UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

38th Annual Conference on Securities and Business Law

February 11-12, 2016
Dallas, Texas

Securities Regulation
Liabilities and Remedies

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Corporate Securities Series

SECURITIES REGULATION

Liabilities and Remedies

VOLUME TWO

by

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2014

(Date originally published: 1984)

Law Journal Press
120 Broadway
New York, New York 10271
www.lawcatalog.com

#00582
(Rel. 56)

SUMMARY OF CONTENTS

Volume 1:

§ 9.06 State Securities and Common Law

In the last two decades, the United States Supreme Court has handed down a number of restrictive decisions under the federal securities laws.[1] Due to this development, the question arises whether investors should consider pursuing their state law actions with greater vigor. This assessment, however, has been significantly curtailed due to the enactment of the Securities Litigation Uniform Standards Act of 1998.[2] This legislation preempts, with certain exceptions, the applicability of state law in securities class actions involving nationally traded securities.[3]

Even in certain situations where the 1998 legislation does not preempt state law, plaintiffs should pursue their grievances under the federal securities acts. For example, a state such as New York declines to recognize a private right of action for violation of its securities laws.[4] In addition, certain other states in their respective securities statutes provide private redress for purchasers only,[5] allow for a shorter

[1] See cases discussed in §§ 7.01, 7.08 *supra,* § 10.02 *infra.* Under the applicable state's definition of the term "security," it is possible that a security may exist under state but not federal law (or under federal but not state law). See:

Sixth Circuit: Riedel v. Bancam, S.A., 792 F.2d 587, 593-594 (6th Cir. 1986) (although CDs issued by a Mexican bank are not a security under federal law, CDs were securities "under the broadly drafted" Ohio Securities Act).

State Courts:

Illinois: Saunders, Lewis & Ray v. Evans, 158 lll. App. 3d 994, 512 N.E.2d 59 (1989) (even though corporate stock is a security under federal law, not a security under state law unless acquiror is a "passive investor").

See generally: Long, *Blue Sky Law* § 2.01 *et seq.* (1998); Branson and Okamo- to, "The Supreme Court's Literalism and the Definition of 'Security' in the State Courts," 50 Wash. & Lee L. Rev. 1043 (1993); Warren, "The Treatment of *Reves* 'Notes' and Other Securities Under the State Blue Sky Laws," 47 Bus. Law. 321 (1991).

For law review articles by this author on state securities law remedies, see: Steinberg, "The Emergence of State Securities Laws: Partly-Sunny Skies for Investors," 62 U. Cin. L. Rev. 395 (1993); Steinberg, "The Ramifications of Recent U.S. Supreme Court Decisions on Federal and State Securities Regulation," 70 Notre Dame L. Rev. 489 (1995); Steinberg, "State Securities Laws: A Panacea for Investors?," 22 Sec. Reg. L.J. 53 (1994).

[2] Pub. L. No. 105-353, 112 Stat. 3227 (1998). See H.R. Rep. No. 105-803, 105th Cong., 2d Sess. (1998).

[3] See: Section 101 of the Uniform Standards Act, *amending* Section 16 of the Securities Act (15 U.S.C. § 77p) and Section 28 of the Exchange Act (15 U.S.C. § 78bb); Chadbourne & Parke LLP v. Troice, _____ U.S.____ , 134 S.Ct. 1058, 188 L.Ed.2d 88 (2014); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 126 S.Ct. 1503, 164 L.Ed.2d 179 (2006); discussion in Ns. 47-66 and accompanying text *infra.*

[4] See CPC International v. McKesson Corp., 70 N.Y.2d 268, 519 N.Y.S. 2d 804, 514 N.E.2d 116 (1987).

[5] See, e.g.: North Dakota Comm. Code § 10-04-17, construed in Weidner v. Engelhart, 176 N.W.2d 509, 513 (N.D. 1970); Ohio Rev. Code § 1707.43. See also,

statute of limitations than that prescribed by federal law[6] and do not recognize aider and abettor liability against certain collateral parties.[7] Moreover, by premising liability upon the status of the primary violator as a seller, many of these statutes arguably cannot be invoked against a corporate defendant and its fiduciaries in secondary market frauds, such as when a company allegedly issues a deliberately false press release or earnings statement.[8] Adoption of a sufficiently broad definition of "seller" in this context would expand the statute's scope to encompass such situations.[9]

Another significant downside to state law is with respect to class action litigation. Unlike federal law which recognizes the fraud-on-the- market theory to create a presumption of reliance,[10] thereby facilitating use of the class action mechanism,[11] a number of state courts have declined to adopt this doctrine with respect to actions alleging common law fraud.[12] The consequence is that individualized proof of reliance is required, hence militating against class certification. For example, in

§ 410(a) of the Uniform Securities Act, reprinted in 1 Blue Sky L. Rep. (CCH) ¶ 5500, at 1566 (adopted 1956).

[6] *See, e.g.:*

Georgia: Ga. Code § 97-114(d).

Missouri: Mo. Code § 409.411(e).

North Carolina: N.C. Securities Act § 78A-56(f).

Virginia: Va. Code § 13.1-522(D).

See also:

District of Columbia: Clouser v. Temporaries, Inc., [1990-1991 Transfer Binder] CCH Fed. Sec. L. Rep. H 95,846 (D.D.C. 1989) (holding claim was barred by the two-year District of Columbia blue sky statute of limitations, D.C. Code § 2-2613(e)).

[7] See, e.g.:

Michigan: Mercer v. Jaffe, Snider, Raitt and Heuer, P.C., 713 F. Supp. 1019, 1027-1028 (W.D. Mich. 1989), *aff'd* 933 F.2d 1008 (6th Cir. 1991) (interpreting Michigan Uniform Securities Act).

South Carolina: Allen v. Columbia Financial Management, Ltd., 297 S.C. 481, 377 S.E.2d 352, 356 (S.C. Ct. App. 1988).

[8] Hence, many states have adopted the Section 12(a)(2) counterpart but have declined to provide a private remedy for the Rule 10b-5 counterpart. *Compare,* Texas Securities Act Art. 581-33A(2) (Section 12(a)(2) counterpart), *with* Wash. Securities Act, RCW 21.20.010 (Rule 10b-5 counterpart).

[9] For example, holding that a company issuing a materially misleading press release aided the sale, played an integral role in the sale, or solicited the transaction for its financial benefit would, depending upon the standard adopted, confer "seller" status upon the entity, thereby subjecting it to liability exposure in secondary open market transactions. See Ns. 20-27 and accompanying text *infra.*

[10] Halliburton Co. v. Erica R John Fund, Inc.,_____U.S.____ , 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014); Amgen v. Connecticut Retirement Plans and Trust Funds, 568 U.S. ___ , 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013); Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S.____ , 131 S.Ct. 2179, 180 L.Ed.2d 24 (2011); Basic, Inc. v. Levinson, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988), discussed in § 7.05 *supra.*

[11] See discussion in § 7.05 *supra.*

[12] See: Ns. 13-14 and accompanying text *infra.*

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