In the

Supreme Court of the United States

FOREMOST-MICKESSON, INC.,
Petitioner,

v.

PROVIDENT SECURITIES COMPANY,
Respondent.

No. 74-742

Washington, D. C.
October 7, 1975

Pages 1 thru 38

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PROVIDENT SECURITIES COMPANY, :
Respondent. :
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Washington, D. C.,

Tuesday, October 7, 1975.

The above-entitled matter came on for argument at 10:04 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MORTON MOSKIN, ESQ., 14 Wall Street, New York, New York, 10005; on behalf of the Petitioner.

NOBLE K. GREGORY, ESQ., Pillsbury, Madison & Sutro, 225 Bush Street, 19th Floor, San Francisco, California 94104; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 74-742, Foremost-McKesson, Incorporated, against Provident Securities Company.

Mr. Moskin, you may proceed whenever you're ready.

ORAL ARGUMENT OF MORTON MOSKIN, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on a petition for certiorari to the Ninth Circuit Court of Appeals. It arises under Section 16(b) of the Securities Exchange Act of 1934.

The Court of Appeals found that a holder of more than ten percent -- that is to say, a beneficial owner of more than ten percent of the equity securities of petitioner, within six months of that purchase, which made respondent such an equity owner, sold certain of those equity securities, and realized a profit thereby.

Nevertheless, it found that there was no liability under the statute because it concluded that the transaction by which respondent became a ten percent beneficial owner was not one that met the requirements of a Section 16(b) purchase.

To come to that conclusion, it relied upon a proviso in Section 16(b) which provides that the subsection shall not be construed to cover any transaction where such beneficial owner was not such, both at the time of the purchase and sale, or the sale and purchase of the security involved.

This decision by the Court of Appeals was contrary to all of the pre-existing authority, particularly that of the Second and Eighth Circuits, and the Stella case is the case which we contend is the -- was and should remain the prevailing authority on the point.

The key facts all arose in a two-month period, in September and October of 1969.

On September 25th in 1969 petitioner and respondent entered into an agreement -- I pause to note that the statute provides that a purchase is defined to include an agreement to purchase, and a sale is defined to include an agreement to sell. The agreement was one by which respondent would exchange some $54 million of its assets, roughly two-thirds of this personal holding company's assets, in exchange for four and a quarter million dollars in cash and just under $50 million of debentures which were immediately convertible into common stock of Foremost-McKesson.

On the 13th of October, two days before the closing under that agreement, the shareholders of Provident met informally to consider what their agenda described as the Section 16(b) problem. They went on, two days later, to close this transaction and acquired, at that point in time, $40 million of immediately convertible debentures.

Five days later another $7.5 million of these convertible debentures were delivered pursuant to adjustments in the closing price under the agreement.

The next day, on the 21st of October, respondent entered into an agreement along with petitioner and Dillon, Read and Company, on behalf of an underwriting group, to sell $25 million of these convertible debentures. And the closing under that underwriting agreement took place on October 28th.

Respondent will undoubtedly stress two additional facts, and I would like to put those before the Bench at this time as well. They are that on October 13th, the day when the shareholders informally met to consider the "Section 16(b) problem", the board of Provident also adopted a so-called liquidating dividend, one which did not fix any specified date for the liquidating dividend and which was subject to various contingencies and other legal requirements, including the fact that under California law debtors and others with claims against the company would have to be satisfied before any liquidation could take place.

On -- the second point, which perhaps they will stress or emphasize or report to you is that on October 24th, between the date the underwriting agreement was signed and the date it was closed there was a distribution of $22,250,000 face amount of these debentures to shareholders of Provident. And we concede that --

QUESTION: You are now on the seven days between the 21st and the 28th?

MR. MOSKIN: Yes, Your Honor.

And we concede that had that liquidating distribution taken place before the 21st, there would not be Section 16(b) liability. We concede that on the authority of the Reliance Electric case.

Now then, this case began when respondent sought a declaratory judgment in the Federal District Court, because it wished to liquidate and dissolve. The Court, on what it considered equitable considerations, found for respondent.

The Ninth Circuit opinion afrirmed but, in the process, rejected all of the arguments that had been made by respondent. And they said, among other things, that there was sufficient cooperation between the parties prior to the purchase, such as could give rise to the possibility of obtaining inside information at that point in time.

They also said that between the purchase date and the sale date, that there was an opportunity to exchange in speculative abuse and they went on to add that it was the very kind of speculative abuse with which the statute was designed to cope.

I would like to just stress a few brief factual items in the Appendix on the first of those two points, the pre-purchase cooperation. Because Provident's brief, at page

38, states that it is undisputed that negotiations only involved an evaluation of Provident's assets. Not only is there nothing in the record to support that, but there are, indeed, items in the record to support the contrary inference.

I would call your attention to page A41 in the record, where Mr. Haskell of Dillon, Read, appearing before the Department of Corporations of California, on the 25th of September, points out that Provident had hired Dillon, Read, the previous September to explore possibilities and that they went into a great detail with a number of these companies and "examined" all of these companies. They then settled upon Foremost as the most likely participant in a transaction to provide liquidity to its shareholders, and on A46 they go on to say, Mr. Haskell does, that: We think the deal is fair because the quality of the securities that we are getting -- that is to say, petitioner's securities -- is of sufficient quality and condition where we think that they represent a fair marketable security for the Provident shareholders.

And then on A74, the chief executive officer of Provident observes in an affidavit that when the Foremost partnership, if you will, or deal had been decided as the most promising, "there followed throughout the late summer and early fall intense negotiations between Foremost and Provident.

QUESTION: What page did you say that was?

MR. MOSKIN: That last was in an affidavit at page

A74. Mr. de Limur's affidavit.

The Ninth Circuit relied, I think, on two things: first, it purported to find legislative history to support its conclusion in respect of the proviso.

There are a number of answers to this contention, perhaps the most compelling is that this Court, in Reliance Electric, said that the legislative history does not explain the proviso.

Moreover, neither the District Court nor the Court of Appeals in the Stella case found any legislative history that bore on the explanation of the proviso back in 1956; and the Securities and Exchange Commission, which has submitted amicus briefs to this Court in Reliance and earlier to the Second Circuit Court in Stella, found some scraps of legislative history to the contrary to support petitioner's contention here.

In addition to which the dissent in the Stella case, by Judge Hencks, was one that conceded that there was no applicable legislative history in respect of the proviso.

It is an interesting point to note that Judge Hencks in his dissent concluded that the principal reason for his judgment that the proviso require that there be a purchase subsequent to becoming a ten percent stockholder was that, in his mind, was clearly required in respect of directors and officers, a position that Mr. Chief Justice Burger found in error three years later when he sat and decided in the Second Circuit for unanimous court the case of Adler v. Klawans.

Moreover, Judge Wallace, himself, in the Ninth Circuit I think was a little inconsistent on this legislative history point, because when he came to consider the meaning of "at the time of purchase" and "at the time of sale", he decided that in respect of the sale, sale meant "simultaneously with" rather than "prior to".

Therefore, he looked to the purposes of the statute rather than to the legislative history to define the same words "at the time of purchase and sale" differently in respect of the purchase than in respect of the sale.

It is also interesting that neither Provident nor Gulf & Western, in the case that was decided last week in the Seventh Circuit, saw fit to urge the point about this proviso and the meaning of both "at the time of purchase and sale". It was never argued in the Ninth Circuit by either party. And in the Gulf & Western case in the Seventh Circuit, it was only after the Provident case was decided in the Ninth Circuit that supplementary papers were submitted by Gulf & Western and consequently by Allis-Chalmers to support the then novel theory of the Ninth Circuit.

And, incidentally, the Seventb Circuit expounds still another view of the meaning of these words,"both at the time of purchase and sale". A meaning which I suggest and believe is at holdings at the time of the purchase -- or, indeed, at the time of the purchase or sale.

You remember earlier I spoke about the statute defining contract to buy and contract to sell as including purchases and sales. And surely a director or an officer could buy and sell a contract without ever obtaining an equity position and still liability would attach under the statute.

QUESTION: How would that be?

MR. MOSKIN: The statute defines directors, officers, and ten percent beneficial owners as fiduciaries. It makes --

QUESTION; You're talking about a director or someone separately defined as opposed to a ten percent holder?

MR.MOSKIN: Yes, Mr. Justice, I am.

QUESTION: Well, you say "in a factual situation such as ours", are you suggesting that we ought to have a number of case-by-case analyses of these things?

MR. MOSKIN: I am not, Your Honor. I am simply, in all candor, trying to protect my flank. I think that --

QUESTION: Well, --

MR. MOSKIN: -- if you chose to go that route, you could still find for petitioner in this case. I don't think that's the appropriate way to go.

QUESTION: That certainly doesn't seem to be what Congress has in mind. They wanted a flat rule.

MR. MOSKIN: I believe you are absolutely correct, and I agree with that conclusion.

I think that hopefully it has been established that in this case there was at least an ambiguity in what the key statutory words mean. That being so, it is appropriate to look to the statute as a whole, and to consider the results of the alternative constructions.

And I suggest that the one that best carries out, rather than defeats the statutory purposes is the one that should be adopted.

I would like to offer a few illustrations.

Under the Ninth and Seventh Circuit views, if within six months there was a purchase of 50 percent of the stock of an issuer, and all of it was sold within that time at a profit, there would be no liability.

Similarly, if 9.9 percent of the stock had been acquired, and then an additional 40 percent had been acquired, and then all of it had been sold within the same six-month period, again there would be no liability.

And yet, if you added one share before the sale, there would be liability for the profit on that one share.

QUESTION: Of course, if the sale were deferred so that it took place in seven months rather than six, there would be no liability, either.

MR. MOSKIN: That's true. The statute is arbitrary, it is designed to deter and I think the purposes of deterrence, the Court -- the Congress, as a matter of fact, concluded that they had to evaluate on the one hand the beneficial purposes of the statute, and also, on the other, the beneficial purposes of long-term investments, and concluded that a six-month cutoff would be appropriate to meet both of those counterveiling objectives.

In each of these cases that I have postulated, the director or officer would be liable. At least under the doctrine of Adler v. Klawans. That was a case in which the defendant bought stock, sixty days later became a director, and then within six months of the purchase sold the shares. And the Second Circuit found liability should attach, because of the purposes of the statute.

And, as a matter of fact, in that case Mr. Chief Justice Burger wrote that: at some moment before making a sale of stock, the insider was in an official position, which he could have used to influence the sale price.

That brings me to what I think is the appropriate interpretation of this statute, to wit, that it doesn't matter whether you acauire this information before or after the initial transaction, so long as it exists prior to the closing transaction, the second of the two transactions.

And there is again -- authority is legion to support that view. Not only the Adler v. Klawans case, but I think that in Kern County this Court looked to -- at least examined into the question of whether or not there was a possibility of abuse between the date of the purchase and the date of the sale.

I think, too, if you consider the language in Adler and other places to the effect that the theory here is that the director, officer, or the beneficial holder is a fiduciary, and look to common-law concepts, it should not matter whether the fiduciary abuses his trust before or after he becomes a fiduciary, so long as the abuse of trust has taken place prior to the point when the sale occurred and the profit was realized.

QUESTION: Mr. Moskin, I suppose you're coming to this, but why do you think the statute, through the proviso, draws a distinction between a ten percent holder and an officer and a director?

MR. MOSKIN: I think the statute draws that distinction, Mr. Justice Powell, because there is some difference between a holder of something under ten percent -- be it one or eight or nine, and the Congress said ten -- and a director and an officer.

The legislative history makes clear that once you get to ten percent -- and at one point it was five percent that they were talking about -- that you have the potential for control, for manipulation that justifies your being treated the same as a director or officer.

Now, Reliance Electric made it quite clear that this means that in a step-up or step-down transaction there cannot be a liability attached if the transaction is structured in an appropriate way, so that one -- put it this way: if this purchase here had been 9.9 percent in one transaction and then some additional amount in the second transaction, this proviso would only catch the profit on the second transaction.

Just as in Reliance, this Court found that the profit was only caught on the step-down transaction that got you from whatever it was, 12 point something, to 9.9.

QUESTION: But if the statute does make a distinction between --

MR. MOSKIN: Absolutely.

QUESTION: -- the security holder, on the one hand, the officer and director on the other --

MR. MOSKIN: It does only in respect to the proviso. I think, for example, earlier where the statute talks about the purpose -- there's a kind of a preamble in 16(b), which says "for the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer, by reason of his relationship to the issuer"; et cetera. Now, there's no distinction made there. And there's no distinction made in respect to reporting. The reporting requirements in 16(a) apply without difference to an officer, director and ten percent stockholder.

That reporting is required the moment one becomes a ten percent stockholder, or, rather, within ten days thereafter.

QUESTION: Right. But the basic purpose of the Act is to reach people who have inside information. Tell me, as a practical matter, how a ten percent stockholder, who does not have a representative on the board, obtains inside information lawfully.

MR. MOSKIN: Well, I would answer that in several ways. One, the statutory history suggests that one need not be a director or officer when he owns as much as ten percent of a public company to control the election of directors and officers, to manipulate the behavior of the management in a way that it will go down to his benefit.

In addition to that, the Ninth Circuit Court found the potential for speculative abuse in this very case, both before, as I said earlier, in respect to the increased negotiations and the cooperation between the parties, and subsequent, when it said in the act that Provident passed on to Foremost included the large bundle of real estate and some relatively illiquid securities.

That real estate was such that it could have required -- and Provident would have known this better than anybody else -- substantial expenditures of cash to develop that property. So that they might have learned in these negotiations that Foremost would not pay a dividend next time because it needed to preserve the cash, so that it could proceed to develop these properties.

What Provident was doing here was protecting itself against a market risk.

QUESTION: Would you have to have inside information to draw that inference from the cash picture here?

MR. MOSKIN: Would you have had to? No, you would not have had to. But the statute doesn't speak in terms of "would have had to." It speaks in terms of the possibility.

QUESTION: And presumptions.

MR. MOSKIN: And presumptions.

QUESTION: Yes.

But it's certainly an inference which any sophisticated businessman could have drawn.

MR. MOSKIN: If he knew the nature of the assets that were transferred from Provident to Foremost.

QUESTION: That wouldn't be necessarily inside information, though, would it?

MR. MOSKIN: No, it would not.

QUESTION: Well, Mr. Moskin, if you were counsel to a corporation that had a ten percent stockholder, not represented on the board, would you advise the corporation to make any information available to that ten percent stockholder that was not available to all stockholders.

MR. MOSKIN: Not at this point in time, Your Honor. I would not.

QUESTION: Not in light of 10b-5.

MR. MOSKIN: Not in light of -- but I will, however, and have any number of times, advise a client in that position that he had better not sell within six months of that purchase, because if he did, it was my opinion, and remains my opinion, that he would be liable for any profit he realized.

QUESTION: Right. That's a different question entirely, though, isn't it?

MR. MOSKIN: A different question, yes.

QUESTION: Right. That's the question before us here.

MR. MOSKIN: It is, indeed.

I'm not alone in contending that a construction other than the one from which I contend would destroy the effectiveness of the statute. I think I have -- I hope I have given you some examples to demonstrate that.

QUESTION: Wasn't this entire transaction one for the primary benefit of Foremost? And its convenience?

MR. MOSKIN: I think you're alluding to the fact that the negotiations resulted in securities rather than cash being transferred in exchange for the assets. To that extent, that is true. The transaction was, nevertheless, 100 percent voluntary; there was no gun to the head of the respondent. He was free to enter into this contract or not, as it saw fit. And, moreover, it was free to wait six months before it sold.

And, as the Seventh Circuit said in the Bershad case, the responsibility under this statute rests with the fiduciary to structure the transaction in a way to avoid the prohibitions of the statute, because the deterrent effects of the statute requires that one do that.

QUESTION: Well, it is a little strange for the fiduciary relationship, however, to run to Foremost, isn't it, when it is --

MR. MOSKIN: No, I think not, Your Honor. As a matter of fact, if you will look at the statutory language, the statutory language in respect of the profit says that the profit shall inure to and be recoverable by the issuer.

It has been written and suggested, and you will find a reference to it in the American Standard case, that that word "inure" continued to permit a constructive trust for the benefit of the issuer. And that ties right in with my contention that this is a fiduciary relationship, that it produces the fiduciary relationship to which the statute addresses itself.

If you look at the alternatives, if you want to -- perhaps you're suggesting that this may be a windfall profit to the issuer; if that be so, the alternative is to permit speculation in inside information within a six-month period by statutory insiders with impugnity, unless one can meet the evidentiary standards of Rule 10b-5.

QUESTION: Well, I guess I'm having the same trouble that some of the others indicated as to the source of the inside information here.

MR. MOSKIN: Let me say this, that all of the history and the cases under this statute say that one presumes it be misuse of inside information except in the so-called unorthodox transaction.

The unorthodox transaction test goes not to whether or not there was a profit or whether or not there was an abuse, but the courts have said: When you look to the definition of purchase and sale in an unorthodox transaction and conclude in two categories of cases, I believe, that have analyzed them, that we may not, under the pragmatic theory, find a purchase or a sale.

Those categories are: one, an involuntary transaction, such as you had in Kern; and, two, a situation where, in effect, you are not -- the economical equivalent of what you had before is essentially that which you have later, such as Mr. Justice Stewart's decision in Ferraiolo v. Newman, in the --

QUESTION: Sixth Circuit.

MR. MOSKIN: -- Sixth Circuit. Thank you.

Moreover, Blau v. Lamb is another case where simply there was a transfer of corporate securities from one subsidiary to another subsidiary, and the Court, I think properly, concluded that there was no change in the general sense of the term, and therefore that would not sever the objectives.

But here they had a clear purchase and a clear sale, and I submit that all of the cases say that that is where your inquiry ends in respect of whether, in fact, there was a potential for misuse of inside information.

QUESTION: But you're asking us to resolve an ambiguity in the statute. I don't think it's unreasonable for us to ask ourselves, in this situation which you want covered but which your opponent doesn't, is there a potential for abuse? Even though if it were clearly within the statute, there is no doubt that the congressional presumption would cover.

MR. MOSKIN: It is not unreasonable, but I'm suggesting it is clearly within the statute, because it is clearly a purchase and clearly a sale.

And, moreover, I'd like, if I may, to refer to some language that you, Mr. Justice Rehnquist, wrote again in Blue Chip, and simply substitute Stella for the word Bershad(?), and 16(b) for 10b.

The long-standing acceptance by the Courts, coupled with Congress' failure to reject Stella's reasonable interpretation of the wording of 16(b) -- and then I rely on the words that deal with what 10b meant -- argue significantly in favor of the acceptance of the Stella rule by this court, citing

Blau v. Lehman, which was in fact a Section 16(b) case, there is a longstanding settled acceptance of the law in this.

QUESTION: Okay. But now Stella was the other end of this six-month period, wasn't it?

MR. MOSKIN: It was the sale.

QUESTION: Well, but then the reasoning that Judge Kaufman used, at any rate, was applicable to the other end of the six-month period. You've got an Eighth Circuit case.

Do you have any more Court of Appeals authorities than that?

MR. MOSKIN: The Second Circuit has decided this question at least three times. Klein v. Norton is one, Stella is another, Newmark v. RKO is the third --

QUESTION: What do you have besides the Second and the Eighth Circuits; granted that the Eighth Circuit as well as the Second is a very respectable court here?

MR. MOSKIN: Do I need more?

QUESTION: Well, you had this case in the Ninth Circuit, and now isn't there recent Seventh Circuit opinion?

MR. MOSKIN: Yes, the Seventh Circuit --

QUESTION: In a decision against you. So that you don't have this unbroken line of consistent Court of Appeals authority of the kind that was referred to in Mr. Justice Rehnquist's opinion in Blue Chip, do you?

MR. MOSKIN: Well, we did until the Ninth Circuit --

QUESTION: You did until recently, yes.

QUESTION: Mr. Moskin, I know your time is running short, bu I am interested in the date of sale question in this case.

I would like for you to comment on that before you conclude.

MR. MOSKIN: I will do that now, Your Honor.

QUESTION: All right.

MR. MOSKIN: The underwriting agreement was an agreement to sell. On October 21st, when that agreement was executed, all of respondent's rights and obligations were fixed. The profit was locked in, so far as it was concerned. To be sure, there was a condition, a marked-out, as it were, [writing] that is standard in underriding agreements from the beginning of time, and which almost never is used; and which would have given the underwriters a right in an extreme circumstance during that six or seven-day period not to continue the transaction, not to close it.

But if agreement to purchase and agreement to sell is to mean anything in the context of the statutory definition of purchase and sale, it would be a very simple matter, indeed, for a lot of meaningless conditions to be inserted into a contract and to ignore the whole intent of the statute.

QUESTION: You're really not suggesting that marked-out, as you call it, is meaningless, are you?

MR. MOSKIN: It is meaningless in 99.4 percent of the cases when underwriting agreements are signed.

QUESTION: You testified as to your experience just now, I'll testify as to mine. I've seen them exercised.

MR. MOSKIN: Well, that's the .6 percent that I was describing.

QUESTION: Right.

[Laughter.]

QUESTION: Your answer is that although there are valid conditions to the obligation of the underwriters to buy, and although the underwriting agreement states that the date of purchase shall be the 28th, that because these conditions are extremely unlikely to happen, nevertheless the sale occurred on October 21?

MR. MOSKIN: That is my answer.

QUESTION: Right.

MR. MOSKIN: And I must say it was also Judge Wallace's answer in the Ninth Circuit.

QUESTION: Right.

MR. MOSKIN: I'd like to take a moment before I conclude to refer also to Rule 16(b)(2), which was adopted in 1935, in response to an article in the Virginia Law Review by ?? Mr. Husted Sullivan, in which he pointed out that, as he read it then contemporaneously with the adoption of the statute, the construction for which I contend was required, and it would have prevented underwriters from acquiring securities and distributing them in an underwriting unless the exemption were provided. And the SEC obviously agreed with that construction of the statute and under any number of cases with which this Court has agreed, an agency that is charged with administering a statute, its views are entitled to a special rate, under an ambiguous situation such as this.

May I spend a moment on the Seventh Circuit decision?

I take it silence is acquiescence, and I will proceed to do so --

MR. CHIEF JUSTICE BURGER: Your time is almost up. You can make your own choice about that.

MR. MOSKIN: I will do that, if I may.

I said a while back that it rejects the teaching of reliance as well as its analysis, because it says that a closing transaction in a purchase first -- I'm sorry, in a sale first, purchase later, is caught, notwithstanding the fact that at the time of that second transaction the beneficial owner may own 9.9 or less of the stock.

I believe that to be squarely in the teeth of the holding of this Court in Reliance Electric.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Moskin.

Mr. Gregory.

ORAL ARGUMENT OF NOBLE K. GREGORY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I'd like to start with emphasizing a factual point, although it's not crucial to the main argument, but it came up and I think it's very important in this case, at least from the so-called Kern County argument.

Provident was never a fiduciary of this corporation, Foremost-McKesson. It was only a creditor. All it acquired were convertible debentures which were covered by Section 16(b) because of their convertible nature. But I think it's important to understand that a person coming under 16(b) as a beneficial owner, technically, is not always the fiduciary; and this is a perfect example of it.

The relationship, as very clearly pointed out in many of the cases, of a convertible debenture owner is that of a creditor; and all they had was the information after they became a creditor that a creditor normally would have.

Now, they had knowledge of their own assets, of course, but that was not knowledge that they received as a result of the relationship; which brings me to what I think is the key provision in Section 16(b):

For the purpose of preventing the unfair use of information which may have been obtained by a beneficial owner,

-- that's a more than a ten percent stockholder -- director or officer, by reason of his relationship to the issuer.

I think that's the key to interpreting the so-called proviso or exemption that Section 16(b) shall not be construed to cover any transaction, where such beneficial owner -- that is the more than ten percent stockholder -- was not such both at the time of the purchase and the sale.

Now, Foremost attempts to make a great deal of the statement in the Reliance Electric case, that there is no legislative history of the proviso; and that's correct. There is very little legislative history of the proviso.

But it even goes so far as to take that out of context, because what the opinion says, that although there may be no -- I'm not quoting, I'm paraphrasing -- no legislative history of the proviso, nonetheless, that does not justify departing from the clear purpose of the statute.

I'll read what the Court said, so I won't unfairly paraphrase: the proviso cannot be disregarded simply on the ground that it may be inconsistent with our assessment -- the Court's assessment -- of the "wholesome purpose" of the Act.

Now, more important, if, as I suggest, there is legislative history of this statute -- and nobody can deny it; and the purpose clause, I think exemplifies that legislative history. And it is helpful as applied to the facts of the case at bar, both the Seventh Circuit and the Ninth Circuit have gone into it at length, and I won't go into the detail.

But I think I can clearly state with confidence that it shows that Congress was concerned with the use of the inside information by one who is a substantial stockholder before -- and I emphasize there the "before" -- he had made a purchase or an acquisition, or before it was an intent to sell at a quick profit.

Now, I realize they took the intent language out of the statute and put in a rule of thumb. But the point and the purpose of the statute, which is still in its purpose clause, which was added when they took out the -- put in the rule of thumb; or before he sold at a high price with the expectation of making a quick re-purchase at a lower price; both of these, as the Seventh Circuit points out, are one ends of a swing. And that's what we're talking about: a short swing transaction.

It shows, in other words, that the aim of Section 16(b) was to discourage large stockholders -- and I'm only talking for the moment about stockholders -- from making quick profits by entering into the short swing transaction because of inside information, received by reasons of their relationship to the corporation. That's the proviso which was interpreted in Kern County Land -- and I won't paraphrase that, I'll try not to -- In Kern County Land, this Court pointed out that the aim of that statute is the misuse of information obtained after the acquisition of substantial stock ownings not purchases -- and now I am quoting -- based on inside information obtained from stockholdings that did not yet exist.

Now, that's the situation here. Certainly, as I said a moment ago, Kern had -- I mean, I'm sorry, Provident had knowledge of its own assets. But it didn't have that knowledge as a result of any relationship to Foremost.

Now, Mr. Moskin has paraded before the Court a chamber, a detail of horrors, I should say, and any statute that doesn't apply to everything. There are always situations where it's not going to apply. That was recognized clearly in Reliance, it's recognized by some of the questions from the Court.

Obviously this statute never applies if a stockholder never gets more than nine percent. He can speculate; he can speculate all he wants, as far as 16(b) is concerned, as long as he never gets more than nine percent. Or he can wait the six months.

There are a lot of other things he can do, and some of the things he can do under the statute and under the purposes, acquire information not as a result of his relationship to the corporation but from a tippee. There were provisions in the -- and I think that again goes back to the legislative history. The original provisions or early provisions require -- would have prohibited that.

Because he might have a relationship not to the corporation by stockholding, but by some other relations, and get the inside information and make a killing. And of course there are remedies for that, and Congress didn't stop with 16(b). But 16(b) cannot be made into a device to solve all problems of inside information or the misuse of it. It's only designed by its very terms and its purposes, to prevent the unfair use of inside information arising by reason of the relationship of the corporation to the person making the short swing transaction.

I think I'd like to go on now to the other ground, that I would like first to make one point, which I think should be made. Mr. Moskin keeps making a great deal of the fact that I didn't argue this point as strenuously in the Ninth Circuit. He says we didn't make it. We made it, but we didn't urge it orally.

The reason, I think, is obvious: we had a conflict with the Second Circuit if we went on that ground. And, although I'm highly honored to be arguing the case here, my client is less than happy at the expense. I naturally tried to win on a ground which I thought would end the case.

But the potential for speculative abuse point, the main argument that I made in the Ninth Circuit, and that based on the Kern County Land case, I think fits this case very well; doesn't fit it to a T, it's not a White Horse case; there never are any.

But there's two facts which both the Ninth Circuit, in rejecting it, and Mr. Moskin, attempts to brush over. But the most important one is the one I started with, this lack of any fiduciary relationship. This was not stock.

The Ninth Circuit opinion treats Provident as the stockholder.

Now, as I say, I don't deny that 16(b) applies, because of the convertible nature; but that's the only reason it applies, not because Provident went out to buy stock. Provident went out to sell assets as a part of a liquidation. The corporation was going into liquidation. The sole purpose of this transaction, as far as Provident was concerned -- and this is an objective fact -- was to liquidate this corporation to avoid tax consequences, and this was a legitimate method of complying with the tax laws.

QUESTION: Who were the beneficial owners of Provident?

MR. GREGORY: Heirs of the Crocker estate, Your Honor.

QUESTION: Including Mr. Frederick C. Whitman?

MR. GREGORY: I don't recall the name, I'm sorry; I didn't bother to check who the particular stockholders were.

QUESTION: You don't know.

MR. GREGORY: But they were all heirs; that's all I can tell you.

It may be in the record, I'm just not sure.

But they were heirs of the Crocker estate; they had formed a family corporation to hold certain assets of the Crocker family. And they found tax problems and they wanted to liquidate.

Now, their desire to liquidate was to sell the assets, and they hired Dillon, Read to find somebody that would buy the assets. And the only people that were satisfactory were Foremost, and they thought they had an arrangement with Foremost whereby they could avoid any problems.

Other problems arose. If they had carried it out as they originally designed -- unfortunately they didn't -- they would have had no 16(b) problem.

I'd like to mention, too, that although there is an agenda in which, at the bottom, is a mention of 16(b), the impression I'm sure Mr. Moskin didn't intend to give, that this was all designed to get around 16(b), is not borne out by the record, all it was is that apparently someone mentioned that there might be a 16(b) problem.

The case came up on summary judgment, so we don't have a full detail of that.

Now, the other point is again the convertible debentures.

Now, it was a condition to the whole agreement to sell the assets to Foremost -- and I'm not trying to be picayune in calling it a sale of assets. I realize that under one possible normal construction that any sale of assets to -- for stock, is a technical purchase. But that's the whole point, I believe, to Kern, that where you have something that technically may be a purchase, if it's not within the potential for speculative abuse, that then you look at the realistic transaction.

Now, the day after the agreement to sell, the corporation went into liquidation. And a corporation in liquidation doesn't normally engage in speculation, and under California law it is not permitted to engage in speculation.

The liquidation corporation was never a stockholder of Foremost, and as a debenture holder, Provident was only a creditor, as I said.

There was, as the District Court pointed out, and I should say this is the ground on which the District Court decided the case, the ground that it was not a potential for speculative abuse.

Foremost made no claim in the trial court, as the District Court pointed out, that Provident derived inside information, profit or advantage, and I'm quoting, from its all but momentary status as an insider of Foremost.

Foremost claims that Provident had inside information -- I think I covered that; it was inside information it had by reason of the fact that it was selling it.

Now, even if the information as its own assets could have given Provident an opportunity, it was not an opportunity that grows out of the stockholdings.

Mr. Justice Powell, I think, asked about the other ground that was considered in the Ninth Circuit. The point there again, we must look at this case in view of the facts and the purposes, and I think, as Kern County implies, the agreement was very clear, the date of sale was after the -- I believe it was October the 28th was to be the date of sale. I get these dates wrong.

And before that, more than half of these debentures were distributed to the stockholders of Provident.

Now, there are cases both ways. There are cases that Mr. Moskin relies on, that you disregard all but the contract, and that the contract controls. But I submit, if we follow the teaching of Kern County, that you look at the transaction realistically, where there's no potential for speculative abuse, and you also look at it technically from the contract law point of view that there was no sale until all of these conditions were -- had passed.

Now, there are two other arguments, neither one of which -- I think Mr. Moskin misspoke himself when he said the Ninth Circuit passed on them. Neither the Ninth Circuit nor the trial court passed on the other two arguments. I think they are perhaps not ones that this Court wants to pass on, but I do want to mention that there are questions of whether this comes within the exception for a liquidating agent, under California law, when this liquidation plan was adopted. The corporation, the directors became liquidating agents, they held the stock only for the beneficiaries.

In addition, under California law, once they passed a dividend which they did in distributing dividends, that stock in Foremost -- I beg your pardon, the debentures in Foremost evolved upon the beneficiaries, and there was no beneficial interest.

Those are matters primarily of California law. Neither the District Court nor the Court of Appeals passed on them, and I hope they never have to.

I think that the other arguments are sufficient, and I suggest that this Court should follow the clear learning of the legislative history and the clear purpose of this statute, and if so they will find that this does not come within Section 16(b).

QUESTION: In your view, when were the conditions met? At what point after October 21st?

MR. GREGORY: The conditions were in existence until the actual transfer of the debentures under the underwriting, Your Honor. Because there was that condition. It's provided the express date. This would be the date of sale, and until that time the underwriting could be set aside for various conditions. And prior to that time, the stock, over half the stock, or over half the debentures, were distributed to the individuals.

As you may recall, originally all of the debentures --

QUESTION: Was that October 24?

MR. GREGORY: I believe 24 was when they were distributed.

QUESTION: But that was pursuant to, as I understand it, a liquidating resolution of October 13th, was it?

MR. GREGORY: That's right, Your Honor.

QUESTION: That preceded the actual agreement, the underwriting agreement, which was October 21?

MR. GREGORY: That's correct, Your Honor.

QUESTION: And then on October 24 the liquidating resolution was executed, is that it?

MR. GREGORY: That's correct.

And then the sale actually took place on, I believe it's the 31st.

QUESTION: Mr. Gregory --

MR. GREGORY: Yes, sir?

QUESTION: -- you rely on Kern County. My recollection is that the issue there was -- involved the sale, and that was an involuntary sale resulting from a merger.

MR. GREGORY: I would say involuntary in one term;

there was an involuntary conversion. There was a voluntary aspect to that case. There was an option agreement which was completely voluntary in the same sense that this was voluntary. They didn't have to enter into it. Once they entered into it, of course, they were bound by it. But the only involuntary thing that Occidental couldn't do anything about was the conversion.

But this Court had two sales in the Kern County case, one was the conversion, the other was the option agreement which was entered into willingly. But under the duress of the commercial transaction.

But I could hardly call that involuntary, any more than Mr. Moskin seems to think that we're claiming that Foremost -- I mean that Provident involuntarily sold its assets. It didn't involuntarily sell its assets.

And in the sense that it could have not taken this offer, and not liquidated, it was voluntary. But the form of the transaction was not the one it chose; it was the one that it had to accept under the commercial duress -- I don't want to use the term that has a -- under the exigencies of the moment, Your Honor, which I think are equally applicable to the Kern case and this case.

QUESTION: It was a result of a negotiation between the parties, though, was it not?

MR. GREGORY: In both cases, Your Honor. The option was a negotiation between Kern and Occidental.

QUESTION: But not the merger in Kern County?

MR. GREGORY: Not the merger. That's correct.

QUESTION: Right.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:52 o'clock, a.m., the case in the above-entitled matter was submitted.]

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