number of its opinions. See, e.g., Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983); Chiarella v. United States, 445 U.S. 222, 226 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202 (1976).

3 15 U.S.C. § 78j(b) (granting the SEC the power to proscribe such rules and regulations to prevent manipulative or deceptive acts in connection with the purchase or sale of a security).


5 See JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 293-94 (2d ed. 2003) (discussing the “versatility” of section 10(b) and Rule 10b-5 as a tool for fighting securities fraud); DONNA M. NAGY, RICHARD W. PAINTER & MARGARET V. SACHS, SECURITIES LITIGATION AND ENFORCEMENT 19 (2d ed. 2008) (“Rule 10b-5 is the leading anti-fraud weapon in the federal securities laws. Its reach is vast, embracing fraud in the context of large publicly traded corporations as well as tiny close corporations.”)

6 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 12.3[3][3], at 477 (rev. 5th ed. 2006). (explaining the various circumstances in which section 10(b) and Rule 10b-5 can be used to provide relief).
the enforcement of section 10(b) and Rule 10b-5, the Supreme Court of the United States has held that a private right of action exists based upon these provisions. This private right has become an essential supplement to the federal government’s criminal prosecutions and civil enforcement actions to combat securities fraud.

In Blue Chip Stamps v. Manor Drug Stores, the Supreme Court of the United States held that standing to bring a private right of action under section 10(b) and Rule 10b-5 is limited to plaintiffs who have purchased or sold securities in connection with manipulative or deceptive conduct. The Court adopted this purchaser-seller requirement based on policy considerations because the language of section 10(b) and Rule 10b-5 does not provide a conclusive answer as to whether standing under these provisions is limited to purchasers or sellers of securities.

Speaking for the Court, Justice Rehnquist wrote, “We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question.” Put another way, policy not only played a central role in the adoption of the purchaser-seller requirement but must also continue to play a central role in shaping the private right of action under section 10(b) and Rule 10b-5.

This Article explores the validity of the forced seller exception to the purchaser-seller requirement for standing. The forced seller exception provides that a plaintiff has standing to sue

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7 15 U.S.C.A. § 78u (2008) (granting the SEC the power to enforce section 10(b) and Rule 10b-5).
8 Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (“It is now established that a private right of action is implied under § 10(b).”); Herman & MacLean v. Huddleston, 459 U.S. 375, 381 (1983) (“The existence of this implied remedy is simply beyond peradventure.”)
9 See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504 (2007) (“This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC).”).
10 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975) (holding that the purchaser-seller requirement is a “sound rule and should be followed”).
11 Id. at 737 (discussing the basis for adopting the purchaser-seller requirement).
12 Id. at 749.
13 The forced seller exception has also been referred to by courts and commentators as the “forced seller doctrine” and the “fundamental change doctrine.” The term “forced seller exception” has been used throughout this Article because this Article focuses on whether exceptions to the purchaser-seller requirement exist.
under section 10(b) and Rule 10b-5 without the actual purchase or sale of a security when an
interest in a security is fundamentally changed and transformed from an interest in an existing
business entity into a claim for cash or when a security is exchanged for a fundamentally
different security.\textsuperscript{14} This exception is commonly used to remedy fraudulent short form mergers\textsuperscript{15}
and fraudulent business liquidations.\textsuperscript{16}

\textsuperscript{14} See, e.g., Jacobson v. AEG Capital Corp., 50 F.3d 1493, 1498 (9th Cir. 1995) (“The forced sale doctrine provides a
cause of action under the securities laws to plaintiffs who are forced to convert their shares for money or other
consideration, or forced to fundamentally change the nature of plaintiffs' investments as the result of a fraudulent
scheme.”); 7547 Corp v. Parker & Parsley Dev. Partners, L.P., 38 F.3d 211, 226 (5th Cir. 1994) (holding that the
courts have created a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5
when “a company is fundamentally altered through a merger acquisition, or liquidation”); Mosher v. Kane, 784 F.2d
1385, 1389 (9th Cir. 1986) (“[T]he forced seller doctrine provides that where a defendant is engaged in a scheme
for the purpose of forcing the plaintiffs to convert their shares for money or other considerations, such acts by the
defendant allow a plaintiff standing to sue under the securities act.”); Ray v. Karris, 780 F.2d 636, 640 n.1 (7th Cir.
1985) (“In the substantial number of cases where [the forced seller exception to the purchaser-seller requirement]
has been applied, a shareholder has been treated as a seller when the nature of his investment has been
fundamentally and involuntarily changed.”); Dudley v. Southeastern Factor & Fin. Corp., 446 F.2d 303, 307 (5th
Cir. 1971) (“[A] shareholder should be treated as a seller when the nature of his investment has been fundamentally
changed from an interest in a going enterprise into a right solely to a payment of money for his shares.”); Brown v.
action under the federal securities laws to plaintiffs who are forced to convert their shares for money or other
consideration, or who are forced to fundamentally change the nature of their investments as a result of a fraudulent
investment is altered to the point that he or she must choose between liquidating his or her shares in exchange for
cash or being completely divested of any interest in the corporation, a ‘sale’ within the meaning of Rule 10b-5 has
a shareholder should be treated as a seller when the nature of his investment in any ongoing enterprise has been
fundamentally changed into a right solely to payment of money for his shares.”); Horsell Graphic Indus., Ltd. v.
Valuation Counselors, Inc., 639 F. Supp. 1117, 1123 (N.D. Ill. 1986) (“In the substantial number of cases where [the
forced seller exception to the purchaser-seller requirement] has been applied, a shareholder has been treated as a
seller where his investment has been fundamentally and involuntarily changed.”); FDIC v. Kerr, 637 F. Supp. 828,
836 (W.D.N.C. 1986) (“The forced seller doctrine generally encompasses only those situations where the
fundamental nature of a plaintiff's investment has been changed without an actual sale through circumstances
(“Under the ‘forced seller’ doctrine, a court looks to . . . whether a security holder’s investment is transferred from
an interest in a going enterprise into a right solely to receive payment in exchange for such interest.”); Umstead v.
[for purposes of standing under section 10(b) and Rule 10b-5] when the nature of his investment has been
fundamentally changed from an interest in an ongoing enterprise to a right solely to payment of money for his
shares.”); Koppel v. Wien, 575 F. Supp. 960, 970 (S.D.N.Y. 1983) (“The purchase or sale requirement can be met
when a security holder is "forced" after a merger or similar corporate transaction to convert his or her security to
the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 applies in cases
involving the “fraudulent transformation of a securityholder's investment from an interest in a going enterprise into
a right solely to receive payment in exchange for such interest”) Garner v. Pearson, 374 F. Supp. 591, 597 (M.D. Fla.
1974) (“The forced seller doctrine . . . [provides that the purchaser-seller requirement of 10b-5 is met, evenmt where
there is no actual sale of stock, if the alleged actions of the defendants rendered the stock worthless.”).
This Article has three main purposes. First, there are no other articles focusing on the forced seller exception.17 Vine v. Beneficial Finance Company, the leading case on the forced

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15 See, e.g., 7547 Corp v. Parker & Parsley Dev. Partners, L.P., 38 F.3d 211, 226 (5th Cir. 1994) (“[T]he ‘forced seller’ doctrine was spawned originally in a securities fraud action based upon a short form merger in which the plaintiff was left with no alternative but to exchange his share for cash . . . .”); Vine v. Beneficial Fin. Co., 374 F.2d 627, 632-35 (2d Cir. 1967) (holding that a forced seller can have standing to seek relief under section 10(b) and Rule 10b-5 based upon a fraudulent short form merger); Fulco v. Cont’l Cablevision, Inc., Nos. 89-1342-S, 89-1380-S, 89-1389-S & 89-1422-S, 1989 WL 205356, *7-8 (D. Mass. Oct. 4, 1989) (reporting that the courts in the First Circuit have approved use of the forced seller exception to grant standing under section 10(b) and Rule 10b-5 in cases involving short form mergers); Ridings v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd., 94 F.R.D. 147, 151 n.4 (N.D. Ill. 1982) (“It is well settled . . . that a minority shareholder forced to exchange his shares in a corporation pursuant to a merger is a ‘seller’ within the meaning of the securities laws entitled to assert a cause of action for securities fraud.”); Arnesen v. Shawmut County Bank, N.A., 504 F. Supp. 1077, 1081 (D. Mass. 1980) (holding that the forced seller exception to the purchaser-seller requirement may be employed to provide relief to a “shareholder caught under the pressure of a short form merger”); Valente v. Pesico, Inc., 454 F. Supp. 1228, 1236 (D. Del. 1978) (“A shareholder who retains his shares at the time of a tender offer, but who is required at the time of a subsequent short form merger either to surrender them in exchange for cash or to request appraisal, is a ‘forced seller’.”); Clinton Hudson & Sons v. Lehigh Valley Cooperative Farms, Inc., 73 F.R.D. 420, 425 (E.D. Pa. 1977) (“[A] shareholder can assume the status of a forced seller [for purposes of standing under section 10(b) and Rule 10b-5] when he is a minority stockholder in a corporation which has undergone a short form merger . . . .”); Heyman v. Heyman, 356 F. Supp. 958, 963 (S.D.N.Y. 1973) (holding that the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 is “a response to the unique position of a minority stockholder after a short form merger.

16 See, e.g., Mayer v. Oil Field Sys. Corp., 721 F.2d 59, 65 (2d Cir. 1983) (holding that the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 has been applied to situations involving fraudulent liquidations.); Alley v. Miramon, 614 F.2d 1372, 1380 (5th Cir. 1980) (holding that a plaintiff became a forced seller for purposes of standing under section 10(b) and Rule 10b-5 because he “remained a shareholder until the corporation [in which he held stock] was liquidated”); Dudley v. Southeastern Factor & Fin. Corp., 446 F.2d 303, 308 (5th Cir. 1971) (holding that a plan of liquidation constituted a forced sale because an “investment in a going enterprise has been commuted into a right (said to be a remote and speculative one at that) to a payment of money.”); Coffee v. Permian Corp., 434 F.2d 383, 385-86 (5th Cir. 1970) (holding that the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 applied in a case involving an alleged fraudulent liquidation); Fulco v. Cont’l Cablevision, Inc., Nos. 89-1342-S, 89-1380-S, 89-1389-S & 89-1422-S, 1989 WL 205356, *7-8 (D. Mass. Oct. 4, 1989) (reporting that the courts in the First Circuit have approved use of the forced seller exception to grant standing under section 10(b) and Rule 10b-5 in cases involving liquidations); Matthey v. KDI Corp., 699 F. Supp. 135, 139 (S.D. Ohio 1988) (“The [forced seller] doctrine has been applied primarily in cases where the corporation in which the claimant holds securities has been liquidated or merged into another corporation.”); Batchelder v. Northern Fire Lites, Inc., 630 F. Supp. 1115, 1120 (D.N.H. 1986) (“[T]he ‘forced seller’ exception to the [purchaser-seller] rule has application in the context of a fraudulent corporate liquidation.”); Arnesen v. Shawmut County Bank, N.A., 504 F. Supp. 1077, 1081 (D. Mass. 1980) (holding that courts may employ the forced seller exception to the purchaser-seller requirement to provide relief “[w]hen a corporation is liquidated out from under some minority shareholder, all to the benefit of some majority owners”).

17 A handful of articles mainly from the early and mid-1970s do contain brief references to the forced seller exception, but no one has published an article that thoroughly analyzes whether a forced seller exception presently exists to the purchaser-seller requirement under section 10(b) and Rule 10b-5. But see, e.g., Eric C. Chaffee, Beyond Blue Chip: Issuer Standing to Seek Injunctive Relief Under Section 10(b) and Rule 10b-5 Without the Purchase or Sale of Security, 36 SETON HALL L. REV. 1135, 1150-52 (2006) (providing an overview of the forced seller exception and briefly discussing its continued validity); Note, Standing Under Rule 10b-5 After Blue Chip Stamps, 75 MICH. L. REV. 413, 431-37 (1976) (discussing the forced seller doctrine as a possible exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5); Comment, Blue Chip Stamps v. Manor Drug Stores: Failure to Solve the Purchaser-Seller Problem, 70 NW. U. L. REV. 965, 987-89 (1976) (discussing the various exceptions to the purchaser-seller requirement under section 10(b) and Rule 10b-5, including the forced seller
seller exception, was decided by the United States Court of Appeals for the Second Circuit in 1967, and since that time, the exception has been discussed in dozens of judicial opinions.

The forced seller exception has also been mentioned in treatises, legal encyclopedia, and

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19 An American Law Reports annotation analyzes the forced seller exception to the purchaser-seller requirement and cites dozens of cases discussing and applying the exception. See Richard B. Gallagher, Annotation, Who is “Forced Seller” for Purposes of Maintenance of Civil Action under § 10(b) of Securities Exchange Act of 1934 (15 U.S.C.A. § 78j(b)) and sec Rule 10b-5, 59 A.L.R. Fed. 10 (1982). The Article that you currently are reading also cites dozens of additional cases discussing and applying the forced seller exception that are not contained within the American Law Reports annotation.

20 See, e.g., 2 HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 27.13 (2007) (“There have been some exceptions to Blue Chip . . . . Some courts have . . . applied a ‘forced seller’ concept, primarily in connection with a cash merger.”); EDWARD BRODSKY & M. PATRICIA ADAMSKI, LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES AND LIABILITIES § 12:4 (2007) (“A person who is forced to exchange his shares in a cash-out merger or liquidation has been held to be a section 10(b) seller”); 2 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG & LOWENFELS ON SECURITIES FRAUD AND COMMODITIES FRAUD §4:119 (2007) (discussing the existence and scope of the forced seller exception to the purchaser-seller requirement for standing under section 10(b) and Rule 10b-5); THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 12.7[3][A], at 489 (rev. 5th ed. 2006) (“When a shareholder is frozen out of a corporation or otherwise put in the position of a ‘forced seller,’ Rule 10b-5 standing ordinarily will exist even though there was no voluntary investment decision.”); 5B ARNOLD S. JACOBS, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS § 9:28 (2007) (discussing the existence of the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5); 8 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 3739-43 (3d ed., rev. vol. 2004) (discussing the existence and scope of the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5); 1 ROGER J. MAGNUSON, SHAREHOLDER LITIGATION § 2.9 (2007) (“A forced seller, courts have held, is still a seller [for purposes of standing under section 10(b) and Rule 10b-5].”); 2 BRENT A. OLSON, PUBLICLY TRADED CORPORATIONS: GOVERNANCE & REGULATION §11:4 (2007) (“Pursuant to the ‘forced seller’ doctrine, plaintiffs
casebooks. Additionally, American Law Reports published an annotation that summarizes many of the leading cases applying the forced seller exception. Although these sources do a good job introducing the forced seller exception, they fail to provide the thorough policy discussion and background information that only a law review article can offer.

Second, this Article is designed to provide a roadmap for courts and practitioners in litigating the continued validity of the forced seller exception. As previously mentioned, the Supreme Court adopted the purchaser-seller requirement based on policy considerations. Unless Congress acts, the Supreme Court will ultimately have to rule on the existence of the forced seller exception. Although this Article concludes that the Supreme Court is likely to invalidate the forced seller exception, the Article lays out the policy considerations both for and against such an exception and reviews how lower courts have applied the exception.
currently exists between the circuit courts regarding the continued validity of the exception.\(^{26}\)

The courts can use this Article in formulating their opinions, and practitioners can use this Article in preparing their arguments until the Supreme Court or Congress finally speaks.

Third, this Article is designed to provide Congress with a thorough examination of the forced seller exception in the event that it ever decides to codify the private right of action under section 10(b) and Rule 10b-5. As this Article reports, substantial policy arguments exist for adopting the forced seller exception.\(^{27}\) A number of courts and commentators have argued for the codification of the implied private right of action under section 10(b) and Rule 10b-5.\(^{28}\) In the event that Congress opts to define the terms of the private right, this Article explains the reasons for and against the forced seller exception, and this Article also elucidates the exception’s current scope and uses.\(^{29}\)

The remainder of this work is structured as follows. Part II of this Article provides information regarding section 10(b) and Rule 10b-5, the purchaser-seller requirement, and the possible forced seller exception to this requirement. Part III examines the policy reasons for a forced seller exception to the purchaser-seller requirement, and Part IV explains why the Supreme Court is unlikely to hold that such an exception exists. Finally, Part V suggests that Congress should act to ensure that forced sellers have standing to seek redress under section 10(b) and Rule 10b-5. Ultimately, this Article concludes that Congress should codify the private

\(^{26}\) See infra notes 178-91 and accompany text (discussion the current split among the federal courts of appeals regarding the continued validity of the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5).

\(^{27}\) See infra Part III (providing the policy reasons in favor of a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5).

\(^{28}\) See, e.g., James D. Gordon III, 10 STAN. J.L. BUS. & FIN. 62, 63 (2004) (proposing that Congress adopt an express cause of action “mirroring” the private right of action that has evolved under section 10(b) and Rule 10b-5); see also Michael Kaufman, A Little “Right” Musick: The Unconstitutional Judicial Creation of Private Rights of Action Under Section 10(b) of the Exchange Act, 72 WASH. U.L.Q. 287, 290 (1994) (arguing that the Supreme Court of the United States should invalidate the implied private right of action under section 10(b) and Rule 10b-5 and predicting “Congress likely will respond to the absence of the implied right of action by legislating an express remedy . . . “)).

\(^{29}\) See infra Part II.C (providing an overview of the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5).
right of action under section 10(b) and Rule 10b-5 and provide standing to forced sellers who did not purchase or sell securities in reliance upon manipulative or deceptive conduct.

II. Background

The first step in analyzing whether a forced seller has standing to sue under section 10(b) and Rule 10b-5 requires putting the issue in context. This Part provides background information regarding section 10(b) and Rule 10b-5, the purchaser-seller requirement, and the possible forced seller exception to this requirement. This background provides the foundation for the arguments for and against the forced seller exception that are discussed in the next two parts.

A. Section 10(b) and Rule 10b-5

Section 10(b) and Rule 10b-5 are part of a complex framework of securities regulation. To appreciate the importance of the statute and the rule, one must understand the advent of federal securities regulation in the United States, the basic structure of section 10(b) and Rule 10b-5, and the implied cause of action under these provisions.

Federal securities regulation began in the United States when Congress passed the Securities Act of 1933 ("Securities Act")\(^{30}\) and Securities Exchange Act of 1934 ("Exchange Act").\(^{31}\) Congress enacted these statutes in response to the stock market crash of 1929 and the Great Depression.\(^{32}\) Prior to the Securities Act and the Exchange Act, individual states were the main forces in regulating securities.\(^{33}\) The state statutes were and are commonly referred to as

\(^{32}\) THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 1.2[2], at 20-21 (rev. 5th ed. 2006) (describing the stock market crash of 1929 as “the straw that broke the camel’s back” that ushered in an era of federal securities regulation).
\(^{33}\) Id. (discussing state securities law and beginnings of federal securities regulation).
“blue sky laws,” and prior to the Securities Act and the Exchange Act, the state statutes created an inconsistent patchwork of securities regulation that was largely ineffective in preventing fraud.

Congress drafted the Securities Act chiefly to regulate the distribution of securities by issuers to investors, a distribution relationship which is commonly referred to as the “primary market.” The Act contains extensive provisions governing the registration of securities and prospectuses given to investors. In drafting the Act, Congress had two objectives. First, Congress wanted to ensure that investors are provided with all material information relating to securities for public sale. Second, Congress sought to prevent misrepresentation, deceit, and other fraud in the sale of securities in the primary market.

Congress drafted the Exchange Act to protect holders of securities and to regulate the trading of securities among investors in what is known as the “secondary market.” Notably, section 4(a) of the Exchange Act established the Securities and Exchange Commission (“SEC”). Congress adopted the Exchange Act for a variety of reasons relating to the “national public interest.” These reasons include: the relationship between the securities markets and interstate commerce, the impact of accurate securities prices upon the taxes owed to the United States, and the fear of national emergencies created by unreasonable manipulation and

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34 Id. (noting that Kansas passed the first “blue sky law” in 1911 and the name probably relates to the “Kansas statute’s purpose to protect Kansas farmers against the industrialists selling them a piece of the blue sky”).
35 Id. (reporting that “the blue sky laws proved to be relatively ineffective in stamping out securities fraud, especially on a national level.”).
38 MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 1263 (9th ed. 2005) (discussing the public distribution of securities and providing an overview of the Securities Act).
39 Id.
42 Id. § 78b (2000 & Supp. II 2002) (providing the “necessity” for the regulation contained within the 1934 Act).
fluctuations in securities prices. As the Supreme Court held in SEC v. Capital Gains Research Bureau, Inc., the “fundamental purpose” behind both the Securities Act and the Exchange Act was to “substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.”

As previously mentioned, Congress drafted section 10(b) of the Exchange Act as a “catchall” antifraud provision. Section 10(b) makes it unlawful “[t]o 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 . . . .” Under section 10(b), Congress also granted the SEC the power to prescribe “such rules and regulations . . . as necessary or appropriate in the public interest or for the protection of investors.”

In 1942, using the power granted under section 10(b), the SEC promulgated Rule 10b-5. Rule 10b-5 provides:

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

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

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43 Id.
45 See note 2 and accompanying text.
47 Id.
Section 21 of the Exchange Act expressly grants the SEC the power to enforce section 10(b), Rule 10b-5, and the other provisions of the Act, and section 27 of the Exchange Act grants the district courts of the United States jurisdiction over matters arising from the provisions of the Act.

Section 10(b) and Rule 10b-5 do not contain an express private right of action, but courts have held that a private right of action can be implied from the language of these provisions. In 1946, the United States District Court for the Eastern District of Pennsylvania became the first court to hold that such a private right of action exists in *Kardon v. National Gypsum Co.* In *Kardon*, Morris and Eugene Kardon (collectively the “Kardons”) and Leon and William Slavin (collectively the “Slavins”) owned all of the stock of Western Board and Paper Co. (“Western Board”) and Michigan Paper Stock Co. (“Michigan Paper”). The Kardons alleged that the Slavins entered into a secret agreement with National Gypsum Co. (“National Gypsum”) for the assets of Western Board, and then, the Slavins fraudulently purchased the Kardons’ shares of Western Board and Michigan Paper without revealing the secret agreement with National Gypsum. The United States District Court for the Eastern District of Pennsylvania held that the Kardons had standing to seek relief under section 10(b) and Rule 10b-5 against the Slavins and National Gypsum for conspiring to purchase the Kardons’ stock at an artificially low price. In holding that an implied private right of action existed under section 10(b) and Rule 10b-5, the district court relied on section 286 of the *Restatement of Torts*, which provides:

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49 *Id.*
50 15 U.S.C. § 78u (2008) (granting the SEC the power to enforce section 10(b) and Rule 10b-5).
52 *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (establishing the private right of action under section 10(b) and Rule 10b-5).
53 *Kardon v. National Gypsum Co.*, 73 F. Supp. 798, 800-01 (E.D. Pa. 1947) (providing the underlying facts for the dispute that established the private right of action under section 10(b) and Rule 10b-5).
54 *Id.*
55 *Kardon*, 69 F. Supp. at 514.
The violation of a legislative enactment by doing a prohibited act, or by failing to
do a required act, makes the actor liable for an invasion of an interest of another
if; (a) the intent of the enactment is exclusively or in part to protect an interest of
the other as an individual; and (b) the interest invaded is one which the enactment
is intended to protect.\(^\text{56}\)

The district court held that the requirements of section 286 were satisfied and that a private right
of action exists under section 10(b) and Rule 10b-5 because the purpose of the Exchange Act is
to regulate securities transactions of “all kinds.”\(^\text{57}\) The district court also reasoned that a private
right of action exists under section 10(b) and Rule 10b-5 because the legislature did not
expressly deny such a right.\(^\text{58}\)

The Supreme Court of the United States has confirmed that a private right of action exists
under section 10(b) and Rule 10b-5. Twenty-five years after \textit{Kardon}, the Supreme Court in
\textit{Superintendent of Insurance v. Bankers Life & Casualty Co.} declared in a single sentence in a
footnote: “It is now established that a private right of action is implied under section 10(b).”\(^\text{59}\) If
faced with the same issue today, the Court undoubtedly would hold that such a private action
does not exist.\(^\text{60}\) However, the Court has repeatedly reaffirmed its acceptance of the private right
of action under section 10(b) and Rule 10b-5.\(^\text{61}\)

\(^{56}\) \textit{Id.} at 513 (quoting the language of \textit{Restatement of Torts} \S 286 (1934)).
\(^{57}\) \textit{Id.} at 514.
\(^{58}\) \textit{Id.}
\(^{59}\) See \textit{Superintendent of Ins. v. Bankers Life & Cas. Co.}, 404 U.S. 6, 13 n.9 (1971) (providing the Supreme Court’s
one sentence holding that a private right of action exists under section 10(b) and Rule 10b-5). Amazingly, the
Supreme Court of the United States did not even interpret section 10(b) and Rule 10b-5 until 1969. \textit{See SEC v.
Nat’l Sec.}, Inc., 393 U.S. 453, 465 (1969) (“Although § 10(b) and Rule 10b-5 may well be the most litigated
provisions in the federal securities laws, this is the first time this Court has found it necessary to interpret them.”).
\(^{60}\) \textit{See}, \textit{e.g.}, \textit{Alexander v. Sandoval}, 532 U.S. 275, 315 n.24 (2001) (Stevens, J., dissenting) (noting that the private
right of action under section 10(b) and Rule 10b-5 was adopted using reasoning that the Supreme Court now
the current cannon of statutory interpretation that “there is an implied cause of action only if the underlying statute
can be interpreted to disclose the intent to create one”).
\(^{61}\) \textit{See}, \textit{e.g.}, \textit{Basic Inc. v. Levinson}, 485 U.S. 224, 231–32 (1988) (“Judicial interpretation and application, legislative
acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of
Section 10(b) and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act’s requirements.”);
\textit{Herman & MacLean v. Huddleston}, 459 U.S. 375, 380 (1983) (stating that existence of an implied private right of
action under section 10(b) and rule 10b-5 is “simply beyond peradventure”).
In fact, the Supreme Court has developed a substantial body of case law defining and shaping the elements of the private right of action under section 10(b) and Rule 10b-5. To state a cause of action under these provisions, a private litigant must demonstrate:

1. a material misrepresentation (or omission);
2. scienter, i.e., a wrongful state of mind;
3. a connection with the purchase or sale of a security;
4. reliance, often referred to in cases involving public securities markets (fraud-on-the-market cases) as “transaction causation;”
5. economic loss; and
6. “loss causation,” i.e., a causal connection between the material misrepresentation and the loss.

Notably, because the right of action under section 10(b) and Rule 10b-5 is judicially implied, the courts have been largely responsible in shaping contours of the right.

B. The Origins of the Purchaser-Seller Requirement

Because of the judiciary’s role in delimiting the private right under section 10(b) and Rule 10b-5, Justice William H. Rehnquist famously wrote, “When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.” The Supreme Court took a major step in pruning this “judicial oak” when the Court held in Blue Chip Stamps v. Manor Drug Stores that standing to pursue a private right of action under section 10(b) and Rule 10b-5 is limited to purchasers and seller of securities. Whether exceptions

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62 Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005) (providing a list of the elements necessary to have a private cause of action under section 10(b) and Rule 10b-5).
63 Id. (citations omitted).
64 Musick, Peeler & Garrett v. Employers Ins., 508 U.S. 286, 292-95 (1993) (holding that Congress left the task of formulating and refining the private right of action under section 10(b) and Rule 10b-5 to the judiciary).
66 Id. at 749 (adopting the purchaser-seller requirement for standing to pursue a private right of action under section 10(b) and Rule 10b-5).
exist to the purchaser-seller requirement remains an open question that has split the circuit courts. 67 In this section, the purchaser-seller requirement and its origins will be examined.

The Supreme Court adopted the purchaser-seller requirement from the United States Court of Appeals for the Second Circuit. 68 In 1952, only six years after the first court announced the existence of a private right of action under section 10(b) and Rule 10b-5, 69 the Second Circuit held in Birnbaum v. Newport Steel Corp. that one must have purchased or sold in reliance upon a manipulative or deceptive conduct to have standing under section 10(b) and Rule 10b-5. 70 Because of this holding, the Second Circuit became known as the “Mother Court” for the purchaser-seller requirement. 71

Although the existence of exceptions is hotly debated, the purchaser-seller requirement announced in Birnbaum remains in force today. 72 In Birnbaum, a group of shareholders of Newport Steel Corporation (“Newport Steel”) brought suit on behalf of the corporation and as representatives of all similarly situated shareholders for alleged violations of section 10(b) and Rule 10b-5. 73 The shareholders claimed that C. Russell Feldmann (“Feldmann”), the president of Newport Steel, rejected a merger offer that would have been highly profitable to all shareholders, so that Feldmann could sell his own 40 percent of stock in Newport Steel to another company at a premium that was twice its market value. 74 Feldmann and the other defendants in the case filed a motion to dismiss the complaint for failure to state a cause of action

67 See infra Part II.C (discussing possible exceptions to the purchase-seller requirement under section 10(b) and Rule 10b-5.

68 Blue Chip Stamps, 421 U.S. 749 (adopting the purchaser-seller rule from Birnbaum, a Second Circuit opinion, and concluding that “it is a sound rule and should be followed”).

69 Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (establishing the existence of a private right of action under section 10(b) and Rule 10b-5).

70 Birnbaum v. Newport Steel Corp., 193 F.2d 461 463-64 (2d Cir. 1952).

71 Blue Chip Stamps, 421 U.S. at 762 (Blackmun, J., dissenting) (noting that the Second Circuit is “regarded as the ‘Mother Court’ in this area of the law”).

72 See infra Part II.C (discussing possible exceptions to the purchaser-seller requirement under section 10(b) and Rule 10b-5).

73 Birnbaum, 193 F.2d at 462.

74 Id.
under section 10(b) and Rule 10b-5 because neither the shareholders nor the corporation purchased or sold based on the alleged deceptions. The district court granted the motion to dismiss on the grounds that section 10(b) and Rule 10b-5 punish fraud perpetrated only upon purchasers or sellers of securities.

The United States Court of Appeals for the Second Circuit affirmed the district court and held that standing under section 10(b) and Rule 10b-5 is limited to those who have purchased or sold based on an alleged deception. The Second Circuit held that Rule 10b-5 was promulgated to fill a gap in the antifraud provisions in the Securities Act and Exchange Act because “[n]o prohibition existed against fraud on a seller of securities by the purchaser if the latter was not a broker or a dealer.”

Prior to the promulgation of Rule 10b-5, the only antifraud provisions relating to the purchase or sale of securities were section 17(a) of the Securities Act and section 15(c) of the Exchange Act. Section 17(a) of the Securities Act makes it unlawful to use manipulative or deceptive acts on purchasers of securities, and section 15(c) of the Exchange Act section deals only with fraudulent practices by brokers and dealers in the secondary market. In short, Rule 10b-5 is needed to protect sellers of securities from manipulative and deceptive conduct by purchasers who are not brokers or dealers.

In support of this conclusion, the Second Circuit cited a May 21, 1942 press release in which the SEC stated that Rule 10b-5 was promulgated to “‘prohibit[] individuals or companies from buying securities if they engage

75 Id.
76 Id.
77 The distinguished panel in Birnbaum, which was composed of Chief Judge Swan, Judge Learned Hand, and Judge Augustus Hand. Id. at 462. Judge Augustus Hand wrote the opinion of the court. Id.
78 Id.
79 Id.
82 Birnbaum, 193 F.2d at 463.
in fraud in their purchase.\textsuperscript{83} Based upon Congress’s regulatory scheme and the purpose of the Rule, the Second Circuit concluded that standing for a private litigant to seek relief under section 10(b) and Rule 10b-5 must be limited to purchasers or sellers of securities.\textsuperscript{84}

Notably, the Second Circuit rejected arguments for a broader interpretation of section 10(b) and Rule 10b-5 based on the language of the Rule and purpose of the Exchange Act. The shareholders contended that the terms “in connection with” and “upon any person” demonstrated that the scope of Rule 10b-5 extended beyond protecting just purchasers and sellers.\textsuperscript{85} The shareholders also argued for a broader interpretation because Congress enacted the Exchange Act in part to protect investors from mistreatment by corporate insiders.\textsuperscript{86} After conceding that “the Rule may have been somewhat loosely drawn,” the Second Circuit held that Rule 10b-5’s “meaning and scope are not difficult to ascertain when reference is had to the scheme of SEC regulation and the purpose underlying [its] adoption.”\textsuperscript{87} Thus, the Second Circuit rejected the shareholders arguments and adopted of the purchaser-seller requirement.\textsuperscript{88}

The Supreme Court of the United States waited over twenty years to speak on the purchaser-seller requirement under section 10(b) and Rule 10b-5.\textsuperscript{89} In the interim, a number of courts questioned the continued validity of the purchaser-seller requirement,\textsuperscript{90} and some

\begin{footnotesize}
\begin{enumerate}
\item Id. (citations omitted) (quoting Securities Exchange Act Release No. 3230 (May 21, 1942)).
\item Id. at 464.
\item Id. at 463.
\item Id.
\item Id.
\item Id.
\item Id. at 463-64.
\item Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (adopting the purchaser-seller requirement announced in \textit{Birnbaum}).
\item See, e.g., Eason v. Gen. Motors Acceptance Corp., 490 F.2d 654, 658 (7th Cir. 1973) (rejecting the purchaser-seller requirement for standing to seek relief under section 10(b) and Rule 10b-5 in part because “the rule has been interpreted to encompass additional types of misconduct and to extend protection to a variety of persons not included within the traditional definition of either purchaser or seller.”); Tully v. Mott Supermarkets, Inc. 337 F. Supp. 834, 839 (D.N.J. 1972) (“The thrust of defendants’ jurisdictional argument seeks to revive the spectre of the Birnbaum buyer-seller doctrine at a point in time when both courts and legal scholars are seeking to bury it.”); Entel v. Allen, 270 F.Supp. 60, 69 (S.D.N.Y.1967) (suggesting that the Second Circuit had “seriously challenge[d], if not overrule[d]” the purchaser-seller requirement that was announced in \textit{Birnbaum}); \textit{but see}, e.g., Rekant v. Desser, 425
\end{enumerate}
\end{footnotesize}
commentators predicted its demise.\textsuperscript{91} The courts that continued to enforce the purchaser-seller requirement developed exceptions to limit the restrictions that it placed on standing to seek relief under section 10(b) and Rule 10b-5.\textsuperscript{92}

In 1975, nearly a quarter century after \textit{Birnbaum}, the Supreme Court of the United States adopted the purchaser-seller requirement in \textit{Blue Chip Stamps v. Manor Drug Stores}.\textsuperscript{93} In that case, an antitrust consent decree required a corporation, Blue Chip Stamps (“Blue Chip”), to offer shares of its common stock to a group of retailers.\textsuperscript{94} One of the retailers who did not purchase stock brought suit under section 10(b) and Rule 10b-5.\textsuperscript{95} The retailer alleged that Blue Chip had issued an overly pessimistic appraisal of its status and future prospects to discourage the group of retailers from purchasing shares of Blue Chip stock, but the retailer did not claim that it or the other members of the class that it represented had purchased or sold based on the alleged deception.\textsuperscript{96} The United States District Court for the Central District of California dismissed the complaint for failure to state a claim on which relief could be granted because the retailer and other members of the class had not purchased or sold based on the alleged deception.\textsuperscript{97}


\textsuperscript{92} See infra Part II.C (discussing the four exceptions to the purchaser-seller requirement that developed in the interim between the Second Circuit’s announcement of the requirement and the Supreme Court’s adoption of it).

\textsuperscript{93} \textit{Blue Chip Stamps v. Manor Drug Stores}, 421 U.S. 723 (1975).

\textsuperscript{94} Id. at 725-26.

\textsuperscript{95} Id. at 726-27.

\textsuperscript{96} Id.

A divided three-judge panel for the United States Court of Appeals for the Ninth Circuit reversed. After noting that the Ninth Circuit had adopted the purchaser-seller requirement, the circuit court held that an exception existed for aborted transactions in which a plaintiff failed to purchase or sell because of a defendant’s fraud, if the plaintiff could demonstrate a causal link between the alleged misrepresentation and the aborted transaction. The circuit court based this holding on the underlying purpose of section 10(b) and Rule 10b-5 to protect the “purity” of securities transactions.

The Supreme Court of the United States reversed the Ninth Circuit and adopted the purchaser-seller requirement without an aborted transaction exception. The Court based its holding on policy considerations because “neither the congressional enactment nor the administrative regulations offer conclusive guidance.” Writing for the Court, Justice Rehnquist stated that neither legislative nor administrative intent could be derived from section 10(b) or Rule 10b-5 because Congress and the SEC had not provided for a private right of action under these provisions. Although the Court acknowledged that some deserving plaintiffs would be denied standing under section 10(b) and Rule 10b-5, the Court adopted the purchaser-seller requirement based on policy concerns founded upon fears of vexatious

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98 Manor Drug Stores v. Blue Chip Stamps, 492 F.2d 136 (9th Cir. 1973)
99 Id. at 138 n.3.
100 Id. at 138.
101 Id. at 141-42.
102 Id. ("Congress and the Commission cannot have intended to prohibit such fraudulent practices if they failed but not if they succeeded.").
103 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 754-55 (1975). Justice Rehnquist delivered the opinion of the Court in which Chief Justice Burger and Justices Stewart, White, Marshall, and Powell joined. Id. at 725. Justice Powell also delivered a concurring opinion in which Justices Stewart and Marshall joined. Id. at 754 (Powell, J., concurring). Justice Blackmun delivered a dissenting opinion in which Justices Douglas and Brennan joined. Id. at 761 (Blackmun, J., dissenting).
104 Id. at 737.
105 Id.
106 Id. at 737-39.
litigation. 107 First, the Court was concerned that strike suits with plaintiffs seeking unjust enrichment would become commonplace without the purchaser-seller requirement. 108 Second, the Court held that the purchaser-seller requirement was necessary to prevent courts from becoming the adjudicators of numerous “hazy issues of historical fact the proof of which depended almost entirely on oral testimony.” 109 The Court refused to make an exception for the aborted transaction in Blue Chip out of concern that it would lead to a “case-by-case erosion” of the purchaser-seller requirement. 110

C. Possible Exceptions to the Purchaser-Seller Requirement

While writing for the Court in Blue Chip Stamps, Justice Rehnquist admitted that the purchaser-seller requirement prevents some deserving plaintiffs from obtaining relief under section 10(b) and Rule 10b-5. 111 In the interim between the announcement of the purchaser-seller requirement by the Second Circuit in 1952 112 and its adoption by the Supreme Court in 1975, 113 four major exceptions developed in the lower courts to ameliorate the harsh effects of the requirement. The lower courts employed the aborted transaction exception, injunctive relief exception, beneficial owner exception, and forced seller exception to grant standing to certain categories of deserving plaintiffs seeking relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security. 114

107 Id. at 739.
108 Id. at 740-43.
109 Id. at 743.
110 Id. at 754-55.
111 Id. at 738.
112 Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463-64 (2d Cir. 1952) (announcing the purchaser-seller requirement to maintain an action under section 10(b) and Rule 10b-5)
113 Blue Chip Stamps, 421 U.S. at 749 (adopting the purchaser-seller requirement for standing under section 10(b) and Rule 10b-5 that was announced by the Second Circuit in Birnbaum).
114 Some courts and commentators claim that an additional exception exists for a security holder bringing suit derivatively on behalf of a security issuer. This, however, should not be viewed as exception to the purchaser-seller requirement because the security holder sues to enforce the rights of the security issuer, and to have standing, the issuer must have purchased or sold based on the alleged deception. See Blue Chip Stamps, 421 U.S. at 738 (holding that shareholders “may frequently be able to circumvent the [purchaser-seller] limitation through bringing a
The first exception to the purchaser seller requirement, the aborted transaction exception, allowed standing for plaintiffs to seek relief under section 10(b) and Rule 10b-5 when a misrepresentation or deception delayed or prevented their purchase or sale of a security. Only a small number of courts employed this exception because it threatened to swallow the purchaser-seller requirement. The aborted transaction exception had the potential to allow a vast number of plaintiffs standing to seek relief under section 10(b) and Rule 10b-5 simply by asserting that they would have purchased or sold but for an alleged deception.

The Supreme Court rejected the aborted seller exception when it reversed the United States Court of Appeals for the Ninth Circuit in Blue Chip Stamps. As previously discussed, an antitrust consent decree required a company, Blue Chip, to offer shares of its stock to a group

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derivative action on behalf of the corporate issuer if the latter is itself a purchaser or seller of securities.”) A security holder may also be able to bring a derivative suit if the issuer is eligible for one of the possible exceptions to the purchaser-seller requirement. See also Eric C. Chaffee, Beyond Blue Chip: Issuer Standing to Seek Injunctive Relief Under Section 10(b) and Rule 10b-5 Without the Purchase or Sale of Security, 36 SETON HALL L. REV. 1135 (2006) (arguing that security issuers should be able to seek injunctive relief without the purchase or sale of security although arguing that the Supreme Court of the United States is unlikely to hold that such an exception exists).

115 See, e.g., Travis v. Anthes Imperial Ltd., 473 F.2d 515, 521-22 (8th Cir. 1973) (finding standing under section 10(b) and Rule10b-5 for plaintiffs who held securities based on defendants’ alleged misrepresentations); Feldberg v. O’Connell, 338 F. Supp. 744, 747 (D. Mass. 1972) (holding that plaintiffs were “entitled to recover under Rule 10b-5 for the loss caused by a fraudulently induced delay in liquidating their interest in [a] partnership”); Silverman v. Bear, Stearns & Co., 331 F. Supp. 1334, 1336 (E.D. Pa. 1971) (holding that a plaintiff who claimed it delayed in selling its securities because of its broker’s alleged fraudulent misrepresentations had standing to seek relief under section 10(b) and Rule 10b-5); Stockwell v. Reynolds & Co., 252 F. Supp. 215, 219 (S.D.N.Y. 1965) (“If plaintiffs indeed wished to sell their . . . shares and were induced to defer the sale by the fraudulent representations of the defendants, with the result that they ultimately sold at a greater loss, it follows . . . that the fraud was in connection with the sale of securities as that term is used in Section 10(b) and Rule 10b-5.”).

116 See, e.g., Smallwood v. Pearl Brewing Co., 489 F.2d 579, 593 (5th Cir. 1974) (“The federal courts have consistently denied Rule 10b-5 standing in damage actions to shareholders who allege that fraud induced them to retain their stock.”); Goldman v. A.G. Becker Inc., No. 81 Civ. 6748, 1983 WL 1302, at *3 (S.D.N.Y. Apr. 20, 1983) (“Relying on the Birnbaum rule and later on Blue Chip, numerous courts have found that mere allegations that a plaintiff was induced to retain securities because of a defendant's misrepresentation are not sufficient to state a claim under Rule 10b-5.”).

117 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 754-55 (1975); see also, e.g., Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25, 38 (2d Cir. 2005) (“This Court and others have applied the Blue Chip Stamps purchaser-seller rule of standing to bar claims alleging fraudulently induced retention or delayed sales of securities.”); Gurley v. Documation Inc., 674 F.2d 253, 257 (4th Cir. 1982) (holding based on Blue Chip that a plaintiff who delays purchasing or selling securities based upon an alleged fraudulent misrepresentation does not have standing under section 10(b) and Rule 10b-5); O'Brien v. Cont'l Ill. Nat. Bank & Trust Co. of Chicago, 593 F.2d 54, 59 (7th Cir. 1979) (holding that retaining securities based on a deception or misrepresentation does not provide standing under section 10(b) and Rule 10b-5); Sacks v. Reynolds Sec., Inc., 593 F.2d 1234, 1241 (D.C. Cir. 1978 (“Blue Chip Stamps does not permit recovery under Rule 10b-5 when alleged fraud causes an investor to retain ownership of securities.”).
of retailers.\textsuperscript{118} One of the retailers who did not purchase alleged that Blue Chip had violated section 10(b) and Rule 10b-5 by issuing an overly pessimistic appraisal of its status and future prospects to dissuade potential purchasers.\textsuperscript{119} The Ninth Circuit held that an exception existed for purchaser and sellers who aborted their transactions as a result of fraud by defendants.\textsuperscript{120} The Supreme Court reversed the Ninth Circuit and rejected an aborted transaction exception because it would lead to the “erosion” of the purchaser-seller requirement.\textsuperscript{121}

Notably, the Supreme Court held that the plaintiffs in \textit{Blue Chip Stamps} would have had standing if they had a contractual right to purchase or sell the securities at issue in the case.\textsuperscript{122} However, standing based on a contractual right should not be viewed as an exception to purchaser-seller requirement. Section 3(a) of the Exchange Act provides that a contract to purchase or sell securities constitutes a purchase or sale for purposes of the Act.\textsuperscript{123} Thus, by definition, contracts for purchases and sales render the parties purchasers and sellers for purposes of standing.

The second exception to the purchaser-seller requirement that developed in the interim between \textit{Birnbaum} and \textit{Blue Chip Stamps} provides standing under section 10(b) and Rule 10b-5 if a plaintiff seeks injunctive relief, rather than monetary damages.\textsuperscript{124} Many courts utilizing the

\textsuperscript{118} \textit{Blue Chip Stamps}, 421 U.S. at 725-26.
\textsuperscript{119} \textit{Id.} at 726-27.
\textsuperscript{120} Manor Drug Stores v. Blue Chip Stamps, 492 F.2d 136, 140 (9th Cir. 1973).
\textsuperscript{121} \textit{Blue Chip Stamps}, 421 U.S. at 754-55.
\textsuperscript{122} \textit{Id.} at 750-51.
\textsuperscript{123} 15 U.S.C. 78c(a)(13) (2008) (“The terms ‘buy’ and ‘purchase’ each include any contract to buy, purchase, or otherwise acquire.”); 15 U.S.C. 78c(a)(14) (2008) (“The terms ‘sale’ and ‘sell’ each include any contract to sell or otherwise dispose of.”); see also \textit{Blue Chip Stamps}, 421 U.S. at 750-51 (“A contract to purchase or sell securities is expressly defined by § 3(a) of the 1934 Act, 15 U.S.C. § 78c(a) as a purchase or sale of securities for purposes of that Act.”).
\textsuperscript{124} See, e.g., Landy v. FDIC 486 F.2d 139, 156 (3d Cir 1973) (“An injunction suit, as distinguished from an action for damages, will . . . , in appropriate circumstances, be permitted under [section 10(b) and Rule 10b-5] even though the complainant is not a purchaser or seller.”); Kahan v. Rosenstiel, 424 F.2d 161, 173 (3d Cir. 1970) (holding that a plaintiff seeking injunctive relief under section 10(b) and Rule 10b-5 is not required to have purchased or sold based on an alleged deception); Britt v. Cyril Co., 417 F.2d 433, 435-36 (6th Cir. 1969) (allowing an action for injunctive relief under section 10(b) and Rule 10b-5 to proceed even though the plaintiff did not purchase or sell based on the
injunctive relief exception have held that it only applies to prevent on-going securities fraud, i.e., when a plaintiff needs relief to prevent continuing injury from a defendant’s past or present misrepresentations. Interestingly, the United States Court of Appeals for the Second Circuit has been one of the leading proponents of the injunctive relief exception. The Second Circuit’s endorsement of the exception is significant because the circuit is the “Mother Court” of the purchaser-seller requirement.

The Second Circuit adopted the injunctive relief exception to the purchaser-seller requirement in 1967. In *Mutual Shares Corp. v. Genesco, Inc.*, the Second Circuit first

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125 See, e.g., *Granada Invs., Inc. v. DWG Corp.*, 717 F. Supp. 533, 535 (N.D. Ohio 1989) (“A plaintiff seeking injunctive relief must demonstrate, through the use of substantial and verifiable evidence, that he will be injured by the continuation of past and present wrongdoing.”); *Doll v. James Martin Assocs. (Holdings), Ltd.*, 600 F. Supp. 510, 522 (E.D. Mich. 1984) (holding that the injunctive relief exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 is available “only when plaintiff seeks “prophylactic relief”, i.e. a prohibition against future violation of the securities laws”); *Hundahl v. United Benefit Life Ins. Co.*, 463 F. Supp. 1349, 1359 (N.D. Tex. 1979) (“A plaintiff requesting injunctive relief [under section 10(b) and Rule 10b-5] must demonstrate that the continuation of past and present practices will injure him.”); *Fuchs v. Swanton Corp.*, 482 F. Supp. 83, 89 (S.D.N.Y. 1979) (holding that a plaintiff can seek injunctive relief under section 10(b) and Rule 10b-5 without a purchase or sale only if the plaintiff can demonstrate continuing injury from the alleged manipulative or deceptive act or omission); *Bertozzi v. King Louie Int’l, Inc.*, 420 F. Supp. 1166, 1177 (D.R.I. 1976) (holding that the injunctive relief exception to the purchaser-seller requirement allows plaintiffs standing “only to prevent consummation of and their resultant injury from an asserted § 10(b)/10b-5 violation.”); *Petersen v. Federated Dev. Co.*, 387 F. Supp. 355, 358 (S.D.N.Y. 1974) (“Although a stockholder has been permitted to seek injunctive relief against threatened or continuing fraud, he lacks standing to seek injunctive relief once the fraud has been consummated.”); *Heyman v. Heyman*, 356 F. Supp. 958, 964 (S.D.N.Y. 1973) (holding that the injunctive relief exception “has no application where the alleged fraudulent exchange has been fully consummated.”)

126 See, e.g., *Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 157, 170-71 (2d Cir. 1999) (holding that injunctive relief exception exists to the purchaser-seller requirement under section 10(b) and Rule 10b-5); *United States v. Neuman*, 664 F.2d 12, 17 (2d Cir. 1981) (“[T]his Court, and other Courts of Appeals as well, [have] held that a plaintiff need not be a defrauded purchaser or seller in order to sue for injunctive relief under Rule 10b-5.”); *Mut. Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 546-47 (2d Cir. 1967) (adopting an injunctive relief exception to purchaser-seller requirement under section 10(b) and Rule 10b-5); *Langner v. Brown*, 913 F. Supp. 260, 270 (S.D.N.Y. 1996) (holding that the injunctive relief exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 is “well-established Second Circuit precedent.”); *Fuchs v. Swanton Corp.*, 482 F. Supp. 83, 89 (S.D.N.Y. 1979) (“It has long been held in this Circuit that a suit for injunctive relief under Section 10(b) of the Exchange Act may be maintained by plaintiffs who are not actual purchasers or sellers of securities in connection with the challenged transactions.”).

127 *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (Blackmun, J., dissenting) (referring to the United State Court of Appeals for the Second Circuit who announced the purchaser-seller requirement in *Birnbaum* as the “‘Mother Court’ in this area of the law.”).
recognized that a plaintiff can have standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security.\textsuperscript{128} In that case, shareholders of S.H. Kress and Company ("Kress") sued Genesco, Inc. ("Genesco") under section 10(b) and Rule 10b-5 for a "fraudulent conspiracy" to acquire and abuse control of Kress.\textsuperscript{129} The shareholders requested both monetary damages and injunctive relief, and the United States District Court for the Southern District of New York dismissed the action for lack of jurisdiction based in part on the ground that the plaintiffs had failed to state a cause of action under section 10(b) and Rule 10b-5.\textsuperscript{130}

United States Court of Appeals for the Second Circuit reversed the district court in part and held that the shareholders had standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security.\textsuperscript{131} The Second Circuit reached this holding because section 10(b) and Rule 10b-5 are designed to prevent the manipulation of market prices of securities, and although the SEC can bring actions to halt such manipulations, allowing private plaintiffs the ability to seek injunctive relief under section 10(b) and Rule 10b-5 can play an important role in enforcement of these provisions.\textsuperscript{132} The court also adopted an injunctive relief exception to the purchaser-seller requirement because it fit with the broad remedial purposes of the Exchange Act.\textsuperscript{133} Additionally, the court held that injunctive relief does not raise the same concerns about "proof of loss and casual connection" that plague actions for damages under section 10(b) and Rule 10b-5.\textsuperscript{134}

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{128}]
\item Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967).
\item Id. at 542.
\item Id. at 543.
\item Id. at 547.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
After Blue Chip Stamps, the circuit courts split over the existence of an injunctive relief exception to the purchaser-seller requirement. In Blue Chip Stamps, the United States Supreme Court was careful to limit the scope of its holding to damages actions. Some courts have held that the injunctive relief exception survived Blue Chip Stamps, and other courts have reached the exact opposite conclusion. Still others have yet to make a determination on the issue. Although major policy considerations weigh in favor of an injunctive relief exception, the Supreme Court or Congress will ultimately have to settle this issue.

135 Prior to Blue Chip Stamps, the circuit courts were also split over the existence to an injunctive relief exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5. See cases cited supra note 125 (evidencing a split in the circuit courts prior to Blue Chip Stamps regarding the existence of an injunctive relief exception to the purchaser-seller requirement).

136 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 725 (1975) (defining the issue in the case as whether a plaintiff can “maintain a private cause of action for money damages” under section 10(b) and Rule 10b-5 without the purchase or sale of a security); id. at 727 (“Our consideration of the correctness of the determination of the Court of Appeals requires us to consider what limitations there are on the class of plaintiffs who may maintain a private cause of action for money damages for violation of Rule 10b-5, and whether respondent was within that class.”).

137 See, e.g., Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 170-71 (2d Cir. 1999) (holding that the purchaser-seller rule that was announced in Blue Chip Stamps does not apply to actions for injunctive relief under section 10(b) and Rule 10b-5); Davis v. Davis, 526 F.2d 1286, 1290 (5th Cir. 1976) (holding that a plaintiff does not need to be a purchaser or seller to seek injunctive relief under section 10(b) and Rule 10b-5); Granada Inv., Inc. v. DWG Corp., 717 F. Supp. 533, 535 (N.D. Ohio 1989) (“[S]uits for prospective injunctive relief pursuant to Section 10(b) of the Exchange Act may be brought by plaintiffs who are not actual purchasers or sellers.”); USG Corp. v. Wagner & Brown, 689 F. Supp. 1483, 1493-94 (N.D. Ill. 1988) (holding that plaintiffs had standing to bring a claim for injunctive relief under section 10(b) and Rule 10b-5 based on the injunctive relief exception to the purchaser-seller requirement); Foster v. Wheeler Corp. v. Edelman, No. 87-4346 (GB), 1987 WL 61446, at *4 (D.N.J. Dec 9, 1987) (holding that the exception to the purchaser-seller exists and will continue to be applied “unless and until the Third Circuit rules otherwise”).

138 See, e.g., Cowin v. Bresler, 741 F.2d 410, 423-25 (D.C. Cir. 1984) (holding that the purchaser-seller requirement that was announced in Blue Chip Stamps applies to actions seeking injunctive relief under section 10(b) and Rule 10b-5); Burlington Indus., Inc. v. Edelman, No. C-87-274-G, 1987 U.S. Dist. LEXIS, at *4-7 (M.D.N.C. July 30, 1987) (dismissing a claim for injunctive relief under section 10(b) and Rule 10b-5 because the plaintiff failed to meet the purchaser-seller requirement announced in Blue Chip Stamps); Alt. Fed. Sav. & Loan Ass’n of Fort Lauderdale v. Dade Sav. & Loan Ass’n, 592 F. Supp. 1089, 1092 (S.D. Fla. 1984) (denying a claim for injunctive relief under section 10(b) and Rule 10b-5 because plaintiffs failed to allege that they were either purchasers or sellers of the securities at issue); W.A. Krueger Co. v. Kirkpatrick, Pettis, Smith Polian, Inc., 466 F.Supp. 800, 805-06 (D. Neb. 1979) (holding that the purchaser-seller requirement under section 10(b) and Rule 10b-5 is applicable to actions for injunctive relief); Wright v. Heizer Corp., 411 F.Supp. 23, 34 (N.D. Ill. 1975) (holding that the purchaser-seller requirement adopted in Blue Chip Stamps is applicable to both actions at law and actions at equity under section 10(b) and Rule 10b-5).

139 See, e.g., Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 140 F.3d 478, 486 (2d Cir. 1998) (noting that the Third Circuit has not decided whether the injunctive relief exception to the purchaser-seller requirement survived Blue Chip Stamps); Advanced Res. Int’l, Inc. v. Tri-Star Petroleum Co., 4 F. 3d 327, 332 (4th Cir. 1993) (reserving for future determination whether an injunctive relief exception exists to the purchaser-seller requirement that was announced in Blue Chip Stamps); Westinghouse Credit Corp. v. Bader & Dufty, 627 F.2d 221, 223 (10th Cir. 1980) (declining to decide whether the purchaser-seller requirement from Blue Chip Stamps applies to a private
The third exception that emerged in the interim between Birnbaum and Blue Chip Stamps is the beneficial owner exception. Under this exception, an individual or entity with a beneficial interest in a security has standing to sue under section 10(b) and Rule 10b-5 if the security is purchased or sold in connection with alleged manipulative or deceptive conduct.\footnote{141}{For example, in James v. Gerber Products Company, the United States Court of Appeals for the Sixth Circuit adopted the beneficial owner exception and applied it in the context of testamentary trusts.\footnote{142}{In that case, the beneficiary of two testamentary trusts alleged that the trustee had violated section 10(b) and Rule 10b-5 by selling securities from the trusts to Gerber Products Company at less than fair market value.\footnote{143}{The United States District Court for the Western District of Michigan dismissed the action on the grounds that the beneficiary lacked standing to bring the action under section 10(b) and Rule 10b-5 because she neither purchased nor sold based on the alleged deception.\footnote{144}{The Sixth Circuit reversed the district court and held that the beneficiary did have standing under section 10(b) and Rule 10b-5 because she was a de facto seller of the action for injunctive relief under section 10(b) and Rule 10b-5 that does not involve the purchase or sale of a security).}

140 In a previous article, I argued in favor of issuer standing to seek injunctive relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security. Eric C. Chaffee, Beyond Blue Chip: Issuer Standing to Seek Injunctive Relief Under Section 10(b) and Rule 10b-5 Without the Purchase or Sale of Security, 36 Seton Hall L. Rev. 1135 (2006). In that article, I concluded that although strong policy arguments weigh in favor of an injunctive relief exception that the Supreme Court of the United States is unlikely to hold that such an exception exists. \textit{Id.} at 1178. Ultimately, I recommended that Congress amend section 10(b) and Rule 10b-5 to include an injunctive relief exception to the purchaser-seller requirement. \textit{Id.}

141 See, e.g., Selzer v. Bank of Berm. Ltd., 385 F. Supp. 415, 419 (S.D.N.Y. 1974) (holding that a trust beneficiary has standing to seek relief under section 10(b) and Rule 10b-5 for purchases and sales of securities for the trust); Heyman v. Heyman, 356 F. Supp. 958, 965-66 (S.D.N.Y. 1973) (holding that a trust beneficiary had standing to seek relief under section 10(b) and Rule 10b-5 for alleged deceptions and misrepresentations in the sale of stock from the trust); \textit{but see} Rippey v. Denver U.S. Nat’s Bank, 260 F. Supp. 704, 715-716 (D. Colo. 1966) (denying standing to trust beneficiaries because their beneficial interest in securities sold from the trust did not make them purchasers or sellers for purposes of section 10(b) and Rule 10b-5).


143 \textit{Id.} at 945.

144 \textit{Id.} at 946
The Sixth Circuit reasoned that courts have employed “a logical and flexible construction” of the purchaser-seller requirement, and that granting a beneficial owner standing comports with the purpose of section 10(b) and Rule 10(b) to “protect purchasers and sellers of securities from those who deal unfairly with them.” The Sixth Circuit also adopted the beneficial owner exception to the purchaser-seller requirement on the grounds that “novel and atypical transactions are not to be excluded from [the] . . . ambit” of section 10(b) and Rule 10b-5.

Uncertainty exists as to whether the Supreme Court of the United States overruled the beneficial owner exception in *Blue Chip Stamps*. In *Blue Chip Stamps*, the Court was concerned about the “case-by-case erosion” of the purchaser-seller requirement. If *Blue Chip Stamps* constitutes a strict prohibition on exceptions to the purchaser-seller requirement in damages actions, then the beneficial owner exception no longer exists. After *Blue Chip Stamps*, however, a number of lower courts have reaffirmed the existence of the exception, although some courts

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145 Id. at 948-950.
146 Id. at 948.
147 Id. at 949.
149 See, e.g., Grubb v. FDIC, 868 F.2d 1151, 1161-62 (10th Cir. 1989) (holding that a plaintiff who guaranteed a loan that was used by a holding company to purchase securities had standing under section 10(b) and Rule 10b-5 because the plaintiff was the actual party at risk); Norris v. Wirtz, 719 F.2d 256, 259-61 (7th Cir. 1983) (holding that a trust beneficiary had standing to bring an action under section 10(b) and Rule 10b-5 against a trustee because the alleged fraudulent misrepresent were made directly to the beneficiary who had the power to approve the sale of securities from the trust); Kirshner v. United States, 603 F.2d 234, 240 (2d Cir. 1979) (holding that a trust beneficiary has standing to sue under section 10(b) and Rule 10b-5 for “securities frauds perpetrated or threatened by the trustees of his fund”); Caballero v. Spanish Int’l Comm’n’s Corp., No. 84 Civ. 7039-CSH, 1985 WL 249 (S.D.N.Y. Feb. 1, 1985) (holding that a trust beneficiary can seek relief under section 10(b) and Rule 10b-5 against a trustee who commits fraud in connection with purchasing or selling securities for the trust); Atchley v. Quonaar Corp., No. 81 C. 6295, 1982 WL 1313 (N.D. Ill. Mar. 29, 1982) (holding that one who buys securities through an agent or a trustee can still seek relief under section 10(b) and Rule 10b-5); Hackford v. First Sec. Bank of Utah, N.A., 521 F. Supp. 541, 549 (D. Utah 1981) (holding that trust beneficiaries have standing to seek relief under section 10(b) and Rule 10b-5 because the beneficiaries experience the consequences of the fraud, rather than trustee); Gross v. Diversified Mortgage Investors, 431 F. Supp. 1080, 1093 (S.D.N.Y. 1977) (holding that a trust beneficiary had standing to sue under section 10(b) and Rule 10b-5 because the beneficiary was the “only person who was actually harmed” by alleged fraud in connection with the securities purchased for the trust); but see Lincoln Nat’l Bank v. Lampe, 414 F. Supp. 1270, 1280-81 (N.D. Ill. 1976) (holding that the Supreme Court of the
have narrowed its scope.\textsuperscript{150} In the end, the Supreme Court or Congress will also have to speak on the validity of this exception.

The fourth exception that developed in the interim between \textit{Birnbaum} and \textit{Blue Chip Stamps} is the forced seller exception.\textsuperscript{151} Under this exception, a plaintiff whose interest in a

\textsuperscript{150} A number of courts have refused to apply the beneficial owner exception to the purchaser-seller requirement to situations in which \textit{total} investment authority has been delegated to a trustee or other party. \textit{See}, \textit{e.g.}, Congregation of the Passion, Holy Cross Province \textit{v}. Kidder Peabody \& Co., 800 F.2d 177 (7th Cir 1986) (holding that a trust beneficiary cannot bring suit against a trustee when the beneficiary has transferred full investment authority to the trustee); O’Brien \textit{v}. Cont’l Ill. Nat’l Bank \& Trust Co. of Chicago, 593 F.2d 54, 59-63 (7th Cir 1979) (holding that a trust beneficiary does not have standing to bring an action under section 10(b) and Rule 10b-5 against a trustee with sole discretion to make investment decisions to purchase or sell securities because an alleged misrepresentation will not be “in connection with” the purchase or sale of a security); Harris Trust \& Sav. Bank \textit{v}. Ellis, 609 F. Supp. 1118, 1122 (N.D. Ill 1985) (holding that a beneficiary of a trust “had no authority and thus cannot complain of any fraud ‘in connection with’ any investment decision or securities transaction” involving securities contained in the trust). Some courts have also refused to extend the beneficial owner exception to the purchase-seller requirement to cases involving beneficiaries of wills. \textit{See}, \textit{e.g.}, Davison \textit{v}. Belcor, Inc., 933 F.2d 603, 608 (7th Cir 1991) (“Beneficiaries under a will, unlike beneficiaries of a trust, do not have standing to bring an action [under section 10(b) and Rule 10b-5] against third parties who enter into fraudulent transactions for the purchase or sale of securities with the representative of an estate.”); Benson \textit{v}. RMJ Sec. Corp., 683 F. Supp. 359, 368 (S.D.N.Y. 1988) (refusing to extend the beneficial owner exception to cases involving beneficiaries under a will).

\textsuperscript{151} \textit{See}, \textit{e.g.}, Sargent \textit{v}. Genesco, Inc., 492 F.2d 750, 764 (5th Cir 1974) (“That a forced seller has 10(b) standing has been recognized in this circuit.”); Smallwood \textit{v}. Pearl Brewing Co., 489 F.2d 579, 593 (5th Cir 1974) (recognizing the forced seller exception to the purchaser-seller requirement but holding that the exception did not apply under the facts of the case); Travis \textit{v}. Anthes Imperial Ltd., 473 F.2d 515, 522-23 (8th Cir 1973) (holding that plaintiffs qualified as forced sellers for purposes of standing under section 10(b) and Rule 10b-5 based on alleged misrepresentations related to a de facto merger that gave defendants control of the price at which plaintiffs’ securities could be sold); Mount Clemens Indus., 464 F.2d 339, 346-47 (9th Cir 1972) (noting the existence of the forced seller exception but holding that no basis existed for applying it in the case before the court); Fershtman \textit{v}. Schectman, 450 F.2d 1357, 1361 (2d Cir 1971) (recognizing the existence of the forced seller exception but refusing to apply it based on the facts of the case); Dudley \textit{v}. Southeastern Factor \& Fin. Corp., 446 F.2d 303, 307 (5th Cir 1971) (“[A] shareholder should be treated as a seller when the nature of his investment has been fundamentally changed from an interest in a going enterprise into a right solely to a payment of money for his shares.”); Coffee \textit{v}. Permian Corp., 434 F.2d 383, 385-86 (5th Cir 1970) (applying the forced seller exception to grant standing under section 10(b) and Rule 10b-5 in an action involving an alleged fraudulent liquidation); Kahan \textit{v}. Rosenstiel, 424 F.2d 161, 171 n.10 (3d Cir 1970) (“The purchaser-seller requirement was liberalized by courts holding that plaintiffs who did not actually sell stock were ‘forced sellers’, (because of a statutory merger of the company in which they held stock.”)); Crane Co. \textit{v}. Westinghouse Air Brake Co., 419 F.2d 787, 798 (2d Cir.1969) (holding that the plaintiff had standing to seek relief under section 10(b) and Rule 10b-5 as a forced seller); Greenstein \textit{v}. Paul, 400 F.2d 580, 581 (2d Cir. 1968) (noting the existence of the forced seller exception to the purchaser-seller exception but holding that it did not apply because the proposed, allegedly fraudulent merger never took place); Vine \textit{v}. Beneficial Fin. Co., 374 F.2d 627, 634 (2d Cir. 1967) (holding a plaintiff had standing to seek relief under section 10(b) and Rule 10b-5 based on an alleged fraudulent short form merger because his stock had “in effect, been involuntarily converted into a claim for cash”); Devonbrook, Inc. \textit{v}. Lily Lynn, Inc., No. 70 Civ. 4687, 1974 WL 419 Ingenito \textit{v}. State Mut. Life Assurance Co. of America, 376 F. Supp. 1154, 1178-79 (S.D.N.Y. 1974) (acknowledging the existence of the forced seller exception but refusing to apply it in a case involving a bankruptcy liquidation); Garner \textit{v}. Pearson, 374 F. Supp. 591, 597 (M.D. Fla. 1974) (holding that a shareholder has standing to seek relief as a forced seller under section 10(b) and Rule 10b-5 when “[t]he shareholder ‘as a practical
security is forcibly converted into a claim for cash or is forcibly exchanged for a fundamentally different security has standing to seek relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security. This exception is commonly used to remedy fraudulent short form mergers and fraudulent liquidations. A forced sale, however, does not occur based on a mere diminution of the value of a security. A forced sale also does not occur based on a

matter’ has no choice but to surrender his interest in [a] corporation and to exchange his shares for cash’); In re Penn Cent. Sec. Litig., 367 F. Supp. 1158, 1173-74 (E.D. Pa. 1973) (acknowledging the existence of the forced seller exception but refusing to apply it because the business entity at issue continued “to be an ongoing enterprise whose assets have never been liquidated”); Heyman v. Heyman, 356 F. Supp. 958, 963 (S.D.N.Y. 1973) (“The term ‘forced seller’ is a legal fiction, for the plaintiff in Vine was not a seller at all when he brought suit; the court denominated him a ‘forced seller’ because his shares were utterly worthless unless he sold them.”); Feldberg v. O’Connell, 338 F. Supp. 744, 746-47 (D. Mass. 1972) (applying the forced seller exception and granting plaintiffs standing to seek relief under section 10(b) and Rule 10b-5 based on the conversion of their partnership interests into claims for cash through a partnership dissolution); Chris-Craft Indus. v. Piper Aircraft Corp., 337 F. Supp. 1128, 1133 (S.D.N.Y. 1971) (acknowledging the existence of the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5); Hogan v. Teledyne, Inc., 328 F. Supp. 1043, 1047-48 (N.D. Ill. 1971) (recognizing the existence of the forced seller exception to the purchaser-seller requirement but refusing to apply it based on the facts of the case); Lewis v. Salny, No. 99-C-751, 1980 WL 263, at *2-3 (S.D.N.Y. June 9, 1970 (noting the existence of a forced seller exception to the purchaser-seller requirement to remedy the harms created by fraudulent mergers but refusing to apply it in the case because the plaintiff did not allege that any merger was ever consummated); Weisman v. MCA Inc., 45 F.R.D. 258, 261 (D. Del. 1968) (holding that plaintiffs had standing to seek relief under section 10(b) and Rule 10b-5 as forced sellers based on an alleged fraudulent short form merger); Hambros Bank, Ltd. v. Meserole, 287 F. Supp. 69, 72 (S.D.N.Y. 1968) (holding that a plaintiff has standing under section 10(b) and Rule 10b-5 when “the plaintiff is forced to give up his stock by means of an alleged fraudulent scheme, even though he was not taken in by it and refused to sell”); Mooney v. Vitolo, Nos. 67-1500 & 67-1501, 1967 U.S. Dist. LEXIS 11522, at * (S.D.N.Y. Dec. 7, 1967) (citing the forced seller exception to the purchaser-seller requirement as one way in which the Second Circuit has expanded standing under section 10(b) and Rule 10b-5).

152 See supra note 14 (citing cases providing that a forced sale occurs for purposes of standing under section 10(b) and Rule 10b-5 when security is forcibly converted into a claim for cash or when a security is forcibly exchanged for a fundamentally different security).

153 See supra note 15 (citing cases to demonstrate that the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 is commonly used to remedy fraudulent short form mergers).

154 See supra note 16 (citing cases to demonstrate that the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 is commonly used to remedy fraudulent liquidations).

155 See, e.g., Anderson v. Dixon, No. 95-4119, 1996 WL 276183, *2 (10th Cir. 1996) (holding that a “diminution in value [of stock] is not within the scope of section 10(b) and Rule 10b-5”); Ray v. Karris, 780 F.2d 636, 640 n.1 (7th Cir. 1985) (holding that “diminution of value of the plaintiff’s equity interest . . . has been held to be outside of the scope of the ‘forced seller’ concept”); Jeanes v. Henderson, 703 F.2d 855, 860 (5th Cir. 1983) (holding that a dilution of equity interest does not constitute the type of fundamental change necessary to qualify as a forced seller for purposes of standing under section 10(b) and Rule 10b-5); Sargent v. Genesco, Inc., 492 F.2d 750, 766 (5th Cir. 1974) (holding that dilution of equity is insufficient to provide standing under the forced seller exception to the purchaser-seller requirement); Brown v. Kinross Gold, U.S.A., 343 F. Supp. 2d 957, 962 (D. Nev. 2004) (“[T]he forced seller] doctrine does not apply to a plaintiff whose stock value merely decreased as a result of an allegedly fraudulent scheme.”); Matthey v. KDI Corp., 699 F. Supp. 135, 140 (S.D. Ohio 1988) (“The "forced sale" doctrine does not apply when a party has suffered only a diminution in the value of an equity interest, and has not been forced to surrender his securities.”); FDIC v. Kerr, 637 F. Supp. 828, 836 (W.D.N.C. 1986) (“[A] mere dilution in value of the plaintiff's investment is not sufficient for standing as a forced seller . . . .”); Rodriguez Cadiz v. Mercado Jimenez, 579 F. Supp. 1176, 1181 (D.P.R. 1983) (holding that dilution in the value of a shareholder’s equity will not
fraudulent statutory merger because a statutory merger constitutes an actual sale since a statutory merger involves an underlying contract to exchange securities.\textsuperscript{156}

Similar to the injunctive relief exception, the Second Circuit has also been a leading proponent of the forced seller exception.\textsuperscript{157} The Second Circuit first adopted the forced seller exception to the purchaser-seller requirement in \textit{Vine v. Beneficial Finance Company} in 1967.\textsuperscript{158} In that case, Leo Vine ("Vine") brought suit under section 10(b) and Rule 10b-5 against Beneficial Finance Company, Inc. ("Beneficial") for an alleged fraudulent scheme to acquire control of Crown Finance Company, Inc. ("Crown") through a short form merger.\textsuperscript{159} During all relevant times, Vine owned 100 shares of Crown stock.\textsuperscript{160} Because of the short form merger, Vine’s assent to the merger was not necessary,\textsuperscript{161} and he was left with the option to sell his shares at an inadequate price, pursue his right of appraisal, or retain stock in a corporation that no longer existed.\textsuperscript{162} The United States District Court for the Southern District of New York dismissed the claim on the basis that Vine had not purchased or sold based on the alleged deception.\textsuperscript{163}

The United States Court of Appeals for the Second Circuit reversed the district court and held that Vine had standing to sue as a forced seller under section 10(b) and Rule 10b-5 because

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\textsuperscript{156} See, e.g., SEC v. Nat’l Sec., Inc., 393 U.S. 453, 467 (1969) (holding that plaintiffs could seek relief under section 10(b) and Rule 10b-5 because they “‘purchased’ shares in [a] new company by exchanging them for their old stock” during a statutory merger).  
\textsuperscript{157} See supra note 151 (providing cases from the Second Circuit after Birnbaum and before Blue Chip Stamps holding that a forced seller exception exists to the purchaser-seller requirement under section 10(b) and Rule 10b-5); see infra note 178 (providing Second Circuit cases holding that the forced seller exception remains valid after the Supreme Court of the United States adopted the purchaser-seller requirement in Blue Chip Stamps).  
\textsuperscript{158} Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir. 1967).  
\textsuperscript{159} Id. at 630-31.  
\textsuperscript{160} Id. at 630.  
\textsuperscript{161} Id. at 631.  
\textsuperscript{162} Id. at 634.  
\textsuperscript{163} Id. at 631.
his shares were “in effect . . . , involuntarily converted into a claim for cash.”\textsuperscript{164} The Second Circuit noted that to receive any value for his shares “as a practical matter [Vine] must eventually become a party to a ‘sale,’ as that term has always been used.” The Second Circuit was willing to make an exception to the purchaser-seller rule under the facts of this case because requiring an actual purchase or sale would constitute a “needless formality.”\textsuperscript{165}

Notably, the Second Circuit rejected the argument that Vine could not demonstrate the necessary deception and reliance for a claim under section 10(b) and Rule 10b-5 because no misrepresentations were made to him about the short form merger and Vine did not have to assent to the merger. The Second Circuit held that the deception requirement was met by the alleged fraudulent scheme to obtain enough shares of Crown stock from other shareholders to undertake the short form merger.\textsuperscript{166} The court then held that reliance is “unnecessary in the limited instance when no volitional act is required and the result of the forced sale is exactly intended by the wrongdoer.”\textsuperscript{167}

In the interim between \textit{Birnbaum} and \textit{Blue Chip Stamps}, the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 was also employed to remedy fraudulent liquidations of business entities. For example, in \textit{Coffee v. Permian Corporation}, the United States Court of Appeals for the Fifth Circuit held that a minority shareholder of a fraudulently liquidated corporation could be a forced seller for purposes of standing under section 10(b) and Rule 10b-5.\textsuperscript{168} In that case, Charles Wendell Coffee ("Coffee") was a minority shareholder in Knight Company ("Knight"),\textsuperscript{169} and through a series of transactions Permian

\textsuperscript{164} \textit{Id.} at 634.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Coffee v. Permian Corporation}, 434 F.2d 383 (5th Cir. 1970).
\textsuperscript{169} \textit{Id.} at 384.
Corporation (“Permian”) obtained an 80.2% interest in Knight. Coffee alleged that Permian fraudulently secured the liquidation of Knight using misrepresentations regarding Knight’s financial status. Coffee argued that he should be allowed to seek relief under section 10(b) and Rule 10b-5 because he became a seller when the liquidation converted his shares of Knight stock into a claim for cash. The United States District Court for the Northern District of Texas granted the defendants’ motion to dismiss the complaint on the ground that Coffee was neither a purchaser nor seller for purposes of standing under section 10(b) and Rule 10b-5.

The Fifth Circuit reversed the district court and held that fraudulent liquidations can constitute forced sales for purposes of standing. The Fifth Circuit reached this holding on the ground that the purchaser-seller requirement should be liberally construed to meet the underlying purposes of the Exchange Act. The court also noted the similarities between the alleged fraudulent liquidation and the alleged fraudulent short form merger that occurred in Vine. The Fifth Circuit wrote, “In both instances the shareholder ‘as a practical matter’ ha[d] no choice but to surrender his interest in the corporation and to exchange his shares for cash.” Based on the similarity between the two cases, the Fifth Circuit held that the forced seller exception applies to both fraudulent short form mergers and fraudulent liquidations because in both cases the underlying securities undergo a fundamental change.

After Blue Chip Stamps, the circuit courts have split on the continued validity of the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5.
instances that a bankruptcy liquidation in certain circumstances may render a plaintiff a forced seller for purposes of standing to seek relief under section 10(b) and Rule 10b-5); Sanders v. Thrall Car Mfg. Co., 582 F. Supp. 945, 963 (D.N.J. 1984) (holding that in certain cases the continued existence of the forced seller exception but refusing to apply the exception based on the facts of the case); Teltronics Servs., Inc. v. Anaconda-Ericsson, Inc., 587 F. Supp. 724, 731 (E.D.N.Y. 1984) (holding that a forced seller exception exists to the purchaser-seller requirement but holding that the exception does not apply in cases of bankruptcy reorganization); In re Adelphia Comm’ns Corp. Sec. & Derivative Litig., 398 F. Supp. 2d 244, 260 n.12 (S.D.N.Y. 2005) (noting the existence of the forced seller exception to the purchaser-seller requirement but refusing to apply it based on the facts of the case); In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig., 676 F. Supp. 458, 476 (S.D.N.Y. 1987) (acknowledging the existence of a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5); Silverman v. Senft, No. 84 Civ. 0393-CSH, 1986 WL 3772, at *2-3 (S.D.N.Y. Mar. 27, 1986) (recognizing the continued existence of the forced seller exception but refusing to apply the exception based on the facts of the case); Teltronics Servs., Inc. v. Anaconda-Ericsson, Inc., 587 F. Supp. 724, 731 (E.D.N.Y. 1984) (holding that in certain instances that a bankruptcy liquidation in certain circumstances may render a plaintiff a forced seller for purposes of standing to seek relief under section 10(b) and Rule 10b-5); Sanders v. Thrall Car Mfg. Co., 582 F. Supp. 945, 963 (S.D.N.Y. 1983) (stating that the Court of Appeals for the Second Circuit has “repeatedly held” that a forced seller exception to the purchaser-seller requirement for standing under section 10(b) and Rule 10b-5); Koppel v. Wien, 575 F. Supp. 960, 970-71 (S.D.N.Y. 1983) (“The purchase or sale requirement [under section 10(b) and Rule 10b-5] can be met when a security holder is ‘forced’ after a merger or similar corporate transaction to convert his or her security to cash at a fixed price.”); Natowitz v. Mehlman, 567 F. Supp. 942, 945-46 (S.D.N.Y. 1983) (recognizing the existence of the forced seller exception but holding that it did not apply based on the facts of the case); Bolton v. Gramlich, 540 F. Supp. 822, 839-40 (S.D.N.Y. 1982) (holding that the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 because shareholders interest had undergone a fundamental change from an interest in an existing business enterprise to a claim for monetary payment); Farness v. Leblich, 489 F. Supp. 889, 891-92 (S.D.N.Y. 1980) (confirming the existence of a forced seller exception to permit standing to seek relief under section 10(b) and Rule 10b-5 for allegedly fraudulent mergers but refusing to apply it in the case because no merger was ever consummated); Greenfield v. Flying Diamond Oil Corp., No. 78 Civ. 3723-CSH, 1980 WL 1376, at *4 (S.D.N.Y. Feb. 26, 1980) (“Recent authority indicates that the [forced seller] doctrine survives Blue Chip. . . . Indeed, there is no reason why it should not, since nothing in Blue Chip, which adopts the Birnbaum principle, is inconsistent with the exception to Birnbaum which the Second Circuit fashioned in Vine.”); Canadian Javelin Ltd. v. Brooks, 462 F. Supp. 190, 195 (S.D.N.Y. 1978) (“A shareholder should be treated as a seller when the nature of his investment has been fundamentally changed from an interest in a going enterprise into a right solely to a payment of money for his shares.”); Weisman v. Darneille, No. 77 Civ 2110 (LFM), 1978 WL 1049, at *2 (S.D.N.Y. Jan. 6, 1978) (holding that Blue Chip Stamps did not invalidate the forced seller exception to the purchaser-seller requirement); Alpex Computer Corp. v. Pitney-Bowes, Inc., 417 F. Supp. 328, 330-31 (S.D.N.Y. 1976) (recognizing the existence of the forced seller exception after Blue Chip Stamps but refusing to apply it to the “winding down” of a corporation’s unsuccessful business); Rich v. Touche Ross & Co., 415 F. Supp. 95, 99-100 (S.D.N.Y. 1976) (holding that an SPIC liquidation constituted a forced sale for purposes of standing under section 10(b) and Rule 10b5 “where and to the extent customers’ claims to specific shares are satisfied in cash due to shortage’’); Murphey v. Hillwood Villa Assocs., 411 F. Supp. 287, 292 (S.D.N.Y. 1976) (holding that the forced seller exception to the purchaser-seller requirement is available in circumstances involving “fraudulent transformation of a securityholder’s investment from an interest in a going enterprise into a right solely to receive payment in exchange for such interest”); but see Koppel v. 4987 Corp., Nos. 96 Civ 7570 (RLC) & 97 Civ. 1754 (RLC), 1999 WL 608783, at *4 (S.D.N.Y. Aug 11, 1999) (holding that the forced seller exception to the purchaser-seller requirement is of “debatable validity”).

See, e.g., 7547 Corp v. Parker & Parsley Dev. Partners, L.P., 38 F.3d 211, 226-27 (5th Cir. 1994) (holding that a forced seller exception exists to the purchaser-seller requirement that was announced in Blue Chip Stamps); Jeanes
holding that the forced seller exception still exists. The First, Third, Fourth, Sixth, and

v. Henderson, 703 F.2d 855, 859-60 (5th Cir. 1983) (noting the existence of the forced seller exception to the purchaser seller requirement but refusing to apply it based on the facts before the court); Falls v. Ficking, 621 F.2d 1362, 1365 n.11 (5th Cir. 1980) (stating that the forced seller exception to the purchaser-seller requirement has “continued vitality” after Blue Chip Stamps); Alley v. Miramon, 614 F.2d 1372, 1386 (5th Cir. 1980) (“In upholding the Birnbaum Rule, the Blue Chip Court did not discuss the continued validity of the forced seller exception to the purchaser-seller requirement. Lower courts, however, uniformly have continued to apply the exception.”); Broad v. Rowell Int'l Corp., 614 F.2d 418, 436 (5th Cir. 1980) (holding that the Fifth Circuit has adopted the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5); Baugh v. Citizens & Southern Nat'l Bank, No. 81-63-MAC, 1980 WL 1487, at *3 (M.D. Ga. Apr. 30, 1980) (“[T]he [Fifth Circuit] confirmed that the forced seller doctrine remains valid after the Supreme Court's decision in Blue Chip . . . .”).

See, e.g., Bold v. Simpson, 802 F.2d 314, 320-21 (8th Cir.1986) (noting the existence of the forced seller exception of the purchaser-seller requirement but refusing to apply it to the case before the court).

See, e.g., Jacobson v. AEG Capital Corp., 50 F.3d 1493, 1499 (9th Cir. 1995) (“The forced sale doctrine does not cut a wide swath. Although recognized by the Ninth Circuit, we have rarely encountered instances where it applies.”); Stitt v. Williams, 919 F.2d 516, 524-25 (9th Cir. 1990) (recognizing the existence of the forced seller exception to the purchaser-seller requirement but refusing to apply it based on the facts of the case); Sec. Investor Prot. Corp., 803 F.2d 1513 (9th Cir. 1986) (holding that the forced seller exception is an exception to the purchaser seller requirement under section 10(b) and Rule 10b-5 but declining to apply it based on the facts before the court); Mosher v. Kane, 784 F.2d 1385, 1389 (9th Cir. 1986) (“The forced sale doctrine was first recognized in Vine v. Beneficial Finance Co. . . . , and has been adopted by the Ninth Circuit.”); Shivers v. Amerco, 670 F.2d 826, 830-31 (9th Cir. 1982) (noting the existence the forced seller exception but holding that the plaintiffs were not forced sellers for purposes of standing under section 10(b) and Rule 10b-5); see also Brown v. Kinross Gold, U.S.A., 343 F. Supp. 2d 957, 962 (D. Nev. 2004) (“The Ninth Circuit recognizes the ‘forced seller’ exception to the Birnbaum rule.”); In re Union Exploration Partners Sec. Litig., Nos. CV-90-3125-RSWL, CV-90-5149-RSWL & CV-91-0306-RWSL, 1992 WL 203812, at *2 (C.D. Cal. 1992) (holding that the Ninth Circuit recognizes the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5); Newman v. Comprehensive Care Corp., 794 F. Supp. 1513, 1521 (D. Ore. 1992) (holding that forced sellers have standing to sue under section 10(b) and Rule 10b-5 without the purchase or sale of a security).

The United States Court of Appeals for the Eleventh Circuit has never spoken on the existence of a forced seller exception to the purchaser-seller requirement. However, because the Fifth Circuit was divided to create the new Fifth and Eleventh Circuits on October 1, 1981, the Eleventh Circuit has adopted Fifth Circuit opinions issued prior to close of business on September 30, 1981 as binding precedent. See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981). Because the Fifth Circuit affirmed the existence of forced seller exception after Blue Chip Stamps and prior to close of business on September 30, 1981, the Eleventh Circuit has binding precedent affirming the validity of the forced seller exception after Blue Chip Stamps. See supra note 179 (providing Fifth Circuit case law finding the existence of the forced seller exception after Blue Chip Stamps and prior to the Fifth Circuit split); see also Badger v. Southern Farm Bureau Life Ins., No. 6:06-cv-637-Orl-28KRS, 2008 WL 1884887, at *10 (M.D. Fla. Apr. 25, 2008) (The forced seller doctrine was adopted and expanded by the United States Court of Appeals for the Fifth Circuit in Coffee v. Permian Corporation . . . , which decision is binding on this Court.”); APA Excelsior III, L.P. v. Windley, 348 F. Supp. 2d 1357, 1360 n.2 (N.D. Ga. 2004) (“The Eleventh Circuit itself has not addressed the application of the forced seller doctrine. Consequently, this Court is forced to rely on Fifth Circuit authorities predating the creation of the Eleventh Circuit for binding appellate precedent regarding the doctrine's application.”); APA Excelsior III, L.P. v. Windley, 329 F. Supp.2d 1328, 1348 n.24 (N.D. Ga. 2004) (stating in analyzing the existence and scope of the forced seller exception that the Eleventh Circuit has adopted as binding precedent decisions of the Fifth Circuit handed down prior to close of business on September 30, 1981); but see Kirwin v. Price Commc'ns Corp., 274 F. Supp. 2d 1242, 1250 n.3 (M.D. Ala. 2003) (“Several courts have questioned the continuing validity of the [forced seller] doctrine in light of later Supreme Court precedent.”).

See, e.g., Jacobs v. Winthrop Financial Assocs., 77 F. Supp. 2d 206, 209 (D. Mass. 1999) (holding that although the First Circuit has not “chimed in” on the existence of the forced seller exception to the purchaser seller requirement, the district courts in the First Circuit have “collectively articulate[d] a sound and consistent application of the forced seller doctrine”); Dowling v. Narragansett Capital Corp., 735 F. Supp. 1105, 1120-21 (D.R.I. 1990) (applying the forced seller exception to grant standing to seek relief under section 10(b) and Rule 10b-
D.C. Citations have not spoken on the continued validity of the forced seller exception after

*Blue Chip Stamps*, but district courts in each of these circuits have held that it remains a valid

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5 in an alleged fraudulent asset sale while acknowledging that the First Circuit has never considered the availability of the exception under such circumstances); Fulco v. Cont’l Cablevision, Inc., Nos. 89-1342-S, 89-1380-S, 89-1389-S & 89-1422-S, 1989 WL 205356, *3 (D. Mass. Oct. 4, 1989) (holding that involuntary redemption of limited partnership units constituted a forced sale for purposes of standing under section 10(b) and Rule 10b-5); Batchelder v. Northern Fire Lites, Inc., 630 F. Supp. 1115, 1120-21 (D.N.H. 1986) (discussing the application of the forced seller exception to fraudulent mergers and fraudulent liquidations but refusing to apply it to the factual allegations of the case because no merger or liquidation had occurred); Rodriguez Cadiz v. Mercado Jimenez, 579 F. Supp. 1176, 1180-81 (D.P.R. 1983) (discussing the existence of the forced seller exception but refusing to apply it because the plaintiff had not been compelled to sell his stock); Arnensen v. Shawmut County Bank, N.A., 504 F. Supp. 1077, 1081-82 (D. Mass. 1980) (noting the existence of the forced seller exception to the purchaser-seller requirement but refusing to apply it based on the facts of the case); but see Howe v. Bank Int’l Settlements, 194 F. Supp. 2d 6, 27 (D. Mass. 2002) (“It is at least doubtful . . . whether the forced-seller doctrine retains any viability. The First Circuit has never adopted it . . . and the courts of this district . . . have not found it satisfied in many years.”).


See, e.g., Arnold v. Moran, 687 F. Supp. 232, 234 n.5 (E.D. Va. 1988) (“This court finds that the ‘forced seller’ doctrine remains a viable, though limited, exception to the 10b-5 ‘purchaser-seller’ requirement.”); FDIC v. Kerr, 637 F. Supp. 828, 836 (W.D.N.C. 1986) (holding that *Blue Chip Stamps* did not invalidate the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5); Umstead v. Durham v. Hosier Mills, Inc., 578 F. Supp. 342, 346 (M.D.N.C. 1984) (“When a shareholder has in substance become a seller despite the fact that he still holds stock certificates in a non-functioning corporation, the purchase/sale element of Rule 10b-5 is not a bar to recovery.”).

See, e.g., Brewer v. Lincoln Int’l Corp., 148 F. Supp. 2d 792, 806 (W.D. Ky. 2000) (“[W]e believe that the central holding of *Vine* remains relevant: when a shareholder's investment is altered to the point that he or she must choose between liquidating his or her shares in exchange for cash or being completely divested of any interest in the corporation, a ‘sale’ . . . has occurred.”); Matthey v. KDI Corp., 699 F. Supp. 135, 139-40 (S.D. Ohio 1988) (noting the existence of the forced seller exception but refusing to apply it based on the facts of the case).

See, e.g., Houlihan v. Anderson-Stokes, Inc., 434 F.Supp. 1330, 1337-39 (D.D.C. 1977) (holding that owners of units in a limited partnership formed to construct a condominium had standing to seek relief as forced sellers based on an alleged fraudulent disposition of the partnership assets transformed their securities from an interest in a functioning business entity to a right to receive a payment of cash). The United States Court of Appeals for the D.C. Circuit has referred to the forced seller exception in dicta. See Northland Capital Corp. v. Silver, 735 F.2d 1421, 1430-31 (D.C. Cir. 1984).
exception to the purchaser-seller requirement. The Tenth Circuit also has not spoken on the continued validity of the forced seller exception, but a district court in that circuit has questioned the continued validity of the exception. Finally, the Seventh Circuit and a number of district courts from other circuits have strongly questioned the continued validity of the exception.

188 See Anderson v. Dixon, No. 95-4119, 1996 WL 276183, at *2 (10th Cir. May 24, 1996) (“The Tenth Circuit has not yet adopted the ‘forced sale’ doctrine, and we do not have to decide whether to do so in this case.”). See Melnyk v. Cononus, No. 2:03-CV-00528 DB, 2005 WL 2263950, at *3 (D. Utah 2005) (“[T]he forced seller doctrine has not been adopted by the Tenth Circuit, the doctrine is of questionable continued validity, and the facts of this case do not lend to its application.”); but see Eastwood v. Nat’l Bank of Commerce, 673 F. Supp. 1068, 1072 (W.D. Okla. 1987) (noting in dicta the existence of the forced seller exception and discussing the requirements to have standing as a forced seller); Okla. Pub’l’g Co. v. Standard Metals Corp., 541 F. Supp. 1109, 1111-12 (W.D. Okla. 1982) (suggesting in dicta that in forced seller cases reliance may be assumed for purposes of a private action under section 10(b) and Rule 10b-5).

189 See, e.g., Jakubowski, 150 F.3d 675, 680 (7th Cir. 1998) (holding that the Seventh Circuit “reject[s] . . . the forced-seller doctrine and the fundamental-change doctrine and insist[s] that the wrongdoing affect an investment decision”); Isquith v. Caremark Int’l, Inc. 136 F.3d 531, 535-36 (7th Cir. 1998) (referring to the forced seller exception as “defunct” and referring to the related fundamental change doctrine as an “esoteric and dubious judge-made doctrine”); Cont’l Cas. Co. v. State of N.Y. Mortgage Agency, No. 94 C 1463, 1994 WL 532271, at *4 (N.D. Ill. Sept. 21, 1994) (“Although the forced sale doctrine may be accepted in other circuits, it is not binding here.”); Alexander v. Centrafarm Group, N.V., 124 F.R.D. 178, 184 (N.D. Ill. 1988) (expressing doubt as to the validity of the forced seller exception in the Seventh Circuit based on the circuit court’s unwillingness to speak on the existence of the exception). Prior to Jakubowski and Isquith, however, a number of district courts in the Seventh Circuit had held that a forced seller exception did exist to the purchaser-seller requirement under section 10(b) and Rule 10b-5. See, e.g., Gilford Partners, L.P. v. Sensormatic Elecs Corp., No. 96 C 4072, 1997 WL 757495, at *9 (N.D. Ill. Nov. 12, 1997) (noting the existence of the forced seller exception but refusing to apply it based on the facts of the case); Beale v. EdgeMark Fin. Corp., 164 F.R.D. 649, 655 (N.D. Ill. 1995) (“The ‘forced seller’ doctrine broadly construes the term ‘sale’ in Rule 10b-5 and considers shareholders to be sellers under the Act when the nature of the investment had been fundamentally and involuntarily changed even though they had not actually sold or purchased shares of stock.”); Gault v. Foster, No. 83 C 1688, 1990 WL 17145, at *2-3 (N.D. Ill. Jan. 19, 1990) (recognizing the existence of the forced seller exception although not applying it in the case because no fraud was alleged in connection with the “forced sale”); Yabsley v. Conover, 644 F. Supp. 689, 699 (N.D. Ill. 1986) (“[N]umerous cases have found that minority shareholders forced to exchange shares in a corporation pursuant to a merger or ‘going private’ transaction are ‘sellers’ within the meaning of the securities laws, even if the shareholders have not yet tendered their shares at the time the suit is brought.”); Grossman v. Waste Mgmt. Inc., 589 F. Supp. 395, 413 (N.D. Ill. 1984) (acknowledging the existence of the forced seller exception but holding that it did not apply under the facts of the case); Ridings v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd., 94 F.R.D. 147, 151 n.4 (N.D. Ill. 1982) (“It is well settled . . . that a minority shareholder forced to exchange his shares in a corporation pursuant to a merger is a ‘seller’ within the meaning of the securities laws entitled to assert a cause of action for securities fraud.”) Issen v. GSC Enters., Inc., 508 F. Supp. 1278, 1285 (N.D. Ill. 1981) (“It appears to be settled that a minority shareholder forced to exchange his shares in a corporation pursuant to a merger or going private transaction is a ‘seller’ within the meaning of the securities law.”).

190 See, e.g., Melnyk v. Cononus, No. 2:03-CV-00528 DB, 2005 WL 2263950, at *3 (D. Utah 2005) (holding that the forced seller exception has not been adopted by the United States Court of Appeals for the Tenth Circuit and stating that it is of “questionable continued validity”); Kirwin v. Price Commc’ns Corp., 274 F. Supp. 2d 1242, 1250 n.3 (M.D. Ala. 2003) (“Several courts have questioned the continuing validity of the [forced seller] doctrine in light of later Supreme Court precedent.”); Howe v. Bank for Int’l Settlements, 194 F. Supp. 2d 6, 27 (D. Mass. 2002) (holding that the forced seller exception has been not adopted by the United States Court of Appeals for the First
In many cases, a single dissenting circuit court and a scattering of district court opinions would not constitute a significant circuit split. However, when the Seventh Circuit judges challenging the continued validity of the forced seller exception include prominent judges, such as Richard Posner and Frank Easterbook, this creates significant reason to doubt the continued validity of the exception.\(^1\)

In *Isquith v. United States*, Judge Posner strongly questioned the continued validity of the forced seller exception to the purchaser-seller requirement.\(^2\) In that case, Baxter International, Inc. (“Baxter”) spun-off Caremark International, Inc. (“Caremark”), a wholly owned subsidiary of Baxter.\(^3\) Baxter achieved the spin-off and recast Caremark as a publicly owned company by issuing shares of Caremark stock to current Baxter shareholders.\(^4\) Because of alleged deceptions in the spin-off process and a subsequent devaluing of Baxter and Caremark stock, holders of the original Baxter stock sought relief under section 10(b) and Rule 10b-5.\(^5\) Holders of Baxter stock claimed that they were forced sellers of their original Baxter shares because they were fundamentally changed when Caremark was spun off from being a wholly owned subsidiary of Baxter.\(^6\) The United States District Court for the Northern District of Illinois

\(^1\) The United States District Court for the Northern District of Illinois


\(^3\) Isquith, 136 F.3d at 535-37.

\(^4\) Id. at 532-33.

\(^5\) Id.

\(^6\) Id. at 533.

\(1\) Id.
dismissed the case because the holders of Baxter stock were neither purchasers nor sellers for purposes of standing under section 10(b) and Rule 10b-5.\textsuperscript{198}

The United States Court of Appeals for the Seventh Circuit affirmed the dismissal for lack of standing. Writing for the court, Judge Richard Posner first asserted that the forced seller exception had been recast as the “fundamental change doctrine,” which permits standing under section 10(b) when a security undergoes a change that “in some sense [is] ‘fundamental’ rather than nominal; hence the renaming of the doctrine.”\textsuperscript{199} The Seventh Circuit then held that Baxter’s spin-off of Caremark did not satisfy the fundamental change doctrine because the holders of Baxter stock were not forced to relinquish anything since they retained ownership of Baxter and simply received shares of Caremark, a newly publicly owned company.\textsuperscript{200} A fundamental change in ownership did not occur because the Baxter stockholders had the same ownership interest after the spin-off except that the ownership interest was split between two corporations, rather than an ownership interest in just one corporation.\textsuperscript{201}

The Seventh Circuit went on to question the validity of the fundamental change doctrine and the forced seller exception, which Judge Posner referred to as “esoteric and dubious judge-made doctrine.”\textsuperscript{202} The Seventh Circuit stated concerns that the fundamental change doctrine extended section 10(b) and Rule 10b-5 into areas that do not constitute securities fraud because securities fraud does not include oppression of minority shareholders through mergers and liquidations.\textsuperscript{203} The Seventh Circuit also was concerned that the fundamental change doctrine

\textsuperscript{198} Id. at 532.
\textsuperscript{199} Id. at 535-36.
\textsuperscript{200} Id. at 536.
\textsuperscript{201} Id.
\textsuperscript{202} Id. at 535.
\textsuperscript{203} Id. at 536.
ignores that reliance is an element of securities fraud under section 10(b) and Rule 10b-5 because forced sellers do not make investment decisions.\textsuperscript{204}

The significance of \textit{Isquith} is debatable. The case can be viewed as questioning the validity of the forced seller exception or rejecting it. In \textit{SEC v. Jakubowski}, the Seventh Circuit took the latter view, and Judge Frank Easterbrook wrote in dicta that the Seventh Circuit “reject[s] . . . the forced-seller doctrine and the fundamental-change doctrine and insist[s] that the wrongdoing affect an investment decision.”\textsuperscript{205} No matter what view one takes of \textit{Isquith}, the lower courts have taken steps to limit the scope of the forced seller exception to conform to recent Supreme Court opinions about the elements and contours of a private right of action under section 10(b) and Rule 10b-5, which will be explained in Part IV.B of this Article.\textsuperscript{206} To settle the debate over the existence of the forced seller exception, either the Supreme Court or Congress will have to speak about the existence of the exception.

\textbf{III. Arguments in Support of a Forced Seller Exception}

The Supreme Court of the United States ultimately adopted the purchaser-seller requirement under section 10(b) and Rule 10b-5 based on policy concerns.\textsuperscript{207} The Supreme Court took into account the precedential support for the requirement in the lower courts and the legislative intent that could be discerned from the Securities Act and the Exchange Act.\textsuperscript{208} However, the Court admitted that it was unable to “divine the ‘intent of Congress’ as to the contours of a private cause of action under Rule 10b-5” because neither Congress nor the SEC

\textsuperscript{204} \textit{Id.} at 536.
\textsuperscript{205} See \textit{SEC v. Jakubowski}, 150 F.3d 675, 680 (7th Cir. 1998).
\textsuperscript{206} See \textit{infra} Part IV.B (discussing the challenges of conforming the forced seller exception to the elements established by the Supreme Court of the United States for the private right of action under section 10(b) and Rule 10b-5).
\textsuperscript{207} \textit{Blue Chip Stamps v. Manor Drug Stores}, 421 U.S. 723, 737 (1975).
\textsuperscript{208} \textit{Id.} at 749.
had provided for the existence of a private right.\textsuperscript{209} Thus, the Court resorted to policy considerations “to flesh out the portions of the law with respect to which neither congressional enactment nor the administrative regulations offer conclusive guidance.”\textsuperscript{210}

An analysis similar to that used in \textit{Blue Chip Stamps} justifies the existence of a forced seller exception to the purchaser-seller requirement. First, although section 10(b) and Rule 10b-5 do not offer conclusive guidance, affording standing to forced sellers is consistent with the precedential history and regulatory scheme underlying the Securities Act and the Exchange Act. Second, policy considerations weigh in favor of the adoption of a forced seller exception to the purchaser-seller requirement because the exception is consistent with the purposes and effective functioning of the Securities Act and the Exchange Act. Finally, the policy concerns that gave birth to the purchaser-seller requirement and led the Supreme Court to refuse to grant standing to the aborted purchasers in \textit{Blue Chip Stamps} do not exist in forced sellers cases. Taken together, a strong case exists for a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5.

\textbf{A. The Forced Seller Exception is Consistent with the Regulatory Scheme under the Securities Act and the Exchange Act}

The place to begin in interpreting section 10(b) and Rule 10b-5 is the language of the provisions themselves.\textsuperscript{211} If the language of the statute and rule are clear, then one needs to look

\textsuperscript{209} \textit{Id.} at 737.
\textsuperscript{210} \textit{Id.}
\textsuperscript{211} See \textit{e.g.}, Chiarella v. United States, 445 U.S. 222, 226 (1980) (holding that “the starting point of our inquiry is the language of the statute” when interpreting section 10(b) and Rule 10b-5); Santa Fe Indus. v. Green, 430 U.S. 462, 472 (1977); (holding that the language of section 10(b) is the place to begin “in deciding whether a complaint states a cause of action for ‘fraud’ under Rule 10b-5”); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976) (holding that the language of the statute is the place to start in addressing the contours of the private right of action under section 10(b) and Rule 10b-5); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring) (“The starting point in every case involving construction of a statute is the language itself.”).

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no further in interpreting these provisions. The existence of the forced seller exception, however, cannot be determined based on the language of section 10(b) and Rule 10b-5. As held in Blue Chip Stamps, issues regarding standing cannot be decided based on the language of these provisions because neither Congress nor the SEC provided for an express cause of action. Nevertheless, the statute and the rule both state that only manipulative and deceptive devices used “in connection with the purchase or sale of any security” are rendered unlawful under these provisions. To satisfy this requirement, courts have either held that a forced sale is a special type of sale or that an actual sale is an unnecessary formality because plaintiffs will ultimately have to sell their securities to receive any value for them.

\[\text{See, e.g., Cent. Bank of Denver, N.A. v. Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994) ("[O]ur cases considering the scope of conduct prohibited by § 10(b) in private suits have emphasized adherence to the statutory language . . . . We have refused to allow 10b-5 challenges to conduct not prohibited by the text of the statute."); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976) ("[T]he language of a statute controls when sufficiently clear in its context . . . .")}]

\[\text{Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975)}\]


\[\text{See, e.g., Jacobson v. AEG Capital Corp., 50 F.3d 1493, 1498 (9th Cir. 1995) ("A shareholder who is forced to sell or alter her securities as the result of a fraudulent scheme is deemed a seller for purposes of the securities laws."); Ray v. Karris, 780 F.2d 636, 640 n.1 (7th Cir. 1985) ("In the substantial number of cases where [the forced seller exception to the purchaser-seller requirement] has been applied, a shareholder has been treated as a seller when the nature of his investment has been fundamentally and involuntarily changed."); Madison Consultants v. FDIC, 710 F.2d 57, 61 (2d Cir. 1983) ("This Circuit has repeatedly held . . . that an owner of securities who is forced to sell them against his will has standing as a 'seller' for purposes of Rule 10b-5."); Vine v. Beneficial Fin. Co., 374 F.2d 627, 634-35 (2d Cir. 1967) (holding that an actual sale is a "needless formality" and stating that a forced seller is a seller under the Act for purposes of standing to seek relief under section 10(b) and Rule 10b-5; Brewer v. Lincoln Int'l Corp., 148 F. Supp. 2d 792, 806 (W.D. Ky. 2000) ([W]hen a shareholder's investment is altered to the point that he or she must choose between liquidating his or her shares in exchange for cash or being completely divested of any interest in the corporation, a 'sale' within the meaning of Rule 10b-5 has occurred."); Beale v. EdgeMark Fin. Corp., 164 F.R.D. 649, 655 (N.D. Ill. 1995) ("The 'forced seller' doctrine broadly construes the term 'sale' in Rule 10b-5 and considers shareholders to be sellers under the Act when the nature of the investment had been fundamentally and involuntarily changed even though they had not actually sold or purchased shares of stock."); Fulco v. Cont'l Cablevision, Inc., Nos. 89-1342-S, 89-1380-S, 89-1389-S & 89-1422-S, 1989 WL 205356, *7 (D. Mass. Oct. 4, 1989) (holding that the term "seller" under section 10(b) and Rule 10b-5 has been extended to include forced sellers of securities); Horsell Graphic Indus., Ltd. v. Valuation Counselors, Inc., 639 F. Supp. 1117, 1123 (N.D. Ill. 1986) ("In the substantial number of cases where [the forced seller exception to the purchaser-seller requirement] has been applied, a shareholder has been treated as a seller where his investment has been fundamentally and involuntarily changed."); Yabsley v. Conover, 644 F. Supp. 689, 699 (N.D. Ill. 1986) ("[N]umerous cases have found that minority shareholders forced to exchange shares in a corporation pursuant to a merger or 'going private' transaction are ‘sellers’ within the meaning of the securities laws, even if the shareholders have not yet tendered their shares at the time the suit is brought."); Ridings v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd., 94 F.R.D. 147, 151 n.4 (N.D. Ill. 1982) ("It is well settled . . . that a minority shareholder}

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Although the existence of the forced seller exception cannot be validated by the language of the statute and the rule, the regulatory schemes of the Securities Act and the Exchange Act provide persuasive support for the existence of the forced seller exception. In cases in which individual provisions of the federal securities law are unclear, the comprehensive regulatory scheme underlying those provisions can be used to provide guidance as to the meaning of those individual provisions. The regulatory scheme of the Securities Act and the Exchange Act suggests the existence of a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 because the exception has been accepted by most lower courts and

forced to exchange his shares in a corporation pursuant to a merger is a ‘seller’ within the meaning of the securities laws entitled to assert a cause of action for securities fraud.”

216 See, e.g., 7547 Corp v. Parker & Parsley Dev. Partners, L.P., 38 F.3d 211, 226 (5th Cir. 1994) (holding that the forced seller exception is an exception to the requirement that a plaintiff must be an actual purchaser or seller for purposes of standing under section 10(b) and Rule 10b-5); Mayer v. Oil Field Sys. Corp., 721 F.2d 59, 65 (2d Cir. 1983) (“[W]hen a stockholder has been forced by fraudulent means into a situation where he has no alternative to disposing of his stock for cash, Rule 10b-5 applies even though he has not actually sold his stock.”); Alley v. Miramon, 614 F.2d 1372, 1384 (5th Cir. 1980) (stating that the forced seller exception is an “exception[] to the purchaser-seller requirement” under section 10(b) and Rule 10b-5); Vine v. Beneficial Fin. Co., 374 F.2d 627, 634-35 (2d Cir. 1967) (holding that an actual sale is a “needless formality” and stating that a forced seller “is a seller under the Act” for purposes of standing to seek relief under section 10(b) and Rule 10b-5); Badger v. Southern Farm Bureau Life Ins., No. 6:06-cv-637-Orl-28KRS, 2008 WL 1884887, at *9 (M.D. Fla. Apr. 25, 2008) (“The forced seller doctrine is an exception to the requirement in § 10(b) and Rule 10b-5 that an individual must actually be a seller of stock.”); Brown v. Kinross Gold, U.S.A., 343 F. Supp. 2d 957, 962 (D. Nev. 2004) (“[A] plaintiff may attain standing [under the forced seller exception to the purchaser-seller requirement] without selling his securities if the nature of his investment fundamentally changed due to fraud.”); Lewis v. Dow Chem. Co., No. 91-534, 1992 U.S. Dist. LEXIS 15792, at *10 (D. Del. 1992) (“The primary purpose of the forced seller doctrine is to relive a limited class of plaintiffs from having to show that a ‘purchase and sale’ occurred in order to achieve standing to sue.”); Umstead v. Durham v. Hosiery Mills, Inc., 578 F. Supp. 342, 346 (M.D.N.C. 1984) (“When a shareholder has in substance become a seller despite the fact that he still holds stock certificates in a non-functioning corporation, the purchase/sale element of Rule 10b-5 is not a bar to recovery.”); Erlbaum v. Erlbaum, No. 80-4245, 1982 WL 1321, at *2 (E.D. Pa. 1982) (“The ‘forced sale’ doctrine permits persons holding shares of stock in nonexisting or expiring corporations as a result of mergers, acquisitions or liquidations to bring actions under § 10(b) to redress fraudulent acts, although there has been no ‘purchase or sale’.”); McCloskey v. McCloskey, 450 F. Supp. 991, 994 n.5 (E.D. Pa. 1978) (“Courts have fashioned the forced seller doctrine to confer standing [under section 10(b) and Rule 10b-5] on plaintiffs who were neither purchaser nor sellers . . . .”); Arnesen v. Shawmut County Bank, N.A., 504 F. Supp. 1077, 1081 (D. Mass. 1980) (stating that the forced seller exception may provide standing “even though no actual sale occurred, because the circumstances are such that they have the practical effect of a sale and render the sale itself a formality”); Heyman v. Heyman, 356 F. Supp. 958, 963 (S.D.N.Y. 1973) (holding that the forced seller exception is a “legal fiction” that serves as a substitute for an actual sale).

217 See, e.g., Musick, Peeler & Garrett v. Employers Ins., 508 U.S. 286, 294 (1993) (holding that the Supreme Court’s role in interpreting section 10(b) and Rule 10b-5 is “to ensure that the rules established to govern the 10b-5 action are symmetrical and consistent with the overall structure of the 1934 Act and, in particular, with those portions of the 1934 Act most analogous to the private 10b-5 right of action that is of judicial creation.”); SEC v. Nat’l Sec., Inc., 393 U.S. 453, 466 (1969) (holding that “the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen . . . .” for any individual provision).
Congress as a part of the securities laws, is consistent with the express causes of action under the Acts, and is consistent with the provisions defining private causes of action under the Exchange Act.

Even though the forced seller exception is an implied exception to an implied purchaser-seller requirement to an implied cause of action under section 10(b) and Rule 10b-5, an argument exists that the exception is an established part of the regulatory scheme because it has been recognized by courts and accepted by Congress for over forty years. In 1967, the United States Court of Appeals for the Second Circuit decided *Vine v. Beneficial Finance Company*, the leading case on the forced seller exception. Prior to *Blue Chip Stamps*, dozens of courts recognized the existence of the forced seller exception, and after *Blue Chip Stamps*, dozens of courts have reaffirmed its existence. The United States Court of Appeals for the Seventh Circuit and a handful of district courts may have questioned the continued validity of the forced seller exception, but the forced seller exception remains a well-established exception to the purchaser-seller requirement.

Congress has also acquiesced to the existence of a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 by failing to define the contours of the private right of action under these provisions. The Supreme Court of the United States has acknowledged and embraced the judiciary’s role in defining the terms of the private right of

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218 *See supra* note 151 (citing dozens of cases prior to *Blue Chip Stamps* recognizing the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5).

219 *See supra* notes 178-187 (citing dozens of cases after *Blue Chip Stamps* recognizing the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5).

220 *See supra* notes 192-205 and accompany text (discussing the United States Court of Appeals for the Seventh Circuit’s rejection of the forced seller exception under section 10(b) and Rule 10b-5); *see supra* note 191 (listing a small number of United States district courts that have questioned the continued validity of the forced seller exception).
action under section 10(b) and Rule 10b-5. The lower courts have played their role by adopting the forced seller exception, and Congress has not objected to the existence of the exception.

Of course, the Supreme Court of United States can freely overrule the substantial body of case law holding that a forced seller exception to the purchaser-seller exists and wait for Congress to speak on the issue. However, the Court has permitted the lower courts to make determinations about the terms of the private right of action under section 10(b) and Rule 10b-5 in the past. For example, in Superintendent of Insurance v. Bankers Life & Casualty Co., the Court simply deferred to the lower courts when holding in a footnote in a single sentence: “It is now established that a private right of action is implied under section 10(b).” Amazingly, this terse and conclusory statement was made twenty-five years after the United States District Court for the Eastern District Pennsylvania in Kardon v. National Gypsum Co. became the first court to hold that a private right of action exists under section 10(b) and Rule 10b-5. Similarly, after not addressing the existence of the purchaser-seller requirement for more than twenty years, the Supreme Court in Blue Chip Stamps relied heavily on precedent from the lower courts in adopting the requirement.

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221 See, e.g., Musick, Peeler & Garrett v. Employers Ins., 508 U.S. 286, 292 (1993) (“The federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b-5 right and the definition of the duties it imposes.”); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975) (We are dealing with a private cause of action [under section 10(b) and Rule 10b-5] which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question.”).
223 Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (establishing the private right of action under section 10(b) and Rule 10b-5).
224 Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952).
225 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975) (“Thus we conclude that what may be called considerations of policy, which we are free to weigh in deciding this case, are by no means entirely on one side of the scale. Taken together with the precedential support for the Birnbaum rule over a period of more than 20 years, and the consistency of that rule with what we can glean from the intent of Congress, they lead us to conclude that [the purchaser-seller requirement] is a sound rule and should be followed.”).
Significantly, the longstanding acceptance of the forced seller exception by the lower courts and Congress also provides a response to the Supreme Court’s current reluctance to expand the scope of the private right of action under section 10(b) and Rule 10b-5. In Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., the Court held: “Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.”226 The forced seller exception has been recognized since the late 1960s, and if the Supreme Court chooses to validate its existence, it arguably would not be an expansion of present boundaries of the private right of action under section 10(b) and Rule 10b-5 because of its longtime incorporation into the regulatory scheme.227

A forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 can also be justified on the grounds that it is consistent with how courts have interpreted the express causes of action under the Securities Act and the Exchange Act. The Securities Act and the Exchange Act contain various express private causes of action, and most of these causes of action explicitly require that a plaintiff be a purchaser or seller to have standing to seek relief.228 In the limited number of cases addressing the issue, courts have held

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227 See supra note 151 (citing dozens of cases prior to Blue Chip Stamps holding that a forced seller exception exists to purchaser-seller requirement under section 10(b) and Rule 10b-5); see supra notes 178-87 (citing dozens of cases after Blue Chip Stamps holding that a forced seller exception exists to purchaser-seller requirement under section 10(b) and Rule 10b-5).
228 See Securities Act of 1933 § 11, 15 U.S.C. § 77k (2008) (provides a private right of action for “any person acquiring a security” based on a registration “contain[ing] an untrue statement of a material fact or omit[ting] to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”); Securities Act of 1933 § 12(a)(1), 15 U.S.C. § 77l(a)(1) (2008) (providing a private right of action for any “person purchasing [a] security” against “any person who offers or sells a security” in violation of the registration and prospectus requirements found in section 5 of the Securities Act); Securities Act of 1933 § 12(a)(2), 15 U.S.C. § 77l(a)(2) (2008) (providing a private right of action for any “person purchasing [a] security” against a person offering to sell a security based on a prospectus or oral communication containing “an untrue statement of a material fact or omit[ting] to state a material fact necessary in order to make the statements . . . not misleading . . . .”); Securities Exchange Act of 1934 § 9(e), 15 U.S.C. § 78i(e) (2008) (providing a private right of action for “any person who shall purchase or sell any security at a price” that was affected by a variety of manipulative acts described in sections 9(a), (b), and (c) of the Exchange Act); Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (2008) (providing a private right of action for recovery of short-swing, insider profits “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
that a forced seller or forced purchaser has standing under many of these provisions to seek relief.\textsuperscript{229}

For example, in \textit{In re Union Exploration Partners Securities Litigation}, the United States District Court for the Central District of California held that the forced seller analysis applies to claims for relief under section 12(a)(2) of the Securities Act.\textsuperscript{230} In that case, former holders of partnership units of Union Exploration Partners, Ltd. brought suit against a variety of defendants for fraud in connection with the conversion of the partnership into Unocal Exploration Corporation.\textsuperscript{231} The former holders of the partnership units brought suit under section 12(a)(2) of the Securities Act.\textsuperscript{232} Section 12(a)(2) provides a private right of action for a “person purchasing [a] security” against any person who offers or sells a security “by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements . . . not misleading . . . .”\textsuperscript{233} The defendants moved to dismiss the complaint on the grounds that the former holders of the partnership units could not demonstrate that they ever made an investment decision in converting their shares. The district court refused to dismiss the claims and held that “the ‘forced seller’ doctrine which saved Plaintiffs’ § 10(b) claims should extend to Plaintiffs’ § 12(2) [sic] claims as well.”\textsuperscript{234} Thus, using forced seller analysis, the plaintiffs could be treated as forced sellers and

\footnotesize{\begin{itemize}
\item \textsuperscript{229} See infra notes 230-37 (providing examples of forced seller and forced purchaser analysis being used to provide standing under section 11 of the Securities Act, section 12(a)(2) of the Securities Act, section 9(e) of the Exchange Act, and section 18(a) of the Exchange Act).
\item \textsuperscript{231} \textit{Id.}
\item \textsuperscript{232} \textit{Id.}
\item \textsuperscript{234} \textit{Id.}
\end{itemize}}
forced purchasers when they were forced to convert their partnership units into shares of the new corporation.

The use of the forced seller analysis under section 12(a)(2) of the Securities Act provides support for the existence of a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5. The forced seller exception has also been used to permit plaintiffs’ standing to seek relief under section 11 of the Securities Act, section 9(e) of the Exchange Act, and section 18(a) of the Exchange Act. Although the case law is notably sparse, the use of a forced seller analysis to grant standing under other provisions of the Securities Act and the Exchange Act suggests that the implied private right of action under section 10(b) and Rule 10b-5 should be interpreted in the same way to be consistent with the rest of the regulatory scheme under the Acts.

The forced seller exception is also consistent with the provisions defining private causes of action under the Exchange Act. One of the reasons that the Supreme Court adopted the purchaser-seller requirement and refused to grant an exception for the aborted purchasers in Blue Chip Stamps was that section 28(a) of the Exchange Act limits recovery in private actions under the Act to actual damages. Section 28(a) of the Exchange Act provides in relevant part: “[N]o person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his

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236 Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 794 (2d Cir.1969) (affording a plaintiff standing under section 9 of the Exchange Act because the plaintiff became a forced seller under the Act).
237 Weisman v. Darneille, No. 77 Civ 2110 (LFM), 1978 WL 1049, at *2 (S.D.N.Y. Jan. 6, 1978) (applying the forced seller doctrine to an action under section 18(a) of the Exchange Act as to satisfy “the intent of Congress to afford broad disclosure of material information to investors”).
238 See supra note 217 (citing precedent from the Supreme Court of the United States that section 10(b) and Rule 10b-5 should be interpreted in the context of the Securities Act and the Exchange Act).
actual damages on account of the act complained of.” The Court adopted the purchaser-seller requirement in *Blue Chip Stamps* in part because in many circumstances damages become “largely conjectural and speculative” without a purchase or sale. The purchaser-seller requirement is needed because actual damages become extraordinarily difficult to determine when aborted purchasers or sellers try to prove what they would have, could have, or should have done in the absence of an alleged deception.

Allowing standing for forced sellers to seek relief under section 10(b) and Rule 10b-5 without the purchase or sale of a security does not raise concerns under section 28(a) or the other provisions governing private causes of action under the Exchange Act. In a forced sale, a fundamental change occurs when a plaintiff’s interest in an on-going business entity is converted into a claim for cash or when a security is forcibly exchanged for a fundamentally different security. A variety of objective values can be used to determine actual damages in such a case. For example, a court can award the difference between the value of the claim for cash and the value of the security in the on-going business entity, or a court can award the difference between the value of the claim for cash and the true liquidation value in the absence of fraud. While the damages suffered by a forced seller may in certain be difficult to determine, they are considerably less speculative than those of an aborted purchaser or seller and very similar to those of an actual seller.

**B. The Forced Seller Exception Supports the Purposes and Effective Functioning of the Securities Act and the Exchange Act.**

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241 *Blue Chip Stamps*, 421 U.S. at 735.
242 *Id.* at 734-35.
243 See *supra* note 14 (citing various cases defining the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5).
In *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, the Supreme Court of the United States addressed the issue of how to interpret the private right of action under section 10(b) and Rule 10b-5: “Our task is . . . to attempt to infer how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision in the 1934 Act.”244 In the previous subsection, the forced seller exception was demonstrated to be consistent with the mechanics of the regulatory scheme under section 10(b) and Rule 10b-5. Based on the statement in *Musick*, however, mere conformance with the regulatory scheme is not enough. In addition, the forced seller exception must also fit with Congress’s policy reasons for adopting a federal system for regulating securities and be sound policy by itself.

In this section, the policy justifications for adopting a forced seller exception will be explored. The forced seller exception will be shown to support Congress’s underlying purposes for enacting the Securities Act and the Exchange Act and to be justified as a means to protect a deserving class of plaintiffs from securities fraud. Additionally, the forced seller exception will also be shown to help the SEC and the DOJ in maintaining the integrity of the capital markets and in enforcing the mandates of the Securities Act and the Exchange Act.

The forced seller exception is consistent with the purposes underlying the Securities Act and the Exchange Act. As previously mentioned,245 in *SEC v. Capital Gains Research Bureau, Inc.*, the Supreme Court of the United States held: “A fundamental purpose, common to [the Securities Act and the Exchange Act], was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.”246 Congress promulgated the Securities Act to ensure honesty in the

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245 *See supra* Part II.A (discussing Congress’s underlying purposes in adopting the Securities Act and Exchange Act).
primary markets in which securities are distributed from issuers to investors.\textsuperscript{247} Similarly, Congress promulgated the Exchange Act to ensure honesty in the treatment of holders of securities and honesty in the trading of securities among investors in the secondary market.\textsuperscript{248} In short, Congress wanted to prevent fraud, deceit, and misrepresentation in securities transactions.

A forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 helps to achieve Congress’s objectives in passing the Securities Act and the Exchange Act. To ensure stability in the securities markets, securities holders should not have to be concerned about being forced out of an investment through a fraudulent short form merger or fraudulent liquidation. Even if state law might afford some relief, the Securities Act and Exchange Act were designed to provide comprehensive relief and replace the patchwork of inconsistent state regulation that existed prior to the existence of the Acts.\textsuperscript{249} The forced seller exception promotes honesty in the capital markets because it allows holders of securities a remedy if they are forced out of a business entity because of fraud or deceit.

A forced seller exception to the purchaser-seller requirement is also justified because it enables a worthy class of plaintiffs to seek relief under section 10(b) and Rule 10b-5. As stated in \textit{Blue Chip Stamps}, the purchaser-seller requirement excludes three principal classes of potential plaintiffs: “First are potential purchasers of shares . . . . Second are actual shareholders . . . . Third are shareholders, creditors, and perhaps who allege that they decided not to sell . . . .”

\textsuperscript{247} \textit{See supra} notes 36-39 and accompanying text (discussing Congress’s policy rationales for promulgating the Securities Act).
\textsuperscript{248} \textit{See supra} notes 40-44 and accompanying (discussing Congress’s policy rationales for promulgating the Exchange Act).
\textsuperscript{249} \textit{See supra} Part II.A (analyzing the rationales for adopting a comprehensive system of federal securities regulation); \textit{see also}, e.g., \textit{Santa Fe Indus. v. Green}, 430 U.S. 462, 478 (1977) (“[T]he existence of a particular state-law remedy is not dispositive of the question whether Congress meant of provide a similar federal remedy . . . .”); \textit{but see id. at 749} (“Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.”).
others related to an issuer who suffered loss in the value of their investment . . . ”250 Forced sellers are the intermediate between actual sellers and the third class of potential plaintiffs. Members of the third category include security holders who have retained their securities and suffered a loss to the value of their investment. Forced sellers have also retained their share and suffered a loss to the value of their investment. However, forced sellers can be clearly delineated from the third class of potential plaintiffs because their interests in securities have been fundamentally changed and transformed from an interest in an existing business entity into a claim for cash or their securities have been forcibly exchanged for fundamentally different securities.251 Forced sellers may not be the same as actual sellers, but the fundamental change from investment to cash that occurs in both forced sales and actual sales makes them very similar.

Forced sellers should be treated the same as actual sellers for purposes of standing under section 10(b) and Rule 10b-5 because they are an easily identifiable class of deserving potential plaintiffs. As previously discussed, section 10(b) of the Exchange Act was designed as a “catchall” antifraud provision that could be used to combat a wide variety of manipulative and deceptive activities that can occur in connection with the purchase or sale of a security.252 In Blue Chip Stamps, the Supreme Court acknowledged that the purchaser-seller requirement “prevents some deserving plaintiffs from recovering damages which have in fact been caused by violations of Rule 10b-5.”253 In making this acknowledgement, the Court was speaking

250 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737-38 (1975) (discussing the various classes of potential plaintiffs who would be excluded by the purchaser-seller requirement).
251 See supra note 14 (citing various cases defining what constitutes a forced seller for purposes of standing under section 10(b) and Rule 10b-5).
252 See supra note 2 (reporting that section 10(b) was drafted as a “catchall” antifraud provision and that the Supreme Court of the United States has acknowledged this underlying purpose for drafting the provision).
253 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 738 (1975) (acknowledging that many commentators have viewed the purchaser-seller requirement as an “arbitrary restriction” that prevents some deserving plaintiffs from obtaining relief under section 10(b) and Rule 10b-5).
specifically about the members of the three classes of potential plaintiffs that are listed above. The problem with the three classes of potential plaintiffs listed above is that identifying deserving members of these classes to receive relief under section 10(b) and Rule 10b-5 can be very difficult and generates substantial concerns about “vexatious litigation” from undeserving plaintiffs. 254

Forced sellers, however, are a narrowly defined class of security holders who have suffered a fundamental change in their securities by having their interests in business entities forcibly converted into a claim for cash or forcibly exchanged for another security. As will be explained more fully in the next subsection, grouping forced sellers with actual sellers for purposes of standing under section 10(b) and Rule 10b-5 does not create the same concerns about vexatious litigation that caused the Supreme Court to adopt the purchaser-seller rule. 255

Forced sellers are a defined group with obvious characteristics, i.e., forced sellers have had a fundamental change in the nature of their securities that transformed their interests from interests in an ongoing business entity into a claim for cash or that caused their securities to forcibly be exchanged for other securities. 256 Because forced sellers can be easily identified by a court and section 10(b) is a “catchall” provision for preventing securities fraud, forced sellers should be allowed to seek relief under section 10(b) and Rule 10b-5 based on the fraud that they have suffered.

Forced sellers should also be granted standing under section 10(b) and Rule 10b-5 because it helps the SEC and DOJ to maintain the integrity of the capital markets and to enforce

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254 Id. at 739-49 (adopting the purchaser-seller requirement under section 10(b) and Rule 10b-5 in substantial part based on concerns about “vexatious litigation”).

255 See infra Part III.C (explaining that the forced seller does not raise the same policy concerns that justified the adoption of the purchaser-seller requirement in Blue Chip Stamps).

256 See supra note 14 (citing cases defining the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5).
the mandates of the Securities Act and the Exchange Act. Section 21 of the Exchange Act grants
the SEC the power to undertake civil enforcement actions to punish violations of section 10(b)
and Rule 10b-5 without being a purchaser or seller of a security,\textsuperscript{257} and section 32 of the
Exchange Act allows the DOJ to criminally prosecute violations of the Exchange Act without
being a purchaser or seller.\textsuperscript{258} However, both the SEC and DOJ have limited budgets, resources,
and time to focus on securities fraud under section 10(b) and Rule 10b-5. In \textit{Tellabs, Inc. v.
Makor Issues & Rights, Ltd}. the Supreme Court of the United States stated: “This Court has long
recognized that meritorious private actions to enforce federal antifraud securities laws are an
essential supplement to criminal prosecutions and civil enforcement actions brought,
respectively, by the Department of Justice and the Securities and Exchange Commission
(SEC).”\textsuperscript{259} Put simply, private suits under section 10(b) and Rule 10b-5 by deserving plaintiffs
help to augment the government’s efforts to enforce the securities law.

Granting forced sellers standing to seek relief under section 10(b) and Rule 10b-5 assists
the SEC and DOJ in enforcing the Securities Act and the Exchange Act. As previously
explained, the forced seller exception is consistent with the purposes underlying the federal
securities laws.\textsuperscript{260} Common forced seller situations, e.g. fraudulent short form mergers and
fraudulent liquidations, are types of securities fraud. Allowing forced sellers to seek redress
under section 10(b) and Rule 10b-5 prevents this burden from being placed on the SEC and DOJ.
Moreover, the private right of action under section 10(b) and Rule 10b-5 shifts the financial
burden of enforcing the securities laws from the government to the private security holders who
benefit most when an alleged fraud is remedied.

\begin{flushleft}
\footnotesize
\textsuperscript{257} \textit{15 U.S.C. §78u (2008).}
\textsuperscript{258} \textit{15 U.S.C. § 78ff (2008)}
\textsuperscript{259} \textit{Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504 (2007)}
\textsuperscript{260} \textit{See supra Part III.B (explaining that the forced seller exception is supports the purposes and effective functioning of the Securities Act and the Exchange Act).}
\end{flushleft}
C. The Forced Seller Exception Does Not Raise the Same Policy Concerns that Justified the Adoption of the Purchaser-Seller Requirement

As previously mentioned, the Supreme Court of the United States in *Blue Chip Stamps* admitted that certain deserving plaintiffs would be denied relief under section 10(b) and Rule 10b-5 because of the purchaser-seller requirement.\(^{261}\) Writing for the Court, Justice Rehnquist stated: “We have no doubt that this is indeed a disadvantage of the [purchaser-seller requirement] and if it had no countervailing advantages it would be undesirable as a matter of policy, however much it might be supported by precedent and legislative history.”\(^{262}\) Justice Rehnquist continued: “But we are of the opinion that there are countervailing advantages to the [purchaser-seller requirement], purely as a matter of policy . . . .”\(^{263}\) The Court’s statements suggest that in the absence of the “countervailing advantages” of the purchaser-seller requirement that the result in *Blue Chip Stamps* would have been different because of the judiciary’s central role in shaping the implied private right of action under section 10(b) and Rule 10b-5.\(^{264}\)

The forced seller exception does not suffer from the same policy concerns that led to the adoption of the purchaser-seller requirement in *Blue Chip Stamps*. The exception does not create the same possibility of vexatious litigation by unworthy plaintiffs seeking unjust enrichment nor does it require courts to adjudicate issues of hazy historical fact. Moreover, the adoption of a forced seller exception does not create the danger of case-by-case erosion of the purchaser-seller requirement. In sum, adopting a forced seller exception is justified because it does not raise the policy concerns that gave birth to the purchaser-seller requirement, and the forced seller


\(^{262}\) Id. at 738-39.

\(^{263}\) Id. at 739.

\(^{264}\) Id. at 749 (“We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question.”).
exception allows a deserving class of potential plaintiffs to seek relief under section 10(b) and Rule 10b-5.

The Supreme Court adopted the purchaser-seller requirement in Blue Chip Stamps based on fears of vexatious litigation.\textsuperscript{265} Justice Rehnquist wrote, “There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.”\textsuperscript{266} The Court divided the danger of vexatious litigation into two types. First, the Court was concerned that allowing standing for plaintiffs under section 10(b) and Rule 10b-5 without the purchase or sale of a security would lead to strike suits by undeserving plaintiffs seeking unmerited settlements.\textsuperscript{267} Second, the Court was concerned that in the absence of the purchaser-seller requirement, triers of facts would be left to struggle with “many rather hazy issues of historical fact the proof of which depend[s] almost entirely on oral testimony.”\textsuperscript{268}

The forced seller exception does not create a substantial risk of strike suits by unworthy plaintiffs seeking unjust enrichment. In Blue Chip Stamps, the Court feared that undeserving plaintiffs would be able to get beyond the dismissal and the summary judgment phases simply by asserting that they would have, could have, or should have purchased or sold but for an alleged deception.\textsuperscript{269} Because the existence of a suit under section 10(b) and Rule 10b-5 may frustrate the normal activities of a business entity, the Court believed that many business entities would choose to settle suits without merit, rather than go through the pains of discovery and trial.\textsuperscript{270}

\textsuperscript{265}Id. at 739-49
\textsuperscript{266}Id. at 739.
\textsuperscript{267}Id. at 740-43.
\textsuperscript{268}Id. at 743-44.
\textsuperscript{269}Id. at 740.
\textsuperscript{270}Id. at 740-743.
The forced seller exception under section 10(b) and Rule 10b-5 does not create the same concerns about litigation abuse. Forced sellers must bring forward specific allegations and evidence that they owned securities in a business entity that was fundamentally changed into a claim for cash or that their securities were forcibly exchanged for other securities. A reduction in stock price is not enough. This is the reason why forced sales mainly occur in two factual scenarios, i.e., fraudulent short form mergers and fraudulent liquidations. If plaintiffs do not allege or cannot bring forth evidence suggesting that their securities were fundamentally changed into a claim for cash, then their cases are dismissed or summary judgment is granted.

Moreover, forced seller cases do not require triers of fact to adjudicate “hazy issues of historical fact that depend[] entirely on oral testimony.” Courts can look at objective facts regarding the status of a plaintiff’s investment of a business entity. Courts can determine if the business continues to exist and whether the plaintiff’s interest or former interest in a business has been converted into a claim for cash. Although all litigation presents the opportunity for abuse, allowing forced sellers standing to seek relief under section 10(b) and Rule 10b-5 does not present the opportunity for “vexatious litigation” that the Supreme Court was concerned about in Blue Chip Stamps.

Adopting the purchaser-seller requirement also does not create the danger of case-by-case erosion of the purchaser-seller requirement that the Court feared in Blue Chip Stamps. In that case, the Supreme Court noted that the circuit court from which the appeal was taken did not object to the purchaser-seller requirement but wished to make an exception to the rule for the

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271 See supra note 14 (citing various cases defining the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5).
272 See supra note 155 (providing case law holding that a mere diminution in the value of a security is not enough to constitute a forced sale for purposes of obtaining relief under section 10(b) and Rule 10b-5).
273 See supra note 15-16 (providing case law demonstrating that the forced seller exception is commonly used to remedy fraudulent short form mergers and fraudulent liquidations).
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aborted purchasers who had been given a right to purchase securities under an antitrust consent decree.\textsuperscript{275} In response, the Supreme Court held:

Were we to agree with the Court of Appeals in this case, we would leave the [purchaser-seller requirement] open to endless case-by-case erosion depending on whether a particular group of plaintiffs was thought by the court in which the issue was being litigated to be sufficiently more discrete than the world of potential purchasers at large to justify an exception. We do not believe that such a shifting and highly fact-oriented disposition of the issue of who may bring a damages claim for violation of Rule 10b-5 is a satisfactory basis for a rule of liability imposed on the conduct of business transactions.\textsuperscript{276}

Put simply, the Supreme Court was unwilling to extend standing under section 10(b) and Rule 10b-5 to any class of aborted purchaser.

The Court’s holding in \textit{Blue Chip Stamps} does not preclude the existence of a forced seller exception. First, the Supreme Court’s holding addressed exceptions for aborted purchasers, so the existence of a forced seller exception was not before the Court. Second, a forced seller exception does not create a “shifting and highly fact-oriented disposition of the issue” of who has standing under section 10(b) and Rule 10b-5 because the forced seller exception provides a narrow definition of who has standing under section 10(b) and Rule 10b-5.\textsuperscript{277} To have standing, a forced seller must demonstrate that an interest in a business entity has been fundamentally changed into a claim for cash or forcibly exchanged for a fundamental security.\textsuperscript{278} In the absence of that, the forced seller exception provides no relief. Third, the forced seller exception will not lead to a case-by-case erosion of the purchaser-seller requirement because the lower courts have already

\textsuperscript{275} \textit{Id.} at 749-750.
\textsuperscript{276} \textit{Id.} at 755.
\textsuperscript{277} \textit{Id.}
\textsuperscript{278} See supra note 14 (citing various cases defining who constitutes a forced seller for purposes of standing under section 10(b) and Rule 10b-5).
refused to expand the exception to include circumstances in which the value of stock has merely been diminished.  

In sum, a substantial argument exists for a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5. Even though section 10(b) and Rule 10b-5 do not offer conclusive guidance, affording standing to forced sellers is consistent with the precedential history and regulatory scheme underlying the Securities Act and the Exchange Act. A forced seller exception is justified based on policy grounds because it supports the purposes and effective functioning of the Securities Act and the Exchange Act. Finally, a forced seller exception does not prompt the same policy concerns that prompted the Supreme Court to adopt the purchaser-seller requirement and to refuse standing to the class of aborted purchasers in Blue Chip Stamps.

IV. Arguments Against a Forced Seller Exception

Even though compelling arguments justify the existence of a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5, the Supreme Court is unlikely to hold that such an exception exists. A forced seller exception is not supported by the language of section 10(b) and Rule 10b-5, and the forced seller exception conflicts with the required elements for a private cause of action under those provisions. Moreover, a strong argument exists that the forced seller exception is an unnecessary extension of federal law. Ultimately, Congress should speak and codify the private right of action under section 10(b) and Rule 10b-5 with a forced

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279 See supra note 155 (citing cases refusing to expand the scope of the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 to a mere diminution of the value of a security).
seller exception. The codification of the private right with a forced seller exception will clarify the confusion that has occurred in the absence of Congressional guidance.

A. The Forced Seller Exception Is Not Supported by the Language of Section 10(b) and Rule 10b-5

In interpreting the private right of action under section 10(b) and Rule 10b-5, courts begin by examining the language of those provisions. As previously stated, the Supreme Court of the United States held in *Blue Chip Stamps* held that “neither the congressional enactment nor the administrative regulation offer conclusive guidance” in regard to the issue of standing under section 10(b) and Rule 10b-5 because Congress did not provide for an express cause of action. However, the Supreme Court has held that in determining the contours of the private right of action under section 10(b) and Rule 10b-5 that the judiciary should consider how the 1934 Congress would have drafted the private cause of action if they had included an express cause of action in the Exchange Act. One method for doing this is considering the existing language of section 10(b) and Rule 10b-5 and extrapolating.

The language of section 10(b) and Rule 10b-5 forms the basis for a strong argument that a forced seller exception does not exist to the purchaser-seller requirement under these provisions. The language of section 10(b) and Rule 10b-5 does not provide a private right of action, and although the Supreme Court has acquiesced in the existence of the private right, the Court is unlikely to expand it. The language of section 10(b) and Rule 10b-5 also requires that a fraud or misrepresentation be “in connection with the purchase or sale of a security,” and a forced sale is not an actual sale. Finally, the addition of an implied forced seller exception to an

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281 See supra note 244 and accompanying text (discussing one of the cannons of construction suggested by the Supreme Court of the United States for determining the contours of the private right of action under section 10(b) and Rule 10b-5).
implied purchaser-seller requirement under an implied cause of action under section 10(b) and Rule 10b-5 requires a tortured interpretation of the statute and the rule.

One of the most compelling arguments against a forced-seller exception to the purchaser-seller requirement is that the language of section 10(b) and Rule 10b-5 does not authorize any private right of action. Although the Supreme Court of the United States has acquiesced to the existence of the private right under section 10(b) and Rule 10b-5, the Court is unlikely to allow any expansion of it. Since the mid 1970s, the Supreme Court has significantly narrowed many of the implied private rights of action under the securities laws. The private right of action under section 10(b) and Rule 10b-5 has by no means been immune to this trend. During the past few decades when interpreting the private right of action under section 10(b) and Rule 10b-5, the Court has limited standing in damages actions to purchasers and sellers of securities, required scienter on the part of defendants, held that the conduct complained of must be “manipulative or deceptive,” ruled that the conduct complained of must be material, required that reliance occur on the part of plaintiffs, held that economic loss must

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282 See supra note 61 and accompanying text (reporting that the Supreme Court of the United States has repeatedly reaffirmed the existence of a private right of action under section 10(b) and Rule 10b-5).
283 See also supra note 60 and accompanying text (reporting that the Supreme Court of the United States would not find the existence of a private right of action under section 10(b) and Rule 10b-5 if faced with the same issue today).
285 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975) (holding that standing in damages actions under section 10(b) and Rule 10b-5 is limited to purchasers or sellers of securities).
286 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 (1976) (holding that to recover under the private cause of action under section 10(b) and Rule 10b-5 that a plaintiff must demonstrate that a defendant acted with scienter); Aaron v. SEC, 446 U.S. 680, 691 (1980) (“[S]cienter is an element of a violation of § 10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought.”).
287 Santa Fe Indus. v. Green, 430 U.S. 462, 473-74 (1977) (holding that section 10(b) and Rule 10b-5 only apply to conduct that is either manipulative or deceptive).
288 Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (holding that an alleged manipulation or deception must be material to form the basis of a cause of action under section 10(b) and Rule 10b-5 and providing a standard for determining materiality).
289 Id. at 243 (holding that reliance is an element of the private cause of action under section 10(b) and Rule 10b-5).
and required a showing of causation between an alleged misrepresentation and an alleged loss.\textsuperscript{291} The Court has also held that the private right of action under section 10(b) and Rule 10b-5 does not extend to aiders and abettors,\textsuperscript{292} and the Court has limited a plaintiff’s ability to seek relief under section 10(b) and Rule 10b-5 against secondary actors.\textsuperscript{293} Put simply, precedent demonstrates that the Court wishes to limit the private right of action under section 10(b) and prevent its expansion.\textsuperscript{294}

The Supreme Court is unlikely to hold that forced sellers have standing to seek relief under section 10(b) and Rule 10b-5 because the language of the statute does not provide for such standing. As previously mentioned, the Supreme Court of the United States held in \textit{Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.} during the 2007-08 term: “Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.”\textsuperscript{295} An argument exists that the forced seller exception to the purchaser-seller requirement is not an extension of existing law because of its longstanding acceptance by the lower courts.\textsuperscript{296} In the wake of \textit{Stoneridge}, however, the current Supreme Court seems unlikely to validate any expansion of the private right of action under section 10(b) and Rule 10b-5.

\textsuperscript{290} Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 342 (2005) (holding that economic loss is required element for a private right of action under section 10(b) and Rule 10b-5)
\textsuperscript{291} Id. (holding that a plaintiff must demonstrate loss causation to be able to recover under section 10(b) and Rule 10b-5).
\textsuperscript{292} Cent. Bank of Denver, N.A. v. Interstate Bank of Denver, N.A., 511 U.S. 164, 191-92 (1994) (holding that a private right of action does not exist against those who aid and abet a violation of section 10(b) and Rule 10b-5).
\textsuperscript{293} Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 773-74 (2008) (holding that plaintiffs can pursue relief under section 10(b) and Rule 10b-5 only against “secondary actors who commit primary violations”).
\textsuperscript{294} The Supreme Court, however, did hold that an implied private right of action exists under section 10(b) and Rule 10b-5 even though other express remedies are available. Herman & MacLean v. Huddleston, 459 U.S. 375, 380-87 (1983) (holding that an implied cause of action exists under section 10(b) and Rule 10b-5 even though other express remedies exist covering the same transaction).
\textsuperscript{296} \textit{See supra} notes 218-227 and accompanying text (arguing that the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 is not an extension of existing law because of its longstanding acceptance by the lower courts and Congress’s acquiescence in its existence).
The existence of the forced seller exception is also doubtful because the language of section 10(b) and Rule 10b-5 requires that a fraud or misrepresentation be “in connection with the purchase or sale of a security,” and a forced sale is not an actual sale. Although a forced sale is similar to an actual sale, forced sellers do not make investment decisions to divest themselves of their securities. A forced sale occurs when an interest in a security is fundamentally changed and transformed from an interest in an existing business entity into a claim for cash or when a security is forcibly exchanged for a fundamentally different security.\textsuperscript{297} In Vine \textit{v. Beneficial Finance Company}, one of leading cases on the forced seller exception, the Court of Appeals for the Second Circuit held that an actual sale is a “needless formality” because the fundamental change in the nature of the security will ultimately require an actual sale to occur.\textsuperscript{298} Many courts have followed the Second Circuit’s reasoning and held that an actual sale is not required.\textsuperscript{299} Other courts have held that a forced sale constitutes an actual sale by expanding the definition of that term.\textsuperscript{300}

Based on the Supreme Court’s current approach to the private right of action under section 10(b) and Rule 10b-5, the Court is unlikely to hold that a forced sale meets the requirement that a misrepresentation be “in connection with the purchase or sale of a security.” In Stoneridge Investment Partners, LLC \textit{v. Scientific-Atlanta, Inc.}, writing for the Court, Justice Kennedy stated: “Concerns with the judicial creation of a private cause of action caution against its expansion.”\textsuperscript{301} To adopt the forced seller exception to the purchaser-seller requirement, the Supreme Court would have to expand the definition of “sale” or rule that an actual sale is not

\textsuperscript{297} See supra note 14 (providing cases defining the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5).
\textsuperscript{298} Vine \textit{v. Beneficial Fin. Co.}, 374 F.2d 627, 634 (2d Cir. 1967).
\textsuperscript{299} See supra note 216 (citing cases law holding that an actual sale is a unnecessary formality in cases involving forced sellers seeking relief under section 10(b) and Rule 10b-5).
\textsuperscript{300} See supra note 215 (citing cases law holding that a forced sale is an actual sale for purposes of seeking relief under section 10(b) and Rule 10b-5).
required. Current Supreme Court jurisprudence suggests that such an expansion of the private right of action under section 10(b) and Rule 10b-5 is extremely unlikely to occur.

Additionally, the recognition of the forced seller exception requires a tortured interpretation of the statute and the rule. To acknowledge the forced seller exception, the Supreme Court of the United States would have to recognize an implied exception to an implied purchaser-seller requirement under the implied private right of action under section 10(b) and Rule 10b-5. As Justice Scalia bluntly wrote in his concurrence to Lampf, Pleva, Prupis & Petigrow v. Gilberston while discussing interpreting the implied private right under section 10(b) and Rule 10b-5, “We are imagining here.” The Supreme Court’s collective imagination is unlikely to allow for the existence of an exception to the purchaser-seller requirement. Although compelling arguments may exist for the existence of such an exception, the exception probably extends too far beyond the language of the statute or the rule. The Court probably will defer to the Congress to speak if it wants a forced seller exception to the standing requirement under section 10(b) and Rule 10b-5.

B. The Forced Seller Exception Conflicts with the Required Elements for an Action Under Section 10(b) and Rule 10b-5

As discussed in the previous subsection, the Supreme Court of the United States has created a variety of elements that must be alleged to state a cause of action under section 10(b) and Rule 10b-5. To obtain relief under these provisions, a private litigant must allege and prove:

1. a material misrepresentation (or omission);
2. scienter, i.e., a wrongful state of mind;
3. a connection with the purchase or sale of a security;
4. reliance, often referred to in cases involving public securities markets (fraud-on-the-market cases) as “transaction causation;”
5. economic loss; and

(6) “loss causation,” i.e., a causal connection between the material misrepresentation and the loss.\(^{303}\)

The elements demonstrate that the Court wishes to limit the scope of the private right to securities fraud. As Justice Powell wrote in *Chiarella v. United States*, “Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud.”\(^{304}\)

Forced sellers, however, have particular difficulty proving the elements that the Supreme Court has established for securities fraud under section 10(b) and Rule 10b-5. As discussed in the previous subsection, allowing forced sellers standing to seek relief under these provisions requires expanding the definition of “sale” in the third element listed above.\(^{305}\) Additionally, the Supreme Court would likely have to modify the material misrepresentation, reliance, and causation elements of a private cause of action under section 10(b) and Rule 10b-5 to allow a forced seller the ability to seek relief under these provisions. The Court’s current hostility toward expanding the private right of action and intent to limit its scope to fraud casts doubt on the existence of the forced seller exception.

Forced sellers have difficulty proving the materiality of misrepresentations for purposes of standing under section 10(b) and Rule 10b-5. In *Santa Fe Industries, Inc. v. Green*, the Supreme Court held that a material misrepresentation or deception is required even if plaintiffs are forced to sell their securities.\(^{306}\) In that case, minority shareholders of Kirby Lumber Corp. (“Kirby”) brought suit under section 10(b) and Rule 10b-5

\(^{303}\) *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (providing a list of the elements necessary to have a private cause of action under section 10(b) and Rule 10b-5).

\(^{304}\) *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980); *see also supra* note 2 (reporting that section 10(b) was drafted as a catchall provision and that the Supreme Court has held that section 10(b) is a catchall provision on multiple occasions).

\(^{305}\) *See supra* notes 297-300 and accompanying text (explaining that the Supreme Court of the United States would have to expand the definition of “sale” under section 10(b) and Rule 10b-5 to allow standing for forced sellers of securities because a forced sale is not an actual sale).

against Santa Fe Industries, Inc. ("Santa Fe") and a banking firm who had appraised the value of Kirby’s stock for the purposes of a short form merger.\(^{307}\) Santa Fe had acquired 95% of Kirby’s shares and chose to undertake a short form merger to gain complete ownership of Kirby.\(^{308}\) The minority shareholders alleged that they had received an inadequate price for their shares and that they had been improperly frozen out of their ownership interests in Kirby.\(^{309}\) The district court dismissed the complaint for failure to state a claim upon which relief could be granted because of the lack of any allegations of misrepresentation or deception.\(^{310}\) The United States Court of Appeals reversed and held that a material misrepresentation or deception is not a necessary element to an action under section 10(b) and Rule 10b-5.\(^{311}\)

The Supreme Court of the United States reversed the Second Circuit and held that a material misrepresentation is required to state a claim under section 10(b) and Rule 10b-5. The Court began by examining the language of the statute and held that section 10(b) and Rule 10b-5 punish only manipulative and deceptive conduct.\(^{312}\) Writing for the Court, Justice White noted, the minority shareholders “were furnished all relevant information on which to base their decision.”\(^{313}\) The minority shareholders failed to state a claim upon which relief could be granted because they had not alleged a material misrepresentation or a material failure to disclose.\(^{314}\) The Court was also concerned that

\(^{307}\) *Id.* at 467-68.
\(^{308}\) *Id.* at 465.
\(^{309}\) *Id.* at 467.
\(^{310}\) *Id.* at 468.
\(^{311}\) *Id.* at 469.
\(^{312}\) *Id.* at 473-74.
\(^{313}\) *Id.* at 474.
\(^{314}\) *Id.* at 474-77.
allowing the plaintiffs to pursue their claim would unnecessarily encroach on an area traditionally left to state law, i.e., issues relating to the internal affairs of a corporation.\(^\text{315}\)

As demonstrated by \textit{Santa Fe}, forced sellers must allege and prove a material misrepresentation to obtain relief under section 10(b) and Rule 10b-5. The Court is unlikely to relax this requirement for forced sellers because \textit{Santa Fe} involved a short form merger, one of the circumstances in which the forced seller exception is commonly employed to grant standing.\(^\text{316}\) Thus, in the absence of a material misrepresentation, relief cannot be granted to a forced seller under section 10(b) and Rule 10b-5.

Forced sellers have particular difficulty in meeting the materiality requirement of this element because forced sellers have no choice in the conversion of their securities into claims for cash. In \textit{Basic Incorporated v. Levinson}, the Supreme Court announced that the standard for materiality under section 10(b) and Rule 10b-5 is whether “‘the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.’”\(^\text{317}\) Forced sellers are by definition forced to suffer a fundamental change in the nature of their securities, so omitted or misrepresented facts rarely can be viewed as altering anything because forced sellers have no control over the conversion of their shares.

Courts have dealt with this issue in two main ways different ways. First, some courts have focused on whether the misrepresentation was material to other investors who did have an investment decision to make in the chain of events that led to the forced

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\(^{315}\) \textit{Id.} at 477-80.

\(^{316}\) \textit{See supra} note 15 (citing cases to show that the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 is commonly used to remedy fraudulent short form mergers).

\(^{317}\) \textit{Basic Inc. v. Levinson}, 485 U.S. 224, 231-32 (1988) (quoting and adopting for purposes of actions under section 10(b) and Rule 10b-5 the standard of materiality that was announced in \textit{TCS Industries, Inc. v. Northway, Inc.}, 426 U.S. 438, 449 (1988)).
sale. This solution is unsatisfying because the fraud is being visited upon a third party, rather than the plaintiff, and therefore, it is unlikely to be adopted by the Supreme Court. Second, for the forced seller exception to apply, other courts have required that the forced sellers would have been able to stop or prevent the forced sale but for the alleged material misrepresentation. This solution is more satisfying because the fraud is then directly being visited upon the forced seller who could have done something but for the alleged deception. However, it still creates some evidentiary difficulties because forced sellers would have to prove what they would have, could have, or should have done in the absence of the misrepresentation or deception.

Forced sellers also face similar problems when trying to prove reliance for purposes of satisfying the elements of a section 10(b) and Rule 10b-5 claim. In Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., the Supreme Court of the United States held: “Reliance by the plaintiff upon the defendant’s deceptive acts is an essential element of the § 10(b) private cause of action.” Although the Court held that circumstances exist in which reliance is presumed, the Court also held that the presumption is a “rebuttable presumption,” i.e., actual reliance must exist. As the Court held in Basic Incorporated v. Levinson, “Reliance provides the requisite causal

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318 See, e.g., Alexander v. Centrafarm Group, N.V., 123 F.R.D. 178, 183 (N.D. Ill. 1988) (explaining that to satisfy the materiality element under section 10(b) and Rule 10b-5 in a forced seller action, a plaintiff must be able to demonstrate that the plaintiff “with full knowledge would not have been powerless to prevent that transaction” that caused the forced sale); Eastwood v. Nat’l Bank of Commerce, 673 F. Supp. 1068, 1072 (W.D. Okla. 1987) (“The Court is aware that in the context of short-form or “squeeze out” mergers, it has been held that in order to state a claim under section 10b or Rule 10b-5, “forced sellers” . . . must allege that they had a means to prevent the forced sale which they could and would have pursued had they known of the omissions and misrepresentations, to establish materiality and/or reliance.”).


320 Id.

321 Id.
connection between a defendant’s misrepresentation and a plaintiff’s injury.”

Thus, plaintiffs, including forced sellers, must demonstrate reliance to recover under section 10(b) and Rule 10b-5.

Forced sellers have similar problems proving reliance as they have proving materiality. Forced sellers have their interests in existing business entities converted into claims for cash or have their securities forcibly exchanged for fundamentally different securities. Forced sales occur regardless of a forced seller’s reliance on any misrepresentation or deception. Arguably, reliance does not occur or matter in the forced seller context because the forced sale would occur irrespective of any reliance on the part of the forced sellers.

Courts have dealt with this issue in a number of different ways. First, some courts have held that the reliance requirement is excused in forced seller cases. Although this

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322 Basic, 485 U.S. at 243.
323 See supra note 14 and accompanying text (providing a definition of a “forced sale” for purposes of standing under section 10(b) and Rule 10b-5 and citing various cases employing that definition).
324 See, e.g., Jacobson v. AEG Capital Corp., 50 F.3d 1493, 1499 (9th Cir. 1995) (“The forced sale doctrine . . . eliminates the reliance requirement.”); Vine v. Beneficial Fin. Co., 374 F.2d 627, 634-35 (2d Cir. 1967) (holding that satisfying the reliance element under section 10(b) and Rule 10b-5 is “unnecessary in the limited instance when no volitional act is required and the result of a forced sale is exactly that intended by the wrongdoer”); APA Excelsior III, L.P. v. Windley, 329 F. Supp.2d 1328, 1351 (N.D. Ga. 2004) (holding that a forced seller is not required to show reliance to recover under section 10(b) and Rule 10b-5); Brown v. Kinross Gold, U.S.A., 343 F. Supp. 2d 957, 962 (D. Nev. 2004) (“The forced sale doctrine is a means to bypass a plaintiff’s requirement to prove reliance on misrepresentations when they are forced to sell their shares.”); Gerber v. Computer Assocs. Int’l, Inc., No. 91 CV 3610(SJ), 2000 WL 307379, at *10 (E.D.N.Y. 2000) (holding that reliance is unnecessary when a plaintiff has standing to seek relief based upon the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5); Wong v. Thomas Bros Rest. Corp., 840 F. Supp. 727, 730 (C.D. Cal. 1994) (“[T]here is no need to show reliance . . . where a ‘forced seller’ situation exists.”); In re Union Exploration Partners Sec. Litig., Nos. CV-90-3125-RSWL, CV-90-5149-RSWL & CV-91-0306-RWSL, 1992 WL 203812, at *3 (C.D. Cal. 1992) (“Where the ‘forced seller’ doctrine applies, the element of reliance is waived and need not be proven.”); Fulco v. Cont’l Cablevision, Inc., Nos. 89-1342-S, 89-1380-S, 89-1389-S & 89-1422-S, 1989 WL 205356, *11 (D. Mass. Oct. 4, 1989) (holding that plaintiffs seeking relief under section 10(b) and Rule 10b-5 did not have to demonstrate reliance because their claims were “squarely within the ‘forced seller’ doctrine”); Kahn v. Lynden Inc., 705 F. Supp. 1458, 1461 (W.D. Wash. 1989) (“The requirement of reliance has been avoided in ‘forced sale’ cases.”) Grossman v. Waste Mgmt. Inc., 589 F. Supp. 395, 413 (N.D. Ill. 1984) (holding that in forced seller actions under section 10(b) and Rule 10b-5 that “proof of reliance is not necessary”); Beebe v. Pac. Realty Trust, 99 F.R.D. 60, 69-70 (D. Or. 1983) (holding that proof of reliance is unnecessary for a forced seller to obtain relief under section 10(b) and Rule 10b-5); Hershfang v. Knotter, 562 F. Supp. 397, 397(E.D. Va. 1983) (holding that the element of reliance does not apply in forced seller cases brought under section 10(b) and Rule 10b-5); Levine v.
would be a simple solution, the Supreme Court of the United States is unlikely to adopt it because it would be contrary to current case law and would constitute a significant expansion of the private right under section 10(b) and Rule 10b-5 by providing an exception to the reliance requirement. Second, other courts have allowed the reliance requirement to be met by the reliance of other investors who did have an investment decision to make in the chain of events that led to the forced sale. This solution is also unappealing because it allows reliance of a third party to satisfy the reliance requirement, rather than requiring reliance by the plaintiff upon whom the fraud was visited. Third, still other courts have held that the reliance requirement is satisfied if the forced seller would have been able to stop or prevent the forced sale but for relying on the alleged deception. This solution is the one most likely to be accepted by the Supreme Court because it requires reliance by the forced seller upon the deception or misrepresentation. However, once again, forced sellers are faced the daunting task of proving what they

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Biddle Sawyer Corp., 383 F. Supp. 618, 622 (S.D.N.Y. 1974) (holding that a forced seller of securities need not show reliance to obtain relief under section 10(b) and Rule 10b-5); see also Weisman v. MCA Inc., 45 F.R.D. 258, 263-64 (D. Del. 1968) (holding that in forced seller cases involving short form mergers, “[T]he only reliance that seems relevant is the more general reliance by the minority stockholders which the law implies at the time the stockholders purchase their shares, namely, reliance on the good faith and fair dealing of the defendants.”).  

325 See, e.g., Howe v. Bank for Int’l Settlements, 194 F. Supp. 2d 6, 27 (D. Mass. 2002) (holding that the reliance requirement under section 10(b) and Rule 10b-5 is satisfied when “some other shareholders or partners were deceived and the plaintiff’s injury results from a transaction that the deceived shareholders or partners endorsed”); Gilford Partners, L.P. v. Sensormatic Elecs Corp., No. 96 C 4072, 1997 WL 757495, at *9 (N.D. Ill. Nov. 12, 1997) (holding that forced sales are a circumstance in which “courts have . . . permitted plaintiffs to pursue Rule 10b-5 claims regardless of their personal reliance where the plaintiff entered into the injurious transaction irrespective of its own volition and based solely upon third parties’ reliance on the fraud”).  

326 See, e.g., Howe v. Bank for Int’l Settlements, 194 F. Supp. 2d 6, 27 (D. Mass. 2002) (holding the reliance requirement under section 10(b) and Rule 10b-5 is satisfied when “the plaintiff could have enjoined the transaction under the law of the state of incorporation, but was deceived into not taking that action because of the fraud”); Alexander v. Centrafarm Group, N.V., 123 F.R.D. 178, 183 (N.D. Ill. 1988) (explaining that to satisfy the reliance element under section 10(b) and Rule 10b-5 in a forced seller action, a plaintiff must be able to demonstrate that the plaintiff “with full knowledge would not have been powerless to prevent that transaction” that caused the forced sale); Eastwood v. Nat’l Bank of Commerce, 673 F. Supp. 1068, 1072 (W.D. Okla. 1987) (“The Court is aware that in the context of short-form or “squeeze out” mergers, it has been held that in order to state a claim under section 10b or Rule 10b-5, "forced sellers" . . . must allege that they had a means to prevent the forced sale which they could and would have pursued had they known of the omissions and misrepresentations, to establish materiality and/or reliance.”).
would have, could have, and should have done in the absence of the deception or
misrepresentation.

Additionally, forced sellers also have problems when it comes to satisfying the
causation element under section 10(b) and Rule 10b-5. In *Dura Pharmaceuticals, Inc. v.
Broudo*, the Supreme Court held that to obtain relief under section 10(b) and Rule 10b-5, a plaintiff must demonstrate loss causation, “a causal connection between the material
misrepresentation and the loss.”  In forced seller cases, courts have consistently
required loss causation to state a cause of action under section 10(b) and Rule 10b-5,
including those courts that have been willing to excuse the reliance element for forced
seller seeking relief under section 10(b) and Rule 10b-5.

In many forced seller cases, however, loss causation is difficult, if not impossible,
to prove. The two typical types of forced seller cases are short form mergers and
liquidations.  In *Santa Fe*, for example, the plaintiffs were minority shareholders of
Kirby, and Kirby was a party to a short form merger under Delaware law. The
minority shareholders arguably were forced sellers because their shares in Kirby were
fundamentally changed into a claim for cash when the short form merger took place.

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328 *See, e.g.*, *Grace v. Rosenstock*, 228 F.3d 40, 48-49 (2d Cir. 2000) (holding that causation must be proven for a
forced seller to obtain relief under section 10(b) and Rule 10b-5); *APA Excelsior III, L.P. v. Windley*, 329 F.
Supp.2d 1328, 1348 (N.D. Ga. 2004) (holding that “[c]ourts have generally required . . . a causal relationship
between the alleged fraud and the altered nature of the plaintiff’s investment” for a forced seller to recover under
section 10(b) and Rule 10b-5); *Kirwin v. Price Commc’ns Corp.*, 274 F. Supp. 2d 1242, 1250 (M.D. Ala. 2003)
(holding that the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5
“does not excuse a plaintiff from pleading or proving causation.”); *Lewis v. Dow Chem. Co.*, No. 91-534, 1992 U.S.
Dist. LEXIS 15792, at *11 (D. Del. 1992) (“[T]he forced seller doctrine requires that the alleged fraud cause both
the plaintiff’s loss and the transaction leading to that loss.”).
329 *See supra* note 15-16 (citing cases to demonstrate that the forced seller exception to the purchaser seller
requirement under section 10(b) and Rule 10b-5 is commonly used to remedy fraudulent short form mergers and
fraudulent liquidations).
331 *See supra* note 14 (providing various cases defining who constitutes a forced seller for purposes of obtaining
relief under section 10(b) and Rule 10b-5).
Even if the minority shareholders had alleged a material misrepresentation, they still
would not have been entitled to relief under section 10(b) and Rule 10b-5, unless they
argued that the material misrepresentation in some way caused their loss.\textsuperscript{332} Because the
short form merger statute authorized the merger and the merger could have taken place
even if a misrepresentation had occurred, the minority shareholders would have had a
difficult time arguing that any misrepresentation caused their loss. The same is often true
in forced seller causes involving liquidations because the forced seller’s shares are often
forcibly converted into claims for cash without any means for the forced seller to prevent
it.

In the forced seller context, courts have dealt with this in two ways. First, they
have required that misrepresentations in some way relates to the chain of events that
caus ed the forced sale.\textsuperscript{333} Second, courts have found the causation element for section
10(b) and Rule 10b-5 satisfied when the forced seller would have been able to stop or
prevent the forced sale but the alleged deception caused them not to act.\textsuperscript{334}

Both of these solutions are likely acceptable interpretations of the loss causation
requirement under section 10(b) and Rule 10b-5. However, the loss causation element
limits the ability of forced sellers to recover under section 10(b) and Rule 10b-5
significantly. The existence of the forced seller exception to the purchaser-seller

\textsuperscript{332} See supra note 328 (providing case law holding that forced sellers must demonstrate causation to obtain relief
under section 10(b) and Rule 10b-5).

establish the causation required for a forced seller to recover under section 10(b) and Rule 10b-5, the forced seller
must show that the defendant’s act was a “substantial or significant contributing cause” of the forced seller’s injury);
was caused by the deception of others in the merger context is sufficient to establish causation . . . .”).

\textsuperscript{334} See, e.g., Bolton v. Gramlich, 540 F. Supp. 822, 840 (S.D.N.Y. 1982) (holding that forced sellers has established
the causation element under section 10(b) and Rule 10b-5 because of the “concurrence of material nondisclosures
and the availability of injunctive relief,” which the forced sellers had failed to seek because of the alleged
decreation).
requirement is cast into doubt based on the material misrepresentation, reliance, and loss causation elements because most, if not all, forced sellers have difficulty proving these elements.

C. The Forced Seller Exception is an Unnecessary Extension of Federal Law

In Part III of this Article, the arguments in favor of a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 were presented and explored. The forced seller exception was demonstrated to be consistent with the regulatory schemes under the Securities Act and the Exchange Act\textsuperscript{335} and to support purposes and effective functioning of those legislative enactments.\textsuperscript{336} Moreover, the forced seller exception was shown not to raise the same policy concerns that justified the adoption of the purchaser-seller requirement.\textsuperscript{337} In short, the forced seller exception was demonstrated to be a useful extension of the current provisions governing securities fraud.

Although the forced seller is a useful extension of existing law, the exception was not shown to be a necessary extension of federal law. The dominance of state law in corporate governance matters and the possible increased burden on federal courts from a forced seller exception suggests that the Supreme Court may defer to Congress to decide whether to adopt a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5.

\textsuperscript{335} See supra Part III.A (analyzing why the forced seller exception is consistent with the regulatory scheme under the Securities Act and the Exchange Act).

\textsuperscript{336} See supra Part III.B (analyzing why the forced seller exception supports the purposes and effective functioning of the Securities Act and the Exchange Act).

\textsuperscript{337} See supra Part III.C (analyzing why forced seller exception does not raise the same policy concerns that justified the adoption of the purchaser-seller requirement).
Even though the forced seller exception might be a useful extension of federal law, the Supreme Court is unlikely to hold that it exists because of the dominance of state law in corporate governance matters and the availability of state law remedies to protect forced sellers. As previously discussed, *Santa Fe Industries, Inc. v. Green* involved a short form merger, which is a typical forced seller situation. The Court held that the plaintiffs failed to state a claim on which relief could be granted because they did not allege a material misrepresentation or deception. The Court reached this holding because the language of the statute is “dispositive” that a material misrepresentation or deception must be alleged and proven to recover under section 10(b) and Rule 10b-5. The Court also acknowledged that “additional considerations weigh heavily against permitting a cause of action under Rule 10b-5 for the breach of fiduciary duty alleged in this complaint.” One of these considerations was that issues of corporate governance and fiduciary duty are traditionally matters of state law. Writing for the Court, Justice White acknowledged, “There may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of § 10(b) and Rule 10b-5 . . . .” In short, the Court opted to defer to the Congress because corporate governance issues are traditionally left to the states.

Even though the Supreme Court did not address the forced seller exception in *Santa Fe*, the opinion evidences that the Court may be unwilling to extend standing in the

339 See supra note 15 (citing cases showing that the forced seller exception to the purchaser seller requirement under section 10(b) and Rule 10b-5 is commonly used to remedy fraudulent short form mergers).
340 *Santa Fe*, 430 U.S. at 474.
341 Id. at 477.
342 Id. at 477.
343 Id. at 478-80.
344 Id. at 479-80.
absence of a statement from Congress. Internal governance and fiduciary duty in business associations are traditionally issues of state law. The typical forced seller situations, fraudulent short form mergers and fraudulent liquidations, can be remedied in most states by seeking statutory appraisal rights to receive fair value for securities or through actions for breach of the duty of loyalty. Although compelling justifications may exist for allowing standing for forced sellers under section 10(b) and Rule 10b-5, the Supreme Court may be unwilling to hold that a forced seller exception exists without explicit Congressional direction.

Additionally, the Court may also wait for Congressional guidance because recognizing standing for forced sellers under section 10(b) and Rule 10b-5 will likely increase the burdens on federal courts. Although the forced seller exception does not generate the same concerns of vexatious litigation that were present in Blue Chip Stamps, any extension of the private right of action under section 10(b) and Rule 10b-5 does create some risk of “strike suits” from plaintiffs seeking undeserved settlement

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346 See generally ROBERT CHARLES CLARK, CORPORATE LAW § 10.6 (1986) (providing an overview of and discussing the availability of appraisal rights for shareholders that dissent from certain types of corporate transactions).

347 See generally WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 293-368 (2d ed. 2007) (providing an overview of the duty of loyalty in the business context).

348 See supra Part III.C (explaining that the forced seller exception does not raise the same policy concerns that justified the adoption in Blue Chip Stamps of the purchaser-seller requirement for standing under section 10(b) and Rule 10b-5).
Because the forced seller is merely a useful extension of federal securities law, rather than a necessary one, the Supreme Court may be reluctant to open the federal courthouse doors to plaintiffs who could already seek relief on the state level.

V. Conclusion

As demonstrated in this Article, a strong argument exists for a forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5. A forced seller exception is consistent with the regulatory scheme of the Securities Act and the Exchange Act, and a forced seller exception supports the purposes and effective functioning of those Acts. Moreover, the forced seller exception does not raise the same policy concerns that justified the adoption of the purchaser-seller requirement in the first place.

However, the Supreme Court of the United States is unlikely to hold that such a forced seller exception exists because the Court is adverse to expanding the private right of action under section 10(b) and Rule 10b-5. Forced sellers also have difficulty meeting the requirements that the Court has set forth for the private right of action under those provisions. Additionally, although some might view the forced seller exception a useful extension of the federal securities laws, the Court is unlikely to allow its extension

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349 See Blue Chip Stamps v. Manor Drugs, 421 U.S. 723, 739 (1975) (holding that any expansion of the private right of action under section 10(b) and Rule 10b-5 creates a special danger because “[t]here has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.”).
350 See supra Part III.A.
351 See supra Part III.B.
352 See supra Part III.C.
353 See supra Part IV.A.
354 See supra Part IV.B.
without Congressional guidance because issues of governance and the internal affairs of business entities are traditionally left to the states.  

Ultimately, Congress should provide resolution to the circuit split and debate over the existence of the forced seller exception to the purchaser-seller requirement under section 10(b) and Rule 10b-5 by codifying the private right under these provisions. As this Article shows, although the forced seller exception may not be a necessary extension of federal law, it is a useful one. If a “fundamental purpose” of the Securities Act and the Exchange Act was “to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry,” then this fundamental purpose should also be extended to fraudulent short form mergers and fraudulent liquidations.  

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355 See supra Part IV.C.