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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-679

TITLE BATEMAN EICHLER, HILL RICHARDS, INCORPORATED,
Petitioner V. CARL F. BERNER, ET AL.

PLACE Washington, D. C.

DATE April 15, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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BATEMAN EICHLER, HILL :
RICHARDS, INCORPORATED, :
Petitioner :
v. : No. 84-679
CARL F. BERNER, ET AL. :
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Washington, D.C.
Monday, April 15, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:50 o'clock p.m.

APPEARANCES:

ROBERT S. WARREN, ESQ., Los Angeles, California;
on behalf of Petitioner.
GEOFFREY P. KNUDSEN, ESQ., San Francisco,
California; on behalf of Respondents.
BRUCE N. KUHLIK, ESQ., Assistant to the Solicitor
General, Department of Justice; pro hac vice; on
behalf of Securities and Exchange Commission as
amicus curiae in support of Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Warren, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT S. WARREN, ESQ.

ON BEHALF OF THE PETITIONERS

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

This case presents the issue of whether a tippee who knowingly receives inside information in breach of fiduciary duty, intending to use it to defraud others, may in turn sue his tipper under Section 10 of the Securities Exchange Act.

The case arose in the context of a suit before the United States District Court in San Francisco. A Judge Schwarzer dismissed the action on motion on the basis of the following critical allegations of the complaint.

The Plaintiffs alleged that they had invested in a company known as TONM that was engaged in exploration for gold in Surinam. They said that they did so by obtaining information directly or indirectly through the Defendant broker of a number of matters, but the following was the essential point, and that was that there was a developed gold find in Surinam, and that there would shortly be announced a joint venture with a

1 major mining company in order to exploit that gold
2 find.

3 The complaint recites that they were told that
4 this was inside information obtained from a president or
5 a vice president of TONM. They said that they purchased
6 shares of stock in TONM over a period of time from
7 November 1979 until 1981 on the premise that this was
8 inside information from that source.

9 QUESTION: Was that a violation of the
10 securities laws?

11 MR. WARREN: At that particular point there is
12 a suggestion that it would be, Mr. Chief Justice.
13 However, it was confirmed by what happened in or about
14 april of 1980 when they contacted Mr. Neadeau directly.
15 Mr. Neadeau was alleged to be the president of TONM, and
16 they asked Mr. Neadeau whether this information that
17 they had learned from the broker, Mr. Lazzaro, was true,
18 and they were told by Mr. Neadeau as follows: first,
19 that he could not confirm or deny that information;
20 second, he told them why, because it was not yet
21 public. Then he told them when it would be public. He
22 said you will have to wait until you see the annual
23 report.

24 And then to make sure that there was no
25 misunderstanding, that the information might be

1 inaccurate, he told them that Mr. Lazzaro, the broker,
2 was a very trustworthy and a good man.

3 QUESTION: And you suggest that was a signal
4 that in effect was a violation of the act?

5 MR. WARREN: Exactly. I suggest that the
6 following is true, that under the analysis of this Court
7 in Dirks, that that conduct, their subsequent trading
8 with that information, that inside information, was in
9 fact a violation of Section 10 of the Act, for the
10 following reasons.

11 The duty in question is derivative from Mr.
12 Neadeau. Mr. Neadeau is the person with the fiduciary
13 responsibility. As President of that company he had a
14 fiduciary responsibility to his stockholders not to
15 selectively tell a broker and that broker's customers so
16 that that broker's customers could trade, that broker
17 could earn commissions, that broker's own stock could be
18 benefitted -- and these parties were told about the
19 stock of Mr. Lazzaro and his family.

20 QUESTION: Well, Mr. Warren, is the tippee
21 liable derivatively through Lazzaro or directly, in your
22 view, from Mr. Neadeau?

23 MR. WARREN: The tippee here, Justice
24 O'Connor, is liable both directly from Mr. Neadeau,
25 through the contact with Mr. Neadeau, and derivatively

1 by virtue of being, if you will, a subtippee from Mr.
2 Lazzaro, knowing of Mr. Neadeau's involvement or of some
3 counterpart of Mr. Neadeau.

4 QUESTION: We have to look at this based on
5 the face of the complaint, do we not?

6 MR. WARREN: Exactly we do.

7 QUESTION: And the complaint does not say, of
8 course, how Mr. Lazzaro got his information or what it
9 was that Mr. Neadeau told Mr. Lazzaro, if anything.

10 MR. WARREN: That is correct. All we know
11 is --

12 QUESTION: It could be a total fabrication by
13 Mr. Lazzaro that he was told anything by Mr. Neadeau.

14 MR. WARREN: It could have been. However,
15 what we know is that the belief --

16 QUESTION: Well, just looking at the face of
17 the complaint, that could be true, could it not?

18 MR. WARREN: That could be true. It --

19 QUESTION: And therefore, no derivative
20 liability of the tippee through Mr. Lazzaro from the
21 face of the complaint alone.

22 MR. WARREN: Not on the basis of what the
23 facts are as the Plaintiffs assumed them to be. And
24 that's what we must look at in deciding whether they
25 either committed or attempted to commit a violation of

1 Section 10.

2 QUESTION: And what is it that Mr. Neadeau
3 said directly to the tippee that you say imposes this
4 liability on the part of the tippee?

5 MR. WARREN: First, the Plaintiffs allege, and
6 they allege this as a charging allegation, so it is
7 assumed that this was an important statement to them and
8 one that they deemed important in determining to go upon
9 this acquisition program of stock -- they said they told
10 Mr. Neadeau that they were dealing with Mr. Lazzaro and
11 that they wanted to confirm certain information, and
12 they said in the complaint that what they wanted to
13 confirm was the gold strike in Surinam and the
14 prospectige joint venture with St. Joe's.

15 QUESTION: I thought the complaint discloses
16 that Mr. Neadeau refused to confirm or deny that.

17 MR. WARREN: The complaint alleges a statement
18 by Mr. Neadeau that the Plaintiffs allege misled them
19 into believing that they had inside information and a
20 jump on every other TONM shareholder in that he made a
21 statement to them that they allege in their complaint --
22 it must be to make it a charging allegation -- was a
23 clever confirmation while nonconfirming. They said that
24 he said yes, that he couldn't confirm or deny, but the
25 realities were that when he said the reason he couldn't

1 confirm or deny was because the information was not yet
2 public, they would have to wait for that annual report
3 to see that, but he did want to tell them that Mr.
4 Lazzaro was a very trustworthy and good man.

5 There is only one inference from that, and if
6 that is not -- if that is not an improper transmission
7 by Mr. Neadeau, then in the brokerage industry I believe
8 they are going to talk about somebody being
9 Neadeaulized because that is nothing more than a ploy,
10 at least as they allege it, that's their charge, a ploy
11 to indicate that they had inside information, an unfair
12 jump on the TONM shareholders.

13 And they say that they acted on it. They say
14 in reliance on it, on the premise that they had inside
15 information, they bought from other shareholders, and
16 they bought at two, they bought with an advance
17 knowledge of market conditions, and they did in fact
18 watch the stock over a period of time from November of
19 1979 up to the first quarter of 1981, and indeed, in the
20 last quarter of 1980, hit a high water mark of seven.

21 So based upon the information, the jumps that
22 they thought they had, they did indeed have a jump.
23 They rode that stock from approximately two up to seven,
24 and had they sold at that point, they would have
25 actually achieved the results of their contemplated

1 fraud.

2 They didn't; they held. The stock did not pan
3 out. A public announcement was made contrary to the
4 inside information announcing that the joint venture
5 wouldn't go through; the stock went down.

6 So it is our position that on those facts, as
7 disclosed on the face of the complaint, that Plaintiffs
8 were guilty of a 10(b)(5) violation.

9 Now, it is understood that --

10 QUESTION: In your view, Mr. Warren, would the
11 in pari delicto defense always be available then to a
12 tippee who voluntarily trades on what is represented to
13 be insider information?

14 MR. WARREN: I believe that if the tippee, as
15 here, is put in the position to understand that the
16 information was received from a corporate insider with a
17 fiduciary duty not to disclose it selectively, and as
18 here, they know that it has been disclosed selectively
19 for the purpose of causing the customers of a certain
20 broker to enjoy an unfair advantage, yes. If all they
21 are told is we have some inside information, I think one
22 can say at that point you don't know enough to know
23 whether a Dirks duty has in fact been breached or has
24 not. Here we do.

25 QUESTION: Do you think it is correct to say

1 that at common law, the in pari delicto defense was
2 available in an action for fraud?

3 MR. WARREN: Yes. When the conduct which is
4 the equal fault is itself fraud. In other words,
5 obviously if we have a gambling game where someone has
6 gambled, and that is their fault, they have gambled
7 against the state law and they are cheated with marked
8 cards, then you don't have equal fault because one
9 person has a fraudulent intent and the other person just
10 intends to gamble, a small matter.

11 Here, these people are alleged to have had the
12 identical intent. Here it is alleged that Mr. Neadeau
13 and Mr. Lazzaro intended to commit a 10(b)(5)
14 violation. They intended to defraud the market.

15 QUESTION: By what?

16 MR. WARREN: I beg your pardon?

17 QUESTION: By passing out false information or
18 what, or by -- or withholding information?

19 MR. WARREN: They allege that the Defendants
20 were engaged in what they call manipulation of the
21 market. At one point they had a Section 9 claim as
22 well, but that was dismissed by virtue of nontimely
23 filing.

24 QUESTION: So if equal -- if close to equal
25 fault is essential for the defense to be invoked, what

1 is the difference between -- is there some difference
2 between these -- the tipper, the tipster and the tippee,
3 in this case?

4 MR. WARREN: Not a meaningful difference, in
5 our view, because they each intended according to the
6 allegations of the complaint as we read them to commit a
7 fraud on stockholders.

8 QUESTION: Well, they also -- they also
9 intended to use inside information.

10 MR. WARREN: The tippees?

11 QUESTION: Well so did the tipster.

12 QUESTION: Both of them.

13 MR. WARREN: Oh, the tipster to use in side
14 information. Well, they allege that the inside
15 information is not true, that the tipster was passing a
16 wrong that information.

17 QUESTION: Well, then, the tipster not only
18 was purporting to use inside information, but he was
19 also lying.

20 MR. WARREN: And says, I believe, the Dirks --
21 I'm sorry.

22 QUESTION: And the tippee, the tippee didn't
23 lie to anybody, he just didn't tell them what the facts
24 were.

25 MR. WARREN: Well, I don't -- I suggest that

1 the difference between an actionable misrepresentation
2 under 10(b)(5) and an actionable nondisclosure such as
3 an affiliated ute under 10(b)(5) are indistinguishable.
4 Obviously --

5 QUESTION: Yes, but the tipster might be stuck
6 under state law for defrauding somebody.

7 MR. WARREN: The tipster might be stuck under
8 state law for defrauding somebody, of course.

9 QUESTION: He wouldn't be -- but the tippee
10 wouldn't be committing a state law offense by just
11 not -- just by saying caveat emptor.

12 MR. WARREN: Oh, I -- perhaps I am unduly
13 influence by the fact that I am from the State of
14 California, but I don't think that could be --

15 QUESTION: You have statutory.

16 MR. WARREN: I don't think that could be said
17 in the State of California.

18 QUESTION: You have statutory remedies.

19 MR. WARREN: Well, we have, yes, we have a --
20 yes, we are a code state. However, we have a well
21 developed case law in California, and we have duties of
22 when it is necessary to disclose in order not to commit
23 fraud, and I believe that this Court has drawn upon
24 common law concepts as to those duties to disclose. In
25 Dirks, when we talk about there being fiduciary

1 duties --

2 QUESTION: So the tippee wants to buy some
3 stock from some stockholder because he thinks the stock
4 is going up. He just doesn't tell him why he thinks the
5 stock is going up, that would be his -- would give the
6 seller of the stock a remedy under state law?

7 MR. WARREN: No, but if he, if he had gone to
8 a corporate insider with a fiduciary duty to that
9 shareholder that he is going to go buy it from --

10 QUESTION: I understand that.

11 MR. WARREN: -- and he gets told something by
12 that corporate insider that is not to be revealed and is
13 a breach of duty to do so, and he then goes and buys
14 that stock and he doesn't disclose, yes, I believe
15 indeed he is guilty of actual fraud. I believe he is
16 guilty of actual fraud under common law, under state
17 law, and under the federal securities laws.

18 QUESTION: If this stock had gone to 28 and
19 then this fellow had sold it and made a very large
20 profit, would it be subject to some vulnerability on the
21 part of others?

22 MR. WARREN: Would the plaintiffs here be
23 subject to vulnerability to a suit by others? Yes,
24 indeed, I believe so.

25 QUESTION: Now, as I read the District judge,

1 he said he wasn't going to get into a fine tuned
2 weighing of quantitative dishonesty, quantitative fraud,
3 quantitative violations of the Securities Act, that he
4 was going to weigh and did weigh what he thought was the
5 qualitative violations, and he thought qualitatively
6 they were in the same boat.

7 Isn't that about it?

8 MR. WARREN: That is correct. I believe that
9 is exactly the fact, that the dollars weren't as
10 important as the offense which was committed and the
11 state of mind with which it was committed.

12 Now, we believe that if we are correct that
13 there indeed was a fraud and attempted fraud committed
14 by the plaintiffs then they should be barred because,
15 first, the defense of in pari delicto is a part of the
16 statutory law of the securities laws; second, it is
17 based upon rational, reasonable and publicly accepted
18 considerations; and third, the government here has
19 failed in any respect to show that its enforcement will
20 inhibit the enforcement of the securities laws.

21 First, as to the legislative point, Rule 10 is
22 based upon the statutory section 10 which simply
23 prohibits manipulative and deceptive practices. As
24 such, if construed to have a private remedy, it is a
25 very general, federal tort standard with the contours to

1 be set by the court.

2 In *Briscoe v. LaHue*, however it is correctly
3 pronounced, it was said that when Congress passes such a
4 very general federal tort even for very good and
5 important purposes such as the civil rights statutes, it
6 is presumed to be aware of the common law and the
7 existing of common law defenses and to accept them into
8 that tort structure.

9 This is particularly appropriate with regard
10 to Section 10 because of the savings clauses that are
11 found in Section 16 of the '33 act and 28 of the '34 act
12 which accept common law remedies and deem them to
13 continue in effect.

14 The federal courts uniformly, in applying
15 Section 10, have adopted common law defenses based upon
16 the conduct of plaintiffs, for example, laches, waiver,
17 estoppel, ratification, consent, limitations, all of
18 those based upon conduct by the plaintiffs have been
19 accepted. One of them has been *in pari delicto*. The
20 federal courts have applied *in pari delicto* in
21 securities actions, and indeed, in the *Kuehnert* case in
22 1969, applied it to an action much like that here, also
23 involving the tipper/tippee type of situation.

24 QUESTION: Mr. Warren, can I interrupt with
25 one question?

1 MR. WARREN: Yes, sir.

2 QUESTION: I guess one of the problems is what
3 really is equal fault in cases of this kind, and if I
4 understand your colloquy with Justice White, you say it
5 really doesn't make any difference whether the tipster
6 was telling the truth or not; in either event it is
7 equally bad.

8 MR. WARREN: Yes --

9 QUESTION: Is that -- in other words,
10 supposing you had a case in which a tipster -- a broker
11 says to a customer, I just talked to the president of
12 the company and they are about to buy a gold mine, and
13 in one case that is just no basis in fact for it; in the
14 other case it's totally true. Would you -- and the
15 customer then goes out and buys 100 shares of stock.

16 Would you say in neither case could the
17 customer recover?

18 MR. WARREN: I would say in neither case could
19 the customer recover, and if it is true, of course, as
20 pointed out in Kuehnert and pointed out in Tarasi, it is
21 likely that there will be no need to worry about the
22 problem because all concerned will be wealthy.

23 QUESTION: Well, no, not because -- at the
24 time he tells him, it is true, but then a month later
25 the deal falls apart. You know, that is -- arguably

1 that might have happened here. I don't know.

2 MR. WARREN: There's that possibility.

3 QUESTION: So that at the time of the
4 transaction, though, everybody was dealing in at least
5 not a false way.

6 You say there is no difference between the case
7 where he tells the truth and the one where the broker
8 lies.

9 MR. WARREN: Oh, well, in the former case, we
10 also will leave out now the wealthy because it didn't
11 pan out. However, because we have no bad intent on the
12 part of the defendant, we can also forget about it
13 because there is no cause of action.

14 The in pari delicto defense assumes that there
15 is fault on each side.

16 QUESTION: Well, there is intent in both cases
17 to trade on inside information. In the one case it is
18 false inside information; in the second case it's true.

19 MR. WARREN: Yes.

20 QUESTION: And it seems to me that one could
21 make a stronger argument that when everybody thought it
22 was true but they just thought they would make a little
23 money on the side, that you would say they are equally
24 guilty, but it is a little different if he -- I just --
25 if one of them is lying and the other one didn't realize

1 it.

2 MR. WARREN: I understand, Justice Stevens,
3 but I don't think, still, in your first postulate, there
4 would be any cause of action at all because the two
5 parties may have engaged in inside trading, but there
6 would be no relationship between the inside trading and
7 the loss. In other words, the party who received the
8 tip would not have a cause of action against the party
9 who gave the tip because of the concept of inside
10 trading, there would be no deception.

11 QUESTION: But there would be -- isn't it a
12 violation of the securities law to give inside
13 information in that situation?

14 MR. WARREN: Perhaps insofar as the SEC is
15 concerned, but not insofar as a private right of action
16 is concerned.

17 QUESTION: Well, why not? If he acts on
18 illegally acquired information, the stock instead of
19 going up goes down, why hasn't he been injured?

20 MR. WARREN: Because there's no deception,
21 there's been no violation as to him. The violation
22 occurs in the inside information case as to the party
23 who doesn't know about it. It's the superior knowledge
24 improperly obtained that makes the violation.

25 QUESTION: So you are saying that the broker

1 who gives inside information, truthful inside
2 information to a customer, does not violate the
3 statute?

4 MR. WARREN: Not to the customer. He may
5 indeed to the stockholders from whom the customer buys
6 the stock and with whom the customer deals, but no, a
7 broker who gives inside information, true inside
8 information to a customer and is truthful as between
9 that customer there is no violation as to that customer,
10 there is no tort. There is no violation.

11 There will be a violation as far as the SEC is
12 concerned because that customer then goes out and
13 commits a fraud upon the third party, but the customer
14 has no claim whatsoever.

15 QUESTION: Well, I don't understand your as
16 to. There is or is not a violation. If the SEC could
17 call it a violation, there's a violation of the rules.

18 MR. WARREN: But they call it a violation not
19 because the broker did something bad to the customer --

20 QUESTION: That may be the reason why, but I
21 still say there is a violation, as I understand the law,
22 and it conceivably, it could cause an injury to the
23 person who acts on the basis of the information.

24 MR. WARREN: But the person against whom the
25 violation is perpetrated is not the customer, it is the

1 stockholder out there, and yet under your postulate, you
2 are having the customer come in and sue, and it is not
3 the customer who has been misled under those
4 circumstances. The customer has been told the truth.
5 And if the customer has been told the truth, the
6 customer has no claim.

7 QUESTION: Well, why don't we leave out all
8 these -- why don't you just say that the insider, the
9 tipster is, say, an officer of the corporation.

10 MR. WARREN: All right.

11 QUESTION: And he tips a friend. We are going
12 to buy a gold mine.

13 MR. WARREN: Yes.

14 QUESTION: And that friend then goes out and
15 buys a bunch of corporate stock without revealing
16 anything, without revealing that he is dealing in inside
17 information.

18 MR. WARREN: Yes.

19 QUESTION: Those people he bought the stock
20 from have a cause of action against him.

21 MR. WARREN: They do, yes.

22 QUESTION: Yes, they do.

23 And does the tippee have a cause of action
24 against the tipster?

25 MR. WARREN: No.

1 QUESTION: What if it -- but that's only on
2 the assumption --

3 MR. WARREN: He has not been wronged. He has
4 not been deceived.

5 QUESTION: Yes, but that's only on the
6 assumption though that the inside information is true.

7 Suppose it is false. There is no dealing in
8 inside information at all. He has not revealed any
9 inside information. That is just a dream world.

10 And so wouldn't the tippee then have a cause
11 of action against the fellow who is passing out false
12 information?

13 MR. WARREN: He would but for the existence of
14 the in pari delicto defense, that's right.

15 QUESTION: Well, I know, but --

16 MR. WARREN: That's the one hypothetical --

17 QUESTION: In this case, in this case, in this
18 case you are comparing, as Justice Stevens and I were
19 pursuing before, you are comparing dealing in inside
20 information with deliberate fraud.

21 MR. WARREN: No, but the --

22 QUESTION: And the only, in really inside
23 information case, the tipster has breached his duty to
24 the stockholders.

25 MR. WARREN: Justice White --

1 QUESTION: And you are trying to enforce that
2 also through the tippee.

3 MR. WARREN: Justice White, an insider trading
4 case is an actual fraud. It is not different from an
5 actual fraud, it is --

6 QUESTION: I agree, I agree.

7 MR. WARREN: -- on the shareholder that sells
8 the stock.

9 QUESTION: All right.

10 MR. WARREN: The shareholder that sells the
11 stock without being told the truth, that's the fraud.

12 QUESTION: It's a breach of fiduciary duty.
13 Is that -- you can call it that or anything.

14 MR. WARREN: Well, it is a --

15 QUESTION: That's fraud, a type of fraud.

16 MR. WARREN: It is a fraudulent or deceptive
17 practice under Section 10.

18 QUESTION: And you say that's -- if that's all
19 the -- and you think that the tipster who does that --
20 suppose he just lies, as I said. Do you think that
21 is -- that he has committed a fraud on the
22 stockholders?

23 MR. WARREN: No.

24 QUESTION: If he just lies?

25 MR. WARREN: If he just lies to his customer,

1 he has defrauded his customer.

2 QUESTION: All right, he has lied to his
3 friend, and he has committed on fraud on the
4 stockholders of the corporation.

5 MR. WARREN: That's right, he has just
6 defrauded his friend.

7 QUESTION: And so then I would think you still
8 think, though, in that case there would be in pari
9 delicto defense.

10 MR. WARREN: I do, if the customer, knowing of
11 the wrongful breach of fiduciary duty, capitalized on it
12 to his own benefit to go out and commit the fraud that
13 he intended to commit on the customer. He is a
14 fraudulent party just as the defendant, and that's the
15 only hypothetical in which in pari delicto can arise.
16 If there is no cause of action against the defendant in
17 the first place, we are not talking about in pari
18 delicto, we are talking about no claim.

19 QUESTION: Mr. Warren --

20 MR. WARREN: Yes.

21 QUESTION: -- Dirks seemed to talk in terms of
22 a requirement that the insider, the tipster, act for
23 personal gain.

24 Now if in this case the only thing on the face
25 of the complaint that we look to is Mr. Neadeau, is it

1 clear that he was acting for personal gain?

2 MR. WARREN: It's clear that the plaintiffs
3 had every reason to believe that he was acting for
4 personal gain, and it is their mind set that we look
5 at.

6 QUESTION: Well, did Dirks look at what the
7 tippee thought, or did Dirks also speak in terms of a
8 requirement that the tipster be acting for personal
9 gain?

10 MR. WARREN: In the case of in pari delicto, I
11 think we are looking at what the tippee thought, but
12 let's add both.

13 QUESTION: So suppose the tipster just let it
14 slip at a golf game, no personal gain at all.

15 MR. WARREN: Now, that's correct, that's
16 correct. However, in this case, what is clear here is
17 that Mr. Lazzaro told them that he had inside
18 information from that officer. They called the officer,
19 and he told them it was nonpublic, in other words, they
20 shouldn't have it, that nobody else would receive it
21 until later, but that Mr. Lazzaro was a very good and
22 trustworthy man, he knew they were dealing with Lazzaro,
23 he knew they were going to buy the stock, he knew that
24 would benefit Lazzaro, it would make Lazzaro look like a
25 very smart man.

1 QUESTION: Well, how does that relate to any
2 personal gain by Neadeau?

3 MR. WARREN: It was made clear in Dirks, I
4 thought, that on an objective fact basis we would look
5 to see whether there was any benefit to the insider,
6 meaning wrongful desire to secure something for himself,
7 either monetarily, or to give --

8 QUESTION: Well, did the complaint allege that
9 Mr. Neadeau was going to gain personally?

10 MR. WARREN: It did not say those words.
11 However, it never will.

12 QUESTION: Well, since we look only at the
13 Complaint, it looks to me like you don't have in pari
14 delicto defense here.

15 MR. WARREN: Justice O'Connor, we look at the
16 facts in the complaint, and those facts, while they dont
17 say he personally gained, they show that he did
18 personally gain. They show that he gifted or benefitted
19 a stock broker. He selective released information in a
20 way that would benefit that stockbroker. It alleges
21 that he himself owned a hundred thousand shares of
22 stock. It is alleged that the stock broker owned the
23 shares of stock --

24 QUESTION: And drove the price up.

25 MR. WARREN: And it drove the price up, yes,

1 for the benefit of all.

2 So the facts alleged show that personal gain.
3 We don't need to have the complaint say it in fact
4 was --

5 QUESTION: Could I ask you one quick
6 question?

7 Do we judge this case, or does the record
8 show, or are there findings as to whether or not the
9 tipster here conveyed both true and false information or
10 only true or only false?

11 MR. WARREN: All right. The fact is that the
12 comparison of I believe it is paragraphs 16 and 33 of
13 the complaint, 16 being the representations, and 33
14 being the falsity, shows that we have a mixture, in
15 other words, that they don't contend there wasn't any
16 gold find; they quarrel with its state of development.
17 They don't contend that there were no joint venture
18 negotiations they simply quarrel with the stage at which
19 those negotiations had progressed.

20 QUESTION: So you think that the Complaint on
21 its face alleges that part of it is false and part of it
22 is true?

23 MR. WARREN: I think that is correct. I
24 think, on the other hand, it wouldn't make any
25 difference whether it was all false.

1 QUESTION: I know, I know.

2 MR. WARREN: Because as in the case of Judge
3 Weinfeld, I believe that is beside the point. I
4 believe that an attempt to commit wrong based upon what
5 you believe is criminal activity is plenty enough for in
6 pari delicto. It is plenty enough for punishment for
7 crime.

8 Your Honor, if I may, I am through.

9 I'm very sorry. Thank you.

10 CHIEF JUSTICE BURGER: Mr. Knudsen?

11 ORAL ARGUMENT OF GEOFFREY P. KNUDSEN, ESQ.

12 ON BEHALF OF RESPONDENTS

13 MR. KNUDSEN: Mr. Chief Justice, and may it
14 please the Court:

15 This case is not an insider trading case. It
16 is a case in which the complaint alleged a common,
17 garden variety fraud, and the fraud was perpetrated on
18 the Plaintiffs. The fraud was, as the complaint
19 alleges, was a planned -- a plan conceived by the
20 Defendants to manipulate the price of stock in TONM, not
21 for the benefit of all, but for the benefit of the
22 Defendants alone.

23 As part of the scheme, the Defendants --

24 QUESTION: Well, would that make it any less a
25 violation of 10(b)(5)?

1 MR. KNUDSEN: Pardon me?

2 QUESTION: That he was -- the narrowness of,
3 the scope of the fraud.

4 MR. KNUDSEN: Well, the scope of the fraud, as
5 alleged in the complaint, would have some effect in
6 terms of interpreting whether the Plaintiffs could be
7 considered to be of equal fault or in pari delicto, but
8 the complaint itself is meant to alleged a -- just a
9 fraud 10(b)(5) violation in the context of a market
10 manipulation, and that the plaintiffs were injured by
11 it.

12 What makes it a little bit different is that
13 the complaint alleges that the Plaintiffs, who ended up
14 losing their money, were utilized as an instrumentality
15 of the Defendants' fraud. In other words, it was the
16 intent of the Defendants to provide intentionally false
17 information alleged to be inside to the Plaintiffs.
18 They initiated the contact, they did it for purposes of
19 having the Plaintiffs trade, driving the price of the
20 stock up.

21 They never intended the Plaintiffs to benefit
22 from that market manipulation, and in fact, as the
23 Complaint alleges, when the Plaintiffs indicated some
24 desire to sell when the stock got up at its higher
25 levels, they continued the fraud so that they would

1 continue to hold on to their stock by saying, wait, it
2 will go higher, it will go higher.

3 So it is not a situation where the Defendants
4 and the Plaintiffs embarked upon a conspiracy to somehow
5 utilize inside information. It is solely a situation
6 where the defendants are alleged to have embarked upon a
7 scheme to defraud the market and defraud these
8 plaintiffs.

9 QUESTION: Well, would the tippee in this case
10 have been -- be liable to those people that he bought
11 stock from?

12 MR. KNUDSEN: Because the allegations are that
13 the information was false, there would be no liability.

14 QUESTION: Because? Because nobody, there was
15 no actual use of inside information?

16 MR. KNUDSEN: No one was injured. There's
17 nothing -- he wouldn't have a duty to disclose false
18 information, particularly in the context of --

19 QUESTION: So you think we have to read the
20 complaint as alleging everything was false.

21 MR. KNUDSEN: I think you need to read the
22 complaint as alleging everything is false. That's what
23 the charging allegation is --

24 QUESTION: Well, let's assume we don't agree
25 with you, part fault, part true, and so there was some

1 use of inside information, which the person who bought
2 the stock on the open market didn't disclose.

3 MR. KNUDSEN: Well, I don't think you can look
4 at the face of the complaint and then conclude that the
5 allegations are part false and part true.

6 The central allegation of the complaint is
7 paragraph 16, that the defendants were engaged in --

8 QUESTION: I know, but let me just give you my
9 question again.

10 MR. KNUDSEN: Okay.

11 QUESTION: Let's assume we don't agree with
12 you and that the complaint says part true, part false.

13 Now what about the position of the tippee
14 vis-a-vis the person he bought stock from without
15 disclosing?

16 MR. KNUDSEN: Would he have liability?

17 QUESTION: Yes.

18 MR. KNUDSEN: To the extent that there was
19 damage to such a person --

20 QUESTION: So the answer is yes.

21 MR. KNUDSEN: Related to the true
22 information.

23 QUESTION: So he failed to disclose, and he
24 could be held liable under the securities laws.

25 MR. KNUDSEN: If he received true

1 information.

2 QUESTION: Yes, exactly.

3 MR. KNUDSEN: Right.

4 QUESTION: So at least he is delicto.

5 MR. KNUDSEN: To the extent that he receives
6 true information, he would be delicto, in delicto.

7 QUESTION: Exactly.

8 MR. KNUDSEN: That's right.

9 QUESTION: And the argument would -- then the
10 question would come down, is it in pari delicto.

11 MR. KNUDSEN: Okay, and in terms of deciding
12 in pari delicto, then if you are trying to decide it on
13 the face of the complaint, assuming that you read the
14 complaint that some is true and some is false, the
15 complaint in my opinion would be a very bad device to
16 make that determination of in pari delicto.

17 QUESTION: Yes, but it was made below.

18 MR. KNUDSEN: Well, it was made by the
19 district --

20 QUESTION: That's why the case is here.

21 MR. KNUDSEN: It was made by the District
22 Court, and that was my argument in the 9th Circuit, that
23 it would be a bad device to use. But the 9th Circuit
24 read the complaint as charging an intentional fraud, all
25 of the information false. That's actually what the 9th

31

1 Circuit concluded, was that --

2 QUESTION: So as far as they are concerned,
3 there was no use of inside information at all.

4 MR. KNUDSEN: I don't think that they decided
5 the issue of whether it is inside information in the
6 context of this --

7 QUESTION: Well, if it was false, it wasn't.

8 MR. KNUDSEN: No. I think that the 9th
9 Circuit assumes that there is a line -- there was a line
10 of authority that says if you have a tippee attempting
11 to trade on inside information, that he may be guilty of
12 a violation, but concluded in the circumstances of the
13 allegation of the complaint where an intentional fraud
14 being perpetrated on the Plaintiffs was alleged, that
15 more or less as a matter of law those parties could not
16 be in pari delicto. That is not inconsistent with the
17 common law.

18 QUESTION: I agree with you, I agree with
19 you.

20 MR. KNUDSEN: Which at common law, if you have
21 an actual fraud and the determination, there is a public
22 policy issue if withholding the relief would do more to
23 offend public morals, then in pari delicto would not
24 apply, and that is the situation that the 9th Circuit
25 addressed and said if there is a fraud aimed at these

1 Plaintiffs and aimed at the market, then to withhold
2 relief or to withhold the opportunity to pursue their
3 claim would be more offensive in the concept of -- in
4 the context of in pari delicto.

5 QUESTION: Do you agree with your friend's
6 response when I put to him this question, that if this
7 stock had gone up to 28 and then this gentleman sold out
8 at 28, would you be subject to a claim for recovery from
9 them, and then after that it dropped to where it did
10 drop, 1 or less?

11 Would the purchasers of that stock have been
12 able to recover from this fellow?

13 MR. KNUDSEN: I'm into Justice White's problem
14 in the sense that if you read that there is some true
15 inside information or nonpublic information and some
16 false, and the stock goes to 28 based on an activity of
17 trading, and then there is this true information about
18 the gold find, yes, there would be liability. The
19 Complaint was meant to alleged a market manipulation
20 that did not involve true information, or at most,
21 partially true information solely for purposes of market
22 manipulation.

23 QUESTION: I take it you concede there was
24 market manipulation here?

25 MR. KNUDSEN: Absolutely, but that is not the

1 activity that my -- that was done unknowingly with my
2 clients and the Plaintiffs as an instrumentality of
3 that, and they were not part of a conspiracy to benefit
4 from that market manipulation, and in fact, they lost
5 money, and that is why they have come forward and
6 asserted their claims.

7 QUESTION: I don't understand how you can say
8 that in response to the Chief Justice's question. You
9 say if they had been smart enough to sell out before it
10 dropped, they would be liable to other parties if part
11 of the information was truthful. At least they thought
12 it was truthful when they were relying on the inside
13 information, didn't they? That's why they bought it.

14 MR. KNUDSEN: Yes, that's correct.

15 QUESTION: Now, why isn't that a violation?
16 Why wouldn't they be liable to the people to whom --

17 MR. KNUDSEN: I said they would if the
18 information was true information.

19 QUESTION: What difference does it make? They
20 thought it was true at the time they engaged in the
21 trades, didn't they? That's the whole hypothesis of the
22 fraud.

23 So how can their blameworthiness depend on
24 whether the information turns out to be true or false?
25 I don't understand.

1 MR. KNUDSEN: Well, I think that the
2 hypothetical becomes a little difficult to deal with
3 because if it is false information, the stock doesn't go
4 to 28. That's --

5 QUESTION: Well, it may have as long as people
6 think the information is true. This talk about this
7 gold mine over wherever this place was --

8 MR. KNUDSEN: Oh, I see, and they sell out in
9 the context of --

10 QUESTION: They sell out when -- you say they
11 wanted to, and they were talked out of selling out.
12 They just --

13 QUESTION: The market goes up on the basis of
14 public perception, not reality.

15 MR. KNUDSEN: That's absolutely right, and
16 that's what is charged by the complaint.

17 They would have liability to the extent that
18 they received true information, and you are asking would
19 they also have liability to those folks that sold their
20 stock even though the market was going up because of
21 false information?

22 And I would say no because --

23 QUESTION: Isn't it almost certainly true that
24 some of the information is going to be true? You are
25 not going to assume the burden of proving every single

1 statement alleged in there was false, are you? I mean,
2 in these facts, there is always a mixture of truth, even
3 in the most gross fraud.

4 Do you assume that you have to prove that
5 every statement in the complaint was false?

6 MR. KNUDSEN: No. I assume I have to prove
7 that there was an intentional scheme to manipulate the
8 market utilizing my clients, providing them --

9 QUESTION: And the sheme involved a mixture
10 of --

11 MR. KNUDSEN: Essentially --

12 QUESTION: -- half truths and truths and
13 falsehoods.

14 MR. KNUDSEN: But essentially false
15 information.

16 QUESTION: Well, I just have difficulty
17 understanding how your -- whether your client was
18 engaged in wrongdoing turns out -- depends on whether he
19 finds out later that the information was false or not.

20 MR. KNUDSEN: Well, to the extent my client is
21 engaged in wrongdoing may not depend on that at all
22 unless you look at it in the context of perhaps this
23 court's Chiarella and Dirks analysis, and then you have
24 to look at a duty to disclose, and then the question
25 comes up how can you have a -- how could the insider

1 have a duty to disclose false information because that
2 is the very thing you don't want to happen, but in
3 ignoring that distinction recently drawn, yes, I think
4 the SEC's position would be that it doesn't matter
5 whether it is true or false, my clients are in delicto,
6 as Justice White said. The question becomes if they are
7 intentionally manipulated, are they in pari delicto.

8 In terms of the Plaintiffs' position, their
9 position is there is no equality of fault in those
10 situations where they are being utilized unknowingly as
11 a market manipulator because --

12 QUESTION: May I ask you just one other
13 question?

14 MR. KNUDSEN: Sure.

15 QUESTION: Then I will get it all off my
16 chest.

17 Supposing your theory -- I realize you are
18 relying on a fraud theory, but supposing you had a case
19 in which a plaintiff just said he got inside information
20 which he relied on and was true and so forth and so on,
21 but the stock didn't -- the deal fell through and the
22 stock didn't go up as much as he expected it.

23 Do you think the Plaintiff has a cause of
24 action there? Your opponent says no, there is no cause
25 of action absent fraud.

1 MR. KNUDSEN: Well, I say he has no cause of
2 action because you don't have the degree of scienter on
3 the Defendant that would be required by Ernst & Ernst
4 for a 10(b) violation, I agree.

5 QUESTION: He would know he is deal -- he is
6 passing out inside information, he knows he has a duty
7 not to do so. The customer, the broker, knows it is
8 inside information, knows the law says you are not
9 supposed to do this, you say there is no scienter?
10 That's the answer?

11 MR. KNUDSEN: Maybe I misunderstood your
12 question.

13 QUESTION: Everybody is telling the truth.
14 This is my hypothesis.

15 MR. KNUDSEN: Everyone is telling the truth.

16 QUESTION: The broker says they just found a
17 gold mine, they are going to make a billion dollar deal,
18 it is a good buy, it is inside information, don't tell
19 anybody.

20 MR. KNUDSEN: Right.

21 QUESTION: You trade on it, and the stock goes
22 up for a while, but then the deal falls through, but
23 everybody is dealing on inside information.

24 Does the customer of the stock broker have a
25 cause of action against the stock broker for dealing in

1 inside information?

2 MR. KNUDSEN: No, I don't believe so because
3 of the scienter requirement for -- because it is not an
4 insider -- he doesn't have a claim for insider trading.
5 If he has a claim against a broker for anything, it is
6 for fraud under 10(b)(5), and that would require
7 scienter, which would require some intentionally false
8 or recklessly false information imparted to him, and
9 your hypothetical is it is true.

10 QUESTION: So what it boils down, it is all
11 right to trade on inside information as long as it is
12 true.

13 MR. KNUDSEN: Pardon me?

14 QUESTION: What it boils down to is it is all
15 right to trade on inside information as long as it is
16 true.

17 MR. KNUDSEN: No, that's a different
18 question. The Plaintiff, someone trading on true inside
19 information is going to be liable for criminal
20 sanction. The SEC can proceed against him, and anyone
21 selling his stock who loses, incurs injury, can proceed
22 against him. But that doesn't necessarily -- that's
23 really a separate question. That doesn't necessarily
24 make that person in pari delicto with a person who
25 intentionally misleads him and provides him

1 intentionally false information.

2 You see, he's not suing -- in that case you
3 are not considering the context of the tippee vis-a-vis
4 the broker. You are looking at the tippee vis-a-vis the
5 regulators or vis-a-vis someone who lost money to whom
6 he might have a duty to disclose the correct
7 information.

8 In any event, given the legislative history of
9 the insider trading sanctions act, I think they place
10 the primary responsibility with the brokers and the
11 insiders. I think this Court's decisions that indicate
12 that the tippee liability is derivative indicate that
13 the person at the tippee level is going to be, in the
14 common law sense, even the common law sense, of in pari
15 delicto, not of equal fault.

16 And the facts -- thank you.

17 CHIEF JUSTICE BURGER: Mr. Kuhlik?

18 ORAL ARGUMENT OF BRUCE N. KUHLIK, ESQ.,
19 PRO HAC VICE, FOR SECURITIES AND EXCHANGE
20 COMMISSION, AS AMICUS CURIAE IN SUPPORT OF
21 RESPONDENTS

22 MR. KUHLIK: Thank you, Mr. Chief Justice, and
23 may it please the Court:

24 I would like to focus on what the Commission
25 believes is the dispositive factor in this litigation,

1 and that is the furtherance of the public interest in
2 deterring violations of the federal securities laws.

3 We think that there can be no doubt that
4 allowing this lawsuit to go forward in the circumstances
5 as we now believe them to be will further, will best
6 further the deterrence of violations of Section 10(b)
7 and Rule 10(b)(5).

8 Now, deterrence of wrongdoing is an important
9 component of the in pari delicto defense as it has
10 developed at common law. The courts engaged in a
11 flexible balancing of relative fault in order to
12 determine which party was the primary wrongdoer who
13 should be deterred in the first instance, and we think
14 that in the federal regulatory scheme presented in this
15 case where private actions such as those under Rule
16 10(b), or excuse me, Rule 10(b)(5), makes an important
17 contribution to enforcement of the federal securities
18 laws. We think that the Court's decision in Perma Life
19 Mufflers which held the defense unavailable in a private
20 action under the antitrust laws because the defense
21 would not further the deterrent purpose of the Sherman
22 and Clayton Act, we think that that case requires that
23 the defense be applied here only if it will further the
24 purposes of the securities laws.

25 Now, I would like to turn first to the

1 deterrence of wrongdoing by brokerage professionals and
2 insiders. I don't think there can be any doubt that
3 allowing the lawsuit to go forward will deter brokerage
4 sales people such as Mr. Lazzaro here from perpetrating
5 frauds on their clients. That is the whole purpose of
6 the action to be implied.

7 And the only question then becomes whether or
8 not there is some other overriding factor on the other
9 side in terms of perhaps encouraging wrongdoing by
10 persons in the position of the Plaintiffs that would, as
11 I say, override this deterrent impact on the brokers.
12 And we think that that overriding factor on the other
13 side just isn't present.

14 In the Commission's view, allowing this action
15 to go forward will not unduly encourage illegal tippee
16 trading. In the first place, allowing the suit to go
17 forward will deter brokers from giving information in
18 the first place. It will cut that inside information
19 off at the source. It won't be there for the tippees to
20 trade on.

21 In the second place, investors in the position
22 of the Plaintiffs, in the Commission's view, are often
23 unsophisticated, certainly as compared with the
24 brokerate professionals here, it might be believed that
25 they were unsophisticated, unschooled in the law, and we

1 think that for that reason the brokerage professionals
2 are far more likely to respond to the deterrent impact
3 of not allowing the defense here than ordinary investors
4 would be to the deterrent impact on their trading of
5 allowing the defense.

6 And I think that --

7 QUESTION: May I ask just one question?

8 MR. KUHLIK: Yes, Justice Stevens.

9 QUESTION: Assuming after trial there is a
10 finding that everything everybody said was entirely
11 truthful; is there liability or not?

12 MR. KUHLIK: On whose part? On the --

13 QUESTION: Well, does the Plaintiff recover
14 from the Defendant in this case?

15 MR. KUHLIK: If all of the information was
16 truthful --

17 QUESTION: It's all inside information, but it
18 was truthful.

19 MR. KUHLIK: Then I do not believe they could
20 recover because they would not have been deceived.

21 QUESTION: All right.

22 MR. KUHLIK: I think when tippees consider
23 whether to trade on inside information, they do not
24 consider seriously the possibility of recovery in court
25 if the information turns out to be false. They trade on

1 tips from trusted friends, from their broker, and they
2 will go ahead and trade on it if they believe it. I
3 don't think it would be reasonable to assume that a
4 person would trade, invest substantial sums of money on
5 information believing there to be a substantial
6 possibility that the whole information is false, simply
7 on the chance, just the chance that they might recover
8 later in a legal action.

9 QUESTION: So your submission is that we ought
10 to just, in this case at least, forget the notion of
11 equal fault?

12 MR. KUHLIK: No, Justice White, I believe --

13 QUESTION: I should say that no matter whether
14 they are equal or not, enforcement of the securities
15 laws is so important that the defense should not be
16 allowed.

17 MR. KUHLIK: My position is that the
18 enforcement of the securities laws is so important that
19 the defense should only be allowed where it will further
20 the purposes of the securities laws, even if in a
21 particular case the fault of the parties were relatively
22 equal.

23 But I might add that, you know, I will get to
24 this. We don't believe that this is even a close case
25 as to equal fault. We think it is quite clear that the

1 insider and the brokerage professional here were of
2 greater fault --

3 QUESTION: Because?

4 MR. KUHLIK: Because they abused their special
5 position in the scheme of the capital market system and
6 in the scheme of the enforcement of the securities laws
7 to perpetrate a fraud on the investors.

8 QUESTION: Well, the tippees, assuming there
9 was some true information that wasn't disclosed, the
10 tippees also are in trouble, aren't they, with the
11 people they bought from.

12 MR. KUHLIK: It is true that if --

13 QUESTION: Under the securities law.

14 MR. KUHLIK: Under the securities laws,
15 Justice White, if a plaintiff could prove that the
16 investors here traded on inside information knowing that
17 information or being on notice that that information was
18 received in breach of a fiduciary duty of an insider and
19 that that caused a trading loss to some other group of
20 investors, then they would be liable, but --

21 QUESTION: Well, but that is -- you think that
22 is less reprehensible than what the broker and the
23 tipster did?

24 MR. KUHLIK: I believe it is, and that the --

25 QUESTION: Because of their special position?

1 MR. KUHLIK: Because, well, of a number of
2 factors. Because of their special position, but also
3 because they are the people who instigated the fraud
4 here They are the people who took advantage of the
5 plaintiff investors, engaged them in a scheme, abused
6 their position of trust to make them believe that they
7 were trading on inside information when in fact it was
8 the plaintiffs all along who were the intended victims,
9 excuse me, and the actual victims of the fraud, and in
10 this regard, I might add that the brokers and insiders
11 such as those here, in the Commission's view, have a
12 much greater opportunity to jeopardize the integrity of
13 the market systems. They are continually in a position
14 to come into inside information, to represent or to
15 misrepresent to their clients, to their friends, to
16 their investors that they have access to this sort of
17 information.

18 And the brokerage professionals such as
19 Lazzaro here occupy a key position. They control access
20 to these markets . If a plaintiff wants to trade, he has
21 to do it through a broker, and it is up to the brokers
22 to be -- they are required to be conversant with the
23 law, to be conversant with Commission rules, regulations
24 and the statute, and it is up to them in the first
25 instance to guide the trading of their clients into

1 lawful channels.

2 And that position of trust was abused here.

3 And if the Commission is to be able to uncover
4 these sorts of frauds perpetrated on investors, the only
5 realistic way for most of these frauds to come to light
6 is through private actions such as these, and I think
7 there can be no doubt that the investors would have
8 little incentive indeed to bring these sorts of actions
9 to light because by doing so, they expose themselves to
10 possible criminal and civil sanctions.

11 So without the incentive of recovering their
12 investment, it is most, most unlikely that these sorts
13 of frauds would be uncovered.

14 And finally, we would note in regard to the
15 position of the parties here, that in the Commission's
16 view, the in pari delicto defense should be available in
17 those securities actions where the plaintiffs, perhaps
18 the investors, have instigated an illegal scheme, are
19 truly involved in a conspiracy with a broker for their
20 mutual benefit. But that is not what we have here.

21 That is why I would like to turn then to the
22 comparative fault of the parties.

23 The Petitioner claims that under the common
24 law, a plaintiff who is guilty of fraud is barred from
25 recovering under the in pari delicto doctrine under all

1 circumstances.

2 QUESTION: Could I ask you in this connection,
3 please, if all the information that the broker and the
4 insider handed out was false, all of it was false, and
5 they knew it to be false, and they passed it out to the
6 investor who acted on it thinking it was true inside
7 information, he buys stock, the stock goes down, is then
8 the investor liable to the people he bought from?

9 MR. KUHLIK: If all of the information is
10 false, Justice White, I don't believe that the other
11 parties to the trade would have an action.

12 QUESTION: Yes, because there really, he
13 wasn't using inside information.

14 MR. KUHLIK: But he -- there was nothing that
15 he used that he should have disclosed to them that --

16 QUESTION: Exactly.

17 MR. KUHLIK: -- caused them the loss in those
18 circumstances.

19 QUESTION: Yes. In that event, he wouldn't be
20 in delicto at all.

21 MR. KUHLIK: Well, he might not be, although I
22 believe --

23 QUESTION: What would he be?

24 MR. KUHLIK: Well, some of the cases, Justice
25 White, speak in terms of moral blame --

1 QUESTION: They may be similar cases, but your
2 view is that he wouldn't be in delicto at all.

3 MR. KUHLIK: He would not be in delicto, he
4 would not have violated --

5 QUESTION: So, but he -- but certainly his
6 rights were violated at the outset.

7 MR. KUHLIK: I might have misspoken, Justice
8 White. In our view, if all of the information were
9 false, then another party to a trade wouldn't have had a
10 private action against the investors here, but the
11 Commission most certainly would have. If the Commission
12 could have proved that the investors believed the
13 information to be true, they believed it to be inside
14 information that they had obtained in breach of an
15 insider's duty, or they had notice of such a breach, the
16 Commission most certainly could bring an action, civil or
17 criminal action for an attempted violation of the law.

18 So in that respect, even if all of the
19 information is false, it may well be that the investors
20 here have attempted to violate the law.

21 QUESTION: I see. All right.

22 MR. KUHLIK: At this posture of the case, we
23 don't believe the complaint conclusively shows that.

24 Under the common law, it was not enough
25 simply, or it is not enough now, as the common law has

1 developed, that the plaintiff simply has engaged in a
2 fraud. A more refined balancing takes place that takes
3 into account the deterrent purposes of the law and the
4 actual degree of wrongdoing. And we cite a number of
5 cases in our briefs where, for example, a plaintiff who
6 believed he was defrauding others by engaging in a fixed
7 foot race was allowed to recover, notwithstanding the in
8 pari delicto doctrine, from the parties who had
9 defrauded him, because the race in fact was fixed
10 against him.

11 Finally, I would note that we believe it makes
12 little sense to adopt a rule that would distinguish
13 solely on the basis of whether the investors had noticed
14 that the information they were trading on was inside or
15 indeed was information obtained in breach of an
16 insider's duty because we wouldn't want to allow brokers
17 to escape liability simply by couching their tips in
18 terms of inside information.

19 If there is nothing further --

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.

21 The case is submitted.

22 (Whereupon, at 2:48 o'clock p.m., the case in
23 the above-entitled matter was submitted.)
24
25

CERTIFICATION.

erson Reporting Company, Inc., hereby certifies that the
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#84-679 - BATEMAN EICHLER, HILL RICHARDS, INCORPORATED, Petitioner V.

CARL F. BERNER, ET AL.

that these attached pages constitutes the original
nscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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