

10-1-1971

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### Recommended Citation

Paul J. Levine, *Taxation of Agricultural Property – When is a Farm Not a Farm?*, 26 U. Miami L. Rev. 261 (1971)

Available at: <https://repository.law.miami.edu/umlr/vol26/iss1/10>

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The decision in *Stecher* should eliminate much of the delay and frustration brought on by the confusion following *Shingleton* and *Beta Eta*. Clearly, the solution reached will be welcomed by plaintiffs' counsel for it eliminates the possibility of insurers capitalizing on the uncertainty which previously existed. However, it is submitted that the combined effects of *Stecher* and *Thompson* may remove a sense of equilibrium between plaintiffs and insurers. In fact, it may well be that plaintiffs' counsel will emerge with something of an upper hand, or, at least, a better bargaining position. Whether this is desirable is still to be determined. Nevertheless, the principles of *Stecher* represent an approach which recognizes realities rather than artificial legal distinctions. Such an approach preserves the judicial system as a viable means for the settlement of personal injury claims. Should the *Stecher* and *Thompson* decisions result in a re-evaluation of this area of litigation, it is the author's position that the principles explained in *Stecher* should prevail.

JEFFREY A. DEUTCH

### TAXATION OF AGRICULTURAL PROPERTY—WHEN IS A FARM NOT A FARM?

Plaintiff, a forester for about fifty years, sought the preferential tax treatment granted owners of agricultural property under Florida's complex, confusing, and often overlapping ad valorem taxation statutes.<sup>1</sup> When county taxing officials refused to designate the property as agricultural land for tax purposes, plaintiff brought two actions in the circuit court of Volusia County challenging the classification and assessments for 1966 and 1967.<sup>2</sup> The circuit court held that the lands were properly classified non-agricultural for taxation purposes because plaintiff was not conducting a "bona fide forestry operation" as contemplated by the statute.<sup>3</sup> On appeal, the District Court of Appeal, First District, relying

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1. FLA. STAT. § 193.071(3) (1969) [formerly FLA. STAT. § 193.11(3) (1967)] provides: All lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis, regardless of the fact that any or all of said lands are embraced in a plat of a subdivision or other real estate development. Provided, *agricultural purposes* shall include only lands being used in *bona fide* farming, pasture, grove or forestry operations by the lessee or owner, or some person in their employ. (emphasis added).

FLA. STAT. § 193.461(3) (1969) [formerly FLA. STAT. § 193.201(3) (1967)] provides that "[a]ll lands which are used primarily for bona fide agricultural purposes shall be zoned agricultural."

2. Plaintiff purchased the 3,300 acre tract of woodland in Volusia County for \$302.68 per acre in December, 1965. Plaintiff contended that the proper assessed value of the land in 1966 was \$56 an acre, the land's value for agricultural purposes.

3. FLA. STAT. § 193.071(3) (1969) was applicable to plaintiff's property. See note 1, *supra*. In reaching this decision, the chancellor considered, *inter alia*, the fact that the plaintiff had made no improvements to the property suited to forestry work and had no forestry

on its recent decision in *Sapp v. Conrad*,<sup>4</sup> reversed, holding that planting trees, cultivating the land, and otherwise improving the property are not essential elements of a bona fide forestry operation.<sup>5</sup> The district court of appeal then combined *Sapp v. Conrad*, the instant case, and a third case also involving forestry land<sup>6</sup> and certified the matter to the Supreme Court of Florida as a question of great public interest.<sup>7</sup> The supreme court *held*, reversed and remanded: The lack of improvements and forestry management and the great disparity between the land's recent purchase price and its assessed value as agriculturally classified land supported the chancellor's finding that the land was not being used for a bona fide agricultural operation. *Greenwood v. Oates*, 251 So.2d 665 (Fla. 1971).

In *Greenwood*, the supreme court listed ten criteria which a trial court may properly consider in determining whether a forestry operation is considered bona fide.<sup>8</sup> Perhaps more important than the criteria, however, are the following two concepts strongly emphasized by the court: (1) that the agricultural enterprise must qualify as an "operation"; and (2) that the trial courts are granted wide latitude in determining the question of whether property is entitled to an agricultural classification. Before discussing these concepts, however, it is necessary to discuss the background in which the case arose.

The court considered the certified question from the district court of appeal in light of Florida Statutes section 193.071 (1969) and 193.461 (1969).<sup>9</sup> Although section 193.071 was repealed in 1970<sup>10</sup> as being "redundant, obsolete and unnecessary" in light of section 193.461, it was

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management program. *Greenwood v. Oates*, 251 So.2d 665, 669 (Fla. 1971) [hereinafter cited as *Greenwood*].

4. 240 So.2d 884 (Fla. 1st Dist. 1970).

5. *Oates v. Bailey*, 241 So.2d 730 (Fla. 1st Dist. 1970).

6. *St. Joe Paper Co. v. Mickler*, 241 So.2d 415 (Fla. 1st Dist. 1970).

7. The question, as phrased by the Supreme Court was:

Precisely what criteria should be considered by a county taxing official in determining what constitutes a bona fide forestry operation entitling the land to an agricultural classification for tax assessment purposes? (which would result in a lower tax).

*Greenwood v. Oates*, 251 So.2d 665, 666 (Fla. 1971).

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- (1) the opinions of forestry or other appropriate experts;
- (2) the Tax Assessor's applicable expert opinion and factual data;
- (3) the affidavit and testimony of the landowner and his witnesses;
- (4) the business or occupation of the landowner;
- (5) the nature of the terrain;
- (6) the density of the marketable timber (or other product) on the land;
- (7) the past usage of the land;
- (8) the economic merchantability of the agricultural product;
- (9) reasonably attainable economic salability thereof within a reasonable future time for the particular product (Trees do not mature and become so rapidly salable as do chickens or cows); and
- (10) the use or not of recognized care, cultivation, harvesting and like practices applicable to the product involved, and any implemented plans therefor.

*Greenwood v. Oates*, 251 So.2d 665, 668 (Fla. 1971).

9. *Id.* at 666-67.

10. Fla. Laws 1970, ch. 70-243.

applicable to the plaintiff's property since the contested assessments were for tax years prior to the repeal of section 193.071.<sup>11</sup>

The origins of these two statutes are rooted in Florida's unique development during the booming 1920's when subdivisions were carved out of rural areas in Dade County. These subdivisions were never developed, and by 1957 they had reverted to farming uses.<sup>12</sup> In order to provide a preferential assessment for these lands, the legislature enacted what is now Florida Statutes section 193.071,<sup>13</sup> providing for valuation based on actual use as farm land. When this statute was challenged, the Supreme Court of Florida ruled that the preferential assessment accorded by section 193.071 did not violate the Florida Constitution's requirement of "just valuation."<sup>14</sup> The court held that

if a legislative directive designed to secure a just valuation of a particular class of taxable property is reasonable, not arbitrary or unjustly discriminatory, and applicable alike to all similarly situated, it should be upheld by the courts.<sup>15</sup>

In 1959, the legislature passed a land classification statute which likewise contained a preferential assessment provision for agricultural property.<sup>16</sup> The statute exists today as section 193.461, "the Green Belt law, which would seem to encourage and aid agricultural use of lands in an engulfing urban world . . ."<sup>17</sup> In enacting the statute, the legislature noted with some alarm that urban areas with their necessarily higher assessed valuations were encroaching on farmlands, and as a result, farmers were being "taxed out of existence."<sup>18</sup> Thus, the legislature passed the "Green Belt" law "to perpetuate . . . continue and encourage agricultural pursuits," of farmers, foresters, ranchers, and others similarly situated.<sup>19</sup>

The statute protects agricultural property from high taxes, not by

11. *Oates v. Bailey*, 241 So.2d 730-31 (Fla. 1st Dist. 1970), *aff'd sub nom.* *Greenwood v. Oates*, 251 So.2d 665 (Fla. 1971).

12. *Wershow, Recent Developments in Ad Valorem Taxation*, 20 U. FLA. L. REV. 1 (1967).

13. Fla. Laws 1957, ch. 57-195.

14. *Lanier v. Overstreet*, 175 So.2d 521 (Fla. 1965), *interpreting* FLA. CONST. art. 9, § 1 [1885].

15. *Lanier v. Overstreet*, 175 So.2d 521, 523 (Fla. 1965). The court, however, was deeply divided on the question of the act's constitutionality, as the four-three decision indicated. In his dissent, Justice Drew concluded:

To recognize the power of the Legislature to grant exemptions from taxation to certain classes—and that's what it amounts to—will be to destroy the ad valorem taxing system in this State and to place the burden of government on those who are not fortunate enough to be brought within a favored class. The Legislature has no power, under our Constitution, to exempt any property from taxation. If this is to be changed, it should be done by amendment to the Constitution and not by edict of this Court.

*Lanier v. Overstreet*, 175 So.2d 521, 526 (Fla. 1965) (dissenting opinion).

16. Fla. Laws 1959, ch. 59-226, *predecessor to* FLA. STAT. § 193.461 (1969).

17. *Greenwood v. Oates*, 251 So.2d 665, 667 (Fla. 1971).

18. Fla. Laws 1959, ch. 59-226.

19. *Id.*

lowering the millage rate, but by limiting the land's assessed valuation.<sup>20</sup> Consequently, a farmer will pay lower property taxes than a neighboring phosphate miner, even though both own property of the same size and both are taxed at the same millage rate. In the instant case, the problem facing the supreme court was one of statutory construction. To answer the certified question presented to it by the district court of appeal, the supreme court looked to key phrases in the statutes, initially considering "the construction to be placed on the words 'bona fide' and 'operations,' and then as each relates to the other concerning 'forestry.'" <sup>21</sup>

As the lower courts had done in the past, the Supreme Court of Florida relied on dictionary definitions and construed "bona fide" to mean "in good faith," "genuine," "without fraud or deceit."<sup>22</sup> In the past, establishing the bona fides of an agricultural enterprise had been the key in qualifying for an agricultural classification. Here, however, the court went further and defined the word, "operation." The word was interpreted as "being at work," "producing an effect," "acting," "bringing about," "performing," "functioning," and "activity."<sup>23</sup>

In setting forth a definition of "operation," the court seemingly added a new requirement to the statute, or at least enforced an heretofore ignored requirement. No longer will it be sufficient to establish the bona fides of the agricultural enterprises, now an enterprise must first qualify as an agricultural "operation."

Conceivably, a claim for agricultural assessment under assertion of a bona fide forestry operation could be "bona fide" within the meaning set forth above, yet not meet any standards sufficient to qualify it as an "operation."<sup>24</sup>

Previously, courts had stressed the "bona fides" requirement in the statute with the unstated assumption that if the property were being used in good faith for agriculture, it was being used in an agricultural operation. For example, all 68 acres of a Key Biscayne coconut plantation (located in a valuable, developing section of Dade County) were required to be assessed as agricultural property, even though the agricultural work "could have been accomplished just as well on five or ten acres."<sup>25</sup> In that case, the bona fides requirement was fulfilled, and the

20. Once the land qualifies as property being used primarily for bona fide agricultural purposes, the tax assessor must assess the land only on the basis of its value for agricultural purposes. In other words, a dairy farm in a suburban setting theoretically would be assessed on the basis of its value if sold to another dairy farmer, not its value if sold to a housing contractor. See FLA. STAT. § 193.461(6)(d) (1969).

21. *Greenwood v. Oates*, 251 So.2d 665, 667 (Fla. 1971).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Matheson v. Elcook*, 173 So.2d 164, 166 (Fla. 3d Dist. 1965), *cert. denied*, 184 So.2d 889 (Fla. 1966). Clearly, under the new "operation" guidelines, the *Matheson* reasoning would fail:

[I]t would be possible for a property owner to seek an agricultural assessment in good faith on a thousand acre tract of land devoted to no specific commercial use,

District Court of Appeal, Third District, did not question the presence or lack of an "operation." Under the newly established formula in *Greenwood*, however, a landowner apparently must first establish that his land is an agricultural "operation"<sup>26</sup> before his good faith can be established:

[O]nce a "forestry operation" has been established we expect that it would be a rare situation where the claim for agricultural assessment would not be "bona fide." For example, it is foreseeable that a party, acting in good faith, could invest in unimproved land, knowing its potential as a merchantable timber operation, utilize it as such, and yet anticipate increases in land values as well as deductions afforded on income tax schedules through depreciation and expenditures. The concern of the property owner with these incidental objectives<sup>27</sup> would not disqualify his land for consideration as a bona fide forestry operation.<sup>28</sup>

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but which had only a combined total of 50 acres of merchantable timber. Clearly, the owner in such a case could not be said to be conducting a thousand acre forestry operation, although he may have been acting with perfectly good faith.

*Walden v. Borden Co.*, 251 So.2d 665, 667 (Fla. 1971).

26. The court, in construing the term "operation," necessarily discussed FLA. STAT. § 193.071(3) (1969) [*repealed by* Fla. Laws 1970, ch. 70-243, § 49 (effective Jan. 1, 1971)], which is no longer in force. *See* note 10 *supra*. FLA. STAT. § 193.461 (1969), successor to FLA. STAT. § 193.071(3) (1969), speaks in terms of lands used for agricultural "purposes." The term is used no less than six times in the statute, while there is no reference to an agricultural "operation." It would be a mistake, however, to assume that the court's discussion of "operation" is inapplicable to the current statute. The basic thrust of the discussion is that the land must be actively functioning as an agricultural enterprise. The concept does not change when the word "operation" is replaced by "purposes," since one definition of operation is "[a] course or series of acts to effect a certain purpose . . ." FUNK & WAGNALLS ENCYCLOPEDIA COLLEGE DICTIONARY 946 (1968).

27. But if those incidental objectives become the primary ones in owning the land, the property would not be used "primarily" for bona fide agricultural purposes, a requirement under the statute. *See* FLA. STAT. § 193.461 (1969). Such was the case where a corporate landowner purchased property which it leased for cattle grazing, *i.e.*, agricultural purposes, but reserved an easement across the property for the discharge of fumes from its mining operations.

[T]he legislature did not intend to give preferential tax treatment to land such as that in the instant case that was obviously purchased for use in connection with the company's phosphate operations and is still being used for that purpose, even though it accommodates, also, an incidental use for agricultural purposes.

*Walden v. Borden Co.*, 235 So.2d 300, 302 (Fla. 1970).

28. *Greenwood v. Oates*, 251 So.2d 665, 667 (Fla. 1971). In the court's hypothet, once an "operation" is established, the speculative, non-agricultural aspect of land ownership does not deprive an owner of the necessary good faith. The dicta is reminiscent of, though quite nearly contrary to, a hypothet posed by the District Court of Appeal, First District, in 1965:

[O]ne of two abutting property owners, each having three thousand acres of timberland, may conduct a bona fide timber program while the other primarily utilizes his land as a game preserve with timber producing being incidental. A visual examination of the property by the tax assessor would disclose a similar utilization of the lands, but the bona fides of the utilization of each tract for agricultural purposes would depend to some extent upon the subjective thinking of the landowner. Or consider the obvious illustration of a speculative subdivision developer who places a few cows on urban land and calls it a ranch. Thus, it is the bona fides of the utilization by the landowner that makes the land eligible for the benefits of the statute, and the physical condition and appearance of the subject property is not of itself controlling.

*Stiles v. Brown*, 177 So.2d 672, 676 (Fla. 1st Dist. 1965).

Perhaps it was this theory—that a forestry operation is evidence of a bona fide operation—which led to the conclusions in favor of the landowners in Greenwood's companion cases. In *Conrad v. Sapp*,<sup>29</sup> it was undisputed that the "lands were purchased many years ago by a landowner who was involved in large acreage devote[d] to forestry purposes."<sup>30</sup> In other words, once the forestry operation was established, the bona fides of that operation were more or less assumed.

Likewise, in *St. Joe Paper Co. v. Mickler*,<sup>31</sup> there was no question as to the fact of a forestry "operation." In fact, the county authorities had granted the landowner agricultural classifications on the property in previous years.<sup>32</sup> Only the bona fides had to be established, an easy requirement to fulfill under the new guidelines, which placed the primary emphasis on the question of "operation."

However, in *Greenwood*, the landowner-taxpayer sought the preferential agricultural classification immediately upon purchase of the property.<sup>33</sup> Further, the evidence demonstrated that much of the timber was worthless, and no forestry related improvements had been made—both indicative of the lack of forestry "operation."<sup>34</sup> Thus, given the emphasis on "operation," the court's denial of the agricultural classification is not surprising. In a sense, then, a new "operation" requirement has been added to the statute,<sup>35</sup> and once that requirement has been fulfilled, a favorable determination as to the bona fides of that operation is likely to follow.

Besides the emphasis on agricultural "operation," *Greenwood* also sets forth the principle that the question of bona fides is one of fact, which is to be determined by the trial court and, therefore, rarely should it be disturbed on appeal.

It is clear therefore that any determination of a bona fide forestry operation must be arrived at upon consideration of all practices and indicia existing in each case, and on a case by case basis. It would be an impossible and unwise task for this Court, or any appellate court, to attempt to establish inflexible, definite criteria to be arbitrarily applied on a state-wide or even area basis.<sup>36</sup>

In support of this principle, the court repeated the time-honored legal maxim that a "judgment, order, decree, or ruling of a trial court comes to the appellate court with a presumption of correctness . . . ."<sup>37</sup> Since all of these cases involve questions of fact, the duty of the appellate court should

29. 252 So.2d 225 (Fla. 1971).

30. *Sapp v. Conrad*, 240 So.2d 884, 887 (Fla. 1st Dist. 1970), *aff'd*, 252 So.2d 225 (Fla. 1971).

31. 252 So.2d 225 (Fla. 1971).

32. 241 So.2d 415 (Fla. 1st Dist. 1970), *aff'd*, 252 So.2d 225 (Fla. 1971).

33. *Oates v. Bailey*, 241 So.2d 730-31 (Fla. 1st Dist. 1970), *aff'd sub nom.*, *Greenwood v. Oates*, 251 So.2d 665 (Fla. 1971).

34. *Greenwood v. Oates*, 251 So.2d 665, 669 (Fla. 1971).

35. FLA. STAT. § 193.461 (1969).

36. *Greenwood v. Oates*, 251 So.2d 665, 667-68 (Fla. 1971).

37. *Id.* at 669.

be to consider only the legal sufficiency and competency of evidence, and not its weight. Although the supreme court has spoken generally in these terms in the past,<sup>38</sup> in *Greenwood* it appears to have placed an unusually heavy emphasis on the limited role of appellate courts in reviewing these questions of fact. The supreme court reminded the district courts that they may not substitute their judgment for that of the trier of fact, nor re-try the case.<sup>39</sup>

In *Greenwood*, after finding that the "District Court substituted its judgment for that of the chancellor whose judgment was supported by competent, substantial evidence," the Supreme Court of Florida directed the appellate court to reinstate the chancellor's finding.<sup>40</sup>

The message to the Florida appellate courts seems clear enough. However, the presumption of correctness afforded trial courts' factual determinations is not absolute. In *Conrad v. Sapp*,<sup>41</sup> a companion case to *Greenwood*, the Supreme Court of Florida affirmed the district court of appeal's reversal of the trial court judgment against a landowner. In *Conrad*, county authorities had denied an agricultural classification to a landowner because the property was located near developing areas and would obviously have had a much higher value if converted to a non-agricultural use. This evidence, *i.e.*, evidence of a higher and better use was held to be incompetent.<sup>42</sup>

Likewise, in the other companion case, *St. Joe Paper Co. v. Mickler*,<sup>43</sup> the supreme court reversed the decision of the district court of appeal which had affirmed the trial court's denial of an agricultural classification. There, a court ruled that the lack of scientific agricultural methods did not preclude the existence of a bona fide forestry operation.<sup>44</sup> Justice Dekle, who wrote the opinion in *Greenwood*, dissented in *Mickler*. Relying on the reasoning in *Greenwood*, Justice Dekle reiterated what nine days earlier had formed the basis of the majority opinion:

[I]n cases of disputed facts the granting or denying of the beneficial "agricultural" classification by the taxing authorities, and any court review thereof, are to be based upon the particular facts of each case under applicable standards (criteria); that the determination arrives in this Court with a presumption of correctness (under this well-established rule); and that the decision will be affirmed if supported by competent, substantial evidence.<sup>45</sup>

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38. See *Powell v. Kelly*, 223 So.2d 305 (Fla. 1969).

39. *Greenwood v. Oates*, 251 So.2d 665, 669 (Fla. 1971).

40. *Id.*

41. 252 So.2d 225 (Fla. 1971).

42. Perhaps the *Conrad v. Sapp* decision can be rationalized on the basis of this dicta from *Greenwood*: "Of course, instances may arise where the facts are so clearly established that the conclusion [of a bona fide agricultural operation] becomes one of law." *Greenwood v. Oates*, 251 So.2d 665, 667 (Fla. 1971).

43. 252 So.2d 225 (Fla. 1971).

44. *Id.* See also Judge Wigginton's dissent in *Sapp v. Conrad*, 240 So.2d 884, 888 (Fla. 1st Dist. 1970).

45. *St. Joe Paper Co. v. Mickler*, 252 So.2d 225 (Fla. 1971) (dissenting opinion).

Obviously, the Supreme Court of Florida has attempted to clear the confusion surrounding the determination of bona fide forestry operations for the purposes of preferential tax treatment. The court's new reliance on the "operation" requirement seems logically sound and easy enough to apply. But the strong language indicating that the chancellor's finding should seldom be disturbed on appeal seems somewhat paradoxical in light of the companion decisions. In both *Conrad v. Sapp*<sup>46</sup> and *St. Joe Paper Co. v. Mickler*,<sup>47</sup> the trial court decisions were ultimately reversed. It is clear, therefore, that trial court determinations of factual questions are not as secure on appeal as the language of the supreme court in *Greenwood* seems to suggest.

PAUL J. LEVINE

### INSIDER TRADING AND RULE 10b-5: A NEW REMEDY\*

In the landmark case of *SEC v. Texas Gulf Sulphur Co.*,<sup>1</sup> the Court of Appeals for the Second Circuit held that the use of "inside information" to purchase stock in a corporation and the "tipping" of such information to third parties was a violation of section 10(b) of the Securities and Exchange Act of 1934<sup>2</sup> and rule 10b-5 thereunder.<sup>3</sup> By

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46. 252 So.2d 225 (Fla. 1971).

47. 252 So.2d 225 (Fla. 1971).

\* In 1968, the Court of Appeals for the Second Circuit decided the landmark case of *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968). While the court set forth far-reaching principles of new law, many questions were left to be determined by the federal district court on remand since only the question of liability had been presented to the Second Circuit for review. Since the parties had stipulated that the question of possible remedies would be litigated after a determination of liability, many matters were left untended in the 1968 decision. This note is directed to the return visit of *Texas Gulf Sulphur* to the Second Circuit. Judge Waterman, who wrote the first opinion, has also authored this latest installment. The opinion is a rambling one which contains several sub-holdings within its principal holding and is a decision which must be read in conjunction with its predecessor. This note treats the primary and secondary holdings of this latest case and also places the case within its historical perspective as adequately as possible within its limited length.

1. 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

2. 15 U.S.C. § 78j(b) (1970) [hereinafter cited as section 10(b)].

To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commissioner may prescribe as necessary or appropriate in the public interest or for the protection of investors.

*Id.*

3. 17 C.F.R. § 240.10b-5 (1971) [hereinafter cited as rule 10b-5].

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

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

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or