In the

Supreme Court of the United States

RELIANCE ELECTRIC COMPANY,

Petitioner,

vs.

EMERSON ELECTRIC COMPANY,

Respondent.

No. 70-79

Washington, D. C.
November 10, 1971
November 11, 1971

Pages 1 thru 62

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

RELIANCE ELECTRIC COMPANY,

Petitioner,

v. No. 70-79

EMERSON ELECTRIC COMPANY,

Respondent.

Washington, D. C.,

Wednesday, November 10, 1971.

The above-entitled matter came on for argument at 2:03 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

THOMAS P. MULLIGAN, ESQ., 1750 Union Commerce Building, Cleveland, Ohio 44115, for the Petitioner.

WALTER P. NORTH, ESQ., Associate General Counsel, Securities and Exchange Commission, Washington, D. C. 20549, as amicus curiae, supporting petitioner.

ALBERT E. JENNER, JR., ESQ., 135 South LaSalle Street, Chicago, Illinois 60603, for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 79, Reliance Electric Company against Emerson Electric Company.

Mr. Mulligan, you may proceed.

ORAL ARGUMENT OF THOMAS P. MULLIGAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MULLIGAN: Mr. Chief Justice, and may it please the Court:

This case brings before the Court a question involving Section 16(b) of the Securities Exchange Act of 1934, which relates to short-swing sales transactions involving directors, officers, and 10 percent holders.

We are concerned here with the position of Emerson Electric Company, the respondent, who was what has been described as a beneficial owner under the statute in that it was at the times that are relevant, in our consideration of this question, more than a 10 percent holder of the common stock of Dodge Manufacturing Company, which was subsequently merged into Reliance Electric Company, the petitioner herein.

Section 16(b) of the Securities Exchange Act of 1934 is set out on page 2 of our brief, and provides that: For the purpose of preventing the unfair use of information which may have been obtained by a beneficial owner or director or officer, by reason of his relationship with the issuer, that any

profit realized by him from the purchase and sale or sale and purchase within a period of six months shall be recoverable by the issuer.

There is in 16(b) an exemption which provides, and it is of significance in this case, that the subsection shall not be construed to cover any transaction where the beneficial owner or the officer or director was not such, both at the time of the purchase and at the sale, or the sale and purchase, of the security involved.

This action comes before the Court by reason of a declaratory judgment which was initially filed by Emerson against Reliance, asking for a declaration of its rights and obligations under Section 16(b) by reason of its, that is Emerson's ownership of more than 10 percent of the stock of Dodge.

Briefly, the relevant facts disclose that on June 16th, 1967, pursuant to a tender offer, Emerson purchased 152,282 shares of Dodge stock at $63 a share, pursuant to a tender offer. And by that purchase became the owner of approximately 13.2 percent of Dodge's outstanding stock, and therefore, in our view, within the purview of the Act.

Q Mr. Mulligan, is there any suggestion anywhere here that upon or after this acquisition through tender, Emerson in fact possessed any insider information?

MR. MULLIGAN: There is no information one way or

the other in the record, Your Honor, as to whether they did or did not. It is our view, as I will touch on more fully later, that within the purview of the statute, once they become an insider by reason of the acquisition of more than 10 percent, they are presumed, and irrebutably presumed, to have inside information and to have the opportunity to exploit that inside information in whatever way they see fit.

Q That's the purport of the statute?

MR. MULLIGAN: Yes, Your Honor.

Now, at the time that Emerson made its purchase, and prior thereto, it knew two things. It knew, first of all, that Dodge and Reliance had entered into a merger agreement. It also knew that its own management had authorized the submission of a merger proposal to Dodge. This latter fact, however, was not known on June 16th when Emerson made its purchase by the shareholders of Dodge, nor by the public generally, and it was not known until after Dodge -- after Emerson had purchase the Dodge stock and indicated that it was going to solicit proxies to oppose the merger between Reliance and Dodge which matter was to come before a shareholder's meeting of Dodge on August 22nd, 1967.

Within a few days after Dodge, or Emerson had acquired its 13.2 percent of Dodge, it received a letter from its counsel, dated June 26, 1967, in which he outlined alternatives to a proxy fight with Dodge. And principally, he

told them how he thought they could go about avoiding profit on the disposition of their holdings in Dodge, principally by a defensive plan which would involve selling just enough of the stock to be below 10 percent, and then the disposition of the balance so as to avoid the impact of 16(b) and preserve the profit on the second sale.

Now, in point of fact, in the proxy fight that did ensue, Emerson lost and Dodge was merged into Reliance.

Immediately upon the completion of the meeting at which the shareholders of Dodge approved the merger, August 22nd, immediately thereafter Emerson undertook the deliberate, intentional disposition of its stock as rapidly as it could, pursuant to the plan which had been outlined by its attorney a couple of months before.

On August 28, 1967, in a sale to Goldman, Sachs and Company, it disposed of 37,000 shares of Dodge stock, which had the effect of reducing its holdings in Dodge to just below 10 percent, 9.96 to be exact.

And almost simultaneously with that disposition it entered into negotiations whereby it sold the remaining 9.96 shares to Dodge, which sale was completed in early September of 1967. Both of these transactions involved sales at an amount considerably in excess of what Emerson had paid for the stock; so that the net result of what Emerson had done, pursuant to a plan which had been in its mind while it was an insider, was

the disposition of its entire holdings in Dodge at -- within, as I said, three months -- at a gross profit, including dividends that were declared, of in excess of $900,000.

Q Mr. Mulligan, you said that "it" entered into negotiations with Dodge. Let me get the implications of that statement. Am I mistaken in my impression that it was Dodge that approached Emerson?

MR. MULLIGAN: You are absolutely correct, Mr. Justice. And what I meant to say was that negotiations did go forward. But you are absolutely correct. They were initiated, indeed, by Reliance on behalf of Dodge, and those negotiations did result in this sale.

The negotiations, however, which took place were precisely of a nature which counsel for Emerson had anticipated because, in his letter advising Emerson as to this defensive plan, he had contemplated the very thing that did happen and suggested that it might be one of the ways of doing it, and he issued some precautionary instructions with respect thereto.

Q I suppose it's a natural thing to get rid of that stock after it lost the battle for Dodge, isn't it?

MR. MULLIGAN: Well, I'm sure it was a natural thing for them to want to get rid of it at a profit as soon as they could; and that's precisely what they did. And it is our position that having undertaken the position of becoming a

statutory fiduciary, which is what this law does, that they were not free to dispose of that stock within the period of six months and keep the profit, where they did it pursuant to a plan made at a time when they were an insider.

And, indeed, --

Q Do you make a distinction between a decision and a plan, where you juxtapose the two statements, the Eighth Circuit's evaluation against the statement in the brief, I am not sure I see these two necessarily in such complete conflict as you do.

MR. MULLIGAN: It would appear to us, Your Honor, that what they did was to draw up a plan which they then decided, as soon as it was obvious that they and not -- that they had lost and had not won the merger --

Q You say draw up a plan, you mean they drew up something in writing?

MR. MULLIGAN: No, Your Honor. I think this was totally within their own mind. This was --

Q Well, then it isn't drawing up a plan, is it?

MR. MULLIGAN: It is drawing up in the sense that what they in fact did was precisely what the lawyer had suggested to them in what I would call the defensive plan, as an alternative to a proxy contest. And so that when they sold they were in effect carrying out what had been planned as an alternative defensive way of avoiding the impact of Section

16(b) and thus keeping substantially all of the profit on the sale of the Dodge stock.

And, indeed, in the trial in the District Court, based upon the evidence that was before him, he made certain findings of fact which are in the record and which are of significance. He found, first of all, that while it was a beneficial owner, Emerson determined to dispose of its entire holdings so as to avoid Section 16(b) to the extent possible with respect to the profits that would be realized on such disposition.

He held secondly, and this is a very significant one, that the first sale which Dodge -- which Emerson made of 37,000 shares to Goldman,Sachs, was motivated solely by Emerson's desire to reduce its holdings under 10 percent immediately prior to disposing of the balance.

And finally he said that -- his finding was that these two sales were related parts of a single plan of disposition, the substance of which, overlooking the form, was to dispose of Emerson's entire holdings. And, as a consequence, he held that the second sale of 115,282 shares also fell within the Act and was not immune from the Act by reason of the exemptive provisions to which I made reference a moment ago.

Q So that Judge Regan's finding,then, was directly opposed to advice of counsel, both for Reliance and for Emerson?

Or his conclusion.

MR. MULLIGAN: His ultimate legal conclusion --

Q The conclusion.

MR. MULLIGAN: Yes, Your Honor. The conclusion which he reached, based on these findings which he made, was contrary to the opinion of Emerson, and it was contrary to a concurrence by Reliance with this exception, Your Honor, that in every instance so far as I am aware, in which Reliance had concurred in that opinion, it reserved the right to take whatever view was necessary if shareholders raised any question, and if any further developments in the law or the facts should dictate otherwise.

And in point of fact, we do have a very significant change in the facts, which was not known to Reliance at the time it expressed the views to which you make reference, in that it had no knowledge of the letter of Emerson's counsel and therefore no knowledge of the plan, as I call it, of disposition arrived at while Emerson was an insider.

The Eighth Circuit, on --

Q I don't think Judge Regan used the term "plan" anywhere, did he, or did he? I noticed the one in the quoted material, you -- oh, that's the Eighth Circuit, "it determined"; it's the Eighth Circuit that you've used this term "determined" rather than "plan".

MR. MULLIGAN: Yes, Your Honor. I'm on page 164 of

the record. Judge Regan, in his opinion, said: Looking through form to discern substance, we hold that in truth and in fact the two sale transactions were related parts of a single plan devised by Emerson to dispose of all of its Dodge stock, and so on.

Now, when the case got to the Eighth Circuit on an interlocutory appeal by Emerson, the fact is that the Eighth Circuit accepted the findings of fact by the District Court, but held that: notwithstanding that acceptance of those facts, it was compelled to hold, as a matter of law, that Section 16(b) did not apply to the second sale because, having reduced its holdings to 9.96, it was then free to do what it wished.

And in our view what the problem that the appellate court had was in feeling that it was obligated to restrict its view of the case to ordinary commercial concepts without a clear and full recognition of the prophylactic effect that this statute was intended to have, and without a full appreciation of the liberality of interpretation which was necessary in order to effectuate the purposes of this statute.

It was for that reason that we asked this Court, by way of a petition for certiorari, to review the Eighth Circuit's approval of a technique which, it seems to us, permits an insider, at a time when he is an insider under the statute, to shape his transactions so as to insulate from recovery a substantial portion of the profits which he has realized on

purchases and sales within the six-month period.

Q I don't recall the dates, Mr. Mulligan. How much longer would they have had to wait to get out from under your view of the statute?

MR. MULLIGAN: A little over three months, Your Honor. They did -- their transactions were accomplished in less than three months; the statutory period is six months.

Now, the interesting thing in analyzing the Eighth Circuit's opinion is that it appears that the Eighth Circuit had no difficulty at all in holding that Emerson was liable with respect to its first sale. And the clear thrust of the Eighth Circuit's opinion is that if Emerson had sold the entire 13.2 percent of its holdings at one time, there would have been 16(b) liability and Reliance would have had a right to recover all of the profit.

The difficulty that the Eighth Circuit had was handling the problem of what you do where they divided up to accomplish exactly the same result, but in two sales followed in rapid succession.

Q That often happens in the application of the taxing statutes, doesn't it?

MR. MULLIGAN: I understand --

Q Where two different ways of doing the same thing will produce very, vexy different results.

MR. MULLIGAN: Yes, Your Honor. And in situations

where it appears to the Court that the sole purpose of steps taken by a taxpayer was simply tax avoidance, having no real business purposes. It is my understanding, and this is illustrated especially by this Court's decision in Gregory vs. Helvering, that the Court will look through the form and get to the substance of the transaction, and if the substance doesn't have any real meaning other than tax avoidance, then the Court will not permit the taxpayer to accomplish what he set out to do.

And, similarly, here --

Q Yet, I suppose, in a capital gain or loss situation, purposeful waiting beyond the six-month period results in tax savings, rather --

MR. MULLIGAN: Yes, Your Honor.

Q -- than if you sell it two days before. The purpose is there.

MR. MULLIGAN: No question about it. And in this case, had Emerson waited six months, the same purposeful waiting would have given them immunity.

It is -- the problem as we see it here is that what Emerson did was to make a decision at a time when Congress, by law, said, You are a statutory fiduciary; you are presumed to have inside information; you are not permitted to show that you were innocent and didn't have it. And therefore, when you, Emerson, made a decision, at a time when there is a presumption

of inside knowledge, it is fair to assume that that decision made by Emerson under those circumstances was one dictated by the accessibility of inside information to it, and therefore it, Emerson, was exploiting an opportunity not available to outsiders, but available only to it by reason of its insider status.

Q Incidentally, is Dodge stock listed or not?

MR. MULLIGAN: Dodge has since been merged into Reliance, and it is --

Q Well, was it listed at the time?

MR. MULLIGAN: Oh, yes, it was at the time, yes, Your Honor.

Q I suppose that Emerson wasn't in a position to take an indemnity from Dodge, in case it got stuck for this profit?

MR. MULLIGAN: I don't know whether it was or not, Your Honor. I know that there was no such discussion between the parties.

Now, the point I was making, Your Honors, was that if Emerson had sold the entire amount in one sale, it would have been caught for the profit. And this is because, when you review the legislative history of this Act, it is obvious that what Congress was aiming at were abuses by directors, by officers, and by shareholders, who were profiting in the short-swing speculative trading through inside information or through

manipulative practices.

And the courts, in construing Section 16(b), have recognized this congressional purpose, and the language of the courts indicates that Section 16(b) is to be construed liberally in favor of the corporation, the issuer that is, and strictly against the shareholder, Emerson in this case.

The courts have used such language as thorough-going, that all profit shall be squeezed out of the transaction, that the purpose of the law is to set up standards so high as to avoid any sort of conflict between the selfish interests of the insider and the faithful performance of his duties.

Q What would be your view, Mr. Mulligan, if the record showed that a sale of this 9.96, the bulk of these securities, was made six months and one day rather than approximately three months, and that this was pursuant to a resolution of the board of directors to sell it within 24 hours after the six-month period had expired?

MR. MULLIGAN: I wouldn't have the slightest difficulty, Mr. Chief Justice, in holding that they had met the statutory requirement of holding it for six months, and they would be immune.

Q But is there really all that much difference between that kind of predetermined plan, decision, on six months and one day, and cutting the holdings down to something less than ten percent?

MR. MULLIGAN: Well, --

Q Isn't each one of them an avoidance of the impact of the statute, or at least the motivation -- we don't know whether the result is; the motivation in each case is to avoid the impact of the statute, isn't it?

MR. MULLIGAN: Well -- yes, it could be. In each case it could be. Except that in the case of the person who waits six months and one day, he is complying with what the statute has set up, he is permitted to do that.

Q Even though he has actual inside information?

MR. MULLIGAN: Yes, indeed. No matter what information he has, if he waits that period of time, that's the period of time Congress has set. Just as he can buy nine percent of the stock and preclude himself from being an insider.

But in the case of the person who, while he is an insider, decides what he's going to do within the six-month period in order to circumvent that requirement, that requirement being the requirement or the intention of Congress and the courts to avoid permitting insiders to speculate within the six-month period; when he makes a decision during that period, it is fair for the court to say, He has made that decision on the basis of inside information, he is therefore taking advantage of that position, and he has an advantage over outsiders.

The whole purpose of the --

Q Isn't that equally true of the six-months-and-one-day sale?

MR. MULLIGAN: Only because Congress has said that that's what he can do.

Q But Congress has also said 10 percent, not 9.6.

MR. MULLIGAN: Yes, Your Honor.

But the difficulty I have, as I say, is that he can buy up to 9.6 and prevent himself from coming under the statute. But that once he comes under the statute, and if you assume, as we must, that he then has inside information, and you don't hold him to the second sale, you are thereby, it seems to us, as Emerson did here, you are creating a loophole in the statute. You are creating or approving is a better word, not creating; you are approving a method by which the insider, within the period which Congress has said it does not want short-swing speculation, you are approving a device by which he can so structure his transaction that he is able to maximize the profit and keep it.

Q But when he gets below ten percent he's no longer an insider.

MR. MULLIGAN: He is --

Q Is that right?

MR.MULLIGAN: It is our view, Your Honor, that anybody -- that an insider who makes this determination while he is an insider to dispose of his stock in two sales is pre-

sumed to have arrived at that decision by reason of information which is available to him and not to others, and when he --

Q Yes, he made -- he did all of his planning and all of his conspiring, I'd even say to everything else, but when he acted he couldn't be violating the statute because he was not an insider.

MR. MULLIGAN: Well, this turns on --

Q Because of four-tenths of one percent.

MR. MULLIGAN: But this turns --

Q But he still wasn't an insider at the time he did it.

MR. MULLIGAN: Mr. Justice, I would respond to that by saying that I think this Court, just as the District Court did, is perfectly -- in a perfect position within the decisions that have been decided under the Securities Act, to determine that the word "sale" under Section 16(b) includes all related transactions pursuant to a plan which was predetermined at a time when the man was an insider; and that you don't have to put on blinders and look at each segment of his disposition, that you can fairly say, even though he has divided these in two, I will hold, as a matter of law, that a sale --

Q But aren't you rewriting something?

MR. MULLIGAN: I don't believe so, Your Honor. And in any event there are the additional words in the statute which say "at the time of sale", he must be a 10 percent owner

at the time of sale. And you get the problem of what do the words "at the time of" mean.

Q When it's sold.

MR. MULLIGAN: But I think the --

Q To me it means when it's sold.

MR. MULLIGAN: Judge Regan held that"at the time of" means the time involved in the disposition pursuant to a plan which he conceived --

Q Well, when would he pay his income taxes on it? When he made up his mind to sell it or when he sold it?

MR. MULLIGAN: No, he would -- when he sold it.

Q Well, that's what I thought.

MR. MULLIGAN: Yes. What you need and what we have here is an intention to do something, made while an insider, and the actual carrying out or execution of that program while an insider, and having --

Q Mr. Mulligan, you use the term "putting on blinders", aren't you willing to put the blinders on, though, once the six-month period has expired?

MR. MULLIGAN: No, I wouldn't call it putting blinders on, Your Honor, I would say tht somebody who has done that has complied with the spirit of the -- the actual literal wording of the statute and the spirit of the statute. When a man does what has been done here, it seems to us that he may well arguably have complied with the literal wording of the statute,

but he has not complied with the spirit of the statute, because the spirit of the statute requires that it be thorough-going and squeeze out profits. And yet this technique permits a man, while he has insider information, to determine, on the basis of that information, that it's wise for him to get out. But instead of getting out in one sale, he divides it so that he insulates from recovery a substantial -- and this can be done in every case, in every case where you have a person owning over 10 percent; if the ruling of the Eighth Circuit is affirmed, it would mean that in every single case from now on, insiders can, in our view, circumvent the spirit --

Q Once they get below the ten percent.

MR. MULLIGAN: Yes, Your Honor, they can.

Q As I see the statute, it has two provisions; one is a six-month provision and the other is the 10 percent provision. And as I get your argument, you are feeling yourself bound by the time provision, but not by the 10 percent provision.

MR. MULLIGAN: There can be questions of fact with respect to the time provision, too. That is, there may well be a question in a particular case as to when the time starts to run. That is, when did the purchase occur? Or when did the sale occur? And if that sort of a question came up, I would assume that the Court would liberally construe it in favor of trying to bring this transaction within the ambit of the law.

Similarly here, it would seem to me, that where the word "sale" -- this Court has said that you don't have to construe words in the Securities law in the ordinary commercial sense, but you may construe them in such a way as to effectuate the purposes of the Act.

We submit, Your Honors, that to effectuate the broad purposes of Section 16(b) it certainly requires that 16(b) apply here.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Mulligan.

Mr. North.

ORAL ARGUMENT OF WALTER P. NORTH, ESQ.,

ON BEHALF OF S.E.C. AS AMICUS CURIAE

MR. NORTH: Mr. Chief Justice, and may it please the Court:

The Commission is appreciative of the opportunity to participate in today's oral argument, even though it's only in the case on an amicus basis. And one reason why we feel that way, particularly in this case, is because while we agree with the result for which the petitioner argues, we would put it on a little different ground than at least the one that most of the oral argument has been devoted to, though I think the petitioner also agrees with our somewhat broader view of it.

Q Well, how about the other way around?

MR. NORTH: How's that?

Q How about the other way around? Do you accept

his interpretation?

MR. NORTH: We agree --

Q His accuracy.

MR. NORTH: We agree that his interpretation is one method of disposing of this case, in his favor. In other words, his client would get the same 600 or 700 thousand dollars, no matter which theory is decided on.

Q I gather the Commission thinks that the better interpretation is either the voluntary purchase that's made or if he disposes of it all within six months; in either one he's within 16(b)? Is that it?

MR. NORTH: That's right. And we --

Q Is that broader than what petitioner has been urging?

MR. NORTH: It is. It is. Well, we don't --

Q Do you say it shouldn't go that far?

MR. NORTH: Well, we don't think the case ought to turn on the question of whether or not there is an advance scheme which ties these two separate sales all into one or not. The claimant --

Q You mean that would open up the whole business of suggestive intention of the --

MR. NORTH: That, plus the fact that from then on you'd never have another case that had this kind of facts. The general counsel wouldn't write the company a letter and

propose that you cook up this kind of a scheme. And that will never occur again, if you decide it on that ground.

In other words, the Commission feels that the case ought to be decided on the broader grounds, that a --

Q Which of the two do you prefer, or do you care?

MR. NORTH: How's that?

Q Which of the two interpretations that you proffer is the better, do you think?

MR. NORTH: We feel, just as the questions from the Chief Justice indicate, that there are some weaknesses in putting it on the ground of whether there was a scheme or a plan or not, because that might fit in with some other arguments about whether the six months was better.

Q Yes, but you propose two different and better, you think. And Mr. Justice Brennan's question is which one of those do you think is the preferable?

MR. NORTH: We --

Q The voluntary purchase or the all sales within six months; which?

MR. NORTH: I'm not quite sure that I understand the difference between that and --

Q Well, maybe I don't understand it.

MR. NORTH: Well, we --

Q Don't you have two? You have one at page 29, "not intended to preclude liability for profits made on trans-

actions within a six-month period by a 10 percent beneficial owner who acquires such status by a voluntary purchase".

MR. NORTH: Yes.

Q Is that any different from your next one, at page 34, is it? "The language in the exemptive provision may properly be construed as not excluding any sale transactions effected within six months after a purchase by which a person becomes a 10 percent beneficial owner".

Are they the same thing?

MR. NORTH: Those are both subheadings under our general proposition that neither the purpose nor the language of the section warrants excluding transactions such as this from the operation of the statute.

Now, as we -- those are part and parcel of our over-all argument to the effect.

Q Yes, but they are certainly -- they are quite separate, aren't they, really? Two separate reasons for saying that the exemption doesn't apply.

MR. NORTH: No, I wouldn't think so, Your Honor.

In the first place, we're pointing out that the exemption provision was not intended to preclude liability for profits made on transactions within a six-month period by a 10 percent beneficial owner, who acquires such status by voluntary purchase.

Then, the other, it seems to me, follows along as a

part of the same argument, namely, that the language in the exemptive provision doesn't run contrary to that.

Q I know, but if you're right in that first part, that the exemption provision applies only in cases where there hasn't been a voluntary purchase, which brings him up to 10 percent, you don't need ever to go -- you don't need to go any further and get into any other argument at all.

MR. NORTH: Mr. Justice --

Q And your second -- your second reason would apply however he acquired the stock.

MR. NORTH: I think, Mr. Justice White, the difference is this: that we feel that the purpose of Congress in putting in this provision about the "at the time of both the purchase and the sale", that the purpose for putting that in there was to protect against liability in involuntary situations.

In other words, if a man already owns 8 percent, and then he inherits or is made a present of another 3 or 4 percent, he hasn't become a 10 percent owner by virtue of purchase.

Q We understand that.

MR. NORTH: How's that?

Q I understand that, and that's as far as you need to go with the case. As soon as someone has gotten to be a 10 percent owner by purchase, that's the -- the exemption provision is out the window. That's your position?

MR. NORTH: That's right. But then we say that the thing you should match that against is not just one stage of a two or three or four-stage sales transaction, all you --

Q You don't even need to say that. You don't even need to get to that.

MR. NORTH: Well, assuming that all of his acquisitions are by purchase, then you do have to get to that.

Q All right.

MR. NORTH: The only time you don't get to that is when his acquisitions are by some means other than a purchase. Otherwise you've got to analyze the sale end of the transaction to determine whether or not there is liability.

Q Well, now, let's see if I get this. Is it the Commission's view that once he has acquired enough to make him a 10 percent holder by voluntary purchase, then any of that which he sells within six months is subject to 16(b)?

MR. NORTH: That's right.

Q Well, then, why do we have to go beyond that? As I understand your position, once we've decided that this was acquired by voluntary purchase, then any part of it that he sells within six months brings him within 16(b). Is that right?

MR. NORTH: That's right. Sure, that's right.

Q Then do we have to go beyond that? That inquiry?

MR. NORTH: The only reason we mention or make any

point about involuntary acquisition is to show what we think was the congressional reason for putting that provision in there about the "at the time of both the purchase and the sale".

In other words, we think that the so-called exemptive language, or the provision that says it shan't apply except under the conditions set forth, we think that that provision was put in there for purposes of protecting against involuntary situations and shouldn't be construed so narrowly as to permit a two-step or three-step or four-step sale, all of which steps occur within six months, regardless of whether it was with respect to a predetermined plan or wasn't with respect to a predetermined plan.

And we don't believe that that does any violence to the language of the statute.

Now, the respondent continually insists on saying that that doesn't comport with the literal language of the statute. But, as we all know, in situations of this kind, the literal language of the statute isn't necessarily the controlling factor; in fact, it's generally not the controlling factor.

Q I thought that the --

MR. NORTH: The controlling factor is within Congress.

Q -- cases generally, most of them in the Second Circuit, but there are cases elsewhere, had stood pretty much for the offset interest in this statute. The literal language of the statute was controlling, that the statute is a blunt

instrument, if you will, and if the period of holding is five months and 29 days, it's applicable; if it's six months and one day, it's inapplicable. If the percent held is 9.9 percent, it's inapplicable; if it's 10.1 percent, it's applicable. The literal provisions of the statute are what are controlling in the case. That's what I understood the precedents pretty much to stand for.

I don't mean in this case, I mean in past precedents in this area.

MR. NORTH: It certainly could --

Q Am I right about that?

MR. NORTH: It's certainly true that it's been said time and again that the whole 16(b) concept is one that has arbitrary limitations, and has a mechanical or mechanistic application of hard-and-fast rules. But in determining whether there has been a purchase or there has been a sale, the aspects of the thing that are subject to interpretation, as against the arbitrary limitations, the Court has said repeatedly this is a remedial statute, this should be broadly and literally construed to accomplish the purposes that Congress had in mind, namely, to prevent the types of abuses that arise in connection with short-swing sales by insiders.

And we --

Q Well, there's sometimes been litigation over whether something was a purchase, i.e., an exchange, and so on.

MR. NORTH: That's right.

Q And as that language has been used perhaps in that connection, or whether something was a sale.

MR. NORTH: That's right.

Q But with respect to its basic provisions, haven't the cases pretty well told us -- pretty well stood for the proposition along the lines I said, that this is not a refined instrument, and that we don't look to actual motivation, that's completely irrelevant.

MR. NORTH: That's right.

Q That it's just a mechanical, blunt instrument, if you will.

MR. NORTH: That is true. But, as Your Honor said in writing the Ferraiolo opinion, in the Sixth Circuit, the standards that seem to emerge from the decided cases are to this effect, and I'm quoting from that opinion: "Every transaction which can reasonably be defined as a purchase will be so defined if the transaction is of a kind which can possibly lend itself to the speculation encompassed by Section 16(b)."

And by the same token, the courts have arrived at a decision as to whether or not there was a purchase or a sale on that kind of a test, with the result that they sometimes call a particular transaction a purchase or a sale and then in another case, the identical type of transaction is not

called a purchase or a sale.

Now, to me, it's impossible to say that you're going by the literal language of the statute, and sometimes you reach one result and sometimes you reach another on exactly the same kind of transaction. The whole thing, to me, is in terms of: are you accomplishing the intent of Congress in adopting this broadly remedial statute, unless you call it either a purchase or a sale, or refuse to call it a purchase or a sale.

Q Well, let's see, Mr. North. I gather -- are you saying this, that the exemption provision does not apply at all where the acquisition is voluntary purchase? And for that reason you don't have to worry about the language "both at the time of the purchase and the sale", if you're right about that. Is that correct?

MR. NORTH: I think that's right.

Q But is your second argument, at page 34, on the premise that maybe you're wrong about that, and that the exemption does also apply to voluntary purchases, to which your then answer is that so long as he was a 10 percent beneficial owner at any time during the period in which the sale transactions occur, then he's subject to 16(b)?

MR. NORTH: That's right. From previous --

Q And that's now a tentative argument, is that it?

MR. NORTH: No. No. From page 34 on, we are arguing what is our constructionof the exemptive language of the

statute, namely --

Q If it reaches voluntary purchase.

MR. NORTH: That's right. If the purchases are voluntary.

Q The first one is it doesn't reach voluntary purchases; that's your first argument?

MR. NORTH: No. The exempted provision was not intended to --

Q No, no, no. Wait a minute. Let's get back. The argument that you're making at page 29 --

MR. NORTH: Yes.

Q -- is that the exemptive provision does not reach voluntary purchase, isn't it?

MR. NORTH: No.

Q You needn't even consider the exemption provision at all if there has been a voluntary purchase. Just forget about it from then on.

MR. NORTH: No, that's not --

Q Not at all.

MR. NORTH: That's not the position. We're saying that assuming you've got a voluntary purchase and not an acquisition that isn't by way of purchase, on the one end, the purchase end, then on the sale end any sales within six months should be considered as a single sale transaction, even though it's done in step stages.

But you've still got to have sales within six months of that purchase or you're not going to have any 16(b) liability in the first place.

Q Well, as Justice Stewart suggested, there are, of necessity, a lot of arbitrary things in a statute like this. These problems would arise where the reality exists, where a man acquires more than 10 percent by inheritance, gift; isn't that the reality of it?

MR. NORTH: That's true, but we --

Q But Congress had to draw some lines, so they drew a whole series of lines. They drew the 10 percent line, they drew the six-month line --

MR. NORTH: Yes.

Q They didn't even say 180 days. Suppose some fellow got mixed up in a leap year and miscalculated his time, if he miscalculated and it was -- relied on the one measurement instead of the other, if it was less than six months the statute -- the axe would fall on him, wouldn't it?

MR. NORTH: Yes, that's right.

There are many respects, just as you say, in which the statute is arbitrary, but the courts have never had much difficulty in reaching what they thought was the right result on a case-by-case basis. For instance, this Colby v. Klune case that we mention here. You had a person there who was an employee of the company, but he didn't bear any corporate

official or officer's title. He wasn't the president or the vice president or anything of that sort. But the court said well, he might still be an officer even though he didn't bear an official title, a corporate title of any kind.

Now, the courts overlook the precise language of the statute, where they feel that substance should prevail over form and that there should be liability. If that man is actually working for the company in a capacity where he has the same access to inside information as though he was the president of the company, the court said liability should attach.

Q Was that case decided before or after Blau v. Lehman Corporation?

MR. NORTH: That was before.

Q I don't think it would have been decided the same way afterwards, would it?

MR. NORTH: Yes, I think it would. I think it would, yes.

Q Mr. North, before you sit down, I think it would be helpful for this end of the bench if you, in three sentences, would tell us what your position is.

MR. NORTH: All right. My time is already up, but if I --

Q I know it is.

MR. NORTH: -- can do it in three sentences --

MR. CHIEF JUSTICE BURGER: We'll give you the margin.

MR. NORTH: -- I won't run overtime but a little bit.

Our position is that if you have a voluntary purchase that exceeds 10 percent, that then, to determine whether a 16(b) liability or not, you match -- you add up all the sales that are made within six months of that purchase, and the liability attaches to all such sales.

I don't know --

Q So that on the selling side, as Mr. Justice Brennan says, the exemption has no application?

MR. NORTH: Well, we have tried to state -- whether we've done it effectively or not; and apparently not -- from page 34 on we have tried to state why we think that you can read the statute that way.

Now, if the Court decides you can't read it that way, why, we just can't prevail on that theory. That's the argument we're endeavoring to make.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. North.

Mr. Jenner, you will have about 11 minutes for today.

ORAL ARGUMENT OF ALBERT E. JENNER, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. JENNER: Thank you, Mr. Chief Justice; and members of the Court:

I'm troubled by both arguments because neither argument presents my little case before this Court. And all I

am seeking is to have the Court decide my case and not decide other cases. By a parade of horribles or otherwise.

By Mr. Mulligan, a distinguished lawyer from Cleveland, seeking to retain for his client, who participated in the purchase of the sales, the profit resulting from their purchase of this stock from Reliance.

And may I, in the few minutes this afternoon, I would like to devote, if I may, to stating the facts of this case.

As Mr. Justice Stewart said, in the case in 1958 when he wrote the opinion for the unanimous Court, that the trend has come to be, as you, Mr. Chief Justice, have indicated, when you wrote the opinion as the Circuit Justice of the Second Circuit, is to examine the facts in each case and decide each case.

Now, before I state the facts in this case, which will relate directly, Mr. Justice Blackmun, to one of the inquiries you made as to whether or not in fact Emerson had any inside information of any kind or character at all. To which Mr. Mulligan did not give you a direct answer, or refer you to the record in which there is a direct finding in the case in which Dodge brought suit against Emerson, in which District Judge Grant held, in the case that I tried and represented Emerson, that Emerson not only had no inside information but no possibility of obtaining inside information.

Q Well, the actual information, really, isn't an issue, is it, in these cases? There is just a statutory presumption of inclination resulting from the amount of stock that's held, isn't that true?

MR. JENNER: You are absolutely correct, Mr. Chief Justice, but counsel --

Q But this gentleman went out of his way to say that he didn't impute any bad faith or plotting or conspiracy to anybody. He was just taking this, in one sense, very literal review of the statute.

MR. JENNER: That is correct.

Q And in another sense, perhaps not.

MR. JENNER: That is correct, Mr. Chief Justice.

But in those who seek to argue the meaning of this -- and may I say harsh statute, they turn at times to intent, when an argument of intent will favor them, and they turn to the artificiality of the statute, that is a presumed fiduciary relationship because of the holding of 10 percent or more. But when that doesn't suit the attempt to induce a court to interpret this narrow language, then they adopt a different one.

Now, if Your Honors please, have this in mind overnight: Emerson Electric, on the 22nd of May 1967, made a tender offer for the purchase of the shares of Dodge Manufacturing Company of Mishawaka, Indiana, near South Bend. Prior to the time that they made that tender offer, they had negotiated

with the officers and directors of Dodge Manufacturing Company, in the hope that they could arrange a merger with Dodge and Emerson.

Those discussions came of naught, and when those discussions did end is when Emerson Electric made a tender offer for the shares of Dodge Manufacturing Company. The original tender exercise date was June 2, 1967.

As soon as it became known, we announced -- necessarily on a tender offer you can't reach shareholders so you publish it in newspapers and in the Wall Street Journal. When it became known to the Dodge managers of that company that we had submitted a tender offer for the shares of Dodge, at a very substantial increase over the then price -- as a matter of fact, $20 per share -- the Dodge management immediately contacted all its shareholders, immediately, and said to them: Do not tender your shares.

Two days later the Dodge management then entered into a negotiation with Reliance for a defensive merger to defeat that tender offer.

That is, to have the shareholders of Dodge approve a merge of Dodge into Reliance, and that would destroy the tender offer. And that was announced to its shareholders immediately, and they were urged favorably to consider the defensive merger that was tendered.

In addition to that, Dodge filed suit in the Northern

District of Indiana before His Honor Judge Grant, to enjoin Emerson from proceeding with the tender offer, claiming that Emerson had obtained confidential information from Dodge during the course of the attempts of Emerson to interest Dodge management in a merger of Dodge into Emerson.

And it charged in that complaint, under Section 10(b) and Regulation 10b-5 of the Securities Exchange Act, that Emerson had obtained confidential information during the course of the discussion with Dodge management on the subject matter of a possible merger of Dodge into Emerson.

It was in that case that I represented Emerson, and the case was tried before Judge Grant. And after an extended hearing, with a lot of proof taken, Judge Grant held expressly that Emerson had acted in good faith throughout, and had never obtained any confidential information of any kind or character; that what it had obtained by way of information was in 14(k)'s, 10(k)'s, other matters public with the Securities and Exchange Commission, which they could examine, annual reports and matters of that character.

And so Judge Grant vacated the temporary restraining order that he had entered against Emerson, restraining it from proceeding with this tender offer, and we extended that tender offer to June 2, 1967, with the approval of Judge Grant.

Now we were faced at that particular time with the defensive merger suggested by Dodge to merge Dodge into

Emerson. And so at that point we proposed, as a counter move, that we would submit to the shareholders of Dodge a proposal for a merger of Dodge into Emerson, in which we would exchange convertible preferred shares of Emerson for Dodge stock as Reliance was proposing to give to the Dodge shareholders, convertible preferred shares for that stock; except that we claimed, by publication or otherwise, that our merger offer was more advantageous to the shareholders of Dodge than the Reliance.

But -- and we made a demand on the management of Dodge that they submit the Emerson proposed merger to the shareholders of Dodge, which the management and directors of Dodge refused to do.

Also we demanded the right to see -- to have a shareholders' list, so we could communicate with the shareholders of Dodge. Management refused to give us that list. We filed suit in the Superior Court of -- whatever that county is in Northern Indiana, and we -- that's the only way we were able to get a shareholders' list, and we got it.

Then we filed suit when management refused to submit the Emerson merger proposal to the Dodge shareholders, and we couldn't get it to them for a vote, we then decided we would go ahead with the proxy fight, to see if we could defeat the merger of Dodge into Emerson.

And Emerson turned -- Dodge turned around and sued

us, to enjoin us splitting our merger proposal, of the merger of Dodge into Emerson.

I leave all this with you up to this point to show that it was impossible for anybody to get any confidential information of any kind or character. And the judge, Judge Grant held expressly that we had not obtained any.

Now, the proposal for the merger of Dodge into Reliance --

MR. CHIEF JUSTICE BURGER: I think this would be perhaps a good place to stop.

MR. JENNER: I think it is. Thank you very much.

MR. CHIEF JUSTICE BURGER: You can pick it up there in the morning, Mr. Jenner.

[Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., the following day, Thursday, November 11, 1971.]

IN THE SUPREME COURT OF THE UNITED STATES

RELIANCE ELECTRIC COMPANY, Petitioner, v. EMERSON ELECTRIC COMPANY, Respondent.	No. 70-79

Washington, D. C.,

Thursday, November 11, 1971.

The above-entitled matter was resumed for argument at 10:01 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 79. Mr. Jenner, you may proceed whenever you're ready.

ORAL ARGUMENT OF ALBERT E. JENNER, JR., ESQ.,

ON BEHALF OF THE RESPONDENT [Resumed]

MR. JENNER: Thank you, Mr. Chief Justice.

May it please the Court:

I apologize, I seem to have suffered a cold overnight and I may have a little trouble with my voice.

As I was concluding yesterday I was reciting the facts applicable here, bearing primarily upon the question of whether -- not only whether Emerson had inside information but whether it was humanly possible for Emerson to obtain inside information, let alone abusing inside information if it obtained any.

I had reached the point at which I had stated to the Court, as appears in the record, that when Emerson made a counter merger offer to meet Reliance's and Dodge's merger offer, Emerson then launched into a proxy contest to solicit proxies to a double purpose: for the purpose of defeating the proposed merger of Dodge into Reliance at the special stockholders' meeting that had been called, and also to obtain proxies for the purpose of obtaining a special meeting; to require the Dodge board of directors to submit to Dodge stockholders the counter-merger offer of Emerson, which Emerson claimed was a superior offer, by way of merger, for the share-

holders of Dodge, as against the Reliance offer.

In the meantime, as all of you have realized, regardless of this case, these proceedings served to benefit the shareholders of Dodge very much, because the tender offer at $18.25 above the market, Reliance's -- Dodge's proposed merger -- at still a higher figure in the way of shares; however, that is convertible shares. And then Emerson coming back with another proposed merger of Dodge into Emerson at a still higher figure, so the market price of the Dodge shares has kept going up and up and up.

This had nothing to do with any inside information, but, as this is typical many times, and most of the time of tender offers; that is the market price of shares of the target company tends to rise very materially, first, because the tender offer is always at a higher price than the market at the time the tender offer is submitted, otherwise it wouldn't be attractive.

And the counter-merger by way of -- to defeat a tender offer, likewise raises the price of the stock, because the merger proposal is always at a still higher figure, or it would not be attractive.

It appears to Mr. McRoberts, the general counsel of Emerson, at this time, that is at the point that Emerson began to solicit proxies to defeat the merger of Dodge into Reliance, and to bring about consideration by shareholders of the Emerson

offer of merger of Dodge into Emerson --

Q And in point of time, Mr. Jenner, that was after the acquisition, wasn't it?

MR. JENNER: Yes, sir. The tender offer shares were purchased on the 16th of June. So this came after that point, you're right, Mr. Justice.

Mr. McRoberts then wrote the letter that my brother Mulligan complains about, I think with a somewhat tarnished halo, however, and that appears commencing at page 36 of the record. And what was Mr. McRoberts concerned about? He was concerned about, first, this: that under the cases that had been decided up to that time, Stella and others, that if the merger of Dodge into Reliance was approved at the special shareholders' meeting called for the 22nd of August, that the receipt by Emerson of the convertible preferred shares of Reliance, the surviving company, in exchange for the 155,000 shares of Dodge that Emerson had acquired by way of the tender offer on June 16th, would constitute a sale.

And if constituting a sale would, under the cases, then bring Emerson within, at that point, 16(b). And to require Emerson, then, to pay to Reliance the difference in value gain over the price paid for the tender offer shares, which was $63 a share, and the value of the convertible preferred received in the merger of Dodge into Emerson.

And he so says, as Your Honors will note, in his

letter of opinion.

Now, it is true that in his letter of opinion, where he cautioned Emerson about this fact, that they had the danger of being involuntarily held to have made a sale of the tender offer shares, by virtue of the fact that the merger of Dodge into Reliance had come about by approval of the shareholders and then subsequent approval of the board of directors. Because under the Indiana statute the approval of the shareholders of a merger does not consummate that merger, the board of directors must, under the Indiana statute, approve it, and then it becomes consummated.

So he said, in his letter of opinion, This constitutes a danger, and you should begin to prepare yourself to see if you can avoid that cataclysmic result, where the company has been preventing you from obtaining information, preventing you from reaching its shareholders, and doing everything it can to lock you out, and to cut off all communication. Still you run into the ironical situation, because of this mechanical simplistic statute that you may be involtunarily coming within it.

And you will notice that at page 36 he does recite those circumstances. But he did anticipate, also, the possibility, Your Honors, as my brother Mulligan has said to Your Honors yesterday, that perhaps they could sell, if they wished or desired or needed to sell the tender offer shares acquired in

the future.

But there was at that time, if Your Honors please, no -- there had been no negotiations with Reliance on that score. Reliance was resisting us. And Dodge was resisting us. There had been no offer to purchase, there had been -- we had not undertaken to negotiate a sale. Counsel, Mr. McRoberts, was advising his client: You're in danger.

And, Mr. Chief Justice, when you asked Mr. Mulligan yesterday what was the only way -- what was the way that Emerson could get out of this situation, and Mr. Mulligan responded to you, Well, all they had to do was wait until six months, or six months and one day from the tender offer purchase date, June 16th, 1967. But that wasn't so, because Mr. Mulligan overlooks the fact, which Mr. McRoberts did appreciate, and that is the danger that when the Dodge-Reliance merger, should it be approved by the shareholders and then by the board of directors, that that would constitute the sale.

And Mr. McRoberts' judgment happened to be right on that score, because the Newmark case came down not long after that, in which the Second Circuit so held.

All right. Now, Mr. --

Q Wait a minute, let me get that, Mr. Jenner.

MR. JENNER: Yes.

Q That is, the danger was that when Reliance and Dodge consummated the merger, that that in respect of Emerson's

purchase, for purposes of 16(b), would constitute a sale?

MR. JENNER: Yes, Your Honor. And in the Newmark case in the Second Circuit, the court so held. And that was --

Q You mean it's involuntary, even if --

MR. JENNER: Involuntary.

Q -- there had been a voluntary sale. Any over beyond 10 percent shareholder, involved in a merger, is going to get some profits collected from him?

MR. JENNER: Yes, Your Honor. Unless, as some of the cases held, and as pointed out by Mr. Justice Stewart as a Sixth Circuit judge, the securities received were -- should be the substantial equivalent of the securities surrendered. That is, in price and in terms and in effect. If they are the substantial equivalent, then the court held --

Q But they're not the substantial equivalent, if the price increases, as the Dodge prices did?

MR. JENNER: Yes. At first, Mr. Justice Brennan, you have first the great difference in price.

Q What was that difference?

They realized some $900,000 in profit, did that affect the increase?

MR. JENNER: Well, the differences -- first we offered $63, that was $18.25 above the market; and then the Dodge-Reliance securities were estimated to be at a value of around $76 to $80 a share, and the Emerson management

touted it at an even higher figure -- I don't mean to use the word "tout" in a depreciative fashion. But there was a difference in value, and more important, if Your Honor pleases, the shares to be received in the merger of Dodge into Reliance were convertible preferred shares. So that gave -- would give Emerson enough -- another option. They could ride on the preferred until, if the market of the common came up, it would be propitious for it to exercise that option. So it was pretty clear that what Emerson would receive, had it gone through and waited until beyond the consummation of the merger, would necessarily come within what the cases were then holding, and which Newmark in the Second Circuit, Newmark did subsequently hold.

So, at that point, the management of Emerson, receiving this opinion of its counsel, became concerned, naturally. They still thought they had a chance of defeating the merger, and being successful in the proxy fight, so they went ahead.

But the point I want to emphasize is that it is unlike Mr. Mulligan's representationto Your Honors yesterday. He used the word "scheme"; that on the advice of its counsel, the management of Emerson schemed to try and avoid the harsh results of 16(b) by reducing by one sale the percentage of its shares in Dodge from 13.2 to 9.96.

Now, if the advice of counsel, reading the authorities, as subsequently confirmed in, constitutes a scheme in the sense

that it's invidious and odious, we were guilty of that. But it was advice of counsel. And if Section 16(b) is to be construed by this Court that if, because counsel advises a client of a problem and suggests a possible solution of it, that that is a plan or scheme for which the client is to be punished, then I respectfully suggest to Your Honors that lawyers in this country will have some pause in the giving of advice to clients.

Now, you will notice that Mr. McRoberts' advice to his client was that: sell off enough of your shares to get down below the 10 percent, and then you may undertake the sale of the 9.6 percent remaining, provided, as he says in his opinion, the two steps are not legally tied together.

And both the District Court and the Court of Appeals did find that the two sales were not legally tied together. That is, they were separate and distinct sales. The first sale of the 3.2 percent was to Goldman, Sachs, separately negotiated, at no time up to that point had there been any talk with Reliance whatsoever about the -- its possibly purchasing shares.

Q Mr. Jenner, --

MR. JENNER: Yes?

Q -- you talked about ways out of this. After all, we're talking about whether you're to make a profit or not. I mean, you didn't -- all you had to do was sell and you could get your money back.

MR. JENNER: We could get our money back, if Your Honor please, yes --

Q And you really --

MR. JENNER: -- we could get the money we paid.

Q -- are talking about whether you should profit by your efforts to take over another company.

MR.JENNER: Well, Mr. Justice, --

Q I mean, I know that's in the American tradition, but I mean that's the issue here, isn't it? Whether you should make a profit or not.

MR. JENNER: I don't --

Q Not whether you're going to take a loan out.

MR. JENNER: I don't conceive of that, if Your Honor pleases. It is true that if Section -- if the exemption provision of Section 16(b) applies here, that the difference between what we paid and what we received, less whatever expenses there were, which were substantial, would represent a profit. That is so.

But the issue is, does that come within 16(b)?

Q Oh, I understand that. Yes.

MR. JENNER: Now, --

Q But you aren't locked into the company?

MR. JENNER: I beg your pardon?

Q There's no question of your being locked into the company and having to face a possible loss. I mean, you could

have gotten out any time.

MR. JENNER: No, we couldn't get any time, if Your Honor pleases, because we were faced with the merger of Dodge into Reliance.

Q You mean you think that if you put your stock on the market, the way -- immediately after this letter of counsel, if you had decided then to unload your stock, could you have done it?

MR. JENNER: Immediately after the letter? Yes. Yes, if Your Honor pleases. But if we had unloaded it in the sense that we had sold all of it at one time without first getting down below the 10 percent which we say the statute permits and contemplates --

Q You couldn't have kept the profit?

MR. JENNER: We could not. That's right.

Under the harsh provision of 16(b).

Q Mr. Jenner, --

MR. JENNER: Yes, Mr. Justice Stewart?

Q May I interrupt to ask a couple of questions, to be sure I have this straight in my mind. Is there any question but that the sale of the 37,000 shares in late August of 1967 to Goldman, Sachs was subject to the impact of 16(b) and was recoverable by Reliance?

MR. JENNER: Mr. Justice, that is not an issue open any longer on the part of Emerson in this case. That is, that

on the record in this case, and the decision of the Eighth Circuit, there was no cross-appeal from that decision of the court. It is so that the profit made on the first sale is payable to the Reliance --

Q My reason of 16(b).

MR. JENNER: -- whatever net amount there may be, by reason of 16(b).

Q 16(b), and then it also follows, I guess, that no questions before us with respect to the acquisition of the Reliance shares in -- on June 16, 1967, being of the kind and of the nature that falls under 16(b). I'm referring to the point --

MR. JENNER: No, there is not.

Q -- point raised by the amicus brief.

MR. JENNER: Your Honor, I think you said Reliance; I think you meant the Dodge shares that were acquired?

Q I did, yes.

MR. JENNER: Yes, you are correct about that.

Q Because there is one school of thought that, as you well know, that says you have to be a 10 percent owner in order for your purchase of shares to come under 16(b).

MR. JENNER: Your Honor is referring to the first purchase issue --

Q Right.

MR. JENNER: -- upon which there's an amicus curiae

brief. And on this record, as far as Emerson is concerned, that issue is not open, either.

I have my personal views on the subject matter, and that issue has not yet come before this Court, and I assume it will some day. I must -- I do wish to say to all of Your Honors that I am local counsel for Gulf and Western in Chicago in a case before Judge Parsons in which that issue is presented. And will, I assume, reach this Court some day on full briefing.

Q And the amicus brief --

MR. JENNER: The amicus brief --

Q -- wants to be sure we don't decide that?

MR. JENNER: I think all parties feel that way, that this Court, on a very limited briefing, in these amicus briefs, will not have the full judgment and help of counsel.

Q Well, we've received --

MR. JENNER: And if Your Honors do determine, and I ask Your Honors, determine to go into that issue, then we would very much wish -- all parties would wish the opportunity to brief that question for Your Honors.

Q But in this case we can proceed on the hypothesis that --

MR. JENNER: Yes.

Q -- the sale comes under the -- the purchase, the original purchase comes under 16(b), without deciding it; is that right?

MR. JENNER: That is correct, six.

Q Because it would mean cross-appeal?

MR. JENNER: Yes.

Q Right.

Q Mr. Jenner, --

Q Now, let me ask one diversionary question: If Emerson is right here, at least it has the ability, does it not, to manipulate -- and I don't mean that in the derogatory sense -- to choose which shares it will sell in order to get under the 10 percent limit, and thereby it can choose those with respect to which it has the lesser profit; right?

MR. JENNER: Mr. Justice Blackmun, there are situations in which that's possible, but not here. Because the purchase on the tender offer was, of all 155,000 shares, whatever that exact number is, the same day. So there's no step of opportunity presented here.

Q At the same price per share.

MR. JENNER: $63 on every share.

Q On the facts of this case, that's true, but it --

MR. JENNER: On a hypothetical, yes, Your Honor. There is some dispute in the cases that if you acquire, say, 100 shares the first of the month, 100 shares at the end of the month or along in that area, may you choose, if you still have the certificates, if you haven't turned in all the

certificates to get one certificate, may you sell off the first hundred at the end of six months, even though at that time the remaining shares that you have exceed the 10 percent.

Q Of course that's the same kind of a problem we run into in the tax field --

MR. JENNER: Absolutely; absolutely.

The majority view is that if you match certificates, even though you have otherwise 10 percent or more, that the sale of the certificate that's more than six months old is -- does not involve you in 10(b).

Q Mr. Jenner, --

MR. JENNER: Yes, Mr. Chief Justice.

Q -- let me make this a little more difficult, perhaps, by picking up the point you had touched on about using, I think, different brokers and that sort of thing. Suppose, instead of having these separated by a number of days, the first sale had been at 9 o'clock in the morning, if that's when the Exchange opens, and the second sale had been at 3:00 in the afternoon, if that's when it closes, would your case, would your arguments, would your points be any different?

MR. JENNER: If Your Honor pleases, I thought somebody -- last night that somebody would ask me that question. And I had determined to answer it in this way, if I may:

I have a problem, the first problem is, there is a rule that courts do not dealt in fractions of a day. And if

that rule should be applied so that the Court would say, the fact that you sold 100 shares in the morning and 100 shares in the afternoon, we can't recognize it because we don't recognize fractions of a day, then I would have to say that the odds are that we would -- that would come -- most sales would come within 16(b).

On the other hand, it is my view, and I urge it upon Your Honors, that since the Congress said that if at the time of sale you are not a 10 percent or more shareholder, that Congress contemplated, even though courts do not contemplate fractions of a day, that Congress contemplated that if you got yourself down below 10 percent, then your second sale, or any number of sales subsequently, the same day, would not come within 16(b).

And may I suggest to Your Honors, please, that is the issue in this case. What did Congress intend when it said, and I read from the section, "This subsection shall not be construed -- not be construed by any court to cover any transaction where such beneficial owner, that is an owner of 10 percent or more, was not -- was not -- such; that is, the holder of 10 percent or more, "both at the time of the purchase and sale" -- time of purchase and sale -- or the sale and purchase of the security involved.

That's what Congress said, and I respectfully submit to Your Honors that what both the SEC in this case and what my

brother Mulligan is urging upon Your Honor is to rewrite the exemption provision of 16(b) as Congress wrote it. It's an artificial -- the whole 16(b) is artificial, I don't rale against the section, I agree with the purposes that Congress had in mind. But Mr. Mulligan and the SEC are inclined to overlook this: what does the section say, "for the purpose of preventing the unfair use of information which may" -- which may -- "have been obtained by such beneficial owner."

The beneficial owner is described in 16(a) as being merely an owner of 10 percent or more. "Information which may have been obtained by such beneficial owner by reason of his relationship to the issuer." That is -- now, that's plain, simple, common English, and that's what Congress intended.

Q What you're saying is that Congress did the razor cutting here, did it --

MR. JENNER: Well, yes.

Q -- deliberately in a razor -- in a situation that called for razor-thin line drawing.

MR. JENNER: Very much so. And, Your Honor, when you wrote the opinion for the Court in the Second Circuit, in the --

Q Collins?, I believe you mean.

MR. JENNER: -- Collins?. That's precisely what you said, and when Mr. Justice Stewart wrote the opinion for the Sixth Circuit in the Ferraiolo case, he also said it.

And now may I turn to a very recent case, decided and written for the unanimous Court by Chief Judge Friendly, and I will close my argument by referring to that case. It's so recent that it's not yet in the reports.

Q It's not cited, is it?

MR. JENNER: It's cited in the reply brief of Mr. Mulligan. When we filed our brief, that case was not there. This is as parallel a case -- in law school we talked about cow cases; well, this is a cow case.

This involved Kern County Land Company and Occidental Petroleum.

Occidental Petroleum started out negotiating for a merger of Kern County Land into Occidental Petroleum, just as Emerson negotiated with Dodge for a gentlemen's agreement merger of Dodge into Emerson.

That failed, as did the Emerson situation.

When the negotiations failed, Occidental made a tender offer to the shareholders of Kern County Land. At $20 above the market. Ours was $18 above the market.

Kern reacted just as Dodge reacted. Kern went to Tenneco and arranged a defensive merger of Kern into Tenneco, the mechanism was to organize a new company and merge both companies into the new company.

But the effect was the same. This pushed the stock up in value, as the stock went up in value here in Dodge.

Now, also, Kern resisted just as Dodge resisted all kinds of injunction suits, and the sort of thing that we had in here in which I was so unsuccessful in the Northern District of Indiana; successful only on one, I got a stockholders list. And defeated an injunction.

But the defensive merger came along, and that was an exchange of shares, that is convertible preferred for the shares of Kern County Land.

Now, how did Occidental meet this problem, as Judge, Chief Judge Friendly says, there was the danger of the merger going through and then Occidental, under the cases this Court had decided, that is the Second Circuit, that that would have constituted a sale by Occidental of the shares of Kern County Land it had obtained on its tender offer.

Now, the way they sought to solve the problem, instead of, as -- because the figures were so great here, millions and millions of dollars involved; their counsel resorted to an option, that is, an option to the new Kern County Land, new company coming into existence, to purchase the tender offer shares one day after the six-month period.

And that was attacked as a device, scheme, says my brother Mulligan, and Chief Judge Friendly, for the unanimous court, holds otherwise. And follows and refers directly to both your opionion, Chief Justice Burger, and yours as well, Justice Stewart, as justifying the right to use a solid

option provision to avoid, not evade but to avoid the harshness of 16(b).

So the case is very parallel to this. And Chief Judge Friendly says: some decisions of this Court reflect, at least in dictum, a belief that this principle should be applied across the board, even to situations that Congress scarcely considered.

The highwater mark of this rather simplistic approach was the statement in Park & Tilford, Inc., vs. Schulte, skipping the citation, a case of the sale of common stock within six months of an economically compelled conversion of long-held preferred into common.

Q That was Judge Clark's opinion in that, wasn't it?

MR. JENNER: Yes, it was. The late Judge Clark.

Defendants did not own the common stock in question before they exercised their option to convert. They did afterward. Therefore, they acquired the stock within the meaning of the Act.

That's what Chief Judge Friendly says is the simplistic approach.

However, the mechanistic view did not long persist even in our own court, see Roberts vs. Eaton, certiorari denied.

Then he says, a revolt against it elsewhere was

begun by the opinion of Judge Stewart, as he then was, in Ferraiolo vs. Newman, citing it, which was later followed by the Ninth Circuit in Blau vs. Max Factor, which is sought.

The problem was then given thorough consideration in the Blau case, and then, by this Court in the Blau case, Blau vs. Lehman Brothers.

And so --

Q What's the citation of that opinion that you've just been reading?

MR. JENNER: Ah, --

Q 323 Fed. Supp., is that it?

Is that the Abrams vs. Occidental?

MR. JENNER: Abrams vs. Occidental, yes.

Q 323 Fed. Supp. 570.

Q You were reading from an opinion by Judge Friendly.

MR. JENNER: This is -- I have -- all I have is the CCH advance sheet, No. 93238.

Q Well, we have the case number in the Second Circuit in this brief.

MR. JENNER: Oh, that's very good.

Q But we don't have the Fed. 2d citation?

MR. JENNER: Not yet, Your Honor.

Q All right.

MR.JENNER: It may well be at hand soon.

And the District Court citation is at page 6 of the Reply Brief of my brother Mulligan.

I conclude, if Your Honor pleases -- Your Honors please -- this is a harsh statute in its result. It has an obvious therapeutic effect. But it should not be applied beyond what Congress intended to be applied and you are being urged by the SEC counsel, by Mr. Mulligan, to extend it to restrict it by construction in the face of express wording of Congress that this shall not be construed to extend beyond particular limits.

And so, with a statute that is as artificial and mechanistic as this one, to be applied in its results, then I suggest to you that it is to the right of those who would be affected by the statute to work out, if it's possible, an honorable means of avoiding the harsh results of the statute.

Q You mean -- are you saying that a mechanistic statute may have a mechanistic response?

MR. JENNER: I think I am, if Your Honor pleases. As long as that response is honorable, and I would respectfully submit this was a fully honorable response, and reaches equity in the case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jenner.

Let's see, I think your time is all consumed here. Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:32 a.m. the case was submitted.]