UNITED STATES,

PETITIONER,

V.

NEIL T. NAFTALIN,

RESPONDENT.

No. 78-561

Washington, D. C.
March 26, 1979

Pages 1 thru 28

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v.

NEIL T. NAFTALIN,

Respondent.

No. 78-561

Washington, D. C.

Monday, March 26, 1979

The above-entitled matter came on for argument at 10:52 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

STEPHEN M. SHAPIRO, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.: on behalf of the Petitioner

JOE A. WALTERS, ESQ., O'Connor & Hannan, 80 South Eighth Street, Minneapolis, Minnesota 55402; on behalf of the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 561, United States v. Naftalin.

Mr. Shapiro, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on the government's petition for certiorari to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit set aside the District Court's judgment which had convicted the respondent on eight counts of securities fraud under section 17(a)(1) of the Securities Act of 1933.

The question presented in this case is whether section 17(a)(1) prohibits frauds practiced by customers on their brokers during the course of offering or selling securities. We contend that section 17(a)(1) applies to all fraud occurring during the process of offering or selling, including those frauds that injure brokerage houses.

The facts of this case can be summarized rather briefly. In July and August 1969, the respondent placed sell orders with five different brokerage houses. Those orders in each case were for large blocks of either 500 or

1,000 shares of securities. The respondent had cash accounts with each of these firms and was not permitted to make short sales. In each of the sales, he either stated affirmatively that his position was long or he used words or phrases which would indicate that his position was long. In fact, however, respondent did not own any of the stock that he sold. His position was short rather than long, contrary to his representation.

He planned to buy the stock at some later point in time in the declining market and to make a delayed delivery to the brokerage houses. His profit would be the difference between the price at which he originally sold and the price at which he later covered. But contrary to his expectations, the price of all of these securities went up substantially and he was unable to make covering purchases and for that reason he never delivered any of the stock that he sold.

Under the SEC's rules the brokers were required to cover for respondent's sales. At first when they were still expecting him to make delivery, they forwarded the borrowed securities on his behalf. When he later confessed to the details of this scheme, the brokers were required to buy in the stock at their own expense, resulting in substantial losses.

Due to respondent's deception, the risk inherent in the short selling scheme was shifted from himself to the brokers. Because they believed he was selling long, none of them obtained a margin deposit that would have protected them against the failure to make delivery on his part. The District Court found that respondent's misrepresentations violated section 17(a)(1) of the statute and convicted him on all eight counts of the indictment. The Court of Appeals agreed that the respondent had committed fraud and had injured the brokerage houses, but it concluded that section 17(a)(1) is not violated by the species of fraud which was practiced against brokers rather than purchasers of securities and on that theory the court reversed respondent's conviction on all of the counts of the indictment.

We contend that section 17(a)(1) applies to the species of fraud used here and we rely on the text of the statute in making that contention.

QUESTION: Mr. Shapiro, could this case have been prosecuted under the '34 Act?

MR. SHAPIRO: It could indeed, Your Honor. It might well have been filed under section 10(b) of the '34 Act because there was fraud used in connection with the sale. But a lot of --

QUESTION: Would it have made your position a little easier here had it --

MR. SHAPIRO: We don't feel that it would. We think the most logical choice for this prosecution was

17(a)(1). A fraud was used in an offer and in a sale and as the Blue Chips Stamp opinion points out, section 10(b) does not explicitly extend to frauds in an offer. The indict here charged fraud in both the offer and the sale process and for that reason section 17(a) was the logical choice. 17(a) is the traditional criminal law provision used in prosecutions based on fraudulent selling schemes. It is used in by far the larger part of the cases raising frauds in this particular context.

Now, the respondent admittedly committed fraud by making statements of the following kind: sell long 1,000 shares at market. When he made that statement, he was short rather than long and we say that this misrepresentation occurred in a sale because it was made by the seller at the very time that he placed the sale. The seller told a lie in the very same communication that triggered the contract of sale. The definitions in the statute make that conclusion emphatic.

The statute says that a sale includes every disposition of a security for value, and the dictionary definition of disposition is simply the action of getting rid of something or parting with something. Now, giving these words their ordinary meaning, the respondent committed fraud in the disposition of securities when he placed fraudulent orders to sell those securities. The definition of offer contained in the statute is even more expansive than the definition of sale. An offer includes every attempt to dispose of a security for value.

Now, when respondent called his brokers and ordered them to sell at market, he was obviously attempting to dispose of securities. And since this fraud occurred while he made that attempt to sell, we say that the fraud occurred in his offer and a violation of the statute resulted.

QUESTION: The District Court so found and the Court of Appeals intimated that it agreed on the factual issue, didn't it?

MR. SHAPIRO: That is correct, Your Honor. There was no dispute about the facts in the case at all. It was strictly a question of the scope of section 17(a)(1).

QUESTION: Who was the district judge, Judge Larson?

MR. SHAPIRO: Yes, Your Honor, Judge Larson.

A few more thoughts about the literal text of the statute may be helpful. Section 17(a)(1) nowhere limits the class of victims. It extends to any scheme to defraud, like the mail fraud statute, which is the basis for section 17(a)(1), the victim can be anyone. Indeed, the case law makes it clear that there doesn't have to be any victim at all. The scheme to defraud is itself illegal if it is practiced in the protected medium, that is the process of offering or selling a security. And the statute does not say that the fraud must occur in a particular phase of the sale or in a particular phase of the offer. The sale transaction, of course, consists of a series of events. There is the order to sell, there is the execution, there is the confirmation, and in the ordinary course there is the delivery of securities and the payment of money. But the statute does not say that the fraud must occur at a particular point in this process, and it certainly does not say that it must extend all the way from the seller through the anonymous exchange process to the purchaser on the other side of the transaction.

The common sense of our position is illustrated I think by a single example. If a broker acting merely as an agent committed a fraud on a customer in the process of selling, no one would doubt that that was a fraud in a sale within the prohibition of the statute. And we say that it makes no difference if you turn the case around and have a case of the customer defrauding the broker. The locus of the fraud is the same. It still occurs in the sale process, and we submit that there is no basis for the conclusion that brokerage firms participating as intermediaries in the sale process are not subject to the protections as well as the prohibitions of section 17(a)(1).

The Court of Appeals nonetheless believe that it was proper to narrowly construe section 17(a)(1) because of its view of legislative intent. The court thought that Congress' sole purpose in enacting this statute was to protect investors. We submit that that ignores numerous statements of legislative intent to the contrary and it ignores the economic problem that Congress was attempting to grapple with in 1933. This statute was passed in the depths of the depression as a means to revitalize the economy. The market crash of '29 had left many investors penniless and had practically wrecked many American business firms, in the words of the Congressmen who debated this provision.

Securities fraud contributed to these conditions and Congress --

QUESTION: Mr. Shapiro, do you have to delve very deeply into the legislative history if the statute is quite clear on its face?

MR. SHAPIRO: I agree with Your Honor that you don't have to even scratch the surface. We think that the literal terms of the statute directly support our analysis, but for the sake of the completeness --

QUESTION: I realize the Court of Appeals took a different view.

MR. SHAPIRO: That's correct, the Court of Appeals felt that the legislative history pointed the other way and we would like to point out it is supportive of our position. Congress intended to eliminate securities fraud in order to remedy the economic conditions that it pointed to in the debates on this measure. The beneficiaries of that prohibition were explicitly identified as follows, and I quote from the Senate report: "The purpose of this bill is to protect the investing public and honest business." The House report stated that business injury was equally as significant as the loss suffered by investors. In short, Congress was trying to protect the national economy overall, including both public investors and the business firms that participated in our nation's economy. There is not a hint in any of the debates or the reports that Congress intended to protect investors only or that it was unconcerned with injuries suffered by investors or by business firms.

The respondent's citation of legislative history showing that Congress intended to protect investors is quite beside the point, we respectfully submit. We would be the first to affirm that Congress intended to protect investors, but we deny that that was the only purpose and respondent cites nothing that suggests that it was.

In recent securities cases, such as Hochfelder and Blue Chip Stamps v. Manor Drug Stores, this Court has contrasted the statutory provision under consideration with other neighboring provisions to get a clear view on its coverage or its scope. That technique is helpful here.

Section 17(a) contains three separate subdivisions.

They are each expressed in the disjunctive and each is a prohibition against fraudulent conduct. Section 17(a)(1) is the broadest provision, forbidding any fraud in an offer or in a sale. Section 17(a)(3), in contrast, is a more limited provision, dealing narrowly with fraud practiced on purchasers of securities. This difference shows that when Congress intended to cover purchaser fraud, it knew how to do so explicitly and it did do so explicitly.

This Court's decision in the case of United States v. Gilliland, which we have cited in our opening and reply briefs, demonstrates the proper analysis of this question. In that case, the Court considered a provision in the Criminal Code which prohibited the filing of any false report with a government agency. In the same sentence, and stated in the disjunctive, was a prohibition against filing any false claim or bill or voucher demanding money from the government. The defendant there made the same argument that the defendant makes here, that the general prohibition should be circumscribed by the narrower prohibition. This Court rejected that argument in words that are directly applicable here, and I quote: "The rule ejusdem generis is a familiar and useful one...but it gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards." That principle, we submit, is directly applicable here.

Section 17(a)(1) and 17(a)(3) are alternative prohibitions which taken together provide comprehensive protection against fraud, and there is no justification we submit for contracting these complimentary provisions into a single narrow prohibition dealing only with fraud on purchasers.

The respondent is perfectly candid in the position that he takes about the fraud in this case. He doesn't deny that he committed fraud. He doesn't deny that he injured the brokerage houses. And he doesn't even deny that he violated the federal securities laws. He contends, however, that the prosecutor made a mistake, that the prosecutor was duty-bound to pursue him under section 10 of the '34 Act, rather than section 17 of the '33 Act. But as I mentioned previously to Mr. Justice Blackmun, 17(a)(1) was not only an allowable choice, it was the most logical choice. It deals squarely with the thing charged in the indictment, fraud in an offer and fraud in a sale.

I don't mean to suggest by this analysis that respondent did not transgress various different provisions. I assume that he did. I think he violated section 10(b) when he used fraud in connection with a sale. I think he violated section 10(a) when he caused a short sale to be effected in a declining market, contrary to the SEC's rules, and I think he probably violated the mail fraud statute because he used a fraudulent scheme and caused the mails to be used in conjunction with it.

But it is quite common place for a complex criminal scheme to run afoul of different statutory provisions, and when it does this Court's decisions teach that the discretion rests with the prosecutor to select the appropriate charge and that is a broad discussion according to the decisions of this Court.

The respondent has also argued that the decision below must be affirmed because criminal laws should be construed with lenity, but the rule of lenity applies to statutes that contain serious ambiguities which do not afford fair notice to the accused. This statute clearly conveys the congressional purpose. This statute speaks in sweeping terms. It prohibits any device, any scheme or any artifice of fraud used directly or indirectly in an offer or in a sale.

No person reading that statute could think that he was free to pick up the telephone and call his broker and deceive his broker in the process of selling a security, and there is no question here but that the deceit that was practiced was willful and knowing. The District Court found that and the Court of Appeals did not disagree about the clarity of the evidence showing fraud.

Under these circumstances, we submit that the rule of lenity simply has no application. For these reasons and those that we have expressed in our opening and reply briefs, we respectfully request that the decision of the court below be reversed.

And Mr. Chief Justice, I would ask your leave to reserve the balance of my time for reply.

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

Mr. Walters.

ORAL ARGUMENT OF JOE A. WALTERS, ESQ.,

ON BEHALF OF THE RESPONDENT

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

When this case first came before this Court, the government stated in its petition for certiorari that the decision of the Court of Appeals seriously impairs the ability of the United States and the Securities and Exchange Commission to enforce the securities laws in cases involving fraud practiced on the largest participants in the national securities markets.

They also stated at page 12 of their pertition for certiorari that because 17(a)(1) authorizes not only criminal prosecutions but also civil remedies, the effect of the decision here is to abolish one of the government's most effective weapons against the most serious forms of securities fraud practiced on members of the brokerage industry. And by the time we got through briefing this matter, on page 8 of the reply brief the government says the fact that respondent's conduct may have violated other provisions of the federal securities laws in addition to 17(a)(1) is not material.

And counsel stands up today and says that the conduct of this respondent violates 10(a), violates 10(b), violates the mail fraud statute, and I might say today violates section 7 of the 1934 Exchange Act in connection with 7(c).

Now, having gotten into this Court --

QUESTION: What difference does this make to the central issue, Mr. Walters?

MR. WALTERS: I think it makes this difference, Your Honor, as to whether or not this case would be before this Court here today. This is the first time in over forty-five years of the administration of the Securities Act of 1933 that anyone has ever been indicted in connection with what is called a short selling scheme, and we maintain that there are plenty of laws available in order to corral this kind of activity and that this respondent was not properly charged.

QUESTION: The only issue before us is whether he is properly charged under 17(a)(1).

MR. WALTERS: That is correct, Your Honor, now that we are here, that is the issue. And I think in determining that issue we should remember that the Court of Appeals said that this respondent was not guilty of a violation of 17(a)(1) because of the species of fraud practiced by the respondent, and I think that is a very important observation.

What is the species of fraud practiced by the respondent? They say it is short sell, and they say it is defrauding the broker in that the respondent lied to him and misrepresented that he had stock to sell that he didn't then own. But the species of fraud really is the obtaining of illegal credit which when you are dealing with securities on the national securities exchanges is regulated by section 7 of the Exchange Act of 1934.

QUESTION: Well, Mr. Walters, why does it make any difference which "species of fraud," as you put it, he engaged in when 17(a)(1) makes criminal the employment of any device, scheme, or artifice to defraud?

MR. WALTERS: It is our contention that the 1933 Act was directed towards the purchaser of securities, that it dealt with the offer or the sale of securities to the purchasers. It dealt with the distribution of securities in the marketplace. It dealt with the offering of securities in the marketplace. Whereas, the 1934 Securities Act dealt with the transactional situations in the marketplace, what was happening on the stock exchanges. And as some of the debate in the legislative history of the 1933 Act indicates, there was some disappointment on the part of some of the members of the House of Representatives that the 1933 Act did not outlaw transactional things such as short selling, selling against the box, washed sales. But they stated that they realized you couldn't do it all in one act, therefore the 1934 Act took care of transactions.

Now, what did the '34 Act do? It did not outlaw short selling. As one of the witnesses testified in this case, short selling is a common practice. Often the exchange, in dealing with the third market securities, the same securities that are traded on the exchange, if they are traded off of the exchange short selling is commonly done, it is a part of business, but --

QUESTION: But your client wasn't convicted of short selling, he was convicted of fraud.

MR. WALTERS: He was convicted of a species of fraud and I am directing the Court's attention to what is the fraud that he committed. This is not fraud. He did something. The fraud that he committed that the law said he shouldn't do was to get an extension of credit. He obtained an illegal extension of credit from the brokers. That is what he did. It wasn't short selling. That is not illegal. We are dealing with fungible commodities here. Short selling is occurring all the time.

QUESTION: You concede that he did engage in fraud?

MR. WALTERS: I concede that he engaged in fraud in obtaining and illegal extension of credit, and I say that that is in violation of the '34 Act and that it is not encompassed within section 17(a) of the 1933 Act. And I direct this Court's attention to the fact that we are dealing with a transaction that involves the exchange mechanism, that involves the very thing that the 1934 Act was passed to regulate, whereas the 1933 Act provisions were there for the purposes of regulating the distribution of securities.

Now, as the facts indicate, not one investor in any way was injured as a result of the transactions. The illegal extension of credit was in effect what the court found to be the specie of fraud, as they stated that the respondent took a free ride on the broker's money or credit and in so doing violated the '34 Act. So consequently in dealing with the particular problem that we have here, I believe that the Court of Appeals correctly analyzed what species of fraud was that is involved in this particular case, and in addition in looking at the '33 Act on the one hand and the 1934 Act on the other, recognized the charge that should have been placed against this respondent did not fall under 17(a) but rather fell under the '34 Act.

QUESTION: Mr. Walters, before you leave 17(a), do you concede that the short sale was an offer or sale of a security within the meaning of the opening paragraph of 17(a)?

MR. WALTERS: No, I do not.

QUESTION: Would you say there was no offer or sale in the case?

MR. WALTERS: There was no offer or sale to the broker, that's correct.

QUESTION: Forget to the broker for a moment, because the statute doesn't have those in it. Was there in your view an offer or sale of any securities when your client made a short sale, representing it to be a long sale?

MR. WALTERS: My client employed a broker to make a sale of some securities.

QUESTION: So you do concede there was an offer?

MR. WALTERS: Through his agent, he sold securities and they were delivered.

QUESTION: So you concede there was an offer of sale of securities and do you also concede there was a device, scheme or artifice to commit fraud?

MR. WALTERS: No. May I go back for a moment on the offer of sale. The trial judge, Judge Larson found that there was a sale. He never found anything about an offer. So I am not going to concede there was an offer because the trial judge in his own findings said no.

QUESTION: But you do concede there was a sale?

MR. WALTERS: There was a sale to a customer and the securities were delivered to the customer and the customer paid his money for it and the brokerage house that represented the respondent hung onto the money, that's correct.

QUESTION: So your statutory argument is that the words "deceit upon the purchaser" should be read into the entire section?

MR. WALTERS: That is correct.

QUESTION: Statutory --

MR. WALTERS: I maintain that under the '33 Act that the deceit on the purchaser should be read into subdivision (1) and subdivision (2) and subdivision (3) and I point out that if you look at section 12 and you look at section 11 of the '33 Act, you will find it is only the purchaser that has standing to bring a cause of action for fraud, deception or anything in violation of the 1933 Act. And I believe that that is an indication that that should be carried forth in 17(a) provision, that it is really the fraud on the purcahser in connection with a sale that is governed by this particular section, and we have argued that in our brief, that you should re-read into it.

Now, counsel has made the observation that the basis for the 17(a) was the mail fraud statute. According to the research we have done, it was a combination of the mail fraud statute and the Martin Act of the State of New York. The Martin Act was the blue sky act that New York state had adopted, and the interpretations of the Martin Act by its Supreme Court limited violations to purchasers only, and when the '33 Act was written and finally adopted, it was a combination of mail fraud and the Martin Act. And I still say that is in keeping, that 17(a) is still limited to frauds and violations insofar as they direct its conduct towards the purchaser. And the conduct that the respondent here was involved in was not directed to the purchaser at all, it was directed in fact to the broker by way of obtaining illegal credit in violation of law, and that law was the 1934 Act and so if there was a violation that is where this man should have been charged.

QUESTION: Subsection (1) doesn't say anything about the purchaser, does it?

MR. WALTERS: It doesn't, but if you read (1) and you read (2) and you get down to (3) at the end, it talks about fraud on the purchaser.

QUESTION: Isn't each one of them independent?

MR. WALTERS: I don't believe so. I believe that in interpreting (1), (2), and (3), that they should be read as though there was a fraud upon the purchaser in each case. I think that is the only way you give effect to the statute. I think it is clear. To me it is. I realize we are here on a difference of opinion on that, but I believe that is the correct interpretation of this provision.

Now, before closing I would like to point out to the Court a statement made by the government in its reply brief as an effort to overcome the fact that there was an offer made which the court found to be in violation of the law, and I refer the Court to page 3 of the government's reply brief, and it is footnote number three, in which the government does not agree with the statement that we made on page 18, footnote 31 of our brief, in which we made the observation that the District Court found only fraud in the sale of securities. The Court of Appeals found fraud in neither offer nor sale, and offer and sale, of course, are distinct acts.

Then the government in its reply brief comes back and says that we are mistaken because of the fact that the District Court specifically found that as to each count of the indictment the defendant acted as charged, and what I want to point out is that the findings of the trial court which appear on page 28 of the petition for writ of certiorari, says, as to each count of the indictment, the court finds that the defendant acted as charged in the count willfully and knowingly. And I say that that is not a correct characterization by the government, the court didn't find that the respondent was found guilty of everything as charged. What the trial court said was that insofar as the indictment said that what he did was willful and knowingly, I find that to be correct. And I think that is a far statement from saying that this respondent was found guilty of anything at all in connection with the offering of securities by the trial court, and, of course, we are here on the facts of this particular case.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you. Do you have anything further, Mr. Shapiro?

ORAL ARGUMENT OF STEPHEN M. SHAPIRO, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. SHAPIRO: Just briefly, Your Honor.

I think the last sentence in the District Court's opinion bears mention. It says that the court finds the defendant guilty of each count in the indictment and each count of the indictment explicitly charged fraud in an offer and fraud in a sale.

The statutory definition of an offer is simply an attempt to dispose of a security for value. The evidence here showed that there was an attempt. That was the only purpose of calling the broker and telling him to sell the shares. We think that this finding of the District Court is sufficient to establish that there was fraud used in an offer as well as a sale.

QUESTION: Mr. Shapiro, it is true, is it not, that if you read Judge Larson's opinion, he does refer to sale in each paragraph, and his next to concluding paragraph says they prove beyond a reasonable doubt that -- I have lost the language now, but he refers to fraud in the sale of securities and never mentions offer in so many words.

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

QUESTION: So he clearly found fraud in the sale and you are inferring that maybe also offer, but it is not nearly as clear.

MR. SHAPIRO: That is quite correct. He paraphrased the statute in terms of a completed sale, but in the process of making a completed sale there was an attempt to dispose of the security and we think that that is necessarily embraced within this finding.

QUESTION: And in all events, doesn't the question whether it is an offer or not simply become a question of law?

MR. SHAPIRO: It certainly is, and this Court could affirm or reinstate a correct District Court judgment on any applicable legal theory.

QUESTION: Mr. Shapiro, Mr. Walters just before he sat down called our attention to the finding under paragraph 11 by Judge Larson, saying that as to each count of the indictment, the court finds that the defendant acted as charged in the count willfully and knowingly. What do you suppose that last phrase means?

MR. SHAPIRO: Willfully and knowingly?

QUESTION: Yes.

MR. SHAPIRO: That is necessary to sustain a conviction under I believe it is section 24 of the Act that requires scienta and that was the reason for stating that he acted as charged in a willful manner and a knowing manner.

QUESTION: And as to each count of the indictment, was that charged, that it was done willfully and knowingly?

MR. SHAPIRO: I believe that it was, Your Honor.

QUESTION: Including the offer as well as the sale?

MR. SHAPIRO: I think that is correct.

QUESTION: The indictment appears on page 14 --

MR. SHAPIRO: Pages 14 through 15. The very beginning of the paragraph under Neal T. Naftalin, defendant here, willfully and knowingly did employ a scheme to defraud, and then it proceeds to describe the acts that constituted that fraud, stating that this was in the offer and sale of securities, on page 15, and that is repeated with respect to each count of the indictment.

The argument was made that the misconduct here was simply obtaining credit illegally, and I think that it bears prompt rebuttal to that. The basis of the charge here was fraud, a misstatement of the seller's position. The obtaining of credit was only the context in which the fraud took place. The basis of the indictment was misrepresentation.

The argument was also made that the '33 Act deals only with fraud in new issues. That proposition is easy to rebut by examining any of the cases contained in the annotations under section 17(a). Fully two-thirds to three-quarters of these cases are cases involving fraud in the after-market. 17(a)(1) applies to fraud in any sale or in any offer, not just in new distributions of securities.

QUESTION: Mr. Shapiro, tell me again -- I think you covered it in your initial argument -- if you lose this case, how will the commission's operations be hurt or crippled?

MR. SHAPIRO: There is a practical consequence to the choice between 17(a) and section 10(b). 17(a) covers fraud in an offer as well as fraud in a sale. Section 10(b) doesn't extend that far. For example, a fraud was used here in placing a limit order or a stop loss order that wasn't executed on the exchange. It couldn't be effected on the exchange, and deception was used in that attempt to dispose of a security, that would violate section 17(a) but it wouldn't vioalte section 10(b).

QUESTION: Well, is that quite clear, Mr. Shapiro? The Blue Chip case holds that only a purchaser or seller may sue for damages. But is it perfectly clear that only if there is an injury to a purchaser or seller is the statute violated? It is quite a different question.

MR. SHAPIRO: I didn't mean to suggest that. I think that part of the Court's analysis in Blue Chip referred to the fact that section 10(b) speaks only of fraud in connection with a purchase or a sale.

QUESTION: You satisfy that requirement here if you find this to be a sale.

MR. SHAPIRO: That is quite correct.

QUESTION: But by contrast, this one refers also to an offer.

MR. SHAPIRO: Offer and a sale, and that is the practical difference that Justice White was driving at.

QUESTION: But if there is coverage here, what about private actions?

MR. SHAPIRO: This Court has never decided whether there is a private action --

QUESTION: Well, there wouldn't be if there wasn't coverage.

MR. SHAPIRO: Correct.

QUESTION: If you lost, there wouldn't be, but what if you win, how about private actions, would it necessarily follow or not?

MR. SHAPIRO: I don't think that it would necessarily follow that there would be a private action. As the Court has pointed out, this is a judicial construct based on a number of different considerations and the Court has looked to various different factors in trying to decide whether an implied private right should exist. This is an express criminal law provision that we are relying on here. We are not relying on any judicially implied right of action.

Unless the Court has further questions, I will conclude my argument.

Thank you.

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

(Whereupon, at 11:30 o'clock a.m., the case in the above-entitled matter was submitted.)

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