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A Birthday Toast to *Texas Gulf Sulphur*

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A BIRTHDAY TOAST TO TEXAS GULF SULPHUR

Manning G. Warren III*

ABSTRACT

This article commemorates the fiftieth anniversary of the Second Circuit's Texas Gulf Sulphur decision by examining the impact of the case on insider trading law in the United States. The author begins by discussing the SEC's opinion, In the Matter of Cady, Roberts & Co., which laid the foundation for the Texas Gulf Sulphur decision by creating a federal duty to disclose material nonpublic information or abstain from trading securities. The author then posits that the SEC, in its Cady, Roberts decision, rejected judicially developed common law fiduciary duty to disclose based on trust and confidence, and, by administrative fiat, substituted a broader federal duty of disclosure centered on access and unfairness. Next, the article examines how the Cady, Roberts decision would fair under the Supreme Court's modern insider trading law. Finally, the article concludes with a discussion of the court's adoption of a new federal duty of disclosure in Texas Gulf Sulphur.

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I. INTRODUCTION

NORMALLY we make birthday toasts to honor and applaud an individual on the attainment of a given age, celebrating the momentous occasion with “here, heres” and a clanging of glasses held high. My toast here, by contrast, is to an insider trading opinion by the U.S. Court of Appeals for the Second Circuit, *SEC v. Texas Gulf*

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Sulphur Co.,¹ decided fifty years ago this year, and it is hardly laudatory. While not a metaphorical Frankenstein,² the Second Circuit's decision is a strange admixture of disparate parts, from false assumptions to fabricated theories, much like the spider eyes, roach legs, and slug juices that might be stirred together in a witch's brew.

In this brief commentary, I will not reiterate all the criticisms or the praise lavished on the decision by countless academics.³ Instead, I will proffer a number of observations on the strangeness of its judicial brew. Perhaps it is not surprising that the hands on the ladle were those of a law professor. As law professors, we are always stirring our own cauldrons, but Professor William Cary seems to have been especially gifted. In crafting the Securities and Exchange Commission's (SEC) opinion, *In the Matter of Cady, Roberts & Co.*,⁴ he provided the essential ingredients for the nonsensical morass of our present insider trading laws. Since Cary, in his *Cady, Roberts* opinion, provided the foundation for the Second Circuit's opinion in *Texas Gulf Sulphur*, I will address how *Cady, Roberts* creatively overrode the common law of fiduciary duty by fashioning a broader federal duty of disclosure based not on *trust and confidence*, but on *access and unfairness*. I will follow that discussion with a few critical comments on the birthday girl.

II. IN THE MATTER OF CADY, ROBERTS & CO.

When Professor Cary became Chairman of the SEC in 1961, the common law of fraud applicable to insider trading in anonymous stock exchange transactions was encapsulated by the Supreme Court of Massachusetts's decision in *Goodwin v. Agassiz*.⁵ In *Goodwin*, the court expressed the majority view that, at least in non-face-to-face exchange transactions, corporate officers and directors have no fiduciary duties to disclose non-public material information they possess by virtue of their position as insiders.⁶ Their fiduciary duties run solely to the corporation

1. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

2. See generally MARY SHELLEY, FRANKENSTEIN (Bantam Books 1991).

3. See, e.g., Alan M. Weinberger, *Forever Young: Texas Gulf Sulphur Rules at Fifty*, 45 SEC. REG. L. J., no. 1, Spring 2017; Arthur Fleischer, Jr., *Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceeding*, 51 VA. L. REV. 1271 (1965); Stephen M. Bainbridge, *Equal Access to Information: The Fraud at the Heart of Texas Gulf Sulphur* (UCLA SCH. OF LAW, Law & Economics Research Paper Series No. 17-14), <https://ssrn.com/abstract=3014977>; Donald C. Langevoort, *From Texas Gulf Sulphur to Chiarella: A Tale of Two Duties* (2017) (unpublished manuscript) (on file with the Georgetown Law Library), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3036&context=facpub>.

4. *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961).

5. *Goodwin v. Agassiz*, 186 N.E. 659 (Mass. 1933); see also Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1222 (1995) ("*Goodwin* apparently remains the prevailing state law view.").

6. *Goodwin*, 186 N.E. at 661 ("Purchases and sales of stock dealt in on the stock exchange are commonly impersonal affairs. An honest director would be in a difficult situation if he could neither buy nor sell on the stock exchange shares of stock in his corpora-

and its shareholders collectively, and not to individual shareholders. In anonymous exchange transactions, officers, directors, and other corporate agents acting in their individual capacities are engaging their trading contraparties at a very distant arm's length. Since these officers and directors have no fiduciary duty to disclose the inside information (and are fiducially bound by confidentiality), their failure to do so cannot work a constructive fraud. More succinctly put, their conduct does not constitute common law fraud or a breach of fiduciary duty. Indeed, no common law case had ever held, certainly at the time *Cady, Roberts* was decided, that anyone had a duty to disclose insider information in faceless transactions effected over stock exchanges.⁷

Chairman Cary was determined to right this perceived wrong in interpreting the terms “fraud or deceit,” as set forth in the SEC’s Rule 10b-5,⁸ by establishing what one scholar has labeled “a higher ideal of fiduciary responsibility.”⁹ Apparently, Cary was on a mission as the SEC’s new chair to rewrite his own common law at the federal level.¹⁰ The *Cady, Roberts* proceeding provided him the opportunity to rule for the first time that open market trading on inside information constituted fraud. His decision had little, if anything, to do with the actual common law of fraud or the common law of corporate fiduciary duty. In other words, he determined his own meaning of the terms “fraud or deceit” in complete dis-

tion without first seeking out the other actual ultimate party to the transaction and disclosing to him everything which a court or jury might later find that he then knew affecting the real or speculative value of such shares. . . . Law in its sanctions is not coextensive with morality. It cannot undertake to put all parties to every contract on an equality as to knowledge, experience, skill and shrewdness. It cannot undertake to relieve against hard bargains made between competent parties without fraud. On the other hand, directors cannot rightly be allowed to indulge with impunity in practices which do violence to prevailing standards of upright business men. Therefore, where a director personally seeks a stockholder for the purpose of buying his shares without making disclosure of material facts within his peculiar knowledge and not within reach of the stockholder, the transaction will be closely scrutinized and relief may be granted in appropriate instances.”)

7. See Richard W. Jennings, *Insider Trading in Corporate Securities: A Survey of Hazards and Disclosure Obligations Under Rule 10b-5*, 62 NW. U. L. REV. 809, 811–12 (1968).

8. Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5 (2017) (“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”).

9. Donald C. Langevoort, *Rereading Cady, Roberts: The Ideology and Practice of Insider Trading Regulation*, 99 COLUM. L. REV. 1319, 1320 (1999). According to Professor Langevoort, “Cary’s speeches and writings during and after his chairmanship at the SEC leave little doubt that he believed that state corporate law was moribund, perhaps even corrupt.” *Id.* Cary’s goal required “a substantial blurring of the line between fraud and fiduciary duty, and something of a disdain for the spirit of federalism.” *Id.* Indeed, Langevoort correctly concluded, “fraud plays relatively little formal role” in the *Cady, Roberts* decision. *Id.*

10. *Id.* at 1319 (citing JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET* 344–45 (2d ed. 1995)).

dain of any common law referents.¹¹

Given the facts underlying the *Cady, Roberts* decision and, more importantly, Cary's mission to reject state common law precedent, he could hardly look to *Goodwin* for the desired result. The underlying factual catalyst in *Cady, Roberts* was a decision taken at a meeting of Curtiss-Wright Corporation's board of directors to reduce significantly the company's quarterly dividend.¹² After this decision was made, the board immediately authorized public disclosure of this concededly *material* information¹³ by a Western Union telegram to the New York Stock Exchange.¹⁴ Due to typing problems, the telegram transmitted to Western Union at 11:12 a.m. was not actually delivered to the New York Stock Exchange until 12:29 p.m. That was not the only snafu in communications. Due to what the opinion referred to as "some mistake or inadvertence," the company did not get the news to the *Wall Street Journal* until 11:45 a.m., and it did not appear on the Dow Jones ticker tape until 11:48 a.m. One of the company's directors, J. Cheever Cowdin, was a registered representative of Cady, Roberts, and a registered broker-dealer. Apparently assuming the dividend reduction had already been publicly disseminated, Cowdin provided the information to his colleague Robert Gintel at Cady, Roberts, who subsequently entered open market sell orders on the New York Stock Exchange. The SEC subsequently charged Cady, Roberts and Gintel with willful violations of Rule 10b-5.¹⁵ The case was resolved pursuant to an offer of settlement, which included a waiver of any hearing, stipulated facts, and a suspension of Gintel from the New York Stock Exchange for twenty days.

Chairman Cary, after acknowledging the case was one of first impression,¹⁶ opined that Rule 10b-5 was a "broad remedial provision[] aimed

11. It is a well-established principle that when Congress adopts a common law term like "fraud" or "deceit," it incorporates the general common law principles embodied by the term. The Supreme Court has repeatedly held that "[w]here Congress uses terms that have accumulated settled meaning under either equity or common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *see also* *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). In *Burks v. Lasker*, 441 U.S. 471 (1979), the Court held that in adopting the Investment Advisors Act of 1940, Congress incorporated the fully consistent common law of fiduciary duties, because the Court "discerned nothing in the limited regulatory objectives of the [Investment Company Act] or [the Investment Advisers Act] that evidenced a congressional intent that 'federal courts . . . fashion an entire body of federal corporate law out of whole cloth.'" *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (quoting *Burks*, 441 U.S. at 480). In *Cady, Roberts* the SEC simply abandoned the Supreme Court's established rules of statutory construction. For a general discussion of judicial treatment of state law in federal securities regulation, see Theresa A. Gabaldon, *State Answers to Federal Questions: The Common Law of Federal Securities Regulation*, 20 J. CORP. L. 155 (1995).

12. *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 908 (1961).

13. *See* *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 439 (1976) ("[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.").

14. *In re Cady, Roberts*, 40 S.E.C. at 909.

15. *Id.* at 908.

16. *Id.* at 907.

at [] misleading or deceptive activities,” regardless of whether those activities are “precisely and technically sufficient to sustain a common law action for fraud and deceit.”¹⁷ In his view, the federal securities laws had created “a wholly new and far-reaching body of *Federal corporation law*.”¹⁸ He then proceeded to write that law up from scratch, fabricating a federal duty to disclose or abstain from trading applicable to any person who possesses material, non-public inside information.¹⁹ Cary claimed this duty rested on two core principles: (1) “the existence of a relationship giving *access*, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone,” and (2) “the inherent *unfairness* involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.”²⁰

In a presumed reference to the conflicting common law of both fraud and fiduciary duty, Cary pronounced, “we are not to be circumscribed by fine distinctions and rigid classifications.”²¹ His creativity was certainly not circumscribed by the common law of corporate fiduciary duty. Cary then proclaimed that Gintel, as the recipient of Cowden’s tip, had the same duties to disclose or abstain from trading in open markets as insiders (which before this opinion there were none, either under common law or federal law).²² According to Cary, Gintel’s conduct “at least” violated the third clause of Rule 10b-5, which prohibits “[any] . . . practice which operated as a fraud or deceit upon the purchasers.”²³

Under Cary’s new federal duty to disclose or abstain, Gintel, by neither disclosing nor abstaining, committed securities fraud. Surprise, surprise! In this case, acknowledged by Cary as one of “first impression,” how could Gintel have known he was acting illegally? And how were his anonymous counterparties to the trades defrauded? As Professor Donald Langevoort has articulated, Cary “never confronted or even mentioned in all of this [] the central holding of the despised *Goodwin*, that what is lacking in open market insider trading (as opposed, arguably, to face-to-face dealings) is anything resembling detrimental reliance by the so-called victims of the fraud on any aspect of the insider’s conduct.”²⁴ Indeed, before Cary’s *post hoc* decision, the tipper, the tippee, the tipper’s sellers, and the tippee’s buyers could not have possibly guessed that Cary would be creating a new federal *non-fiduciary* duty to disclose by obliterating

17. *Id.* at 910.

18. *Id.* (emphasis added). Indeed, one prominent scholar has credited Cary with coining the term federal corporation law. James D. Cox, *Fraud is in the Eyes of the Beholder: Rule 10b-5’s Application to Acts of Corporate Mismanagement*, 47 N.Y.U. L. REV. 674, 676 (1972).

19. *See In re Cady, Roberts*, 40 S.E.C. at 911.

20. *Id.* at 912 (emphasis added).

21. *Id.*

22. *Id.*

23. *Id.* at 913; *see* Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5(c) (2017).

24. Langevoort, *supra* note 9, at 1321.

the established common law and rewriting § 10(b)²⁵ and Rule 10b-5 of the federal securities laws. Given Cary's astounding creativity, it is understandable why Professor Louis Loss would later state, "if Professor Cary [did] nothing else at the SEC he has earned his pay in *Cady, Roberts & Co.*"²⁶

One can easily surmise that Gintel's settlement offer, agreeing to a surprisingly lenient twenty day suspension,²⁷ might have been suggested by Cary himself. Thus preempting any appeals, he was positioned to adjudicate a radically new insider trading rule without concerns about any due process ramifications. He could also avoid any federal judicial review, at least for long enough to establish his opinion as a final adjudication by the SEC, and, as we shall see, a persuasive, foundational precedent for the Second Circuit in *Texas Gulf Sulphur*. Moreover, by developing his rule through an enforcement proceeding, he was able to circumvent the notice and comment procedures required in agency rulemaking by the Administrative Procedure Act.²⁸ Most importantly, Cary was able to establish a purposely vague definition of a new and broad-based insider trading prohibition imposing liability based on *access* and *unfairness* and largely detached from the *disclosure* philosophy Congress had embraced in enacting the federal securities laws.²⁹

III. CADY, ROBERTS AND MODERN INSIDER TRADING JURISPRUDENCE

Academic curiosity readily compels the question of whether the expertly-concocted opinion in *Cady, Roberts* would be sustainable today under modern federal securities law jurisprudence. It was written fifteen years before the Supreme Court, in *Ernst & Ernst v. Hochfelder*,³⁰ held that § 10(b) required proof of *scienter*, or intent to deceive, and, accordingly, that the SEC could not proscribe *any* practice that would operate as a fraud or deceit, but could only prohibit wrongdoing that was *intentional*.³¹ Additionally, in *Hochfelder*, the Court admonished the SEC that "[t]he rulemaking power granted to [] administrative agenc[ies]" did not include "the power to make law," but rather "to adopt regulations to

25. 15 U.S.C. § 78j (2012).

26. See W. McNeil Kennedy & Herbert S. Wander, *Texas Gulf Sulphur, A Most Unusual Case*, 20 BUS. LAW. 1057, 1057 n. 2 (1965) (citing Cary, Israels & Loss, *Recent Developments in Securities Regulation*, 63 COLUM. L. REV. 856, 861 (1963)).

27. See *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 918 (1961) (Comm'r Frear, dissenting in part).

28. Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2012).

29. See, e.g., *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 26 (1977) (quoting 113 Cong. Rec. 854 (1967)) (discussing the legislative intent of the Williams Act) ("This legislation will close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities.").

30. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

31. See *id.* at 193.

carry into effect the will of Congress as expressed by the statute.”³²

Just one year later, the Supreme Court, in *Santa Fe Industries, Inc. v. Green*,³³ held that § 10(b) and Rule 10b-5 do not and should not address breaches of corporate fiduciary duty.³⁴ The Court emphasized that the fundamental purpose of the federal securities laws was to implement a “philosophy of full disclosure” and that the “fairness” of a transaction is “at most a tangential concern of the statute.”³⁵ Moreover, the Court expressly cautioned against “applying a ‘federal fiduciary principle’ under Rule 10b-5 [that] could be expected to depart from state fiduciary standards.”³⁶ Not only did the Court refuse to equate fraud with breaches of fiduciary duty, but it also questioned the validity of any new *federal corporation law*.³⁷

Subsequently, in *Chiarella v. United States*,³⁸ the Court rejected the SEC’s parity of information theory, which applied the disclose or abstain rule to any person with access to non-public material inside information.³⁹ Instead, the Court, in ironic contrast to *Santa Fe Industries*,⁴⁰ ruled that there was no *general duty* to disclose before trading on material, non-public information,⁴¹ but rather a person possessing such information only has a duty to disclose or abstain from open market trading where that person has a fiduciary relationship with his or her trading counterparties.⁴² Finally, in *Dirks v. SEC*,⁴³ the Court rejected the SEC’s argument that “anyone who knowingly receives nonpublic material information from an insider has a fiduciary duty to disclose before trading.”⁴⁴ The Court stated that a tippee derives a fiduciary duty from the tipping insider only where the insider has breached her fiduciary duty to the corporation’s shareholders (presumably, collectively) by disclosing the information to the tippee *and* where the tippee knows or should know that the insider has breached her fiduciary duty by using the inside information for personal advantage, i.e., the insider must personally benefit, directly or indirectly, from her disclosure.⁴⁵

32. *Id.* at 213 (citations omitted).

33. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977).

34. *Id.* at 472.

35. *Id.* at 478.

36. *Id.* at 479.

37. *Id.* at 478–79.

38. *Chiarella v. United States*, 445 U.S. 222 (1980).

39. *Id.* at 235.

40. *Santa Fe Indus.*, 430 U.S. at 462.

41. *Chiarella*, 445 U.S. at 233.

42. *See id.* at 235. Certainly, corporate officers and directors have a fiduciary duty to their respective corporations, but the common law, as discussed, does not impose fiduciary duties that run to anonymous counterparties to the insiders’ trades. The Court here, similarly to the SEC in *Cady, Roberts*, simply fabricated a federal duty under Rule 10b-5. In doing so, it left insider trading jurisdiction in “theoretical ruins.” *See* Manning G. Warren III, *A Foreword on Insider Trading Regulation*, 39 ALA. L. REV. 337, 342 (1988).

43. *Dirks v. SEC*, 463 U.S. 646 (1983).

44. *Id.* at 656–57.

45. *Id.* at 660. In 2016, the Supreme Court upheld *Dirks* in *Salman v. United States*, 137 S. Ct. 420, 424 (2016).

The *Cady, Roberts* decision predated, and therefore avoided, almost all of the Supreme Court's insider trading jurisprudence. For instance, the SEC did not undertake the *scienter* analysis required by *Hochfelder* before its novel expansion of Rule 10b-5. Additionally, the SEC, in direct contradiction of the Court's holding in *Santa Fe Industries*, openly expressed its belief in a new federal corporation law and rejected state common law in order to address its own perceived *unfairness* of any trading by those with inside information. Furthermore, the SEC's prohibition of insider trading by anyone with *access* to inside information was rejected outright in *Chiarella* and *Dirks* as outside the ambit of Rule 10b-5.

And lastly, the SEC in *Cady, Roberts* never even considered whether the tipper, who the SEC did not charge with a Rule 10b-5 violation, breached any fiduciary duties by disclosing information that he assumed had already been publicly disseminated, an analysis required by the Court in *Dirks*.⁴⁶ Moreover, the SEC made no determination that the tippee it did charge with a Rule 10b-5 violation knew or should have known that his insider tipping both breached fiduciary duties and derived personal benefit from the disclosure. Indeed, the tipper's innocent disclosure should not be viewed as a breach of fiduciary duty where the tipper's purpose in making the disclosure was not to defraud anyone, but to share what he thought was common knowledge. Even the Court in *Dirks* raised these doubts in recognizing that "[c]orporate officials may mistakenly think the information already has been disclosed."⁴⁷ How could the tippee derive a breach of fiduciary duty from an innocent tipper and be charged with derivative liability for fraud? As in *Dirks*, the tippee had no pre-existing duty to the company's shareholders, took no action that induced the tipper to repose trust in him, had no expectation from the tipper to keep the information in confidence, and did not misappropriate the information.⁴⁸ Clearly, the SEC, which in *Cady, Roberts* took the position that the existence of a fiduciary duty should not be relevant, would face difficult challenges under modern securities law jurisprudence if it were compelled to re-litigate the *Cady, Roberts* charges in a federal court.

IV. SEC V. TEXAS GULF SULPHUR CO.

In *SEC v. Texas Gulf Sulphur Co.*, the SEC sought judicial approval for its opinion in *Cady, Roberts* that *access* to inside information and inherent *unfairness* justified its disclose or abstain insider trading prohibition

46. One former SEC Commissioner has written that Cowdin, as the tipper in *Cady, Roberts*, "quite plausibly had good reason to assume that the news of the dividend cut was public at the time he made his phone call to Gintel." Jack M. Whitney II, *Section 10b-5: From Cady Roberts to Texas Gulf: Matters of Disclosure*, 21 Bus. L. 193, 199 (1965). He posited that the SEC's focus in *Cady, Roberts* was on the conduct of a registered broker dealer in "jumping the gun" for the benefit of his clients and not on insider trading generally. *Id.* at 198-99. I disagree.

47. *Dirks*, 463 U.S. at 662.

48. *See id.* at 665.

under Rule 10b-5.⁴⁹ In an article analyzing the SEC's then recently filed complaint in *Texas Gulf Sulphur*, the authors stated:

It is plain that in the *Texas Gulf* case, the Commission is seeking judicial approval for the rule it announced in *Cady, Roberts & Co.*, namely, that corporate officers, directors, and controlling shareholders, *and* any one else who has access to information intended to be available only for a corporate purpose, may not take advantage of such material information by trading in the issuer's securities, while such information is unavailable to the persons with whom they are dealing.⁵⁰

The SEC was successful in this endeavor. The Second Circuit, long before the Supreme Court's imposition of deference to administrative agency interpretation in *Chevron*,⁵¹ fully subscribed to the SEC's position in *Cady, Roberts*. The court gave its judicial imprimatur to the broadest implications of *Cady, Roberts*, which have been described by one influential scholar as "astonishing."⁵² The court fully embraced the parity of information rule:

The essence of the Rule is that anyone who, trading for his own account in the securities of a corporation has "access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone" may not take "advantage of such information knowing it is unavailable to those with whom he is dealing," *i.e.*, the investing public. *Matter of Cady, Roberts & Co.*, 40 SEC 907, 912 (1961). Insiders, as directors or management officers are, of course, by this Rule, precluded from so unfairly dealing, but the Rule is also applicable to one possessing the information who may not be strictly termed an "insider" within the meaning of Sec. 16(b) of the Act. *Cady, Roberts, supra*. Thus, anyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such information remains undisclosed.⁵³

The SEC brought its case against various Texas Gulf Sulphur geologists and other insiders for violation of Rule 10b-5 because they purchased

49. See Kennedy & Wander, *supra* note 26, at 1061. According to one scholar, "[a]s chair, Cary wanted the imprimatur of a federal court decision giving explicit judicial approval of the disclose-or-abstain duty." Weinberger, *supra* note 3.

50. Kennedy & Wander, *supra* note 26, at 1061.

51. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

52. William H. Painter, *Insider Information: Growing Pains for the Development of Federal Corporation Law Under Rule 10b-5*, 65 COLUM. L. REV. 1361, 1375 (1965). In this article, Professor Painter notes that Congress, in its consideration of § 16(b) of the Securities Exchange Act of 1934, which then provided the only substantive restriction on insider trading (and limited solely to officers, directors, and ten percent shareholders), "rejected a suggestion that the use of inside information be made unlawful, in view of the problems of proof involved." *Id.*

53. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

Texas Gulf Sulphur securities on the basis of the company's undisclosed discovery of major mineral deposits in Timmins, Ontario.⁵⁴ Three of these defendants, like Cowdin, the uncharged tipper in *Cady, Roberts*, honestly believed the news of the strike had been publicly disclosed. Proof of intent to defraud, the court held, was unnecessary because negligent insider conduct was enough.⁵⁵ Obviously unable to foresee the opposite conclusion reached by the Supreme Court in *Hochfelder*⁵⁶ and *Aaron v. SEC*,⁵⁷ the court erroneously concluded that there was no clear indication of congressional intent to require a showing of *scienter* under Rule 10b-5.⁵⁸ According to the court, the standard of conduct prohibited by Rule 10b-5 "encompasses negligence as well as active fraud," and includes "lack of diligence, constructive fraud [and] unreasonable or negligent conduct."⁵⁹ The court determined that § 10(b) was a catch-all,⁶⁰ but it failed to note, in the words of Justice Powell in *Chiarella*, that "what it catches must be fraud."⁶¹ For the Court in *Chiarella* and subsequently in *Dirks*, failure to disclose material, non-public information before trading securities does not violate Rule 10b-5 *unless* the trader has a fiduciary duty to disclose. In both *Cady, Roberts* and *Texas Gulf Sulphur*, the existence of a fiduciary duty was irrelevant.

V. CONCLUSION

The SEC's efforts in *Cady, Roberts* and *Texas Gulf Sulphur* to impose a federal non-fiduciary duty to disclose or abstain on anyone in possession of material, non-public information, based on access and unfairness, was initially successful. In the end, the Supreme Court, primarily in *Chiarella* and *Dirks*, rejected the SEC's parity of information theories by requiring not just access and unfairness, but also some sort of fiduciary relationship between the insider and her anonymous counterparties in the impersonal exchange markets. Ultimately, the Supreme Court in *United States v.*

54. For an excellent discussion of the factual context and continued development of Texas Gulf Sulphur's Ontario mine, see Weinberger, *supra* note 3.

55. *Texas Gulf Sulphur*, 401 F.2d at 854-55.

56. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

57. *Aaron v. SEC*, 446 U.S. 680, 691 (1980).

58. *Texas Gulf Sulphur*, 401 F.2d at 855.

59. *Id.*

60. *Id.* at 859.

61. *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980). Strangely, Justice Powell in *Chiarella* made the erroneous observation that the SEC had never adopted a parity of information rule and cited both *Cady, Roberts* and *Texas Gulf Sulphur* with apparent approval. *Id.* at 233. Perhaps, to be charitable, Justice Powell meant that the SEC had never promulgated an *administrative* rule that expressed its *Cady, Roberts* parity of information rule. Subsequently, in *Dirks*, Justice Powell specifically rejected the parity of information rule, which the Court had acknowledged was a theory the SEC had advanced in *Chiarella* and again in *Dirks*. In *Dirks*, the Court specifically rejected the SEC's "theory of tippee liability," that "anyone who knowingly receives nonpublic material information from an insider has a fiduciary duty to disclose before trading." *Dirks v. SEC*, 463 U.S. 646, 656-57 (1983). The Court's insertion of the term "fiduciary" is, of course, bewildering, given that while the SEC asserted a "duty," that duty was not dependent on a fiduciary relationship in either *Cady, Roberts* or *Texas Gulf Sulphur*. Instead, the SEC and the Second Circuit focused on "access" and "unfairness."

*O'Hagan*⁶² adopted the SEC's misappropriation theory, a position the SEC argued too late in *Chiarella*.⁶³ The Court still insisted on a fiduciary link, but the relationship could also be between the inside trader and the source of the information, typically her employer or other principal.⁶⁴ Has the misappropriation theory adopted by the Supreme Court brought us full-circle back to the SEC's parity of information theory, as embraced by *Cady*, *Roberts* and *Texas Gulf Sulphur*? The answer is no, but the SEC was able to recover a large swath of lost ground. The Barry Switzers⁶⁵ and Mark Cubans⁶⁶ of the world remain beyond the SEC's reach, and, perhaps, some inside traders of debt securities.⁶⁷ But given its enforcement fervor for insider trading prosecutions⁶⁸ and its unwillingness to de-

62. *United States v. O'Hagan*, 521 U.S. 642 (1997). For further discussion of *O'Hagan*, see Christopher J. Bebel, *A Detailed Analysis of United States v. O'Hagan: Onward Through the Evolution of the Federal Securities Laws*, 59 LA. L. REV. 1 (1998); Randall W. Quinn, *The Misappropriation Theory of Insider Trading in the Supreme Court: A (Brief) Response to the (Many) Critics of United States v. O'Hagan*, 8 FORDHAM J. CORP. & FIN. L. 865 (2003).

63. *O'Hagan*, 521 U.S. at 650; *Chiarella*, 445 U.S. at 235 (“[The United State’s brief] argues that petitioner breached a duty to the acquiring corporation when he acted upon information that he obtained by virtue of his position as an employee of a printer employed by the corporation. The breach of this duty is said to support a conviction under § 10(b) for fraud perpetrated upon both the acquiring corporation and the sellers. We need not decide whether this theory has merit for it was not submitted to the jury.”); see also Manning G. Warren III, *Who’s Suing Who? A Commentary on Investment Bankers and the Misappropriation Theory*, 46 MD. L. REV. 1222 (1987).

64. *O'Hagan*, 521 U.S. at 652. In reality, the Court’s decision has delegated anti-fraud authority to employers and other principals who are now positioned to either consent to their agents’ trading securities based on material non-public information or to bring an insider trading action against those employees. Since the Court has not bought *Cady*, *Robert’s* access and fairness argument, corporate principles have the power to erase the fiduciary links necessary for a successful insider trading action. As a result, both the SEC and inside traders’ counterparties in exchange transactions find themselves as remediless under Rule 10b-5 as they were under *Goodwin* and state common law.

65. See generally *SEC v. Switzer*, 590 F.Supp. 756 (W.D. Okla. 1984).

66. See generally *SEC v. Cuban*, 620 F.3d 551 (5th Cir. 2010).

67. See Bainbridge, *supra* note 5, at 1213.

68. The SEC’s enforcement of Rule 10b-5’s insider trading prohibition continues as fast and furious as ever. See, e.g., Colin Moynihan & Liz Moyer, *William T. Walters, Famed Sports Bettor, Is Guilty in Insider Trading Case*, N.Y. TIMES: DEALBOOK (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/business/dealbook/william-t-walters-famed-sports-bettor-is-guilty-in-insider-trading-case.html> (a case featuring pro golfer Phil Mickelson as an alleged tippee); Andrew Ramonas, *Ex-Life Time Fitness VP, Friends Charged With Insider Trading*, 49 SEC. REG. & L. REP. 1596 (Oct. 9, 2017); Cara Bayles, *Ross Stores Insider Trading Charges Have To Go, Judge Told*, LAW360 (Dec. 20, 2017), <https://www.law360.com/articles/996070>; Antoinette Gartrell, *SanDisk Exec Tipped Relatives to Merger Talks, SEC Says*, 49 SEC. REG. & L. REP. 1597 (Oct. 9, 2017); R.J. Vogt, *SEC Scores Insider Trading Settlement With Ex-PWC Auditor*, LAW360 (Sep. 13, 2017), <https://www.law360.com/articles/963564>; Andrew Ramonas, *N.J. Doctor To Settle SEC Insider Trading Charges For \$34k*, 40 SEC. REG. & L. REP. 1592 (Oct. 9, 2017); Nicole Hong, *Ruling Buys Insider Trading on Pharma Company News*, WALL ST. J., Aug. 24, 2017, at B1 (discussing the affirmation of the 2014 conviction of former SAC Capital Advisors LP portfolio manager Mathew Martoma); Bonnie Eslinger, *Ex-Amazon Analyst Pleads Guilty To Insider Trading*, LAW360 (Sept. 7, 2017), <https://www.law360.com/articles/961733>; Andrew Ramonas, *Four Charged With Insider Trading on Morgan Stanley Broker Pleads Not Guilty To Insider Trading*, 49 SEC. REG. & L. REP. 1443 (Sept. 18, 2017); Phyllis Diamond, *Israeli Doctor Tipped Brother to Mobileye/Intel Deal, SEC Says*, 49 SEC. REG. & L. REP. 1444 (Sept. 18, 2017); William

velop a more determinative insider trading definition,⁶⁹ whether by statute or regulation, the SEC may yet see a return to its golden era of *Cady, Roberts* and *Texas Gulf Sulphur*. The future lies in the virtues of vagueness.⁷⁰

Gorta, *Ex-Hunton Atty Avoids Jail for Wine-Fueled Insider Trading*, LAW360 (Sep. 26, 2017), <https://www.law360.com/articles/967990>; Rachel Graf, *Supreme Court Won't Review Lawyer's Stock Fraud Conviction*, LAW360 (Dec. 11, 2017), <https://www.law360.com/articles/993319>; Bill Wichert, *4th Person Cops To \$3.9M Insider Trading Scheme In NJ*, LAW360 (Dec. 11, 2017), <https://www.law360.com/article/993479>; Erik Larson, *Ex-BofA Worker Accused by SEC of Tipping 5 Who Face Fraud Charges*, 49 SEC. REG. & L. REP. 1325 (Aug. 21, 2017); Antoinette Gartrell, *CPA Traded On Inside Merger Data, SEC Alleges*, 49 SEC. REG. & L. REP. 1578 (Oct. 2, 2017).

69. The United States does not have a statutory definition of insider trading. For further discussion of this issue, see Daniel L. Goelzer & Max Berueffy, *Insider Trading: The Search for a Definition*, 39 ALA. L. REV. 491 (1988); Richard M. Phillips & Robert J. Zutz, *The Insider Trading Doctrine: A Need for Legislative Repair*, 13 HOFSTRA L. REV. 65 (1984); James D. Cox, *Choices: Paving the Road Toward a 'Definition' of Insider Trading*, 39 ALA. L. REV. 381 (1988). See also James H. Thompson, *A Global Comparison of Insider Trading Regulations*, 3 INT'L. J. OF ACCT. & FIN. REPORTING 1 (2013), <http://www.macrothink.org/journal/index.php/ijaf/article/viewFile/3269/2976> [<https://perma.cc/3KPV-YRTB>], for a detailed analysis of how fourteen industrialized countries have chosen to define insider trading. For a general discussion of the successful efforts of the European Union in developing a common definition of its insider trading (dealing) prohibition, see Manning G. Warren III, *The Regulation of Insider Trading in the European Community*, 48 WASH. & LEE L. REV. 1037 (1991).

70. See Langevoort, *supra* note 9, at 1336. For an insightful discussion of vagueness as an SEC regulatory policy, see Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL'Y 639, 658–60 (2010).