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IN THE SUPREME COURT OF THE UNITED STATES

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THE WHARF (HOLDINGS) :  
LIMITED, ET AL. :  
Petitioners :  
v. : No. 00-347  
UNITED INTERNATIONAL :  
HOLDINGS, ET AL. :

Washington, D.C.  
Wednesday, March 21, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:04 a.m.

APPEARANCES:

PAUL M. DODYK, ESQ., New York, New York; on behalf of the  
Petitioner.

LOUIS R. COHEN, ESQ., Washington, D.C.; on behalf of the  
Respondent.

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor  
General of the United States, Washington, D.C.; as amicus  
curiae, supporting the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument on  
4 Number 00-347, The Wharf (Holdings) Limited, et al., v.  
5 United International Holdings.

6 Mr. Dodyk.

7 ORAL ARGUMENT OF PAUL M. DODYK

8 ON BEHALF OF THE PETITIONER

9 MR. DODYK: Mr. Chief Justice, and may it please  
10 the Court:

11 Let me start by suggesting that whether my  
12 client Wharf Holdings misrepresented its intention to sell  
13 stock of Wharf Cable to UIH is a matter of no concern  
14 under the '34 Act. The paradigm Section 10(b) plaintiff  
15 is an investor who has purchased a security which has been  
16 inflated by deception, the price of which was been  
17 inflated by deception or manipulation. I submit the  
18 central purpose of the '34 Act is to protect such  
19 investors from financial loss. The '34 Act, I submit, was  
20 not passed to provide a Federal remedy to plaintiffs who  
21 complained of their inability to purchase stock. The '34  
22 Act was not passed for the purpose of Federalizing the  
23 adjudication of disputes over the ownership of securities.

24 QUESTION: It depends on what you consider the  
25 security to be in this case.

3

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1                   MR. DODYK: In part that is true, Your Honor,  
2 but I think not solely. Not solely. I think there are  
3 also issues going to the nature of the misrepresentation  
4 involved, and the first --

5                   QUESTION: But first about what the security is.

6                   MR. DODYK: Yes, Your Honor.

7                   QUESTION: And what the Respondents say, and  
8 what the court below believed is that the security here  
9 was an option. And the definition of security in the Act  
10 includes an option to purchase securities.

11                  MR. DODYK: That is correct. That is correct,  
12 Your Honor. But what I am suggesting to Your Honor is  
13 that the oral expression which passes or is asserted to be  
14 a security in this case should not be accepted as such,  
15 that in this case that what you're basically dealing with  
16 is a conversation which gave rise to an asserted right to  
17 purchase common stock in a subsidiary. The answer to why,  
18 as I understand the law, Your Honor, is rooted in the Blue  
19 Chip Stamps case. And as I interpret that case, Your  
20 Honor, I believe it to reflect a reluctance on the part of  
21 the Court to accept oral assertions as satisfying the  
22 predicate to establish standing to sue as a purchaser of  
23 securities.

24                  QUESTION: Mr. Dodyk, how far do you take that?  
25 Are you saying that no oral representations count under

1 the Exchange Act? Are you saying that that goes for the  
2 SEC as well as what we have here, private suitor?

3 MR. DODYK: Well, certainly Your Honor, I'm not  
4 saying then oral statement cannot constitute a  
5 misrepresentation. Far be it from me to suggest that.  
6 Going to the second part of your question, Your Honor, I  
7 certainly think that distinctions can be made between the  
8 breadth of section 10(b) in the hands of the SEC and the  
9 breadth of the judicially-implied private right of action  
10 under Section 10(b). And as Your Honor is aware, there  
11 are distinctions.

12 In an SEC action, it is of no concern whether  
13 anyone relied on misrepresentation. In fact, there is no  
14 purchaser requirement constraining the SEC's enforcement  
15 bar. So I think the contours of the private right of  
16 action which is implied under Section 10(b) are quite  
17 different from the contours within which the SEC might  
18 bring an enforcement action.

19 QUESTION: Are you saying, Mr. Dodyk, that there  
20 can't be any oral options as a matter of Federal  
21 securities law?

22 MR. DODYK: Your Honor, I think as a matter of  
23 Federal securities law, as I read the Blue Chips Stamps  
24 case, that a conversation which a person asserts via an  
25 oral option should not, under the doctrine of that case,

1 be accepted as a security.

2 QUESTION: Well, that would certainly take it  
3 beyond the holding of the case.

4 MR. DODYK: There is no question about that.  
5 The holding of the case itself was limited to a situation  
6 in which the offerees in that situation did not purchase  
7 the stock. But what I say to Your Honor is I don't think  
8 given what I understand to be -- and of course Your Honor  
9 would know better than I -- the thrust of that opinion.  
10 The reluctance of the Court to accept wholly oral  
11 testimony not for the purpose of saying whether or not  
12 there has been a misrepresentation, but for the purpose of  
13 satisfying the threshold predicate requirement of whether  
14 or not the plaintiff has purchased securities. The Court,  
15 time and again in the course of that opinion, said that  
16 the principal advantage of that doctrine was to place as a  
17 requirement for standing in a 10(b) case a transaction  
18 which could be proven by document.

19 QUESTION: But that isn't the issue here --  
20 whether the plaintiff purchased or not. The issue here is  
21 whether the security existed. Whether there was, indeed,  
22 an option, or there wasn't an option. If there was an  
23 option, there's no doubt that this plaintiff purchased it.  
24 It isn't a question of whether the plaintiff, you know,  
25 agreed to accept the option or not. That's, as I

1 understand it, not an issue. The question is was there an  
2 option.

3 MR. DODYK: Well, I'm not sure that Your Honor  
4 is correct in saying that there's no question as to  
5 whether or not there was a purchase of an option here in a  
6 contractually binding sense, because as Your Honor is  
7 aware, it certainly is our position that the court, the  
8 district court, failed to properly instruct the jury with  
9 respect to the statute of fraud.

10 QUESTION: It's quite a different question in  
11 Blue Chip. The question in Blue Chip is whether the  
12 plaintiff would have bought the stock or not. You have no  
13 idea whether the plaintiff would have bought this stock.  
14 Plaintiff said I would have but for this  
15 misrepresentation, or I would have sold it but for the  
16 misrepresentation. It's totally up in the air. The  
17 question here is much simpler, much more focused. Was  
18 there a promise by the alleged seller of the option to  
19 deliver the stock or not?

20 MR. DODYK: I don't think it's simpler, Your  
21 Honor, in the sense in which Blue Chip Stamps saw a  
22 difficulty, if I could explain.

23 QUESTION: Okay.

24 MR. DODYK: It's not simpler for the following  
25 reasons: What was the core, as I understand it, of Blue

1 Chips Stamps' concern was that you'll get someone who  
2 attempts to establish standing to bring a Section 10(b)  
3 action based on an oral assertion of what it is they would  
4 have done. Now I submit to Your Honor, that this case is  
5 no different in that respect. The oral option -- the  
6 purchase of the oral option -- all of that is a lawyer's  
7 description of what happened in a conversation. And just  
8 as in --

9 QUESTION: It's not a description of would have,  
10 could have, should have. I mean, and that's what was at  
11 issue in Blue Chip. Oh, had I known this, I would have.  
12 Had I not known it, I would not have. And it's all  
13 speculation about the future. There's no speculation  
14 about the future here. It is a simple past fact. Was  
15 there this promise to deliver the stock in exchange for  
16 certain actions by the other side, or was there not?  
17 That's not at all as hard to prove as the would have,  
18 could have, should have stuff is.

19 MR. DODYK: I think it is, if I may. I think  
20 this is a would have, could have, should have case. No  
21 question about it. Don't forget that in the Blue Chips  
22 Stamps case, you weren't talking about a drive-by offeree  
23 in the market place. What you were talking about in Blue  
24 Chip Stamps were a group of retailers who as a result of a  
25 plan of reorganization that was entered after a consent

1 decree had the right to purchase a determinate number of  
2 shares which was defined in the consent decree.  
3 Therefore, their right to make the purchase was clearly  
4 documented.

5 In addition, in terms of the damage claim in  
6 that action, in terms of the injury, they were pointing to  
7 the difference between what the price the stock was  
8 trading at currently and the price which it was offered at  
9 in the prospectus. And they said that is the measure of  
10 my damages. Here, you're dealing with I think very much a  
11 weaker case in the sense that the alleged act of purchase,  
12 the existence of the option, was throughout a lawyer's  
13 description of an oral event. And the would have, could  
14 have, should have goes like this: I would have exercised  
15 my option; I would over a period of years have invested  
16 fifty million dollars in this business; the business would  
17 have succeeded, and the stock market would have valued my  
18 stock interest at X million dollars.

19 QUESTION: Well, you've raised -- it seems to me  
20 in your last point you've raised two points. One is a  
21 valuation point, which I don't think is directly what  
22 Justice Scalia is concerned with. The other, the would  
23 have, should have point is I would have exercised my  
24 option. But as I understand it, it's not open to us to  
25 assume that that is the case. As I understand it, the

1 finding was that they did exercise the option. That they  
2 exercised the option by going ahead in effect and paying  
3 part of the consideration for that -- for getting the  
4 option which was the help that they gave to your client in  
5 getting the license.

6 So that as I understand it, we have a finding  
7 that this is not a hypothetical should have or would have  
8 case, but a case in which we did. We went ahead, and when  
9 we performed -- when we did the part performance, at least  
10 -- that sealed the deal for the option. We had the  
11 option, and there is no question as I understand it that  
12 they sought to exercise the option at a later time. So I  
13 don't see where the subjunctive gets into this.

14 MR. DODYK: Well, I think where the subjunctive  
15 gets in -- and perhaps it's not a subjunctive as such --  
16 what I'm saying to you is that the nature of the jury's  
17 conclusion in this particular case, I think, should not be  
18 relevant to the determination which the Court is making,  
19 if my construction of the Blue Chip Stamps case is  
20 accurate.

21 QUESTION: Well, your construction -- I thought  
22 your construction is that yes, Blue Chip Stamps, as  
23 Justice Scalia put it, is a would have, should have case,  
24 and this is a would have, should have case. And I don't  
25 think this is.

1 MR. DODYK: No it's not -- I'm not saying -- I  
2 think it's a would have, should have case in many regards,  
3 Your Honor, in many regards. But what I'm saying with  
4 respect to the reason why Blue Chip Stamps should be  
5 applied to the facts of this case is that I don't see any  
6 difference in the quality of the oral evidence, or the  
7 oral event which gave rise to the finding, and the quality  
8 of the oral evidence which drove the Court in Blue Chip  
9 Stamps to say no, I'm not going to extend the doctrine to  
10 that situation.

11 QUESTION: Then I think you in essence are  
12 saying that they cannot be the oral creation of the  
13 security within the meaning of the Act.

14 MR. DODYK: That's what I am saying.

15 QUESTION: Yeah.

16 MR. DODYK: That's right. I'm not saying that  
17 oral representation cannot be fraudulent. What I am  
18 saying is where a plaintiff cannot satisfy the threshold  
19 requirement of purchase of a security except by a purely  
20 oral event, then I would --

21 QUESTION: There's a statute that lists a whole  
22 bunch of things that constitute a security; one of them is  
23 an option. It doesn't say anything about in writing in the  
24 text of the statute.

25 MR. DODYK: Well, Your Honor, as to that I would

1 suggest that if you look at Section 3810 that all of the  
2 elements of a security there as defined are elements which  
3 are ordinarily written instruments -- common stock, bonds,  
4 notes. There is nothing I think, Your Honor, in 3810 --  
5 no one of the individual elements -- which is not a  
6 written document and therefore --

7 QUESTION: Do you think that Blue Chip would  
8 have come out differently if there were a writing from the  
9 president of the purchaser to his mother saying we intend  
10 to purchase this stock of this corporation next week. Do  
11 you really think that the only problem in Blue Chip was  
12 the lack of a writing, or was it the inherent difficulty  
13 of showing what somebody would have done when it has not,  
14 in fact, been done. Whereas the claim here is that  
15 something has been done; not that it would have been done,  
16 but that it has been.

17 MR. DODYK: I'm not saying that that -- I can't  
18 tell you what element alone would have sufficed for the  
19 conclusion.

20 QUESTION: You think a letter might have done  
21 the job, if --

22 MR. DODYK: No, I don't. I don't think it would  
23 have. No, I don't.

24 QUESTION: I don't think it would have, either.  
25 I think it has very little to do with the writing and

1 much more to do with the inherent ineffability of future  
2 intentions.

3 MR. DODYK: Well, that is certainly true.

4 QUESTION: If that is true, then you have to  
5 admit that Blue Chip doesn't stand for the proposition  
6 that you can't have an orally-created security, and that  
7 we are, as Justice Scalia started out by saying, going to  
8 have to go beyond Blue Chip to hold your way here.

9 MR. DODYK: Well, I'm not suggesting that the  
10 Blue Chip Stamps opinion governs the facts of this case,  
11 but I would point out to Your Honor is that two circuit  
12 courts have interpreted Blue Chip Stamps to bar standing  
13 to a plaintiff who sought to assert -- satisfied the  
14 purchase requirement and sought to assert standing on the  
15 basis of an oral agreement to purchase securities.

16 QUESTION: Why --

17 MR. DODYK: In the Kagen case -- the Kagen case  
18 --

19 QUESTION: Yes?

20 MR. DODYK: -- in the Seventh Circuit, and the  
21 Pelletier case in the Eleventh Circuit both held that, and  
22 those are, to my understanding, the only reasoned  
23 interpretations of Blue Chip Stamps since that case was  
24 decided with respect to this particular issue.

25 QUESTION: Let me ask you this question. You're

1 in effect saying that the '34 Act should be construed as,  
2 in effect, incorporating the statute of frauds for  
3 purposes of determining how a security, or what can  
4 qualify as a security within the meaning of the Act. My  
5 question is, why should we interpret it when the statute  
6 of frauds has traditionally had an independent life of its  
7 own, and of course incidentally in this case, the statute  
8 of frauds has either been satisfied by part performance,  
9 or has been satisfied by part performance as I understand  
10 it in the findings of the jury.

11 MR. DODYK: Well, Your Honor, I would say a  
12 couple of things about that. First of all, certainly the  
13 courts of appeal have construed Blue Chip Stamps to hold  
14 that if you had a purely oral event to satisfy the  
15 purchase requirement which is unenforceable under the  
16 statute of frauds, that under Blue Chips Stamps that  
17 didn't suffice, number one.

18 Number two, the argument I was making about Blue  
19 Chip Stamps and the significance of oral evidence is not  
20 limited to the statute of frauds. After all, you're  
21 talking about the meaning of the Federal statute, and my  
22 interpretation of Justice Rehnquist's opinion in Blue Chip  
23 Stamps -- excuse me, the Court's opinion in Blue Chip  
24 Stamps as underlying the Kagen and Pelletier decisions is  
25 that where the quality of the satisfaction of the purchase

1 is oral, the quality of the evidence is purely oral, that  
2 the claim is too dubious in its nature to satisfy that  
3 threshold requirement --

4 QUESTION: So you're saying there could be an  
5 oral contract, and there could be the oral creation of a  
6 security, but that the act of exercise cannot be oral.

7 MR. DODYK: No, I'm not saying that.

8 QUESTION: I thought that's what you just said.

9 MR. DODYK: No, no, no.

10 QUESTION: I'm sorry.

11 MR. DODYK: No, what I was saying was that where  
12 for purposes of construing the Federal statute,  
13 irrespective of the statute of fraud, that the rule is a  
14 Federal rule, and the rule should be that where the event  
15 which is said to satisfy the purchase of a security  
16 requirement is wholly oral, that that should be  
17 insufficient for very much the same reasons as the  
18 underlay of the Blue Chip Stamps requirement. Now, with  
19 respect to --

20 QUESTION: Mr. Dodyk, may I ask? There is an  
21 aspect of this case that is very disturbing to me, and I  
22 want you to get to it before your time runs out.

23 MR. DODYK: Yes, Your Honor.

24 QUESTION: This is a case with one Federal  
25 claim. I think there were ten or eleven State claims. It

1 was thoroughly tried. There were determinations of those  
2 State claims. The damages, as I understand them, would  
3 have been the same if you never had 10(b) in the picture.  
4 And at this stage, at least going in, I mean, you're  
5 urging that the Court hold something today that it has  
6 never held before. There is an arguable question of the  
7 interpretation of Federal law. The State claims were  
8 pending to that and thoroughly tried. This is not a case  
9 that was dismissed at the threshold.

10 Why are we -- it seems to me that we're talking  
11 about something that is academic in this case if a  
12 judgment is going to stand based on the adjudication of  
13 the State claims.

14 MR. DODYK: Well, let me speak to that if I may,  
15 and also it comes back to the second part of Justice  
16 Souter's question. And this has to do with the  
17 significance of the statute of frauds in this case. And  
18 the proposition which I'm going to advance, Justice  
19 Ginsburg, is that the errors committed by the district  
20 court and by the Eleventh Circuit with respect to the  
21 statute of frauds are clear and undeniable and are fatal  
22 to every cause of action which was asserted in this case,  
23 State or Federal.

24 Now, grant me the indulgence of assuming,  
25 although I've had little indication of this, that the

1 Kagen and Pelletier approach would prevail, and that the  
2 Court was at least open to the argument that, well, Blue  
3 Chip Stamps means that if you have an oral event upon  
4 which you are basing your purchase argument, and you don't  
5 have an enforceable contract under the statute of frauds,  
6 you don't have a purchase. Now, I think -- and I don't  
7 mean to be rude or over-reaching -- but I think it's clear  
8 that both the district court and the Eleventh Circuit  
9 committed undeniable errors in the way they treated the  
10 statute of frauds question.

11 In the court of appeals they said that the  
12 statute of frauds did not apply to this case because the  
13 oral option, although a security for Securities Act  
14 purposes was not a security for the purpose of the statute  
15 of frauds. Now, bear in mind that what we're talking  
16 about here is an oral agreement contract option for the  
17 sale of securities. And I submit that there can't be any  
18 question that the proper analysis on these facts is that  
19 the oral option was the contract for the sale of  
20 securities which the statute of frauds rendered  
21 unenforceable.

22 QUESTION: Then one might say, if we accepted  
23 everything you said, that the Federal claim would fail on  
24 a 12(b)(6). But there was Federal question jurisdiction  
25 by virtue of a claim -- of an arguable claim. And there

1 was indeed a trial. And I just don't understand why, even  
2 if I accepted what you just said, that touches the fact  
3 that there was Federal question jurisdiction, that  
4 everything that you're talking about would go to, has  
5 there been a claim for relief stated?

6 MR. DODYK: Well, Your Honor, if I understand  
7 where we're at at this point, and that is, what is the --  
8 what should be the consequence of a decision in this  
9 case? That there was no Section 10(b) violation because  
10 of the existence of the State claim. If I can address  
11 that question briefly.

12 My position on that question is that if you take  
13 a look at the decided case authorities since Santa Fe and  
14 Blue Chip Stamps, there are two lines of authority which  
15 unanimously would have resulted in the dismissal of these  
16 claims. Now, we've been talking about one of those lines,  
17 and that is to say whether or not you can create a  
18 purchase out of an oral event. There is another line of  
19 cases which doesn't deal with the purchase question.  
20 Another line of cases which says that where you have a  
21 misrepresentation of a party's intention to sell  
22 securities, as distinguished in the language of the  
23 courts, from a misrepresentation going to the value of the  
24 securities, you don't have a Section 10(b) violation.  
25 There are four circuit courts that have come to that

1 conclusion; there are two district court cases within the  
2 last three years that have followed those cases. Just  
3 this year --

4 QUESTION: What's the reasoning, Mr. Dodyk? You  
5 know, there's some English chancellor hundreds of years  
6 ago said that the state of a man's mind is as much a  
7 question of fact as the state of his digestion.

8 (Laughter)

9 MR. DODYK: Yes, indeed, and that made it all  
10 the way into the restatement, did it not? Did it not?  
11 But what I say to you is this, and it's not a simple  
12 thought to get across, but to the extent we're talking  
13 about whether or not that type of statement which has been  
14 made in this case is actionable, that we've gone a long  
15 way beyond the state of the digestion, and where we have  
16 gotten to in the United States, generally speaking, is to  
17 the economic loss doctrine, which is squarely applicable  
18 to the facts of this case. And I think it's also, Your  
19 Honor, a doctrine which this Court should take into  
20 account in deciding what types of misrepresentation are  
21 actionable under Section 10(b). The proposition is --

22 QUESTION: Even giving you the point that the  
23 only kind of misrepresentation that counts under 10(b) is  
24 a misrepresentation of value, do you really think that an  
25 option to purchase from someone who, when he gives you the

1 option, has no intention of ever selling you what he has  
2 promised to sell you? Is it worth as much as an option  
3 from someone who when he gives you the option intends to  
4 go through with the delivery of stock if you exercise it?

5 MR. DODYK: Your Honor --

6 QUESTION: Doesn't that -- I can't imagine what  
7 would more go to the value of the option than the intent  
8 of the optionor to follow through on the contract or not.

9 MR. DODYK: Your Honor, I think whether or not  
10 you recognize the distinction here depends on how you  
11 characterize the purpose of the Securities Act -- if we're  
12 talking about a 10(b)(5) case, which is what we're talking  
13 about. And what I mean to say by that is there are lots  
14 of actions which can undermine the value of a security or  
15 an option to purchase a security. But I submit that there  
16 is a very clear distinction between a misrepresentation  
17 about the financial condition of a company and the refusal  
18 to accede to an asserted contractual obligation to  
19 delivery securities, and I suggest to Your Honors that  
20 given the way in which this Court has articulated the  
21 purpose of the '34 Act that a line should be drawn between  
22 those representations which in the garden-variety Section  
23 10(b)(5) case speak to the value of a security in a  
24 situation such as this in which a person says he should  
25 have sold me the stock and he didn't, and he lied about it

1 in the first place.

2 QUESTION: Mr. Dodyk, you still haven't gotten  
3 to why, even if we accept what you said, there should be  
4 any redoing of this case when the State claims were tried,  
5 and the same damages would apply to those.

6 MR. DODYK: I keep trying to get there, but I  
7 get diverted. And the reason is this, and this is the  
8 reason that I was speaking to the other reason why you  
9 shouldn't find a Section 10(b) violation here, which is in  
10 terms of the character of the representation which has  
11 been made here, and the limited purpose of the '34 Act.  
12 And I was about to get to that point when I said there are  
13 four circuit courts who have decided uniformly,  
14 consistently, that the '34 Act does not apply to an  
15 alleged misrepresentation of a party's intention to sell  
16 securities.

17 QUESTION: But the question --

18 MR. DODYK: I'm about there -- I'm about there.

19 (Laughter)

20 MR. DODYK: And the answer is -- the answer is  
21 that is the kind of decision which can be made in a Rule  
22 12 case. Now I understand Your Honor's formulation of  
23 well, if they've got jurisdiction and there is a decision,  
24 what is all this about? What I'm saying to you is this.  
25 There is a great deal of difficulty with a standard which

1 says whether or not the court should proceed to adjudicate  
2 the State law claims depends on the degree of frivolity of  
3 the Federal action.

4 I say to you that those courts -- those circuit  
5 courts -- which have decided that if you have a case which  
6 is dismissable under Rule 12, then you shouldn't go  
7 forward and adjudicate the State claims is squarely  
8 applicable here.

9 QUESTION: The question is, we're not in the  
10 posture of should you go forward? They have gone forward,  
11 and what you're saying is that we should upset this entire  
12 adjudication. If we were back in the beginning and the  
13 question was should the Federal court go forward on the  
14 State claims once the Federal claim is out of the picture,  
15 one gets one answer. But we're at the end of the line,  
16 and these cases have, in fact, been tried.

17 MR. DODYK: Well, I say that that factor is not  
18 worth consideration which Your Honor is according to it  
19 for the following reason. Number one, there is a value  
20 in having important, unsettled questions of State law  
21 decided by State courts, and that is why the courts have  
22 been restricted from asserting jurisdiction over the State  
23 claim when they have dismissed the Federal claim prior to  
24 the trial. Now, I say that if you accept my construction  
25 of Section 10(b), if you accept my construction of Blue

1 Chip Stamps as six circuit courts have done, the answer is  
2 when that case came up on a Rule 12 motion, Judge King  
3 should have thrown it out. Now, he should not have gone  
4 forward at that point to have adjudicated the State cause  
5 of actions, and I say to you --

6 QUESTION: And that is a matter of lack of  
7 jurisdiction, but abuse of discretion.

8 MR. DODYK: That's correct. Abuse of  
9 discretion, because had he made the right decision  
10 assuming, granting me the assumption, that there is no  
11 10(b)(5) action here, he should have thrown the case out  
12 at that point. Now you have to ask yourself, well, does  
13 it make a difference that we have had some investment of  
14 time as a result of a judicial mistake? And, again, a  
15 couple of circuits have said no, it doesn't make any  
16 difference because there are values in restraining the  
17 Federal judiciary from deciding State court issues in  
18 those circumstances which are not excused by the fact that  
19 someone made a mistake at the district court level and we  
20 should therefore vacate that decision. That's what  
21 happened in Tully v. Mott Supermarkets, for example. Now,  
22 I say to you also --

23 QUESTION: We would not reach that judgment if  
24 we thought that the case for the Federal claim was a lot  
25 more solid than you suggest, even if you would ultimately

1 win on it, that this was not frivolous by any means.

2 MR. DODYK: That is true but for one other  
3 consideration, Your Honor, and that's this. I say to you  
4 that the Tenth Circuit and the district court were  
5 unquestionably wrong in the way they decided the statute  
6 of frauds question, and in the way they decided the  
7 economic loss doctrine question. A proper decision on  
8 either one of those theories would have thrown out every  
9 cause of action in this case, and I suggest to you that  
10 where you're in a situation where there is in fact at the  
11 end of the day no Federal question, and you present it  
12 with a --

13 QUESTION: Thank you, Mr. Dodyk.

14 Mr. Cohen, we'll hear from you.

15 ORAL ARGUMENT OF LOUIS R. COHEN

16 ON BEHALF OF THE REPONDENT

17 MR. COHEN: Thank you, Mr. Chief Justice, and  
18 may it please the Court:

19 UIH pleaded and the jury found that UIH  
20 purchased a security, an option, and paid for that  
21 separate security with services that Wharf requested and  
22 crucially needed.

23 QUESTION: I have one question. Justice Souter  
24 asked counsel for Petitioner whether or not the option was  
25 not exercised when these additional services were

1 performed, I take it after October 8, 1992. I thought --

2

3 MR. COHEN: Thank you.

4 QUESTION: And I thought there was some  
5 agreement from Petitioner's counsel that that was in fact  
6 the theory of the case. Of course, he says there's no  
7 option at all. When was this option exercised?

8 MR. COHEN: It was both a purchase and a  
9 separate attempt to exercise.

10 QUESTION: When was it exercised in here?

11 MR. COHEN: In the spring of 1993, after Wharf  
12 got the cable franchise from the broadcast authorities.

13 QUESTION: Okay, so the option was --

14 MR. COHEN: Wharf had conducted a public  
15 offering, raised the money, called Mr. Ing and sought to  
16 exercise the option.

17 QUESTION: So the option was not exercised in  
18 your view immediately after October 8 when the additional  
19 services were performed.

20 MR. COHEN: It could not be. Its terms were  
21 that UIH would have the option, and had bought the option.  
22 In return for these massive services, it would have the  
23 option to invest ten percent of the capital required by  
24 this newly-formed company and get ten percent of the  
25 stock. That option would be exercisable -- this is all in

25

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1 our complaint -- would be exercisable for six months after  
2 the award of the franchise to Wharf Cable by the broadcast  
3 authority, because without that award there would be  
4 nothing.

5 QUESTION: Mr. Cohen, I must say I just marvel  
6 at the bon homme or the old fashioned nature of your  
7 client to gamble all of this money on an oral handshake  
8 deal. Do people still do that out there?

9 MR. COHEN: They do.

10 (Laughter)

11 QUESTION: I mean, how much money was involved  
12 in this deal?

13 MR. COHEN: Well, the cost of providing the  
14 services with which we purchased the option was about a  
15 million dollars out-of-pocket, but it was the time of  
16 people who were investors in these businesses.

17 QUESTION: You know, I wouldn't even buy an  
18 automobile without a written contract.

19 MR. COHEN: Well, there was a good deal of  
20 testimony at trial --

21 QUESTION: I'm not sure that we ought to protect  
22 this kind of recklessness. If you want to rely on a  
23 handshake deal, then you better be sure you're shaking the  
24 hand of somebody who can be trusted.

25 MR. COHEN: It was a handshake deal that had

1     been preceded by a written reference to an option in the  
2     bid that Wharf submitted to the broadcast authority, that  
3     language was pulled at the last minute.  It's an option  
4     that is referenced in later internal Wharf documents.

5             QUESTION:  We have over a million lawyers in  
6     this country, and one of the main things they do is to  
7     make sure that people make things easy by putting it in  
8     writing.

9             MR. COHEN:  And UIH would have been well-advised  
10    to come out of that meeting, call its lawyer and say how  
11    do we document this?  But the agreement at that meeting  
12    was that documentation would be prepared.  The agreement  
13    at that meeting also was that Wharf needed --

14            QUESTION:  You went ahead before the  
15    documentation was prepared.

16            MR. COHEN:  Yes, because Wharf --

17            QUESTION:  And I'm making a serious point here,  
18    I'm just not saying your client was foolish.  I'm  
19    questioning whether we ought to protect foolish people  
20    like that -- whether we ought to enable strike suits,  
21    enable people to be accused of having sold an option in  
22    order to protect somebody who's foolish enough to invest a  
23    million dollars on the basis of a handshake.

24            MR. COHEN:  The kind of person you're talking  
25    about is a person who is a victim of an unscrupulous

1 securities salesman who calls up and says I've got an oil  
2 company here, and I've got some shares to sell you, and  
3 fails to say there isn't any oil and says give me your  
4 credit card number, or send me a check and I'll send you a  
5 certificate.

6 QUESTION: Unlike those typical securities  
7 situations, what worries me about this case is the pizza  
8 man says, Smith, my customer told me over the phone that  
9 if I got the pizza there on time he'd give me fifty shares  
10 of his stock. Do we have a securities fraud?

11 MR. COHEN: You have a fraud if there --

12 QUESTION: No, in my example.

13 MR. COHEN: If --

14 QUESTION: In my example. In my example the  
15 pizza man calls up -- pizza man, I called him yesterday,  
16 and he said if I got the pizza there in fifteen minutes he  
17 would sell me fifty shares of his stock for forty dollars.  
18 Is that a securities fraud?

19 MR. COHEN: I think yes.

20 QUESTION: Yes?

21 MR. COHEN: Yes, because I think --

22 QUESTION: I thought you'd say no to that one.  
23 I was about to tell you --

24 MR. COHEN: No, because I think there is a  
25 contract. I don't think I need that one. I think my case

1 is much easier.

2 QUESTION: You're saying then that any kind --  
3 any time a person claims that somebody sold them a share  
4 of stock, or promised to sell them a share of stock  
5 orally, that becomes a Federal securities case. I didn't  
6 think you were going to say that, but if you are, I'm  
7 quite interested.

8 MR. COHEN: Any time someone has a provable,  
9 enforceable contract to buy a share of stock --

10 QUESTION: We're saying the same thing, and I  
11 guess the argument against that would be that the  
12 securities statute doesn't intend to have every oral  
13 contract for selling some stock to become a securities  
14 fraud case. There was no intention to have that done,  
15 there is no reason to have it done. It's perhaps a  
16 contract action. Most States wouldn't permit it because  
17 it would be oral, but --

18 MR. COHEN: Justice Breyer, what we have here is  
19 not merely an executory contract to purchase some stock.  
20 We have a completed, consummated contract to sell and  
21 purchase an option which is a separate security as defined  
22 --

23 QUESTION: I know, but I'm trying to get at the  
24 policy that would underlie my concession exactly right.  
25 The pizza man says I have a completed executory contract

1 to sell me an option in return for my getting the pizza  
2 there on time.

3 MR. COHEN: He hasn't --

4 QUESTION: He has promised to sell me fifty  
5 shares of stock. Now, that's an option.

6 MR. COHEN: He hasn't been defrauded out of  
7 anything except perhaps driving fast to deliver the pizza.  
8 We have been defrauded out of services -- the valuable  
9 services -- that we undertook to deliver only because  
10 Wharf agreed to grant and granted us an option. That  
11 option is a separate security which we were then --

12 QUESTION: You're missing my question, and I  
13 won't pursue it except to add what I thought you'd answer.  
14 I thought you'd answer my question no, because there's no  
15 fraud there. And then I was about to say, but all you  
16 have to do is add the allegation. And at the time he  
17 intended not to carry it out. And that allegation always  
18 can be added, for after all he is defending the case,  
19 isn't he? And if he's defending the case, that's pretty  
20 good evidence that he intended not to carry it out, and  
21 therefore you've made all, or almost all, oral promises  
22 into securities cases, contrary to the intent of the  
23 statute. Now, I was trying to get you to address the  
24 policies that might refute my hypothetical, but maybe it's  
25 too complex, and maybe you can't do that easily.

30

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1                   MR. COHEN: Well, let me say this about the  
2 policy. First, there is the difference between a mere  
3 breach of contract and an intent at the time that a  
4 contract is entered into not to perform, and several  
5 courts of appeals have spoken to that. Second, we are  
6 talking here about the defendants' intention quite  
7 different from the problem in Blue Chip of the plaintiff  
8 proving the plaintiff's own intention by his own  
9 affidavit, an inherently untestable thing that gets into  
10 the jury to get past the defendant's intention, a  
11 statement that he intended to fulfill the contract, the  
12 plaintiff is going to have to come up with some concrete  
13 evidence. We had that evidence here -- written evidence  
14 from Wharf's files that Wharf did not intend at the time  
15 that it entered into the contract to fulfill it.

16                   And furthermore, Congress has taken much of this  
17 burden off the Court's shoulders, if you'll excuse me for  
18 just a second, by adding the requirement in the Private  
19 Securities Litigation Reform Act of 1995 in which it  
20 recognized a 10(b)(5) claim and cited how to cabin it, and  
21 it requires a specific pleading of facts sufficient to  
22 create a quote strong inference of intent to defraud, and  
23 if you can't do that, your claim is dismissed under that  
24 statute.

25                   QUESTION: Okay.

1 MR. COHEN: So that policy has been addressed.

2 QUESTION: Somewhere in that long sentence you  
3 made the point that in Blue Chip there was no solid  
4 written evidence as you say there was in your case. Do  
5 you think Blue Chip would have come out differently if  
6 there was solid written evidence to demonstrate that the  
7 alleged purchaser would have purchased?

8 MR. COHEN: No. Blue Chip was interpreting the  
9 statute.

10 QUESTION: Right. So what difference --

11 MR. COHEN: The statute requires a purchaser --

12

13 QUESTION: Okay, what difference does it make if  
14 you have written evidence? And Blue Chip didn't.

15 MR. COHEN: I don't --

16 QUESTION: If Blue Chip wouldn't come out any  
17 differently, written evidence or not, what difference does  
18 it make?

19 MR. COHEN: The difference is that we have a  
20 completed purchase. We have a completed purchase that is  
21 sustained by testimony --

22 QUESTION: Well, that's fine, but the evidence  
23 makes up -- the evidence, or the existence of written  
24 evidence or not makes no difference.

25 MR. COHEN: Let me say one other thing about

1 Blue Chip --

2 QUESTION: Yes or no? The existence of written  
3 evidence or not in this case makes no difference.

4 MR. COHEN: I think it makes no difference to  
5 the outcome.

6 QUESTION: Mr. Cohen, I think -- what if this  
7 contract were found to be void because it didn't comply  
8 with the Colorado statute of fraud? Could it nonetheless  
9 be acted upon? In other words, would that be a final  
10 death knell for your suit, or can you say that under  
11 Federal securities law that isn't conclusive?

12 MR. COHEN: Well, first, of course, it was valid  
13 under the Colorado securities --

14 QUESTION: Could you get to the answer?

15 MR. COHEN: No, I don't think you would be --

16 QUESTION: You can't get to the answer?

17 MR. COHEN: I don't think it would be a death  
18 knell. I'm trying to answer the question.

19 QUESTION: Then even though we're invalid under  
20 Colorado statute of frauds, it could proceed under the  
21 Federal Securities Act?

22 MR. COHEN: I think the sale of a security that  
23 is an invalid security that is represented to be a  
24 security is sufficient under Blue Chip to support a  
25 10(b)(5) claim, whether the security is enforceable or

1 not, and I think the majority of the courts of appeals  
2 have agreed with that.

3 QUESTION: If you win -- this is just what's  
4 worrying me. Imagine every State says sales of goods or  
5 services over ten million dollars has to be in writing.  
6 All right? Now, to a person who's -- that would make no  
7 difference. That statement I just made would be, as a  
8 practical matter, irrelevant because anybody in the stock  
9 area, because anybody who wanted to allege an oral  
10 contract to sell ten million dollars' worth of stock would  
11 run right into Federal court and say it's a securities  
12 claim.

13 MR. COHEN: Well, it has to have a security --

14 QUESTION: No, what he says is he promised to  
15 sell me some stock. The promise is an option on your  
16 view, and therefore it is a security.

17 MR. COHEN: The promise -- that promise is not  
18 an option on my view. An option is a security that you  
19 pay separate consideration for that gives you the right  
20 but not the obligation to purchase another security.

21 QUESTION: A promise. I'm sorry.

22 MR. COHEN: That's what we have here.

23 QUESTION: I'm sorry. In return for my  
24 services, he promised that he would sell me some stock.

25 MR. COHEN: Yes.

1                   QUESTION: All right. All those cases which  
2 would be outlawed by the State statute of frauds, I've  
3 imagined, would suddenly come into Federal court as  
4 securities claims. It's the same problem I have. What's  
5 bothering me is the sweep of a decision in your favor, and  
6 that's what I want you to --

7                   MR. COHEN: What I've tried to say is that you  
8 can decide this case in my favor without reaching that by  
9 determining -- agreeing with the court of appeals that  
10 what you had here was a completed actual paid for sale of  
11 a different security, an option which the parties intended  
12 to document but didn't end up documenting, because that  
13 was part of the fraud, and then there was a --

14                   QUESTION: Why wasn't that sale worth a million  
15 dollars, or whatever the statute of frauds limit is?

16                   MR. COHEN: The statute of frauds --

17                   QUESTION: I mean, surely that contract is worth  
18 something, and what was the value of that?

19                   MR. COHEN: It was, and we paid for it in  
20 services that had a cost to us of about a million dollars,  
21 and --

22                   QUESTION: And is that below the State's statute  
23 of frauds amount? That million dollars?

24                   MR. COHEN: Justice Scalia, first of all, the  
25 present statute in Colorado and every other State says

1 sales of securities are enforceable without a writing.  
2 There is no statute of frauds applicable to securities.

3 QUESTION: That's the answer, then.

4 MR. COHEN: And at the time there was a statute  
5 of frauds which was determined not to apply because of the  
6 -- because of Wharf's -- because of UIH's completed  
7 performance of its obligations.

8 QUESTION: Mr. Cohen, I just want to go back to  
9 Justice Breyer's question --

10 MR. COHEN: Performance took this out of the  
11 statute of frauds. Excuse me.

12 QUESTION: Tell me if I'm wrong here. I think  
13 we've got to say something definite about what the statute  
14 of fraud rule is that will underlie our case, even if you  
15 are right on part performance, and I will assume you are,  
16 because we could construe the statute either to say there  
17 is no requirement of writing in the statute. In other  
18 words, it has no built-in statute of frauds. Or we could  
19 say there is some kind of a built-in statute of frauds,  
20 but it is satisfied by part performance. Or we could say  
21 possibly -- I don't know whether we should -- but we could  
22 say the Federal statute in effect simply leaves the  
23 problem of writing to State law. If State law would in  
24 fact recognize the contract under its statute of frauds,  
25 then that contract is sufficient to create a security, or

1 whatnot, for the purposes of the Securities Act. I think  
2 we've got to say one of those three things. Which should  
3 we say?

4 MR. COHEN: I think you should say that the  
5 question whether there has been a sale of securities is a  
6 question of State law, as it has been.

7 QUESTION: And then the question of whether  
8 there is a creation of the security in the case of the  
9 creation of the option -- that too -- I mean, that's  
10 essentially a contractual act, and that too is a question  
11 to be governed by the State statute of frauds.

12 MR. COHEN: Yes, I think whether the resulting  
13 contract fits the definition of a security is, of course,  
14 a question of Federal law.

15 QUESTION: Mr. Cohen, though, the Federal court  
16 determined what the State statute of frauds was in this  
17 case, and the Federal court determined that performance  
18 took this out of the statute?

19 MR. COHEN: Yes, as a matter of --

20 QUESTION: What if I disagree with that?

21 MR. COHEN: -- matter of State law.

22 QUESTION: I mean, it seems to me performance  
23 takes a contract out of the statute where you have a  
24 bilateral contract. I promise to do one thing, you  
25 promise to do another. One of us performs. The contract

1 is then out of the statute of frauds. But when you have  
2 something that is called a unilateral contract, if you do  
3 something -- you don't have to -- but if you do something,  
4 then I am obligated to do something else. And that's what  
5 you have here.

6 MR. COHEN: No.

7 QUESTION: If you did these things, you will  
8 have -- I will give you an option.

9 MR. COHEN: No.

10 QUESTION: You did the things, you got the  
11 option. That is what concluded the contract, and I would  
12 not hold it, if I were the State supreme court judge, that  
13 that statute was out of the State statute of frauds.

14 MR. COHEN: What we had was not a unilateral  
15 contract. It was a bilateral contract as the jury found.  
16 Wharf sold us an option on April 8 -- on October 8, 1992.

17 QUESTION: Were you obliged -- were you obliged  
18 to go out and do those acts which created the option for  
19 you?

20 MR. COHEN: Yes, we were.

21 QUESTION: Did you promise to do those acts?

22 MR. COHEN: Yes, we did. Yes, we did. But we  
23 also -- but we promised to do --

24 QUESTION: That contract was within the statute  
25 of frauds then, because there certainly wasn't any

1 performance of that.

2 MR. COHEN: Yes, there was. There was a  
3 performance of our contract to acquire an option by  
4 providing services that Wharf requested which included  
5 dispatching named people immediately to Hong Kong at our  
6 expense to serve as officers of Wharf Cable --

7 QUESTION: And you could have been sued if you  
8 didn't do that?

9 MR. COHEN: We could have been sued if we hadn't  
10 done that.

11 QUESTION: That is not an option. That promise  
12 is not a security. If you promise to do some act, and I,  
13 in exchange, promise that if you do the act I will give  
14 you an option -- that contract is not an option and is not  
15 therefore a security.

16 MR. COHEN: It wasn't an if. They granted --  
17 they entered into a contract -- this is a jury finding on  
18 a stipulated verdict forum -- they entered into a contract  
19 granting UIH an option. In that contract, granting us an  
20 option, we promised, and immediately did, pay for that  
21 option by providing required services. There was a  
22 completed actual sale here. That's what this trial was  
23 about for eleven weeks.

24 QUESTION: But it still turns on characterizing  
25 what was done here as going in never intending to perform,

1 and the concern that Justice Breyer expresses is that you  
2 could make that up. How do you distinguish between a  
3 garden-variety breach of contract where somebody doesn't  
4 perform and one where from day one there was no intent to  
5 perform?

6 MR. COHEN: You need to prove that at day one  
7 there was no intent to perform. You need to get past some  
8 -- motion to dismiss, to have concrete evidence of that,  
9 and there needs to be a completed contract -- completed  
10 sale -- in connection with it, which that  
11 misrepresentation is made.

12 QUESTION: Thank you, Mr. Cohen.

13 Mr. Roberts, we'll hear from you.

14 ORAL ARGUMENT OF MATTHEW D.ROBERTS

15 ON BEHALF OF THE UNITED STATES

16 AS AMICUS CURIAE SUPPORTING RESPONDENTS

17 MR. ROBERTS: Mr. Chief Justice, and may it  
18 please the Court:

19 When the seller of a stock option misrepresents  
20 its intention to permit the buyer to exercise the option,  
21 the seller violates Section 10(b). The text of Section  
22 10(b) prohibits the use of any manipulative or deceptive  
23 device in connection with --

24 QUESTION: The seller of an option?

25 MR. ROBERTS: The seller of the option.

40

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1 QUESTION: Would you rephrase that?

2 MR. ROBERTS: Which here is Wharf Cable -- sold  
3 the stock option which was the right to purchase -- excuse  
4 me.

5 QUESTION: It was not an agreement to be  
6 performed? Do you think the sale took place?

7 MR. ROBERTS: A sale took place. At the  
8 meeting, there was a contract, as was explained, the  
9 contract was an exchange of a promise to provide services  
10 for the sale of the option. The promise was performed --  
11

12 QUESTION: You say what happened was that Wharf  
13 said I give you an option today, and in return you must,  
14 in the future, perform certain services. Was that the  
15 agreement?

16 MR. ROBERTS: I sell you an option in exchange  
17 for your promise to perform services, and that there was  
18 performance, which would take that contract out of the  
19 statute of frauds.

20 QUESTION: And you think that the Respondent  
21 here could have been sued for breach of contract if the  
22 Respondent did not perform those services? I didn't read  
23 the transaction as really envisioning that.

24 MR. ROBERTS: Under the understanding that there  
25 was a sale for a promise, yes. You know, under the

1 understanding there was a sale for services.

2 QUESTION: Yes, that would follow, but you think  
3 that that was the reality? That the Respondent could have  
4 been sued if it didn't send those people over to do the  
5 work that was -- you see, I viewed it as much more of a  
6 unilateral contract. If you send the people over, you'll  
7 have an option.

8 MR. ROBERTS: I don't think it makes any  
9 difference, Your Honor.

10 QUESTION: I think it does for the statute of  
11 fraud purpose.

12 MR. ROBERTS: Well, there was performance of the  
13 promise which would take it out of the statute of frauds.  
14 Even if it is was a contract that was unilateral, the  
15 performance of the services would take it out of the  
16 statute of frauds as well, and once the option was  
17 purchased, the option was a security, and the  
18 misrepresentation of the intention to permit the exercise  
19 of the option was a misrepresentation.

20 QUESTION: Well, I think it is important, and  
21 you agree with the counsel for the Respondent that this  
22 was a bilateral contract in which they could have been  
23 sued if they did not provide the necessary services, and  
24 those services were sufficiently specific to have a  
25 contract that was not illusory in the trial courts, and

1 the jury so found?

2 MR. ROBERTS: What the jury found was that they  
3 entered into a contract selling them an option for -- to  
4 purchase ten percent of the stock. I don't recall right  
5 at the moment -- I don't have it in front of me -- that  
6 finding. I'm not sure whether it said in exchange for the  
7 promise or not in the specific language of that finding,  
8 but the finding was on page E21.

9 QUESTION: I think the concern, Mr. Roberts, is  
10 that we not sweep in under the Securities Act a lot of  
11 breach of contract suits.

12 MR. ROBERTS: Yes, Your Honor, and you don't do  
13 that, because in order for there to be a 10(b)(5)  
14 violation, there must be a misrepresentation. There has  
15 to be a fraud, not just a breach of contract.

16 QUESTION: That was exactly why I asked.

17 QUESTION: Yes, it's easily --

18 QUESTION: That's why I asked -- it seems like  
19 the simplest thing in the world, look, this will come up  
20 in families. No brokers, no securities, Uncle Joe  
21 promised to lend me -- to give me securities if I would  
22 take care of him for a year or two, which I did. Okay,  
23 we've got your option. And you say, oh, well, but what  
24 about the misrepresentation? Well, if Uncle Joe is alive.  
25 Look -- he's defending the case, isn't he? And therefore

1 if you believe that he made the oral statement, why didn't  
2 he carry it out? So he's here defending it, so he must  
3 have intended not to carry it out. Now, maybe that isn't  
4 totally sufficient, but you'd be well along the way.

5 MR. ROBERTS: It's not sufficient, Your Honor.  
6 Just as it's easy to allege, it's very hard to prove. In  
7 order to avoid dismissal under the Private Litigation  
8 Securities Reform Act, the plaintiff has to allege with  
9 particularity facts that give rise to a belief that there  
10 was misrepresentation --

11 QUESTION: He is here -- he is here defending  
12 the case which proves he never intended from day one to  
13 follow his oral thing and, besides, I remember his saying  
14 that once.

15 MR. ROBERTS: That would be insufficient to meet  
16 that burden, Your Honor. The fact that he's defending a  
17 suit, obviously, would be insufficient. And the  
18 plaintiff's own testimony about what he thought the  
19 defendant's intention was does not prove the state of the  
20 defendant's mind, nor does the fact that the defendant  
21 failed to perform prove anything more than a breach of  
22 contract. The restatement makes that clear -- that same  
23 principle would apply. Failure to perform alone is not  
24 sufficient. There has to be additional evidence, and  
25 there was additional evidence in this case -- both

1 testimonial and documentary evidence -- that there was no  
2 intention to perform at the time.

3 In addition, it's important to understand that -  
4 - it's important to cover oral contracts such as these  
5 because many contracts for the purchase of securities are  
6 oral, such as when customers contract with their brokers  
7 over the telephone to buy stock. And oral contracts for  
8 the sale of securities are generally enforceable under the  
9 law of all fifty States. In addition to that, the Act  
10 does not require that there be a writing to make someone a  
11 purchaser or a seller of a security. The Act provides  
12 that the options are securities, and the Act also provides  
13 that a purchase includes any contract purchase.

14 QUESTION: Do you agree that the statute, in  
15 effect, looks to State law on the question of statute of  
16 frauds issues?

17 MR. ROBERTS: No, I don't, Your Honor. I think  
18 the statute of frauds is irrelevant to a violation of  
19 Section 10(b). The statute of frauds is a --

20 QUESTION: So there is either a standard implied  
21 in the statute itself, or there is no -- a requirement  
22 implied in the statute itself, or there is no requirement,  
23 period.

24 MR. ROBERTS: There is no requirement. Even  
25 under common law, the traditional rule is that fraud in

1 inducing a contract is actionable, even if the contract is  
2 unenforceable under the statute of frauds. The same  
3 principle applies to Section 10(b), as well, and --

4 QUESTION: Whether or not something is a  
5 contract -- does that depend on State law?

6 MR. ROBERTS: Whether something -- no, a  
7 contract is a Federal term in the statute; it is a Federal  
8 question, I think whether it's a contract --

9 QUESTION: Is there a court authority for that?

10 MR. ROBERTS: There's court authority for the  
11 fact that purchasers -- parties to an oral contract to  
12 purchase are purchasers of securities.

13 QUESTION: They say notwithstanding State law?

14 MR. ROBERTS: Notwithstanding State law?

15 QUESTION: State contract law, not statute of  
16 frauds.

17 MR. ROBERTS: No, they don't specifically  
18 address notwithstanding State law, but in the court of  
19 appeals case that comes to mind, the Threadgill case from  
20 the D.C. Circuit, the district court had said that there  
21 was no purchase or sale because the contract had not been  
22 performed, fully performed, and the court of appeals  
23 reversed and said that the Act defines contract to include  
24 -- the Act defines purchase, excuse me, to include any  
25 contract to purchase.

1           QUESTION: Yes, but that leaves open the  
2 question of what a contract is. And don't we look to  
3 State law to determine what that contract is?

4           MR. ROBERTS: I don't think so, Your Honor. It  
5 wouldn't serve the purposes of the Securities Act for --

6           QUESTION: Well, it would open the doors of the  
7 Securities Act, presumably, to claims that State law would  
8 not recognize and that in itself might be a good reason,  
9 if we knew nothing else, to say that the question of  
10 contractual formation is a State law question.

11          MR. ROBERTS: First, you don't have to address  
12 that issue here because there is a --

13          QUESTION: Well, but we may -- we may get very  
14 close to it if we have to address what the source of any  
15 writing requirement or the dispensation of any writing  
16 requirement is. And if we look to State law on that,  
17 presumably it would be odd if we didn't look to State law  
18 as well for what a contract is.

19          MR. ROBERTS: I don't think that you should look  
20 to State law for any of these questions, Your Honor. It's  
21 a question of --

22          QUESTION: How old do you have to be to buy a  
23 security? You mean we can adopt a Federal rule that  
24 sixteen-year-olds can buy securities?

25          MR. ROBERTS: If there's fraud --

1                   QUESTION: Surely that's a question of State  
2 law, isn't it?

3                   MR. ROBERTS: Whether it's a sale under State  
4 law is a question of State law, whether it's a sale for  
5 purposes of the Securities Act is a question of Federal  
6 law. And it wouldn't serve the purposes of Section 10(b)  
7 to hold that because there isn't a sale that's enforceable  
8 under State law --

9                   QUESTION: But to say it wouldn't serve the  
10 purposes of Section 10(b) isn't the final answer on a case  
11 like this. Congress legislates with a background of what  
12 has been decided under State law, and what is a matter of  
13 Federal law.

14                   MR. ROBERTS: Yes, Your Honor, Congress does.  
15 But Congress simply used the term contract in the  
16 definition of purchase to include any contract, and used  
17 the term contract, and that was commonly understood at  
18 that time, if I may issue that answer.

19                   QUESTION: No, you may not. Thank you, Mr.  
20 Roberts.

21                   (Laughter)

22                   MR. ROBERTS: Sorry. Thank you.

23                   CHIEF JUSTICE REHNQUIST: The case is submitted.

24                   (Whereupon, at 11:03 a.m., the case in the  
25 above-entitled matter was submitted.)