

## Duty to Correct: A Suggested Framework

F. Philip Manns Jr.

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Commercial Law Commons](#)

---

### Recommended Citation

F. P. Manns Jr., *Duty to Correct: A Suggested Framework*, 46 Md. L. Rev. 1250 (1987)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol46/iss4/14>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

# Comments

## DUTY TO CORRECT: A SUGGESTED FRAMEWORK

### I. INTRODUCTION

The principal purpose of the federal securities laws is to compel information disclosure from securities issuers. Accordingly, federal securities law imposes mandatory obligations on issuers to speak. The statutes and administrative rules create express affirmative disclosure obligations, while the federal common law, filling the interstices of securities regulation, contains implied affirmative disclosure obligations. Yet existing law concerning disclosure obligations falls short of reaching the goal of full disclosure. In particular, the law has not developed cohesive rules regarding the duty to correct authorized or unauthorized disclosure by various corporate parties. This comment will examine the need for a duty to correct, and will suggest a framework for such a duty, based on existing securities and tort law principles.

#### *A. Sources of Express and Implied Disclosure Obligations*

Express affirmative disclosure obligations arising by statute and rule include provisions of the Securities Act of 1933,<sup>1</sup> the Securities Exchange Act of 1934 (the Exchange Act),<sup>2</sup> and Securities and Exchange Commission (SEC) rules promulgated under each act.

The disclosure system imposed by statute and administrative rule is largely based on periodic reporting. Issuers must make substantial disclosures on a quarterly and annual basis on forms 10-Q and 10-K, respectively.<sup>3</sup> Because periodic reporting allows information to accrue, large lag times develop between the occurrence of significant events and the date of required disclosure. These lag times frustrate the goal of full disclosure.

The express affirmative disclosure obligations that establish current rather than periodic reporting requirements are, save one, confined to situations in which the issuer conducts certain transac-

---

1. 15 U.S.C. §§ 77a-77mm (1982).

2. 15 U.S.C. §§ 78a-78kk (1982).

3. Section 13 of the Exchange Act, 15 U.S.C. § 78m (1982), requires issuers to file reports with the SEC. Rule 13a-1, 17 C.F.R. § 240.13a-1 (1986), requires annual reports on form 10-K; rule 13a-13, 17 C.F.R. § 240.13a-13 (1986), requires quarterly reports on form 10-Q.

tions in its securities, *e.g.*, issues securities or solicits proxies.<sup>4</sup> Only form 8-K<sup>5</sup> imposes current reporting requirements for events not involving transactions in issuer securities; but the scope of form 8-K is exceedingly narrow. The form is required in only the most exigent of corporate circumstances: changes in control, acquisition or disposition of a significant amount of assets, bankruptcy or receivership, changes in accountant, or resignation of directors.<sup>6</sup>

The narrow scope of form 8-K and the corresponding void in current reporting requirements when the issuer is not transacting in its securities has led to the development of implied affirmative disclosure duties.<sup>7</sup> Two theoretical underpinnings of implied affirmative disclosure obligations are apparent. One theory concludes that by creating an informational flow to the market, a public corporation represents, by implication, that previous disclosures remain accurate. Therefore, the corporation deceives investors, under section 10(b) of the Exchange Act<sup>8</sup> and rule 10b-5,<sup>9</sup> when it permits prior disclosures to represent present conditions, knowing that such information is no longer accurate.<sup>10</sup> The second theory implies an affirmative obligation to disclose by extending the "shingle" and "trust and confidence" theories, applicable to broker-dealers, to securities issuers.<sup>11</sup> Under this rationale, the corporation, by creating a public market in its securities, incurs an obligation to deal fairly with the investing public.<sup>12</sup>

### B. *Liability for Disclosures*

Duties, particularly to disclose, are hortatory unless liability accompanies their failure. Failure to disclose can be actionable under the federal securities laws. Section 18(a) of the Exchange Act<sup>13</sup> grants an express private right of action to investors who have been

---

4. Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a) (1982), requires filings in connection with proxy statements; section 14(d), 15 U.S.C. § 78n(d) (1982), imposes filing requirements in connection with tender offers.

5. 17 C.F.R. § 240.13a-11 (1986).

6. 17 C.F.R. § 240.13a (1986).

7. See Bauman, *Rule 10b-5 and the Corporation's Affirmative Duty to Disclose*, 67 GEO. L.J. 935 (1979); Talesnick, *Corporate Silence and Rule 10b-5: Does a Publicly Held Corporation Have an Affirmative Obligation to Disclose?*, 49 DENVER L.J. 369 (1973).

8. 15 U.S.C. § 78j(b) (1982).

9. 17 C.F.R. § 240.10b-5 (1986).

10. Bauman, *supra* note 7, at 944-45.

11. *Id.*

12. See M. STEINBERG, *SECURITIES REGULATION: LIABILITIES AND REMEDIES* § 2.01 (1986); Bauman, *supra* note 7, at 944-45.

13. 15 U.S.C. § 78r(a) (1982).

injured by reliance upon material misstatements or omissions of fact in documents filed with the SEC, while section 10(b) of the Exchange Act and rule 10b-5 provide a cause of action for injuries due to nondisclosures or misrepresentations other than in an SEC-filed document.<sup>14</sup> Section 10(b) actions are limited to actual purchasers and sellers<sup>15</sup> who show that the defendant acted with scienter<sup>16</sup> in the manipulative or deceptive sale or purchase of securities.<sup>17</sup> The plaintiff in a section 10(b) claim must show more than a mere breach of fiduciary duty,<sup>18</sup> and must also prove damages.<sup>19</sup> Further, claims that allege nondisclosure must show that the defendant was under a duty to disclose.<sup>20</sup>

Of these elements, deception and duty to disclose are the most difficult to establish in a suit alleging liability for failure to meet an affirmative disclosure obligation. The bulk of this comment will address when duties to disclose do, and should, arise by implication under the federal securities laws. A discussion of the deception element is particularly merited in light of the United States Supreme Court decision in *Santa Fe Industries v. Green*.<sup>21</sup> In that case the Court concluded that more than unfairness is required to bring an action within section 10(b). The Court stated that absent manipulation or deception, section 10(b) did not reach breaches of fiduciary duty.<sup>22</sup>

Deception is an independent element of a section 10(b) cause of action. The element of deception requires that some benefit flow to the defendant corporation by reason of the nondisclosure.<sup>23</sup> The two theories stated above of informational flow and shingle would find that the corporation gains a benefit when trading in its securities is buoyed by misinformation. This benefit has been held sufficient to support a claim for failure to meet an implied disclosure obligation under section 10(b) in the post-*Santa Fe* period.<sup>24</sup>

---

14. See *State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843 (2d Cir. 1981), *aff'g in part, rev'g in part*, 500 F. Supp. 278 (S.D.N.Y. 1980); *Goldberg v. Meridor*, 567 F.2d 209 (2d Cir. 1977).

15. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

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

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

18. *Id.*

19. See M. STEINBERG, *supra* note 12, at §§ 7.01-7.07.

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

21. 430 U.S. 462 (1977).

22. *Id.* at 472.

23. See *Dirks v. SEC*, 463 U.S. 646, 663-64 (1983).

24. See *Elkind v. Liggett & Myers*, 635 F.2d 156 (2d Cir. 1980); *Ross v. A.H. Robins Co.*, 465 F. Supp. 904, 908 (S.D.N.Y.), *rev'd on other grounds*, 607 F.2d 545 (2d Cir. 1979), *cert. denied*, 446 U.S. 946 (1980).

It appears that the element of deception is satisfied by mere failure of a duty to disclose since the corporation gains the benefit of enhanced trading in its securities while the market is misinformed. However, in the post-*Santa Fe* period the courts may determine that some additional benefits must be shown.

This comment will focus on the single section 10(b) element of duty to disclose, including when such duties, particularly the duty to correct, can, and should, arise.

## II. AFFIRMATIVE DISCLOSURE OBLIGATIONS IMPOSED BY IMPLICATION RATHER THAN EXPRESS MANDATE OF THE FEDERAL SECURITIES LAWS

Courts in several situations have recognized affirmative disclosure obligations absent express requirements.

*Insider Trading.* Persons who possess inside information must disclose it before trading if they are corporate insiders or if they have received inside information from an insider who will personally benefit from the tip.<sup>25</sup>

*Duty to Update.* Issuers are under a duty to update statements made by them which, while true when previously made, have become misleading.<sup>26</sup> The duty arises because investors may reasonably rely on the continuing accuracy of the earlier statement.<sup>27</sup>

*Duty to Correct.* The duty to correct, as phrased to date, requires issuers to correct statements not made by them but which they know are misleading.<sup>28</sup> The duty to correct, while distinct from the duty to update, is simply a logical extension of it. Analytically, the duty to correct performs a function of logic; it deems the issuer to be the source of information which it did not disseminate. Obviously, the threshold issue in a duty to correct situation is the nexus between the issuer and information source. If the issuer is deemed the source, then a situation akin to a duty to update situation occurs: an issuer has made an earlier statement, by attribution. If the earlier statement was false, the issuer must correct. If the earlier statement

---

25. *Dirks*, 463 U.S. at 649.

26. See M. STEINBERG, *supra* note 12, at § 2.02; Bauman, *supra* note 7, at 963-66.

27. See *Ross v. A.H. Robins*, 465 F. Supp. at 908; *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 860 (2d Cir. 1968) (en banc) (corporation can be liable for issuing a misleading press release), *cert. denied*, 394 U.S. 976 (1969), *on remand*, 312 F. Supp. 77 (S.D.N.Y. 1970) (holding that the release was misleading and the company therefore violated rule 10b-5).

28. See Bauman, *supra* note 7, at 966-67.

was true, the issuer is under a continuing duty to update the attributed statements.

Duty to correct cases have not seized on the analytic symmetry of the duty to correct and the duty to update. Rather, the duty to correct cases have looked solely at the relationship between the issuer and the source, requiring the issuer to correct only if a sufficient relationship exists.<sup>29</sup> This view disregards the considerations of materiality and reasonableness that are part of the duty to update. In a duty to update case the analysis occurs in three steps. First, has an earlier statement become false? If so, is the change material? And, if so, are investors reasonable in relying on the continuing accuracy of the earlier statement?<sup>30</sup>

The second and third steps should be applied with equal force in a duty to correct situation. After attribution is made, the situation is identical to the duty to update. In both situations the issuer has made a statement which is currently misleading. Just as the duty to update analysis then proceeds to consider materiality and reasonableness of reliance, so too should duty to correct analysis.

The analysis for duty to correct situations should use the same three steps of the duty to update with one addition, a new step one: has the issuer made an earlier statement?

A possible differentiation of the duty to correct situation from the duty to update is that the duty to correct, as phrased by the courts, requires issuers to correct only attributed statements which were misleading when made.<sup>31</sup> Under the duty to correct the statement is considered false when made, but in a duty to update the statement is considered true when made. Although it is true that duty to correct cases have only considered the situation in which the statement is false when made by the attributed speaker, this is too narrow a concept of the duty to correct. The duty to correct should be as applicable when attributable speakers speak truthfully as when they speak falsely. The evil sought to be avoided by the duty to correct is issuer avoidance of responsibility for statements by interposing a third party as speaker.<sup>32</sup> To date, duty to correct cases have considered this subterfuge only when the third party speaks

---

29. *Id.* at 966-72. For example, a corporation has a duty to correct if an agency relationship exists between the source of the misstatement and the corporation, and the statement is within the source's scope of employment. *Id.* at 968.

30. *See id.* at 963-66; *see generally* M. STEINBERG, *supra* note 12, at § 2.02 (discussing duty to update).

31. *See* Bauman, *supra* note 7, at 966.

32. *See generally id.* at 969-70.

falsely; but the reasoning is equally applicable when the statement is true but becomes false. The duty to correct only deems an issuer to be the speaker. After this step is complete, the situation is identical to a duty to update. Therefore, when an attributable speaker makes a statement, true or false, the issuer has made the statement. And, because the issuer must update or correct its direct statements, so should it have to update its attributed statements.

### III. APPLICATION OF THE DUTY TO CORRECT

The duty to correct will typically arise from the statements of two distinct groups: corporate parties such as officers and employees, and extracorporate parties such as market analysts. Application of the duty to correct is really just a study of the relationship between the information source, whether corporate or extracorporate, and the corporation. The corporation has a duty to correct statements by those sources that are "attributable" to the corporation.

The "attributable to the corporation" standard and judicial recognition of a duty to correct dates to *Electronic Specialty Co. v. International Controls Corp.*<sup>33</sup> In that case Electronic Specialty Co. (ELS) sought to enjoin a tender offer by International Controls Corp. (ICC).<sup>34</sup> ELS alleged that ICC failed to correct certain misleading statements made during the pretakeover period, two of which statements appeared in the "Heard on the Street" column of the *Wall Street Journal* and one in an announcement over the Dow Jones Broad Tape.<sup>35</sup> The three statements provide an almost academic example of potential issuer liability for statements under both direct and attributed speech theories. The first statement was the *Wall Street Journal* "Heard on the Street" column.<sup>36</sup> ICC could be held liable only under a duty to correct theory since ICC was not the source of the story. The second statement was an announcement over the Dow Jones Broad Tape issued at the direction of the ICC board.<sup>37</sup> Liability could be directly imposed here since the issuer spoke. The third statement was another "Heard on the Street" column which purported to quote Robert Vesco, president and largest

---

33. 295 F. Supp 1063 (S.D.N.Y. 1968), *rev'd in part*, 409 F.2d 937 (2d Cir. 1969).

34. *Id.* at 1066.

35. *Id.* at 1075-77.

36. The column appeared July 31, 1968, and reported that ICC owned approximately 5% of ELS and might make a tender offer. Neither statement was true: ICC owned only 2.5% and its board had not authorized an offer. 295 F. Supp. at 1075.

37. The announcement appeared August 5, 1968, immediately after ELS announced its merger with Carpenter Steel. Vesco announced that ICC had no plans for a tender offer for ELS. *Id.* at 1076.

stockholder of ICC.<sup>38</sup> Liability could be direct if Vesco spoke for ICC; liability could be derivative if Vesco did not speak for ICC but ICC was under a duty to correct his statements.

ELS contended that these three statements were misrepresentations and an attempt to force down the price of ELS stock. ICC contended that the statements were either true or at least not misleading when made. The district court found that each of the three statements misled both ELS and the public regarding ICC's intention to make a tender offer and held ICC liable.<sup>39</sup>

*The first statement.* The district court found ICC under a duty to correct the first "Heard on the Street" column that published an incorrect report of ICC's holdings in ELS. The district court did not discuss what relationship existed between ICC and Dan Dorfman, the author of the column; rather, the court simply stated that ICC was liable for the statement because ICC knew of it and was aware of its effect on the market.<sup>40</sup>

*The second statement.* ICC was held liable for the second statement, the Broad Tape announcement, because it misled as to ICC's intention regarding its ELS holdings. Liability was direct since the ICC board authorized the statement.<sup>41</sup>

*The third statement.* ICC was liable for the third statement because it misled regarding ICC's intention as to its ELS holdings. The liability theory for this statement was not clear. The statement was a quote of Vesco. The district court did not explain the connection between the Vesco statement and the basis of ICC's liability. It appeared that ICC was held liable because Vesco was acting either on behalf of, or on apparent authority of, the corporation. The court's only clear statement concerning Vesco's relationship with ICC was that he was its "president, largest stockholder and dominating force."<sup>42</sup>

The United States Court of Appeals for the Second Circuit reversed.<sup>43</sup> First, it set aside the district court's factual finding that the three statements misled the public and ELS.<sup>44</sup> Second, it reversed

---

38. The column appeared August 15, 1968. It purported to quote Vesco as saying that ICC was only planning to hold its ELS shares and not to acquire additional shares, but that ICC would follow the ELS-Carpenter Steel merger and might, at some point, seek to resume talks. *Id.* at 1077.

39. *Id.* at 1077-78.

40. *Id.* at 1078.

41. *Id.*

42. *Id.* at 1074.

43. 409 F.2d 937 (2d Cir. 1969).

44. *Id.* at 951.

the trial court's implication that Vesco's actions were those of ICC. The appeals court stated that there was no basis in the record demonstrating that Vesco had usurped the board's role as spokesman for ICC.<sup>45</sup>

The court's reversal of the district court's findings of fact meant that the Second Circuit decided the duty to correct issues by concluding that ICC had additional defenses to liability for the first and third statements. ICC could not be liable for the first statement because there was no claim that ICC was its source. The court said, "While a company may choose to correct a misstatement in the press not attributable to it . . . we find nothing in the securities legislation requiring it to do so."<sup>46</sup> The court indicated that because Vesco did not usurp the board's role as corporate spokesperson and thus did not speak for the corporation, the corporation had no duty regarding his statements.<sup>47</sup>

In *Electronic Specialty* the Second Circuit considered the two sources of a potential duty to correct: statements of corporate parties (Vesco, the president and largest shareholder) and statements of extracorporate parties (the *Wall Street Journal* "Heard on the Street" column). The court's treatment of extracorporate sources was the more clear. It stated that the corporation need only correct statements attributable to it. The court did not flesh out a definition of "attributable" other than to indicate that the condition was not met in this case.

The court was even less clear as to corporate parties. Its statement that Vesco did not speak for the corporation was conclusory and not well considered. The bulk of the court's opinion was devoted to overturning the district court's factual findings. The opinion effectively indicates that an issuer would rarely, if ever, be under a duty to correct statements of a corporate party, because the statements of the president, the largest stockholder and dominating force (the trial court's characterization of Vesco) are not attributable to the corporation.

#### A. *The Duty to Correct Statements of Corporate Parties*

The SEC, in a 1986 release,<sup>48</sup> considered the duty of issuers

---

45. *Id.*

46. *Id.* at 949.

47. *Id.* at 951.

48. Public Statements by Corporate Representatives, Exchange Act Release No. 20,560, 3 Fed. Sec. L. Rep. (CCH) ¶ 23,120B (Jan. 13, 1984); 17 C.F.R. § 241.20560 (1986).

regarding statements of corporate parties. It stated that the antifraud provisions of the federal securities laws apply to all company statements that can reasonably be expected to reach investors and the trading markets.<sup>49</sup> The Commission did not define "company statements" but did gloss a definition when it stated that companies and their spokespersons should be mindful of these obligations.<sup>50</sup> Use of "companies and their spokes[persons]" in amplification of "all company statements" implies that the Commission places issuers under a duty only as to statements of corporate parties who were authorized to speak. "Spokesperson" connotes someone with authorization to speak.

This concept of attribution as to a corporate party's statement is too narrow. If the duty to correct is to work, it must contemplate attribution to the corporation of statements by parties who are not authorized to speak. The duty to correct holds issuers responsible for statements that the public might reasonably believe the issuer makes. Obviously, statements of corporate parties, even though unauthorized to speak, fall within this category.

A better approach is to base issuer duties regarding statements of corporate parties on agency and tort theories. Under agency theory, when a corporate party speaks, that party speaks on behalf of, as agent of, the corporation. The issuer has thus spoken, by its agent, and can be held responsible for misstatements. The SEC, in the 1986 release discussed above, adopts this theory of attribution.

In addition, tort theory imposes a duty on a corporation regarding statements made by corporate parties who are not authorized to speak. Neither the SEC nor the courts have developed a theory based on tort. The need to do so is clear. The duty to correct seeks to hold issuers responsible for statements that the public reasonably believes the issuer has made. When corporate parties speak, even though not authorized, the public nevertheless may reasonably believe that they speak for the corporation;<sup>51</sup> thus, the issuer should be under a duty to correct. The duty to correct must include some cohesive theory to attribute to a corporation the statements of corporate parties who the public reasonably believes speak for the corporation.

The competing policies here are clear. On the one hand rests protection of the public from the risk of trading on misinformation.

---

49. *Id.*

50. *Id.*

51. See Bauman, *supra* note 7, at 969.

On the other rests the issuer's burden in policing statements of its employees. A rule that attributes all statements to the issuer goes too far given the number of employees a public company can have. Moreover, reasonable investors do not believe that every employee speaks for an issuer. The balance of interests here is analogous to the balance made by Congress in enacting section 20(a) of the Exchange Act.<sup>52</sup>

Section 20(a) attributes employee acts of securities law violations to employers. Controlling persons, *e.g.*, employers, are made jointly and severally liable with their employees for employee securities law violations unless the employer can show a defense of good faith. The policies considered in this accommodation were the protection of the public versus the supervisory burdens on issuers. Congress chose to provide a good faith defense to attribution of acts, requiring the employer to establish that a system of diligent supervision of employee acts is in place.<sup>53</sup>

A similar balance should be struck in deciding which statements of employees are attributable to corporations. If an issuer has implemented a diligent system to supervise employee statements, the issuer ought to be able to avoid attribution of employee statements. Such a system should include supervision of employees by specifying who is not authorized to speak and designating persons as spokespersons who review press releases and who monitor corporate developments and disseminate them widely and promptly. When such procedures are in place, the public will know who speaks for the corporation, the public will be informed, and investors will not be able to reasonably rely on unauthorized statements.<sup>54</sup>

Application of this analysis to duty to correct situations has been suggested by commentators,<sup>55</sup> but no court has firmly embraced it. In *In Re Warner Communications Securities Litigation*<sup>56</sup> a district court, while approving a class action settlement, favored this approach to the duty to correct statements of corporate parties. The court stated that plaintiffs might prevail by showing that the corporate defendant lacked adequate procedures to ensure dissemination of correct information.<sup>57</sup>

---

52. 15 U.S.C. § 78t(a) (1982).

53. See M. STEINBERG, *supra* note 12, at § 10.04.

54. See Bauman, *supra* note 7, at 969-70.

55. *Id.* at 968-69.

56. 618 F. Supp. 735 (S.D.N.Y.), *aff'd*, 798 F.2d 35 (2d Cir. 1985).

57. *Id.* at 752.

B. *The Duty to Correct Statements of Extracorporate Parties*

Cases following *Electronic Specialty* have added content to the definition of which extracorporate statements are "attributable to the corporation." The District Court for the Southern District of New York, in *Zucker v. Sable*,<sup>58</sup> came markedly close to holding that no statements are attributable to the corporation—*i.e.*, the issuer has no duty to correct.

In that case, the issuer, Union, issued a press release announcing the filing of an investigational new drug application with the Food and Drug Administration.<sup>59</sup> Plaintiffs alleged two material omissions. First, plaintiffs claimed that Union in its press release should have defined "investigational" and specifically should have included the information that it may take as long as several years from the time an investigational application is filed until the product is approved for sale in the public market.<sup>60</sup> The court rejected this claim and concluded that the plaintiff could not rely on his ignorance of the meaning of "investigational" and then impose liability on the defendants when the impact of the event was not as beneficial as the plaintiff might have hoped.<sup>61</sup> Second, plaintiffs alleged a failure by Union to timely correct reports of the original press release that appeared in various financial journals and that omitted the word "investigative."<sup>62</sup> The court rejected this claim as well. The court stated that when an error in a journal is not attributable to the defendants it is unreasonable to require the defendants to search out and correct errors in publications.<sup>63</sup>

The court reasoned that a contrary rule would require that the defendants examine every financial publication to ascertain whether the reports misinterpreted Union's accurate press release. This requirement, the court said, would place issuers under an insurmountable burden not required by law.<sup>64</sup>

This holding is a narrow interpretation of which statements are attributable to the corporation. The source of the financial publications' reports was the corporation. Therefore, this decision means that as long as the corporation transmits true information to the financial community, the corporation cannot be held responsible for

---

58. 426 F. Supp. 658 (S.D.N.Y. 1976).

59. *Id.* at 660.

60. *Id.*

61. *Id.* at 662.

62. *Id.* at 660.

63. *Id.* at 663.

64. *Id.*

failure to correct misreporting. This interpretation would mean that the corporation is only responsible for misstatements that it makes. Note that the financial community misreported only factual material. This was not a situation in which the press drew incorrect conclusions from issuer-released information.

The Second Circuit itself clarified the muddled waters of *Electronic Specialty* regarding attribution of statements by extracorporate parties in *Elkind v. Liggett & Myers, Inc.*<sup>65</sup> In that case the plaintiff asserted that Liggett's practice of reviewing and correcting draft reports of securities analysts regarding the company's operations created a duty to correct those reports when the reports drew inaccurate conclusions.<sup>66</sup> The district court summarily rejected this claim under the authority of *Electronic Specialty*.<sup>67</sup>

The Second Circuit affirmed this conclusion as to the duty to correct. It stated that Liggett had not placed its imprimatur, expressly or impliedly, on the analysts' projections.<sup>68</sup> The appeals court first noted that *Electronic Specialty*, which created a duty to correct under section 14(e) of the Exchange Act, was equally applicable in a suit relying on section 10(b) and rule 10b-5.<sup>69</sup> The court announced several important factors in its conclusion that the statements of the securities analysts would not be attributed to Liggett:

1. The company examined and commented on a number of reports, but its policy was to refrain from comments on earnings forecasts.

2. Analysts were not made privy to the company's internal projections.

3. Liggett's suggestions were limited to factual and descriptive matters. There was no suggestion that analyst estimates coincided with Liggett's internal estimates.

4. There was no assertion that Liggett left uncorrected any *factual* statements it knew or believed were erroneous.<sup>70</sup>

The court's analysis distinguishes between factual and nonfactual matters. The court indicated that issuer comments solely on factual matters did create a duty to correct these facts when errone-

---

65. 635 F.2d 156, 158 (2d Cir. 1980), *aff'g in part, rev'g in part* 472 F. Supp 123 (S.D.N.Y. 1978) (affirming dismissal by district court on duty to correct and one finding of tipping, but reversing as to a second finding of tipping).

66. 472 F. Supp at 124.

67. *Id.* at 126.

68. 635 F.2d at 163.

69. *Id.*

70. *Id.*

ously reported but did not create a duty to correct mistaken conclusions drawn from these factual matters.

After the Second Circuit found that Liggett was not under a duty to correct, it considered Liggett's liability under a tipping theory for pre-release review of analysts' reports. The court stated that tipping liability lurks as a present danger when corporations engage in review because management comments during the review may reveal material nonpublic information.<sup>71</sup> The court found that Liggett had revealed inside information when Liggett confirmed, during a private telephone call, that its earnings, yet unannounced, would be lower.<sup>72</sup> Liggett was accordingly held liable, not for failure to correct, but for tipping inside information.

The Second Circuit apparently chose to use tipping liability to rectify abuses present when the issuer comments as to conclusions drawn by extracorporate parties. However, this type of tipping liability does not survive *Chiarella v. United States*<sup>73</sup> and *Dirks v. SEC*.<sup>74</sup>

*Chiarella* and *Dirks* establish that tip liability accrues only when the tipper personally gains from giving the tip and the tippee knows that the tipper is breaching a fiduciary duty in making the tip.<sup>75</sup> In the case of a tip to a market analyst the *quid pro quo* for the tipper is not apparent. Additionally, it will not generally be apparent to the analyst that a breach of fiduciary duty has occurred. Since tip liability does not survive in this setting, it is time to recanvass the propriety of issuer review of extracorporate parties' reports.

Another, opposite, view of attribution was adopted by the United States District Court for the District of Oregon in *Green v. Jonhop, Inc.*<sup>76</sup> This court announced by far the most expansive duty to correct. It said that the corporation must correct omissions or material misrepresentations made about it "when it learns of such misstatements or omissions and is aware that their publication or nonpublication will be misleading to members of the public."<sup>77</sup> This is complete attribution to the corporation of all extracorporate parties' statements of which the corporation becomes aware.

*Liggett* and *Green* are the two current views regarding the duty to

---

71. *Id.* at 163-64.

72. *Id.* at 167. The appellate court reversed the district court's finding of liability for a second tip. The Second Circuit held that the second tip was not accompanied by scienter. *Id.*

73. 445 U.S. 222 (1980).

74. 463 U.S. 646 (1983).

75. *Id.* at 659.

76. 358 F. Supp 413 (D. Or. 1973).

77. *Id.* at 420.

correct statements of extracorporate sources. *Liggett*, the more narrow, concludes that if issuers comment on solely factual matters, then only the factual portions of extracorporate parties' statements will be attributed to the corporation. Accordingly, the corporation then faces a duty to correct only as to the erroneously reported factual matters. *Green*, however, attributes to the corporation any extracorporate statement of which it becomes aware.

Both tests have the virtue of applying familiar legal principles. The *Liggett* test requires differentiation of factual and nonfactual matters, a difficult but familiar legal process. The *Green* test requires only a determination of whether the corporation knew of a misstatement. Determination of a party's knowledge is similarly a task that the law is familiar with.

Unfortunately, both tests miss the mark of striking a proper balance between preventing the evil which the duty to correct seeks to avoid and fostering information flow to the market. The evil sought to be prevented is an issuer "end run" around its responsibility for its statements. Concurrent with this prevention, though, the securities laws have a principal purpose of fostering disclosure. A strict duty to correct would inhibit communication between issuers and market analysts. This communication does have the benefit of providing information to the market.

Both the *Green* and *Liggett* tests move the balance too far to either side. *Green* prevents the evil, but an issuer under a duty to correct all extracorporate statements of which it learns can be expected to limit severely its contact with extracorporate parties. *Liggett*, on the other hand, draws a proper distinction between factual and nonfactual matters, but goes too far when it allows the issuer to review reports of extracorporate parties. Since the report may contain conclusions, the practice is fraught with danger.

The Second Circuit in *Liggett*, recognizing this shortcoming, decided to use tipping liability to police improper comments as to analysts' conclusions. However, since tip liability is either unavailable or vastly more difficult to prove now than when *Liggett* was decided, it is time to recanvass issuer review of reports. Because tipping liability cannot police abuses here, issuer review of extracorporate parties' statements must be disallowed if issuers want to continue to limit their duty to correct to solely factual matters. When an issuer either discusses nonfactual conclusions or reviews a report which contains nonfactual matters, the courts should attribute all statements of an extracorporate party to the corporation, and the corpo-

ration would thus incur an obligation to correct the whole of that party's statements.

#### IV. CONCLUSION

This comment suggests a framework for analyzing the duty to correct. The framework borrows heavily from concepts applicable to the duty to update and controlling person liability. The suggested framework is as follows (Note: these conditions are cumulative):

*Step 1.* Has the issuer made, by attribution, an earlier statement?

(a) If the speaker was a corporate party:

(i) Is the party an agent of the corporation?

*Yes:* attribution, go to *Step 2.*

*No:* proceed.

(ii) For a party not an agent ask: Has the corporation established and diligently maintained a system that ensures dissemination of correct information?

*Yes:* no attribution, condition not met.

*No:* attribution, go to *Step 2.*

(b) If the speaker is an extracorporate party:

(i) Has the corporation had discussions with the speaker concerning matters in the statement?

*Yes:* proceed.

*No:* no attribution, condition not met.

(ii) Has the corporation limited its communications with the party to factual matters?

*Yes:* attribute all factual matters of statement.

*No:* attribute the entirety of the statement.

*Step 2.* Has the earlier statement become false? (Note that this step assumes that false as well as true statements are attributed at Step 1. This is a change from the duty to correct as previously phrased, which has only attributed statements that were false when made.)

*Yes:* proceed.

*No:* no duty to correct.

*Step 3.* Is the change material?

*Yes:* proceed.

*No:* no duty to correct.

*Step 4.* Are investors reasonable in relying on the continuing accuracy of the earlier statement?

*Yes:* duty to correct.

*No:* no duty to correct.

The recent growth of the securities analysis industry and purposeful attempts by issuers to keep analysts informed (hoping to buoy equity prices and ward off takeover threats) are two trends that have greatly increased the number of statements by extracorporate parties. Thus, the need for a new standard has become even more important and will continue to do so. The contours of the duty to correct are ill-defined. The area is ripe for litigation. The duty to correct as it relates to statements of extracorporate parties is perhaps the most fertile for future litigation.

F. PHILIP MANN, JR.