Pari Delicto Under the Federal Securities Laws
Bateman Eichler Hill Richards Inc. v. Berner

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NOTES

IN PARI DELICTO UNDER THE FEDERAL SECURITIES LAWS: BATEMAN EICHLER, HILL RICHARDS, INC. V. BERNER

A securities broker, in a scheme with the president of a corporation to boost the corporation’s financial image and stock value, informs a potential investor who is an outsider to the corporation that the corporation has just discovered African gold deposits of such magnitude that “[g]eologists . . . [are] finding gold nuggets in dry creek beds”\(^1\) and that negotiations to form a joint mining venture with other companies are ongoing. The information is not yet public, says the broker, but when news of the strike leaks out, the corporation’s stock will increase anywhere from three to sixty times in value.\(^2\) The “tippee” seeks corroboration from the corporation’s president, who neither confirms nor denies the broker’s tip but advises the prospective stock purchaser that the broker is “very trustworthy and a good man.”\(^3\) The tippee, scarcely able to believe his good fortune, purchases the stock in large quantities.\(^4\) In reality, the broker’s reports of both the gold strike and the joint venture negotiations are exaggerated and full of material omissions.\(^5\) After briefly enjoying a sharp increase, the stock price plunges well below the tippee’s purchase price when the negotiations collapse.\(^6\) The enraged tippee sues the broker and the president.\(^7\)

The tippee has an action under rule 10b-5,\(^8\) the Securities and Exchange Commission’s anti-fraud provision, against both the broker and the president for making material exaggerations and omis-

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1 This hypothetical duplicates the facts of Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 302 n.2 (1985).
2 Id. at 302.
3 Id.
4 Id.
5 Id. at 303.
6 Id. at 302.
7 Id. at 302-04.
8 17 C.F.R. § 240.10b-5 (1986). This rule provides:

   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 security exchange,

   (1) To employ any device, scheme, or artifice to defraud,

   (2) To make any untrue statement of a material fact or 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

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sions upon which the tippee relied in purchasing the securities. The tippee, however, is himself guilty of violating rule 10b-5 for failing to disclose the material information before trading on the basis of it. The broker argues that the plaintiff-tippee’s violation of rule 10b-5 renders the plaintiff and defendants equally culpable, therefore the court should dismiss the case under the common-law de-

(3) 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.


A court considering whether to grant the defendant’s motion to dismiss on the basis of in pari delicto assumes that the tipper has committed a rule 10b-5 violation against the tippee where the plaintiff alleges the violation’s necessary elements. The main elements of a tippee’s rule 10b-5 action are scienter, materiality, and reliance. The Supreme Court, in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), required that the defendant possess an actual intent to defraud; fraudulent intent would seem to encompass the deliberate exaggerations allegedly committed by the Bateman Eichler defendants. The Second Circuit in SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969), stated that the test of materiality is whether a reasonable investor would regard the information as affecting the stock’s value. A corporation’s discovery of extensive gold holdings would certainly fulfill this requirement. Indeed, the information’s anticipated effect on the stock’s price prompted the illicit disclosure. The plaintiff need not establish reliance independently; showing failure to disclose material information presumptively establishes reliance. Affiliated Ute Citizens v. United States, 406 U.S. 128, 153 (1972). The defendant, therefore, bears the burden of proving that the plaintiff did not rely on the tip when he purchased or traded his stock. The Bateman Eichler defendants did not attempt to show nonreliance, and the facts in the hypothetical assume that the plaintiff did rely on the false tip.

In addition to the tippee’s direct action based upon material falsehoods, defendant officers and broker-dealers may also face suits by the corporation and other shareholders for leaking material and true inside information. See Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974), cert. denied, 429 U.S. 1053 (1977); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005 (1971).

A tippee’s duty to refrain from trading on inside information derives from the tipper’s duty to the corporation. Dirks v. SEC, 463 U.S. 646, 659 (1983). This hypothetical assumes, as did the Bateman Eichler Court, that the outsider-tippee knew or should have known that his source had breached a fiduciary duty to the corporation and its shareholders: the Court assumed that the tippees knew that the insider personally sought to benefit, directly or indirectly, from his disclosure. Bateman Eichler, 472 U.S. at 311. “Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach.” Dirks, 463 U.S. at 662 (footnote omitted); see also Bateman Eichler, 472 U.S. at 311 n.21.

The Eichler plaintiff-tippees, adopting a theory of legal impossibility, argued that if the information received from the defendants was entirely false, then the tippees had no duty to disclose it prior to trading. The defendants countered that the tippees were liable for an attempted rule 10b-5 violation and urged the court’s application of an intent-based standard rather than the doctrine of legal impossibility. The Bateman Eichler Court declined to decide this issue and proceeded “on the assumption that the respondents’ activities rendered them in delicto.” Bateman Eichler, 472 U.S. at 311 n.21.
fense of in pari delicto. What result?

Prior to 1985, courts split on the issue of allowing the common-law defense of in pari delicto in private actions under rule 10b-5. In Bateman Eichler, Hill Richards, Inc. v. Berner, the Supreme Court held that on the facts of the introductory hypothetical, the defense should not be allowed. The Court framed this issue as fixing "the proper scope of the in pari delicto defense in securities litigation." The Court thus formulated a test for availability of the defense in future private actions under not only rule 10b-5 but other securities provisions as well.

This Note examines the elements of the Bateman Eichler test, scrutinizes the Court's justification for and application of the test, and gauges the test's appropriateness in future litigation under not only rule 10b-5 but also securities registration, margin, and proxy provisions. Part I describes the defense's status before Bateman Eichler. Part II discusses the Bateman Eichler opinion. Part III analyzes the two-pronged test in depth and argues that it is merely a resurrection of the traditional strict in pari delicto doctrine. Part IV applies the test to typical cases in three different securities contexts: registration, margin, and proxy provisions.

I

THE IN PARI DELICTO DOCTRINE PRIOR TO BATEMAN EICHLER

A. The Traditional Doctrine of in Pari Delicto

"In pari delicto" is the shorthand form of the Latin phrase "in pari delicto potior est conditio defendentis," which translates "in a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one." Justice Story's classic elucidation of the doctrine highlights the traditional version's three elements:

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10 Bateman Eichler, 472 U.S. at 312.
13 Id at 305.
14 Id.
15 See infra notes 19-31 and accompanying text.
16 See infra notes 32-49 and accompanying text.
17 See infra notes 50-83 and accompanying text.
18 See infra notes 84-131 and accompanying text.
19 BLACK'S LAW DICTIONARY 711 (5th ed. 1979).
In cases where both parties are in delicto, concurring in an illegal act, it does not always follow that they are in pari delicto; for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offence. And besides, there may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be. Thus, before granting a dismissal, courts traditionally require defendants to show: (1) that the parties' culpability arose out of a "concurrent" act; (2) that the parties were of substantially equal fault; and (3) that allowing the defense would not undermine public interests or conflict with public policies.

B. Modern In Pari Delicto

Contemporary courts have strayed from the traditional requirements by allowing the in pari delicto defense even when the plain-tiff's activity is unrelated to and less culpable than the defendant's own. Criticism of the defense's liberalization prompted the Supreme Court in Perma Life Mufflers, Inc. v. International Parts Corp. to disallow the defense in private actions under the antitrust laws. In Perma Life, several Midas Muffler dealers sued their franchiser, alleging that the franchise agreements constituted a conspiracy to restrain trade in violation of the federal antitrust laws. The district court dismissed the suit on the ground that the plaintiff dealers, as parties to the franchise agreements, were in pari delicto with the franchise, and the Court of Appeals affirmed. In reversing the lower court, the Supreme Court noted,
Although *in pari delicto* literally means "of equal fault," the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages... is himself involved in some of the same sort of wrongdoing. We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes.

... We therefore hold that the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.\(^{30}\)

This language suggested that the Court might find a narrower, more traditional version of the defense less objectionable in the context of federal remedial legislation serving broad public purposes, such as the antitrust or securities laws.

Lower courts opposing the defense in rule 10b-5 private actions generally expressed displeasure with the doctrine's undue interference with the rule's broad remedial purpose.\(^{31}\) Strict adherence to the traditional requirements of the defense would lessen such interference and therefore lessen opposition to the doctrine in the contexts of both rule 10b-5 and securities laws in general.

### II

**Bateman Eichler**

#### A. Summary of Facts

The introductory hypothetical traces *Bateman Eichler*'s essential facts: the corporation's president and a securities broker employed by the corporation fraudulently induced the plaintiffs to buy stock by leaking exaggerated and materially incomplete information relating to the gold strike and planned joint venture. Plaintiff investors claimed substantial losses from the purchase of stock; defendants pleaded in pari delicto. The district court, accepting the defense's

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\(^{30}\) *Id.* at 138-140.

\(^{31}\) See, e.g., Kuehnert v. Texstar Corp., 412 F.2d 700, 706 (5th Cir. 1969) (Godbold, J., dissenting); Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50, 54-57 (S.D.N.Y. 1970). In *Perma Life*, 392 U.S. at 739, the Supreme Court appeared to banish the defense on the ground that the federal statute involved completely preempted the in pari delicto doctrine because the doctrine interfered too greatly with the statute's broad remedial purpose. Lower courts, on the other hand, generally acknowledge the defense's applicability in rule 10b-5 cases, but find that one element of the defense has not been established. See, e.g., Woolf v. S.D. Cohn & Co., 515 F.2d 591, 602-04 (5th Cir. 1975) (defense sanctioned in private action under securities laws but not where plaintiff actually less culpable), vacated, 426 U.S. 944 (1976), on remand, 546 F.2d 1252 (5th Cir.), *cert. denied*, 434 U.S. 831 (1977); Kirkland v. E.F. Hutton & Co., 564 F. Supp. 427, 436 (E.D. Mich. 1983) (defense applicable in rule 10b-5 tipper-tippee cases but not allowed where defendant has not shown plaintiff has substantially equal culpability); Moholt v. Dean Witter Reynolds, Inc., 478 F. Supp. 451, 453 (D.D.C. 1979) (defense allowable in rule 10b-5 action but only where there is equal fault and securities laws are best served).
validity, dismissed the complaint on the ground that the plaintiffs had also violated rule 10b-5 by trading on apparent inside information without first disclosing such information to the public.\textsuperscript{32} The Ninth Circuit, reasoning from the Supreme Court’s Perma Life decision,\textsuperscript{33} reversed the district court because it could find no basis “for creating a different rule for private actions initiated under the federal securities laws.”\textsuperscript{34} The defendants appealed; the Supreme Court granted certiorari and affirmed the Ninth Circuit decision.\textsuperscript{35}

B. The Supreme Court’s Two Pronged Test

The Supreme Court narrowly defined the issue as “whether the common law in pari delicto defense bars a private damages action under the federal securities laws against corporate insiders and broker-dealers who fraudulently induce investors to purchase securities by misrepresenting that they are conveying material nonpublic information about the issuer.”\textsuperscript{36} Given different facts, therefore, the defense may still be allowable in future 10b-5 cases—even in future tippee suits. The Court formulated a two-pronged test to determine the defense’s applicability to the facts and found that the defendants failed both prongs. The Court upheld the in pari delicto defense’s application “only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public.”\textsuperscript{37} The first prong examines the relative culpability of the two parties; the second asks whether allowing the defense would conflict with underlying statutory policies. In order to prevail, defendants must satisfy both prongs of the test.

Applying the test’s first prong to the Bateman Eichler facts, the Court determined that even if the plaintiff-tippees violated rule 10b-5, they were still less blameworthy than the president and the broker-dealer. Citing Dirks v. SEC,\textsuperscript{38} the Court reasoned that a tippee cannot be as culpable as a tipper when the tippee’s duty is “solely derivative”\textsuperscript{39} of the insider’s duty. The Bateman Eichler Court focused on insiders and broker-dealers because they potentially can

\begin{itemize}
\item[32] Bateman Eichler, 472 U.S. at 304.
\item[33] See supra notes 25-30 and accompanying text.
\item[34] Berner v. Lazzaro, 730 F.2d 1319, 1322 (9th Cir. 1984), aff’d, Bateman Eichler, Hill Richards, Inc. v. Berner, 105 S. Ct. 2622 (1985).
\item[35] 470 U.S. 1026 (1985)
\item[36] Bateman Eichler, 472 U.S. at 301.
\item[37] Id. at 310-11 (emphasis added).
\item[38] Dirks, 463 U.S. at 662; see supra note 9.
\item[39] Bateman Eichler, 472 U.S. at 313.
\end{itemize}
commit a "broader range of violations than . . . tippees." The Court concluded, "Absent other culpable actions by a tippee that can fairly be said to outweigh these violations by insiders and broker-dealers, we do not believe that the tippee properly can be characterized as being of substantially equal culpability as his tippers." Applying the second prong to the facts, the Court did not limit its analysis to policies specific to rule 10b-5; rather, it invoked the broad objectives underlying the securities laws in general—protection of the investing public and of the national economy. The Court found that these goals are best furthered through "the promotion of 'a high standard of business ethics . . . in every facet of the securities industry.'" The Court forwarded two reasons why allowing tippees' cases to proceed would best serve these policies. First, private actions significantly assist the SEC in its struggle to enforce rule 10b-5's ban on fraudulent practices. Through such litigation, culpable parties "expose their unlawful conduct and render them[subselves] more easily subject to appropriate civil, administrative, and criminal penalties." The second reason follows from a comparison of the deterrent effects of allowing or disallowing the defense. The Court believed "that deterrence of insider trading most frequently will be maximized by bringing enforcement pressures to bear on the sources of such information—corporate insiders and broker-dealers." Assuming that the purpose of the ban on insider trading is to restrict the use of all material non-public information, deterrent pressure is more efficiently aimed at tippers—the sources of information—than at the potentially larger class of tippees. The Court also noted that insiders and broker-dealers, because of their greater awareness of the securities laws, "will in many circumstances be more responsive to the deterrent pressure of potential sanctions."

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40 Id.
41 Id. at 314.
42 Id. at 315-19.
43 Id. at 315.
44 Id. (quoting SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186-87 (1963)).
45 Id.
46 Id. at 316 (quoting Kuehnert v. Texstar Corp., 412 F.2d 700, 706 n.3 (5th Cir. 1969) (Godbold, J., dissenting)).
47 Id.
48 Id. (citing Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50, 57-58 (S.D.N.Y. 1971)).
49 Id. at 317.
III
ANALYSIS OF THE TWO-PRONGED TEST

Although the *Bateman Eichler* defendants failed both prongs of the test, the Court took care to base its holding upon the relative culpabilities of the parties on the particular facts alleged. The Court explained, "Although situations might well arise in which the relative culpabilities of the tippee and his insider source merit a different mix of deterrent incentives, we . . . conclude that in tipper-tippee situations such as the one before us the factors discussed above preclude recognition of the in pari delicto defense." Some consideration of these "factors" is therefore necessary to determine when the defense should be allowed in cases with facts different from *Bateman Eichler*.

A. The Culpability Prong

The first prong requires the defendant to show that "as a direct result of [the plaintiff's] own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress," yet nowhere does the Court define "substantially equal responsibility." Nevertheless, the opinion indicates the importance of two factors: (1) the degree of voluntariness inherent in the tippee's acts, and (2) the relationship of both parties to each other and, consequently, to the corporation involved.

1. Voluntary Activity

The *Bateman Eichler* Court emphasized the importance of the voluntary nature of the plaintiff's activity by distinguishing voluntary from passive or coerced activity. To prove its point, the Court contrasted the *Bateman Eichler* plaintiffs' acts with those of the plaintiffs in *Perma Life*, the only other case in which the Court discussed the applicability of the defense in the context of broad federal remedial legislation:

[Defendant] contends that the [plaintiff's] delictum was substantially par to that of [defendants because] whereas many antitrust plaintiffs participate in illegal restraints of trade only "passively" or as the result of economic coercion . . . the ordinary tippee acts voluntariness in choosing to trade on inside information . . .

We agree that the typically voluntary nature of an investor's decision impermissibly to trade on an inside tip renders the investor more blameworthy than someone who is party to a contract

50 Id. (emphasis added).
51 Id. at 310-11.
52 See supra note 27 and accompanying text.
solely by virtue of another's overweening bargaining power. 53

In *Perma Life*, the defendant economically coerced the plaintiff into participating in illegal trade restraints, whereas the *Bateman Eichler* plaintiffs suffered from no such duress. 54 Nevertheless, the Court decided that the level of the *Bateman Eichler* plaintiff's activity was insufficient to support a finding of equal culpability. 55

Comparing the plaintiffs in *Perma Life* and *Bateman Eichler* suggests a continuum of voluntary activity with the coerced *Perma Life* plaintiffs at one extreme, the noncoerced but apparently not-too-active *Bateman Eichler* plaintiffs somewhere in the middle, and the hypothetical plaintiff who commits even more "culpable" actions at the other extreme. What would this more "culpable" plaintiff look like? The extent of the plaintiff's culpability in *Bateman Eichler* was that he thought he was getting a good inside tip—he intended to make an easy profit at the expense of an ignorant market. This is presumably why the Court concluded that "the typically voluntary nature of an investor's decision impermissibly to trade on an inside tip renders the investor more blameworthy than someone who is party to a contract solely by virtue of another's overweening bargaining power." 56 A tippee presumably would be more culpable if he actively solicited the tip or, after learning that the tip was false, passed it on to other unwitting investors. Although the *Bateman Eichler* Court gives scant guidance on this point, a tippee's culpability would seem to be affected by the extent to which he initiates the exchange, his reason for doing so (greed versus duress), and maybe even the degree of his awareness of the illegality of his acts.

2. Relationship

The parties' relationship to each other and to the issuing corporation involved is the second factor affecting the relative culpability analysis. The closer one is to the issuing corporation—the source of the securities and the primary source of any material inside information—the broader the range of one's possible violations. In the case of insiders, the Court noted, the insider's close relationship to the corporation determines the number and severity of his breaches of fiduciary and other duties, whether owed to the corporation, a particular investor, or a class of investors. 57

53 *Bateman Eichler*, 472 U.S. at 312.
54 *Id.* at 310.
55 *Id.* at 312-14. See *supra* text accompanying note 41 for the Court's rationale. See also *infra* notes 57-62 and accompanying text.
56 *Bateman Eichler*, 472 U.S. at 312.
57 *Id.* at 313-14 ("A tippee trading on inside information will in many circumstances be guilty of fraud against individual shareholders, a violation for which the tipper shares
The Court found that tippees, on the other hand, generally are less culpable than their tippers because the tippee's duty to disclose the information before trading derives from the tipper's duty.\(^5\) A tippee is one step further removed from the corporation—the alleged “source” of the information—than his tipper; the tippee's breach is not possible without the tipper's breach. In the Court's view, one whose duty derives from that of another is simply not as culpable "as one whose breach of duty gave rise to that liability in the first place."\(^5\)\(^9\)

In most situations, the tippee's greater distance from the corporation will render him less culpable than his tipper. Suppose his tipper is an independent broker-dealer who manufactures false inside information and conveys it to the tippee to manipulate the price of stock for his own gain. The dealer breaches a duty of honesty and fair dealing\(^6\) towards his client and commits fraud against any duped purchasers,\(^6\) but owes no duty to the issuing corporation. Therefore, the tippee of an independent broker-dealer has no duty to refrain from trading before the tip becomes public.\(^6\) Having violated no duty, such a tippee is automatically less culpable than his tipper; consequently the defense of in pari delicto is inapplicable.

The broker-dealer in \textit{Bateman Eichler}, however, did not work independently of the corporation. His status as an employee of the corporation altered the culpability analysis, although it failed to change its outcome. Agency intensified the broker-dealer's relationship to the corporation; he acted as the conduit through which the corporation leaked information to the investors. The tippees' breaches were derivative of the breaches by both the insider and the broker.

In such a situation, the tippee will often be guilty of fraud against individual shareholders, while his source will be guilty of both the same fraud and having breached his fiduciary duty to the issuer. If the information contains material omissions and falsehoods, he will be guilty of fraud against the tippee as well.\(^6\)

In sum, the relative culpabilities of adverse parties are a func-

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\(^5\) Id. at 313 ("'[T]he tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty' toward corporate shareholders.") (quoting Chiarella v. United States, 445 U.S. 222, 230 n.12 (1980)).

\(^6\) Id. at 314 ("Such conduct is particularly egregious when committed by a securities professional, who owes a duty of honesty and fair dealing toward his clients.").

\(^6\) Id. at 313-14.

\(^6\) This follows from the logic of \textit{Dirks}, 463 U.S. at 662 (in absence of breach by insider, there can be no derivative breach by tippee).

\(^6\) \textit{Bateman Eichler}, 472 U.S. at 313-14.
tion of the number and extent of each party's violations of legal obligations imposed by securities laws and by common-law fiduciary standards and the degree of voluntariness with which these violations were undertaken. Furthermore, the number and extent of each party's violations (in contrast to the degree to which they were voluntary) is usually a function of the relationships among the parties and the underlying corporation.

B. The Policy Prong

The Bateman Eichler Court defined the policy considerations relating to in pari delicto very broadly: the Court's analysis was not limited to policies unique to rule 10b-5, but concentrated instead on the securities laws as a whole and "protection of the investing public" in general. Two sections of the opinion help define the test's policy prong: (1) the Court's support for its finding that disallowing the defense best serves the broad policy goals identified above, and (2) the Court's brief discussion of how differences in the parties' culpability may affect the policy prong analysis's outcome.

1. Enforcement and Deterrence

On the Bateman Eichler facts, the Supreme Court decided that denying the in pari delicto defense would best promote the federal securities laws' primary objectives. The Court offered two reasons for this conclusion. First, private tippee suits significantly aid in detecting rule 10b-5 violations, most of which would go undiscovered if detection and enforcement were limited to the efforts of SEC agents. Allowing the in pari delicto defense discourages defrauded tippees from bringing suit. Second, expanding direct pressure on insiders more effectively deters insider trading.

Noting that the primary aim of rule 10b-5 is to reduce insider trading as a whole rather than to punish individual investors, the Court gave two reasons for concentrating deterrent pressure on insiders. First, the law should curtail the tipper's activity because, assuming that the "prophylactic purpose of the law is to restrict the use of all material inside information until it is made available to the investing public," the tipper is "at the fountainhead of the confidential information." The tipper is the root of the tree of confi-

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64 Id. at 315.
65 Id.
66 Id. at 316.
67 Id.
68 Id. (quoting Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50, 57 (S.D.N.Y. 1971)).
69 Id. (quoting Nathanson, 325 F. Supp. at 57).
dential information, the tippee a mere leaf, and it is more efficient to chop down the tree than to pick the leaves off one at a time. The Court reasoned further that because corporate insiders and broker-dealers "are more likely than ordinary investors to be advised by counsel," they are likely to be "more responsive to the deterrent pressure of potential sanctions." 70

The Bateman Eichler Court thus demonstrated greater concern for the maximum deterrence of insider trading in the aggregate than for punishing each and every culpable actor. The Court's framing of the policy prong in terms of broad enforcement considerations as opposed to policies unique to rule 10b-5 underscores its emphasis on maximizing this deterrent effect.

Earlier courts and commentators argued that recognition of the in pari delicto defense could conflict with policies underlying various specific securities provisions. 71 The Bateman Eichler Court, on the other hand, did not focus exclusively on policies unique to rule 10b-5, suggesting that future courts considering violations of the margin, proxy, and registration requirements may worry less about policies peculiar to such provisions and concentrate instead on whether allowing the defense "will best promote the primary objective of the federal securities laws—protection of the investing public and the national economy." 72

The Court's conclusion may be too optimistic: consideration of policies unique to a particular statute may be required. Two reasons support this caveat: first, the Court did not have to consider the policy prong too carefully because the defendants did not show equal culpability and thereby rendered the plaintiff immune to the defense. 73 In other rule 10b-5 actions, the presence or absence of equal culpability may be less obvious.

The second basis for the caveat is that the Court's determination that disallowing the defense would best comport with the policies of the securities laws in general could be equivalent to a determination that disallowance, a fortiori, best comports with rule 10b-5 policies as well. Because the Court found that allowing the defense would not jibe with the policies underlying the securities

70 Id. at 317.
71 See, e.g., 5c A. Jacobs, supra note 25, § 238.02 ("[A]uthorities treating the availability of the . . . defense under other securities acts remedies . . . are not persuasive, since 10b-5 has different underlying policies."). Cf. Mallis v. Bankers Trust Co., 615 F.2d 68, 76 (2d Cir. 1980) (denying defense where alleged acts are unrelated to § 10(b) policies), cert. denied, 449 U.S. 1123 (1981).
72 Bateman Eichler, 472 U.S. at 315.
73 Id. at 317 n.30 ("Because [the culpability prong is not satisfied], we need not address the circumstances in which preclusion of suit might otherwise significantly interfere with the effective enforcement of the securities laws and protection of the investing public.").
laws generally, it did not inquire further into possible conflicts with rule 10b-5 policies. This second argument assumes a congruence between rule 10b-5 policies and the broader policies lying beneath the edifice of the securities laws as a whole. Although the Bateman Eichler Court did not expressly identify policies peculiar to rule 10b-5, other courts have concluded that that provision's purposes are as broad in scope as those that animate the securities laws in general. A statute motivated directly by concern over certain practices perceived as contributing directly to the 1929 crash is more likely aimed at eliminating such practices in the aggregate than with possible unfairness to any individual investor. Satisfaction of the policy prong in an action brought under rule 10b-5 or a similarly broad-minded statute is therefore apt to be more difficult than in an action brought under a statute enacted mainly because the activity proscribed is viewed as unfair to particular parties.

2. Culpability and the Policy Prong

The Bateman Eichler Court stated that "situations might well arise in which the relative culpabilities of the tippee and his insider source merit a different mix of deterrent incentives." Thus, the Court carefully limited its decision to situations where the plaintiffs and defendants are not of equal culpability. Furthermore, the Court failed to indicate how equal culpability would affect the policy analysis in a rule 10b-5 action.

Although the Court's finding of unequal culpability precluded the need to examine the policy prong, it proceeded to determine that the defendants failed that prong as well. Moreover, the Court pointed out that a change in the parties' relative culpability could result in satisfaction of the policy prong, indicating an interrelationship between the two prongs. The Court, however, did not go beyond hinting at the connection to explain how culpability would influence the policy prong analysis.

Arguably, one may deem the policy prong satisfied under Bateman Eichler when the parties are of substantially equal culpability. The Court expressly refused to rule otherwise in both Bateman Eichler and Perma-Life. The Bateman Eichler Court's reluctance to ban

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74 For a synopsis of the policies held by courts to underlie rule 10b-5, see 5 A. Jacobs, supra note 25, §§ 6.01-09.
75 See infra notes 120-21 and accompanying text (discussing policies underlying margin requirements).
76 Bateman Eichler, 472 U.S. at 317.
77 Id. at 317 n.30; see supra note 73.
78 Bateman Eichler, 472 U.S. at 317 n.30.
79 Id.; see supra note 73 and accompanying text.
completely the in pari delicto defense from the realm of rule 10b-5 cases echoes the Court's earlier consideration of the defense in *Perma Life.* While the *Perma Life* Court's plurality opinion seemed to banish the defense forever from the area of antitrust,81 five justices in separate opinions82 agreed that "where a plaintiff truly bore at least substantially equal responsibility for the violation, a defense based on such fault—whether or not denominated in pari delicto—should be recognized in antitrust litigation."83

Furthermore, the number of rule 10b-5 suits that the defense would curtail is extremely limited. The manner in which relative culpability is determined under the first prong of the Court's test virtually guarantees that, in the vast majority of tipper-tippee cases, the derivative nature of the tippee's liability will render him less culpable than the tipper. Thus, recognizing the defense would have a negligible effect on the underlying goals of rule 10b-5.

Allowing dismissal in cases of equal fault therefore does not seriously threaten either the enforcement or the deterrence considerations animating the policy prong analysis in a rule 10b-5 case. Whereas policy conflicts will more likely occur under provisions such as rule 10b-5, which are inspired by broad macroeconomic policies rather than the threat of unfairness to any particular investor, the extremely low number of rule 10b-5 cases involving equal culpability do not seriously undermine the deterrence and detection considerations that justify disallowing the defense in all other cases.

The Court may have preserved the availability of the in pari delicto defense for defendants from whom the plaintiff-tippee actually solicits a tip. Such behavior increases the tippee's culpability and lessens courts' concern with the "derivative" nature of the plaintiff's act. A tippee's liability truly can derive from that of the tipper only where the tipper is the driving force behind the fraud, not where the tippee has approached the insider looking for stock tips. Furthermore, allowing the defense in tippee-driven insider trading cases also satisfies the policy prong. False tips, when they

81 *Id.* at 140 ("[T]he doctrine of in pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.").

82 *Id.* at 146 (White, J., concurring) (courts should "deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them"); *id.* at 147 (Fortas, J., concurring in result) ("If the fault of the parties is reasonably within the same scale—if the 'delictum' is approximately 'par'—then the doctrine should bar recovery."); *id.* at 149 (Marshall, J., concurring in result) ("Where a defendant in a private antitrust suit can show that the plaintiff . . . is substantially equally at fault, the plaintiff should be barred from imposing liability on the defendant."); *id.* at 153 (Harlan, J., joined by Stewart, J., concurring in part and dissenting in part) ("'[I]n pari delicto' . . . properly used . . . refers to a defense that should be permitted in antitrust cases.").

83 *Bateman Eichler,* 472 U.S. at 308-09 (footnote omitted).
occur, will more likely be part of an insider scheme to drive up stock prices than the product of tippee solicitation. Allowing the defense in tippee-driven cases will therefore have a minimal effect on the deterrence and detection policies that concerned the Bateman Eichler Court.

IV

Bateman Eichler's Application to Other Areas of Securities Law

The Bateman Eichler Court limited its decision to the propriety of in pari delicto in rule 10b-5 actions. Nevertheless, the Court acknowledged that it also was considering the broader issue of "the proper scope of the in pari delicto defense in securities litigation" generally. Furthermore, the Court's consciously framing the policy prong to consider whether preclusion of a suit would interfere with the effective enforcement of "the securities laws" as a whole, not merely rule 10b-5, supports Bateman Eichler's applicability to other areas of securities law.

This section accepts the Court's invitation and briefly attempts to apply the Bateman Eichler test to private actions under three different areas of the securities code: registration provisions, margin violations, and proxy violations. The following analyses each perform dual functions. First, each analysis examines the facts of a case typically arising in that area and identifies differences in either the plaintiff's acts or the parties' relationship that may affect both the culpability and policy prongs. Second, each analysis attempts to ascertain the policies supporting the relevant provision, to distinguish them from the broad policies cited by the Bateman Eichler Court, and to consider possible alterations in the outcome of the policy prong.

A. Registration Provisions

Section 5(c) of the Securities Act of 1933 renders unlawful the sale or offer for sale of any security unless the issuer has filed a registration statement. Section 4(1) of the Act limits section 5's applicability to issuers, underwriters, and dealers. Courts generally disallow the in pari delicto defense in private actions brought under

84 Id. at 305.
85 Id. at 310.
86 For a pre-Bateman Eichler discussion of the doctrine's applicability to these same areas, see Note, supra note 25, at 568-72.
88 Id. § 77d(1); see also id. § 77b(4), (11), (12) (definitions of "dealer," "underwriter," and "issuer").
In the typical registration case involving the in pari delicto defense, a broker or insider sells unregistered securities to an outside investor, who in turn either resells the securities to another outsider or, in an effort to protect his investment, urges others to purchase the illicit securities.

For example, in *Can-Am Petroleum Co. v. Beck* a purchaser of unregistered Can-Am securities sued the company for registration violations when the stock declined in value. The company asserted in pari delicto, contending that the plaintiff had violated the same provisions by subsequently selling the stock to other outsiders. The Court disallowed the defense, reasoning that the corporation initiated the plaintiff’s status as a mere investor as part of its plan to raise capital and that the plaintiff was therefore less culpable than the defendant corporate officers. Similarly, in *Katz v. Amos Treat & Co.* the plaintiff purchased a corporation’s unregistered securities as a result of an underwriting broker’s solicitation and recommendation. The broker characterized the deal as an opportunity to purchase a new issue before it was formally offered to the public. The plaintiff actually owned only a portion of the purchased stock, having bought the rest for relatives and friends with funds that they supplied. The defendant had recommended this procedure, maintaining that mass names would complicate the later filing of registration statements, the purchase otherwise would not sit well with the corporation’s attorney. The corporation filed no registration statement and abandoned the proposed public issue. In response to the plaintiff’s suit alleging registration violations, the defendant pleaded in pari delicto. The defendant contended that by purchasing stock for others, the plaintiff had become an “underwriter” or “dealer” and hence was guilty of the same violation. The Court acknowledged that the plaintiff might have been guilty of a violation but found that he had not “so made himself a part of the basic violation that recovery should be denied

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90 331 F.2d 371 (10th Cir. 1964).
91 *Id.* at 372.
92 *Id.*
93 *Id.* at 373-74.
94 411 F.2d 1046 (2d Cir. 1969).
95 *Id.* at 1050.
96 *Id.* at 1051.
97 *Id.* at 1052.
on the basis of *in pari delicto*.”  

Therefore, the Court disallowed the defense.

The *Bateman Eichler* analysis supports the result in both of these cases. A defendant in a registration provision action will not satisfy the test’s culpability prong because the typical plaintiff is an unsophisticated investor solicited by an insider or dealer, usually unaware that the security is unregistered. In *Can-Am*, the plaintiff apparently had no knowledge of registration requirements and relied on the broker to inform her of any legal requirements appurtenant to her investment activities. Similarly, a tippee who knowingly engages in insider trading may not be cognizant of his violating the sanction against insider trading. But unlike the *Can-Am* plaintiff, such a tippee must at minimum realize that his information is material and nonpublic—this is precisely the reason he considers it valuable. The plaintiff who unknowingly violates a registration requirement, if he has committed a culpable act at all, is at most guilty of an unknowing violation, which connotes less culpability than a knowing violation.

Although the *Katz* plaintiff was a sophisticated “operator in securities by avocation” and well aware of the stock’s unregistered status before the actual purchase, the Court’s denial of in pari delicto was justified by at least two reasons. First, the Court suggested that the plaintiff’s act was sufficiently distinct from that of the defendants so that the classic in pari delicto defense’s concurrent act requirement was not fulfilled. A court in a registration case should therefore determine whether the plaintiff purchased the stock with an intent to distribute or merely for his own possession. The former situation would be considered a single, multi-party transaction so that the plaintiff’s purchase and subsequent sale would be single components of one large, wrongful act. Typically, however, the defendant finds an investor and, after securely hooking the investor, coaxes him into soliciting other investors. Second, while the *Katz* plaintiff’s concern about delays in filing the registration state-

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98 *Id*. at 1054.
99 The court’s finding that purpose of the Act is to protect uninformed, naive investors implies that it considered plaintiff unsophisticated. *Can-Am*, 331 F.2d at 373.
100 *Katz*, 411 F.2d at 1049.
101 *Id*. at 1051-52.
102 See, e.g., *id*. at 1050-51 (defendant’s initial solicitation of plaintiff resulted in plaintiff’s personally agreeing to invest $25,000; subsequent pressure by defendants resulted in plaintiff’s getting additional $25,000 from relatives and friends); *Can-Am*, 331 F.2d at 373-74 (“[Plaintiff] was sought out as... [an] aid to Can-Am’s plan to raise capital in violation of the Act. She became ‘sold’ upon the merits... Her relationship as a pure investor became adulterated when she actively assisted in selling others but she at no time had the degree of culpability attributed to defendants.”).
evinced his knowledge of legal registration requirements, other evidence suggested that the defendant lulled him into a false sense of security by claiming that stock sales were structured in such manner "all the time." and that the plaintiff could simplify registration by keeping the shares in his own name.

The relationships between the parties in the typical registration case are highly similar to those of the typical tipper and tippee. As in the tipper-tippee context, the broker stands between the corporation and the unwitting outside investor, acting as conduit for the tainted securities.

As to the policy prong, courts have discerned beneath the registration provisions the same broad policy objectives cited by the Bate-man Eichler Court as supporting the securities laws: protection of investors as a group, not as individuals, and the need for a healthy economy constantly purged by full disclosure. Both considerations favor encouraging private enforcement through litigation. Therefore, in cases where the plaintiff's culpability falls shy of the defendant's, the same deterrence and detection considerations support disallowing the defense. Because the bulk of reported registration cases would seem to involve parties of substantially unequal culpability and because the same policies underlie rule 10b-5 and the registration provisions, allowing the in pari delicto defense would interfere only slightly with statutory policies. Furthermore, the defense would still seem to be available in cases of equal culpability, subject to any rule which the Supreme Court chooses to adopt for that context.

B. Margin Violations

Section 7(c) of the Securities Exchange Act of 1934 authorizes the Federal Reserve Board to limit the amount of credit that investors may receive to finance their stock purchases. Pursuant to this authority, the Board issues regulations governing credit extension by brokers, dealers, and banks. Since 1970, the receipt of

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103 Katz, 411 F.2d at 1051.
104 Id. at 1050.
105 Id. at 1051.
106 See, e.g., SEC v. North Am. Research & Development Corp., 280 F. Supp. 106, 121 (S.D.N.Y.) (purpose of § 5 is to protect public investors through disclosure), aff'd on other grounds, 424 F.2d 63 (2d Cir. 1968); see generally L. Loss, SECURITY REGULATION 178-79 (1961) (aim of registration provision is "‘to protect honest enterprise...; to restore the confidence of the prospective investor...; to bring into productive channels of industry and development capital which has grown timid...; and to aid in providing employment and restoring buying and consumer power.’") (quoting S. Rep. No. 47, 73rd Cong., 1st Sess. 1 (1933)).
108 Regulation T, 12 C.F.R. § 220.01-.18 (1986).
credit in excess of that amount allowed under these margin rules has been illegal.\textsuperscript{110} Prior to that time, investors had an implied right of action against their creditors, but in pari delicto was largely unavailable to creditor-defendants because the investor's liability was unclear. Circuit courts have interpreted the 1970 amendments as evidencing congressional intent to eliminate the investor's private right of action in margin violation cases.\textsuperscript{111} This achieves the same result as allowing a private right of action, then dismissing each such case under the in pari delicto defense. An \textit{Bateman Eichler} analysis in this context anticipates, however, that courts in other circuits may allow an action by an investor against a creditor to proceed.\textsuperscript{112}

Two district courts in other circuits continue to recognize the investor's private right to sue in post-1970 cases. In \textit{Bell v. J.D. Winer & Co.}\textsuperscript{113} the Southern District of New York interpreted the amendment to section 7(f) as shifting some of the responsibility for compliance with margin requirements from brokers to investors and therefore partially endorsed the applicability of in pari delicto in a margin case by dismissing the complaint.\textsuperscript{114} Investors brought suit against the brokers and dealers from whom they had purchased securities after a decline in value. In addition to alleging fraud under rule 10b-5, plaintiffs argued that their initial margin payments were several days late, in violation of the margin requirements and regulation T promulgated thereunder.\textsuperscript{115} The court found that the violation, which it characterized as de minimis, did not proximately cause the alleged damages.\textsuperscript{116} In \textit{Lantz v. Wedbush, Noble, Cooke, Inc.},\textsuperscript{117} on facts essentially similar to those in \textit{Bell}, the District of

\textsuperscript{109} Regulation U, 12 C.F.R. § 221.1-.8 (1986).
\textsuperscript{110} 15 U.S.C. § 78g(f) (1982).
\textsuperscript{112} While this discussion is aimed at legal applicability of the in pari delicto defense in such cases, prudential considerations would still apply in determining whether, Congress' intent aside, the elimination of a borrower's private right to sue is a prudent result.
\textsuperscript{113} 392 F. Supp. 646, 646 (S.D.N.Y. 1975).
\textsuperscript{114} \textit{Id.} at 654. ("'While § 7(f) was probably not specifically intended to restore the in pari delicto defense . . . . it must be interpreted as having had that effect to some extent.')
\textsuperscript{115} \textit{Id.} at 651-52.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} 418 F. Supp. 653 (D. Alaska 1976).
Alaska followed the *Bell* court’s logic in interpreting the effects of the 1970 amendments on the applicability of in pari delicto.\(^{118}\) The *Lantz* court, however, denied the defense based on the plaintiff’s allegation that the defendant misled the investors regarding the applicable margin requirement.\(^{119}\)

Analysis under the culpability prong hinges in the first instance on the plaintiff’s state of mind. As with the registration laws, stock ingenues who rely upon their knowledgeable brokers and bankers to keep them within the margin requirements can hardly be regarded as equally culpable.

Dismissal should occur even though the parties appear to be equally situated in many margin violation cases. Unlike the broker in *Bateman Eichler*, the defendant broker involved in a margin violation is independent of the corporation—he deals in securities already issued, outstanding, and floating freely in the market. He stands not between the purchaser and the corporation but between the purchaser and the marketplace. Both parties are equally culpable when the broker-lender extends illegal credit to the investor.

Allowing the recipients of illegal credit to plead in pari delicto in such cases, however, does not comport with the *Bateman Eichler* test’s policy prong. After debating the proposed amendments to the margin provisions in 1968, the House of Representatives noted that “in passing section 7 of the Securities Exchange Act of 1934, the Congress determined that the financial crisis of 1929 had been caused in part by the granting of excessive credit on the purchase of securities.”\(^{120}\) Courts generally agree that macroeconomic stability was the primary purpose of these requirements; protection of individual buyers or sellers was of secondary concern.\(^{121}\) The enforcement and deterrence considerations noted in *Bateman Eichler* apply to margin violations in equal force, and courts should not allow the in pari delicto defense if permitting it would significantly undermine these considerations.

By eliminating the private right of action under the margin rules, courts have taken away a significant deterrence and enforcement device. The SEC lacks resources to police sufficiently the in-

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\(^{118}\) *Id.* at 654.

\(^{119}\) *Id.* at 655; see also *In Re Schrout*, 1 Bankr. 583 (N.D. Ill. 1979) (disallowing in pari delicto where unsophisticated investor relied heavily upon bank’s statements regarding plaintiff’s margin responsibilities).


Industry; without the assistance of tippees' suits, it cannot effectively prosecute false tipping. The same considerations apply in the context of margin requirements. Moreover, the Supreme Court has emphasized repeatedly that the implied private action provides "a most effective weapon in the enforcement of the securities laws, and is 'a necessary supplement to Commission action.'" Elimination of this device has presumably injured deterrence and enforcement efforts; those liable for breach of the margin requirements now suffer sanctions only in the unlikely event that the SEC discovers their status as creditors.

C. Proxy Violations

Section 14 of the Securities Exchange Act of 1934 prohibits the solicitation of proxies by parties competing for shareholder support by means of proxy statements containing false or misleading information. The leading case in the area, Chris-Craft Industries v. Independent Stockholders Committee, is representative of the type of litigation engendered by such a battle. In Chris-Craft, the corporation's managers and a group of dissident shareholders charged one another with distributing proxy statements replete with false and misleading information. Each side sought damages and costs as well as an injunction against further misstatements by its opponent. The court relied upon the doctrine of unclean hands in dismissing both parties' claims, stating: "where a party seeking equitable relief is itself guilty of a violation involving the transaction in litigation, equity decrees that relief be withheld under the doctrine of unclean hands." The "unclean hands" doctrine differs from in pari delicto in that courts traditionally do not require substantially equal culpability between the parties. In any event, applying the Bateman Eichler analysis would tend to result in a finding of substantially equal culpability. The plaintiff's violation of the proxy rules in no sense derives from the defendant's. Both sides may freely draft and issue as many proxies as the other, and the issuance of a materially inaccu-

122 See supra note 66 and accompanying text.
123 Bateman Eichler, 472 U.S. at 310 (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)).
124 These considerations cast a pall over the prudential wisdom of interpreting the 1970 amendments as eliminating the borrower's private right of action, yet most courts now view the interpretation as mandated by the latest canons of judicial construction.
127 Id. at 921-22.
rate proxy by a minority shareholder group does not depend upon
prior violation by the corporation or board of directors. Plaintiff
and defendant stand on equal footing with respect to the innocent
shareholder—the target of their respective blandishments—and
they are likely to be equally culpable to him or her.

The policy prong analysis in the proxy context is less straight-
forward. Whereas rule 10b-5, registration provisions, and margin
requirements all seek primarily to protect the economy from the
dangerous practices contributing to the 1929 stock crash, the
proxy provisions focus on the individual shareholder. Shareholder
votes based upon materially misleading proxy statements are unde-
sirable, but they hardly pose the same threat to the nation's eco-
nomic health as trading on excessive credit or fraud in the securities
markets. Few are likely to care about inaccurate proxies aside
from the shareholders, who are the targets of the misinformation
and the proper plaintiffs in such a situation. For this reason, the
policies behind the proxy regulations are more concerned with the
merits of a particular case than with broad deterrence or enforce-
ment considerations. Courts should focus not on whether allowing
the defense would likely increase the frequency of corporate proxy
violations, but on whether it is fair to grant the plaintiff at hand the
relief requested. Similarly, enforcement considerations should not
be a significant concern because passive shareholders who are the
targets of misinformation are alerted to the possibility of misinfor-
mation in one side's proxy materials by a proxy statement from the
opposing side. In short, the deterrence and enforcement goals are
adequately served by allowing the defense in cases of equal culpabil-
ity. Thus, in the typical suit alleging violation of the proxy regu-
lations, allowing the in pari delicto defense would not undermine the
policies of those provisions. Given that the plaintiff and the defend-
ant are often equally culpable in such cases, both prongs of the
Bateman Eichler test are usually met and the in pari delicto defense
should be permitted.

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129 See supra notes 74-75, 106 & 120-21 and accompanying text.

130 Piper v. Chris-Craft Indus., 430 U.S. 1, 28 (1977) ("Congress was intent upon
regulating takeover bidders . . . in order to protect the shareholders of target companies.")
(emphasis added); see also Full Disclosure of Corporate Equity Ownership and in Corporate Take-
over Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking
and Currency, 90th Cong., 1st Sess. 178 (1967) (statement of Manuel F. Cohen, Chair-
man, SEC) ("We are concerned with the investor who today is just a pawn in a form of
industrial warfare. . . . The investor is lost somewhere in the shuffle. This is our concern
and our only concern.") (emphasis added).

895 (D. Del. 1973); see supra notes 126-28 and accompanying text.
CONCLUSION

The Supreme Court in Bateman Eichler revived the traditional doctrine of in pari delicto by demanding adherence to the strict requirement of substantially equal culpability. The Court expressly sanctioned the defense's strict application in private actions under rule 10b-5 and provided a paradigmatic application of the defense to assist courts and practitioners in future securities litigation. Furthermore, the two-pronged analysis adopted by the Bateman Eichler Court provides a framework for determining the applicability of the in pari delicto defense to other securities provisions.

Charles J. Silva, Jr.

132 The Court also may have answered in passing a question left open in Perma Life, namely, "whether a plaintiff who engaged in 'truly complete involvement . . . in a monopolistic scheme'—one who 'aggressively support[ed] and further[ed] the monopolistic scheme as a necessary part and parcel of it'—could be barred from pursuing a damages action." Bateman Eichler, 472 U.S. at 308 (quoting Perma Life, 392 U.S. at 139). Bateman Eichler suggests that the answer to this question is "probably." The opinion implies that the defense is still available to defendants in 10b-5 actions in cases of truly equal fault; this rationale would seem to apply to antitrust actions as well. See Bateman Eichler, 472 U.S. at 312.