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William Reynolds Vance

The Journal mourns the passing of Professor William Reynolds Vance. As a dominant figure in the field of insurance law and a widely respected expert on the law of property, he made enduring contributions to legal scholarship. As a counselor and friend of generations of law students, he was ever in the vanguard of legal educators. His impress upon The Yale School of Law is indelible.

CIVIL LIABILITY UNDER THE FEDERAL SECURITIES ACT

In the seven years that have elapsed since its passage, the Federal Securities Act[1] has not produced many private damage suits. Civil remedies incorporated into the Act[2] for the protection of the investor have been invoked

1. 48 Stat. 74 (1933), *amended* 48 Stat. 905, 15 U. S. C. §§ 77a *et seq.* (1934).

2. Section 11 of the Act imposes liability on issuers, directors, experts, and underwriters for frauds and misrepresentations contained in any part of the registration statement required by the Act. Section 12 imposes liability for selling a security (1) in violation of Section 5 (without a necessary registration having been filed, or by means of a prospectus deficient under the prescribed standard of Section 10), and (2) in interstate commerce or through the mails by means of a false or misleading prospectus or oral communication.

in sixteen instances,[3] only three of which have resulted in recovery by the plaintiffs.[4] While the *in terrorem* effect of the Act may have discouraged carelessness or attempts to defraud,[5] the civil remedies provided have not proven to be the undue threat to free investment of which critics warned.[6] Although the effectiveness of the liability provisions in protecting injured security purchasers is still to be demonstrated, the interests which succeeded in "liberalizing" the liability sections through amendment in 1934[7] are currently demanding new and further modification of the available civil remedies.[8] It is the purpose of this Comment to examine the present status of civil liability in the light of the cases which have already been decided, to discover what effect these cases have had on the possibility of recovery by injured plaintiffs, and to discuss the necessity or advisability of any further statutory amendment.

The paucity of litigation cannot be traced solely to restrictive interpretations of the Act by the various courts. The decided cases have been given only slight publicity, and it is more likely that considerations rooted in the Act itself, as well as certain external conditions, have been the major factors in limiting the number of suits. The detailed forms and regulations promulgated by the SEC have shown registrants what information must be included in the registration certificates in order to avoid material omissions.

3. Murphy v. Cady, 30 F. Supp. 466 (D. Me. 1939), *aff'd*, 113 F. (2d) 988 (C. C. A. 1st, 1940); Deckert v. Independent Shares Corp., 27 F. Supp. 763 (E. D. Pa., 1939), *rev'd in part*, 108 F. (2d) 51 (C. C. A. 3d, 1939), *cert. granted*, 309 U. S. 648 (1940); Martin v. Hull, 92 F. (2d) 208 (App. D. C. 1937), *cert. denied*, 302 U. S. 726 (1937); Siebenthaler v. Aircraft Accessories Corp., C. C. H. Securities Act Serv. ¶ 30,202 (W. D. Mo. 1940); Rosenberg v. Hano, 1 C. C. H. Stock Exchange Reg. Serv. ¶ 8631 (E. D. Pa. 1940); Cohen v. Saddlemire, 26 F. Supp. 27 (D. Mass. 1939); Shonts v. Hirliman, 28 F. Supp. 478 (S. D. Cal. 1939); Balls v. Lawrence (App. D. C. 1937) (unreported); Stanford Univ. v. National Supply Co. (N. D. Cal. 1940, No. 20462) (still pending); Johnston v. Whitfield (C. C. Perry County, Ala. 1940) (settled out of court); Rudnick v. Bischoff, 258 App. Div. 608, 17 N. Y. S. (2d) 575 (1st Dep't 1940); M. J. Hall v. Johnson, N. Y. L. J., Feb. 6, 1940, p. 589, col. 2 (Sup. Ct. N. Y. 1940); Farrell v. Reynolds, 11 N. Y. S. (2d) 117 (Sup. Ct., 1939), *aff'd*, 16 N. Y. S. (2d) 530 (1st Dep't 1939); Thorn v. Austin Silver Mining Corp., 171 Misc. 400, 12 N. Y. S. (2d) 675 (Sup. Ct. 1939); Root v. Finney, C. C. H. Securities Act Serv. ¶ 30,020 (Sup. Ct. N. Y. 1937); Hofmayer v. Kehaya, N. Y. L. J., Nov. 27, 1936, p. 1902, col. 4 (Sup. Ct., N. Y. 1936).

4. Thorn v. Austin Silver Mining Co., Murphy v. Cady, Independent Shares Corp. v. Deckert, all *supra* note 3. The last case, however, has been granted certiorari by the United States Supreme Court, 309 U. S. 648 (1940).

5. See Shulman, *Civil Liability and the Securities Act* (1933) 43 YALE L. J. 227; Rodell, *Regulation of Securities by the Federal Trade Commission* (1933) 43 YALE L. J. 272; Comment (1936) 45 YALE L. J. 1076.

6. Ballantine, *Amending the Federal Securities Act* (1934) 20 A. B. A. J. 85; Dean, *The Federal Securities Act: I*, Fortune, August 1933, p. 51; Seligman, *Amend the Federal Securities Act*, Atlantic Monthly, March 1934, p. 370.

7. 48 STAT. 905 (1934), *incorporated* in 15 U. S. C. §§ 77a *et seq.* (1934).

8. See *infra* p. 102.

Market conditions since the effective date of the Act have discouraged possible suit: a large percentage of the new issues of securities has consisted of gilt-edge refunding activities, and the absence of any serious market crisis has meant that few investors have suffered any sudden, catastrophic loss. Exercise of the power to issue stop-orders when the Commission's investigators have uncovered misrepresentations during the twenty day "waiting period" before sale,[9] the rapid expansion of the exempted private placement[10] with large institutional buyers,[11] the great cost of litigation with the consequent fear of throwing good money after bad, and the sheer inability of many injured investors to discover the facts of the misrepresentation, combined with the general apathy of investors towards protection of their rights, may have been of some effect in aborting possible claims.

The liability sections of the Act themselves contain many patent obstacles to hasty suit. The scourge of the nuisance suit has been largely eliminated by the introduction of a discretionary power of courts to demand cost bonds of any plaintiff before the trial of any case;[12] the new requirement that plaintiffs who purchase a security more than a year after its issuance must prove their reliance upon the omission or misstatement, may have had a further discouraging effect.[13] Where there is a clear case of fraud, the adoption in the Act of a modification of the common law "tort" measure of damages,[14] by which a successful plaintiff would receive only the difference between the price originally paid for the security and its value at the time of suit,[15] may have led plaintiffs who are in a position to take advantage

9. SECURITIES ACT § 8b. This period has now been made optional with the Commission by recent amendment, Pub. L. No. 768, 76th Cong., 3d Sess. (Aug. 22, 1940) title III. To the extent that the SEC shortens the waiting periods for certain securities, the possibility of stop orders preventing suit will be diminished.

10. SECURITIES ACT, § 4(1).

11. See N. Y. Times, Oct. 8, 1940, p. 37, col. 4. The exemption relieves privately sold securities only from the registration requirements and from liability under Section 11; the requirements necessary to avoid liability under Section 12 must still be met. But see Rudnick v. Bischoff, 258 App. Div. 608, 17 N. Y. S. (2d) 575 (1st Dep't 1940).

12. SECURITIES ACT, § 11(e).

13. SECURITIES ACT, § 11(a). The provision applies only "after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months," and this reliance "may be established without proof of the reading of the registration statement . . ." The restriction will probably not weaken the plaintiff's position to any great degree, as reliance has always been implicitly used as the test of materiality. See FTC Release No. 137, March 23, 1934; Comment (1935) 44 YALE L. J. 456, 459.

14. This is the minority rule at common law, but it has been adopted among others by the United States Supreme Court, Smith v. Bolles, 132 U. S. 125 (1889); the New York Court of Appeals, Reno v. Bull, 226 N. Y. 546, 124 N. E. 144 (1919). But *cf.* Hotaling v. Leach, 247 N. Y. 84, 159 N. E. 870 (1928); RESTATEMENT, TORTS (1938) § 549, Comment c.

15. SECURITIES ACT, § 11.

of the more lucrative "contract-warranty" standard[16] by which an injured party receives the difference between the represented and actual value of the security, to waive their statutory rights in favor of a common law action in fraud.[17] And, of course, while the Act has modified or eliminated certain of the prerequisites to recovery at common law, the prospective plaintiff must still be able to show the materiality of the representation, that it is of fact rather than an opinion,[18] and his own lack of knowledge of the untruth.

It is as yet impossible to arrive at any definitive appraisal of court reaction to the civil remedies provided by the Act. Courts have, it is true, decided against plaintiffs in nine out of the twelve litigated cases, and in so doing, have called upon one or more of some seven legal propositions. Some of the limitations imposed have merely the nuisance value of forcing plaintiffs to conform to strict rules of pleading; others, were they to be followed, would make the Act in large part unenforceable. About the only generalization that can be made with any degree of certainty is that there has been a noticeable tendency to limit plaintiffs' rights to the strict letter of the law, to demand proof that every statutory requirement has been met, and in some instances to place impassable technical barriers in the way of any recovery. Yet a study of the more important decisions affecting the liability provisions of the Act shows that, in spite of the many harsh restrictions that have been imposed, there have been several recent decisions notably favorable to claimants.

One of the more hopeful developments from the standpoint of the plaintiff has been the general trend, under the impetus of the new Federal Rules of Civil Procedure,[19] toward joint or representative action on behalf of the numerous parties who may have been injured by the same false report.[20]

16. This measure allows plaintiff the benefit of his bargain, and he will recover damages in excess of his actual losses. It has been adopted in a majority of jurisdictions as the standard in common fraud and misrepresentation cases. See Legis. (1934) 48 HARV. L. REV. 107, 116.

17. Comment (1940) 28 CALIF. L. REV. 378, 384. In many cases plaintiffs have relied on both the statutory remedy and a claim at common law. Where the measure of damages differs, however, plaintiff would presumably be forced to choose between the claims to be pressed to a judgment.

18. The one case arising so far under Section 9(a)(4) of the Securities Exchange Act, 48 STAT. 881, 15 U. S. C. §§ 78a *et seq.* (1934), has been dismissed, one ground being that a statement that a given stock would advance 15 points in a few days was "obviously a statement of an opinion" and not a statement of fact. Rosenberg v. Hano, 1 C. C. H. Stock Exchange Reg. Serv. ¶ 8631 (E. D. Pa. 1940).

19. FED. RULES CIV. PROC., Rules 20(a), 23(a)(3). Consolidation on trial of several individually initiated suits is provided by Rule 42(a).

20. In at least four instances group suits of one or another variety have been brought. In Martin v. Hull, 92 F. (2d) 208 (App. D. C. 1937), *cert. denied*, 302 U. S. 726 (1937), sixteen suits were started contemporaneously in the same court, and by agreement action on fifteen was postponed pending the outcome of Martin's claim. Plaintiff lost, and the other suits were dropped. 3 SEC REP. (1937) 173. Thorn v. Austin Silver Mining Co., 171 Misc. 400, 12 N. Y. S. (2d) 675 (Sup. Ct. 1939) involved a suit by several claimants,

The advantages of such a procedure in spreading the large litigation expenses, otherwise individually incurred, are self-evident. There can be little doubt that the various parties plaintiff may join together in the federal courts since common questions of law and fact, within the meaning of Rule 20, will necessarily be present in all cases stemming from one falsity.[21] It is true that every individual cause of action will also contain certain unique features — each plaintiff may have to prove his own purchase, own reliance, own innocence of the untruth, the time when he discovered the fraud, and the other individual characteristics of the transaction necessarily precedent to any recovery. Every joint case, however, may be severed at any time by the court, acting under Rule 20, for separate decision of the features peculiar to each complaint.[22] Ordinarily it might be doubted whether possible claimants would discover the fact of the common misrepresentation simultaneously[23] but the chance of joint discovery is made less fortuitous by the power of the Commission under Section 8(d) to issue stop orders, specifically citing parties for misrepresentations of a nature producing liability under Sections 11 and 12.[24] At least four joint actions have thus been instituted immediately subsequent to the publication of such stop orders.[25] A recent case has dismissed a contention that the findings of the Commission in a stop order proceeding should bind the defendant upon later civil suit arising from the same misrepresentation.[26] In view of the possibility that many defendants might allow a stop order to go through unopposed, finding it cheaper to amend the registration certificate than to contest the order, the

joined for the purpose of the action. Shonts v. Hirliman, 28 F. Supp. 478 (S. D. Cal., 1939) was a consolidation of three separate suits on trial, two of which already were being undertaken by a considerable number of persons joined for suit, and the other a suit by a trustee representing a large number of other shareholders of defendant. Deckert v. Independent Shares, 27 F. Supp. 763 (E. D. Pa. 1939), *rev'd in part,* 108 F. (2d) 51 (C. C. A. 3d, 1939), *cert. granted,* 309 U. S. 648 (1940), was denominated by the court as a "spurious class action" under Rule 23(a)(3), and a large number of the defendant's shareholders participated.

21. This may not have been possible prior to the passage of the Federal Rules of Civil Procedure, Shulman, *Civil Liability and the Securities Act* (1933) 43 YALE L. J. 227. As to joinder available in state courts see 2 MOORE, FEDERAL PRACTICE (1938) 2178.

22. FED. RULES CIV. PROC., Rule 20(b). See also Rule 42b (separate trials).

23. This is not essential, since if one person became aware of the fraud, he would hardly find it difficult to persuade other potential claimants to join with him. To date, however, every joint or class action has followed a stop order. See note 25 *infra.*

24. SECURITIES ACT, § 8(d).

25. Martin v. Hull (stop order against Continental Distillers & Importers Corp., SEC Security Act Release No. 289, Jan. 30, 1935); Thorn v. Austin Silver Mining Co. (stop order, SEC Security Act Release No. 1774, July 13, 1938); Shonts v. Hirliman (stop order against Condor Corp., SEC Security Act Release No. 1433, May 11, 1937); Deckert v. Independent Shares (complaint and consent decree, SEC Security Act Release No. 1759, June 23, 1938), all *supra* note 3.

26. Shonts v. Hirliman, 28 F. Supp. 478 (S. D. Cal. 1939) (preliminary oral opinion).

decision seems correct.[27] Admission into evidence of the findings of the SEC as some proof of the misrepresentation would seem to be the most that could reasonably be allowed.[28]

The emerging pattern of joint or "spurious class"[29] suits, following immediately after SEC stop orders, has raised the question of whether a verdict in favor of a representative of a "spurious class" might bind the defendant in a subsequent suit by another member of the class, not party to the first action. A judgment in favor of the defendant against the class will usually not be binding upon other members of the class who later sue the defendant.[30] The rationale for this holding — that every man must be guaranteed his day in court — has, however, no application to the converse situation, in which the defendant will have fully litigated many of the same factual issues in a previous case. The objection to holding a losing defendant bound on the facts in a later case is not so much any theoretical lack of privity between the parties, as that the proposed ruling would, in effect, impose on defendants an obligation to defend each suit, no matter how trivial it might be, lest an adverse judgment in some minor suit bind him in all future cases. On the other hand, there seems to be no good reason why defendants should be permitted continual relitigation of a factual problem already judicially determined, and it might well be argued that such plaintiffs should be able to fall back upon the facts proved in a previous suit by other persons defrauded by the defendant if they were for sufficient reasons unable to intervene in that suit.[31]

27. See Comment (1940) 49 YALE L. J. 1250, 1267. In some cases, however, the determination of the administrative agency has been given an *in rem* effect, and the decision held binding upon defendant in a later civil suit. Goodspeed v. Great Western Power Co., 33 Cal. App. (2d) 245, 91 P. (2d) 623 (1939); *accord*, Sampson v. Michigan Copper & Brass Co., 274 Mich. 592, 265 N. W. 472 (1936).

28. It has been suggested that some authority for this position could be found by analogy to the minority rule holding a prior criminal conviction *prima facie* evidence in later civil suits. Eagle Star & British Dom. Ins. Co. v. Heller, 149 Va. 82, 140 S. E. 314, (1927); Schindler v. Royal Ins. Co., 258 N. Y. 310, 179 N. E. 711 (1932).

29. FED. RULES CIV. PROC., Rule 23(a)(3). See 2 MOORE, FEDERAL PRACTICE (1938) § 23.07.

30. Wabash R. R. v. Adelbart College, 208 U. S. 38 (1908); National Bank of Florence v. Edwards, 134 S. C. 348, 132 S. E. 824 (1926); 2 MOORE, FEDERAL PRACTICE (1938) § 23.07, p. 2291. It has been suggested that a judgment against a spurious class should bind members of the class who had sufficient notice of the first suit but refrained from joining although such joinder was possible. Towle v. Donnell, 49 F. (2d) 49 (C. C. A. 6th, 1931); see Wabash R. R. v. Adelbart College, *supra*; (1940) 49 YALE L. J. 1125.

31. While most authorities in denying res judicata to spurious class actions fail to distinguish between cases where a losing class and cases where a losing defendant are claimed to be bound on later suit, there is some authority for this distinction. Coca Cola v. Pepsi-Cola, 6 Harr. 124, 172 Atl. 260 (Del., 1934); *accord*, Liberty Mutual Ins. Co. v. George Colon & Co., 260 N. Y. 305, 183 N. E. 506 (1932); see Comment (1926) 35 YALE L. J. 607.

Another liberal opinion in the recent case of *Deckert v. Independent Shares Corp.*[32] has held that claimants under the Act need not meet the ordinary requirements of jurisdictional amount in order to sue in the federal courts. It was there held that Section 22(a) of the Act, in granting concurrent jurisdiction in civil suits to federal and state court systems, "carved out" an entire new field for the operation of federal jurisdiction which is to be granted irrespective of the amount of the claim.[33] In view of the silence of the statute upon the problem of any necessary amount in controversy, it might be questioned whether any deviation from the ordinary jurisdictional requirements was contemplated; but the decision can be justified upon the grounds that it would permit small investors as well as large to take advantage of the more flexible federal procedure.

In a decision of the same temper, the courts have expanded plaintiff's choice of defendants among the single class of "sellers" made liable by the provisions of Section 12. In the recent case of *Cady v. Murphy*,[34] the First Circuit Court of Appeals held that stockbrokers may be considered among the persons selling securities held responsible by the Act. The common law does not consider brokers to be sellers; title to the securities is held to spring directly from selling principal to ultimate purchaser, without residing for an instant in the broker conducting the sale.[35] But the court held that the brokerage activity was included within the Section 2(3) definition of "sale" as "every . . . disposition of, attempt or offer to dispose of, or solicitation of an offer to buy."[36] The import of the decision is not to relieve the selling principals of all liability; it is still possible for injured parties to go behind the broker and hold the beneficiary of the transfer responsible.[37] If the latter's financial responsibility is dubious, however, it will be essential, if recovery is to be a reality, that the plaintiff be given the option of proceeding directly against

32. 27 F. Supp. 763 (E. D. Pa. 1939), *rev'd in part*, 108 F. (2d) 51 (C. C. A. 3d, 1939), *cert. granted*, 309 U. S. 648 (1940).

33. SECURITIES ACT, § 22(a) provides: "The district courts of the United States . . . shall have jurisdiction of offenses and violations under this title . . . and concurrent with state and territorial courts of all suits in equity and actions at law brought to enforce any liability or duty created by this title." The process and venue provisions are fairly broad, but one claim has been dismissed for failure to establish proper venue for the suit. Cohen v. Saddlemire, 26 F. Supp. 27 (D. Mass. 1939). But *cf.* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165 (1939), (1940) 49 YALE L. J. 724.

34. 113 F. (2d) 988 (C. C. A. 1st, 1940), *aff'g* 30 F. Supp. 466 (D. Me. 1939).

35. Gifford v. Eastman, 251 Mass. 520, 146 N. E. 773 (1925); Douglas & Bates, *Stock "Brokers" as Agents and Dealers* (1933) 43 YALE L. J. 46.

36. See Douglas and Bates, *Some Effects of the Securities Act upon Investment Banking* (1933) 1 U. OF CHI. L. REV. 283; 77 CONG. REC. 2921 (1933); *cf.* Securities & Exch. Comm. v. Starmont, 31 F. Supp. 264 (D. Wash. 1940).

37. An underwriter has thus been held liable where his broker sold an unregistered security in violation of the provisions of section 5 of the Act. In the matter of Peterson Engine Co., 2 S. E. C. 893 (1937).

the broker, or joining him as a defendant with the principal.[38] There appears nothing inherently unjust in thus holding the responsible party liable for his negligence.

Objection to holding brokers liable has been raised on the ground that, since Section 12 provides that successful plaintiffs may recover "the consideration paid for such security . . . less the amount of any income received thereon, upon the tender of such security,"[39] it envisions rescission as the remedy where plaintiff still owns the security at the time of suit, and that rescission contemplates restoration of the *status quo* only as between the principals in the sale.[40] However, as the court demonstrated, the Act does not expressly use the word "rescission," and the remedy provided is physically applicable to guilty brokers. The stockbroker, it is true, may thus be forced to assume ownership of securities for the first time, but this is hardly an unreasonable penalty for misrepresentation upon sale.

In the frequent situation where one broker represents both buyer and seller in making the sale, it is possible to hold him liable for any misstatement,[41] but the result is not so clear where the broker acts only for the defrauded purchaser.[42] The problem would not often arise, for usually the sole function of a buyer's broker is to execute an order, the planning of which was not his concern. Nor, apparently, would any of the Act's definitions of "sell" apply to those instances in which a potential purchaser requests advice from the broker, acting in the capacity of an investment counselor.[43] Where, however, the broker actively solicits authority to purchase a particular security, he can probably be considered to have brought himself within the

38. The purchaser will usually have transacted his business solely through the broker, and be unaware of the identity of the original owner. Even if the principal is disclosed, restrictions of venue under Section 22(a) of the Act might make suit against him awkward or expensive.

39. SECURITIES ACT, § 12.

40. Brief for Appellants, p. 14, Cady v. Murphy, 113 F. (2d) 988 (C. C. A. 1st, 1940), *aff'g* 30 F. Supp. 466 (D. Me. 1939); Connolly v. Glenny, 233 App. Div. 198, 251 N. Y. Supp. 288 (4th Dep't 1931); Douglas and Bates, *Stock "Brokers" as Agents and Dealers* (1933) 43 YALE L. J. 46.

41. He can be deemed to act as a seller's broker in making the representation. See Douglas and Bates, *The Federal Securities Act of 1933* (1933) 43 YALE L. J. 171, 207.

42. Upon this point the court in *Cady v. Murphy* came to no definite conclusion. The district court held that buyer's brokers as well as seller's brokers were liable under the Act. 30 F. Supp. 466 (D. Me. 1939). The majority of the First Circuit Court specifically refused to pass upon the point, but the dissent argued that the issue was raised by the facts of the case, and that the Act did not apply to such purchaser's brokers. 113 F. (2d) 988 (C. C. A. 1st, 1940).

43. Such misrepresentations might be outlawed by § 206(2) of the Investment Advisors Act of 1940, Pub. L. No. 768, 76th Cong., 2d Sess. (Aug. 22, 1940) Title II, but not if such services are performed without specific compensation incidental to the conduct of his business as a broker. In any case no provisions are indicated for civil suit under the Act; any punishment would be purely penal.

statutory definition of a "seller" as a person "soliciting an offer to buy."[44] In many such cases the broker would be financially interested in the sale of a specific type of security, and while he may not have actual title to the stocks or bonds in question, he will certainly know where they can be quickly secured.[45] The broker, in such a situation, would be acting in a manner far different from that ordinarily contemplated by his relationship with the plaintiff, and liability would therefore be imposed only on brokers who attempt to appropriate an extraordinary role in the sales transaction.

One recent case[46] imposes a sharp limitation on the seemingly wider choice of potential defendants under Section 11. Along with the corporate issuer, its directors, higher officials, the security underwriters, and certain other experts, accountants are subjected to liability under Section 11 for any misrepresentation appearing in any part of a registration certificate, in the preparation of which they assisted.[47] Thus for the first time the accountant is given the duty of exercising due care for the interests of the general public.[48] Section 11(3)(B) provides that the accountant may avoid this liability if he can demonstrate that, after reasonable investigation, he had reasonable grounds to believe in the truth and completeness of the statement made upon his authority. The opinion in *Shonts v. Hirliman*[49] held that the requirement of a reasonable investigation could be satisfied by mere perusal of matters coming to the accountant's attention through inspection of the "books at their disposal." The court in this case thus set out as reasonable an investigatory standard far below that which is customary in the profession and necessary for the detection of possible contingent liabilities, which must be listed in the registration statement.[50] The usual investigation, it appears,

44. See Douglas & Bates, *The Federal Securities Act*, *supra* note 41. An attempted distinction between soliciting *offers* and soliciting *orders* seems completely fatuous. See Amicus Curiae Brief for the Boston Association of Stock Exchange Firms, p. 4, Cady v. Murphy, 113 F. (2d) 988 (C. C. A. 1st, 1940).

45. In such cases the line between brokers and independent dealers, who are liable under the Act, is very thin. "A broker's knowledge of the amount of stock held by a dealer, its ready availability, and his relationships with the dealer might well make the certainty of his ability to acquire such stock as clear as if he had legal title to it." Bates and Douglas, *Secondary Distribution of Securities* (1931) 41 YALE L. J. 949, 976.

46. Shonts v. Hirliman, 28 F. Supp. 478 (S. D. Cal. 1939), (1940) 38 MICH. L. REV. 1103.

47. SECURITIES ACT, § 11 a. In addition, all those who are named as future directors and all signers of the certificate are made liable.

48. At common law accountants were held to owe no such duty, although actions for deceit were maintainable under proper circumstances. Ultramares Corp. v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931); State St. Trust Co. v. Ernst, 278 N. Y. 104, 15 N. E. (2d) 416 (1938).

49. 28 F. Supp. 478, 483 (S. D. Cal. 1939).

50. Regulation S-X, Uniform Accounting Requirements, Rule 3.18, C. C. H. Securities Act Serv. ¶ 6203.18 (1940). Omission to state contingent facts under § 54 of Form A-1, is an omission of a material fact producing liability under Section 12. In the matter of Resources Corp. Int'l, SEC Securities Act Release No. 2294, July 11, 1940.

would include securing information from the responsible corporate officials as to the extent of any contingent expenditures, legal opinions on the possibility of damages being assessed against the company as a consequence of any pending litigation, and the inspection of the minutes of stockholders' and directors' meetings.[51] It is true that the discovery of such contingent liabilities is among the most difficult problems facing the accountant,[52] but the accountant, alone, will be able to bring to light these items of potential importance to security buyers, and he should therefore be fully liable for any failure to take whatever means are available and customary in discovering any such concealed obligations.[53]

Other restrictions of a more technical nature have been utilized to defeat plaintiffs' causes of action. Prominent among these are the provisions of Section 13, limiting the time in which suits may be instituted. The statute of limitations is ordinarily available only as an affirmative defense, but where a statute creates a special right of action and, in the same enactment, limits the period in which this right may be enforced, a plaintiff must specifically allege and prove the timeliness of his suit.[54] Several Securities Act cases have been summarily dismissed for failure to plead the necessary compliance with the conditions of Section 13.[55]

Because the Section provides that any suit must be originated within one year of the discovery of the fraud, or "after such discovery should have been made by the exercise of reasonable diligence,"[56] it has been held that every plaintiff must allege and prove the date of his discovery of the misstatement and, further, explain why no earlier discovery was made.[57] It is only reason-

51. See Testimony of Expert Witnesses, *Hearings before the SEC in the Matter of McKesson & Robbins* (1939) pp. 45, 101, 157, 207, 257, 303, 359, 413, 464, 520, 571, 611 (testimony of 12 separate accountants). The mere certification by the management that no contingent liabilities exist will not relieve accountants from investigating a default on a contract. *In re* Mining & Dev. Corp., 1 S. E. C. 786 (1936). Possibility of liability under the Securities Act, itself, must be noted. SEC Security Act Release No. 1627, Dec. 2, 1937.

52. Comment (1940) 28 CALIF. L. REV. 369.

53. A pending amendment to the Securities Act contains an addition to § 11 which would deny any defense to an officer furnishing false or misleading information to an expert, leading to a subsequent falsity in the expert's report. S. 3985, 76th Cong., 3d Sess. (introduced May 14, 1940) § 11, p. 20. This change would also help accountants in securing the necessary information as to contingent liabilities.

54. CLARK, CODE PLEADING (1928) 421; Atkinson, *Pleading the Statute of Limitations* (1927) 36 YALE L. J. 914.

55. M. J. Hall & Co. v. Johnson, N. Y. L. J., Feb. 6, 1940, p. 589, col. 2 (Sup. Ct. N. Y. 1940); Rosenberg v. Hano, 1 C. C. H. Stock Exchange Reg. Serv. ¶ 8608, (E. D. Pa. 1938), complaint amended and new action brought, 1 C. C. H. Stock Exchange Reg. Serv. ¶ 8631 (E. D. Pa. 1940).

56. SECURITIES ACT, § 13. In no case can any action be taken more than three years after the issue of the security (§ 11) or the sale (§ 12). Neither the Securities Exchange Act, § 18, nor the Public Utilities Holding Company Act, § 16, requires that discovery be made "by the exercise of reasonable diligence."

57. Shonts v. Hirliman, 28 F. Supp. 478 (S. D. Cal., 1939).

able that the plaintiff, who alone is in a position to know the facts, be required to show when the fraud was uncovered, but the requirement that plaintiff must also show that he acted on his own initiative to discover the fraud at the earliest possible moment appears much less justifiable. The court in the *Shonts* case expressed the opinion that such a requirement would result in no undue hardship because "stockholders are in a position to inquire and to detect fraud on the part of officers of a corporation in matters of record, as they have access to its books and records."[58] Actually the decision would make any recovery under the Act extremely unlikely. Even if security purchasers were familiar with this duty superimposed upon their rights, they would not be likely to incur the expenditures of time and money involved in such a search, on the vague possibility that a given security would not be as it was represented in the prospectus or registration certificate. If the buyer were fortuitously advised of information that would normally put him on inquiry, it would seem just to require him to pursue this lead with reasonable diligence.[59] Any interpretation of the Section, however, which demands for its satisfaction "fishing expeditions" where the purchaser has no reason to believe there was any misstatement, would seem to be a device for distorting the broad liability provisions of the Act to the edge of worthlessness.[60]

A similar treatment of language in a wholly literal sense threatens to make any enforcement of Section 12 a matter of mere chance. That Section, evidently for constitutional reasons, provides liability for use of a false or misleading prospectus or oral communication only when the sale was made by "the use of any means or instruments of transportation or communication in interstate commerce, or of the mails."[61] This has been perverted to mean that each plaintiff must show that his individual purchase (rather than some portion of the security issue) was made in interstate commerce or through the mails.[62] In the latest decision on the point, it has been further held that the individual use of the interstate or postal facilities must be in transference of the false or misleading representation itself, rather than in the physical

58. *Id.* at 486.

59. Victor Oil Co. v. Drum, 184 Cal. 226, 193 Pac. 243 (1920); Original M. & M. Co. v. Casad, 210 Cal. 71, 290 Pac. 456 (1930). Persons knowing of their right to sue upon a misrepresentation under the Act should not be permitted to stay silent and take advantage of any sudden shifts in the market for the security prior to the expiration of the three year outside limit for suits.

60. The extreme position of the court apparently gets its authority from a series of decisions interpreting a California statute, which contains no mention of any constructive discovery. CAL. CODE CIV. PROC. (Deering, 1937) § 328(4). Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 Pac. 809 (1896); Nichols v. Moore, 181 Cal. 131, 183 Pac. 531 (1919).

61. SECURITIES ACT, § 12(2).

62. Farrell v. Reynolds, 11 N. Y. S. (2d) 117 (Sup. Ct. 1939), *aff'd*, 16 N. Y. S. (2d) 530 (1st Dep't, 1939), (1939) 34 ILL. L. REV. 368. The court based its decision partially upon the use of the singular of "security" in § 12, and the similar singular use of "security" in § 2(1). But see H. R. REP. No. 85, 73d Cong., 1st Sess. (1933) 22.

conveyance of the security to the buyer.[63] This interpretation would, in effect, make the Act merely an interstate "Blue Sky" law. The only oral communications encompassed would be those which happened to be made by long distance telephone, and the section's provisions would apply only to persons doing business at a distance. It seems evident that such a narrow construction of the wording will seriously impair the scope of the section, and must be abandoned if the section is to be of any real use to injured investors.

Although the measure of the "damages" prescribed by Section 12 as an alternative to rescission in those cases where plaintiff has sold the security prior to bringing suit is as yet undetermined,[64] Congress has otherwise largely removed the problem of damages from the sphere of controversy. Section 11 has adopted a modification of the common law "tort" measure, allowing recovery to the extent of the difference between the price paid and the value at the time of suit, or the price received by plaintiff on reselling the security; rescission has been established as the basic remedy for breach of Section 12. Only money damages are contemplated; demands for direct injunctive relief have been rejected.[65]

Proof of damages according to the prescribed measure is a condition precedent to any recovery by the plaintiff. Under Section 11, where plaintiff has retained the securities, the required proof involves evidence of the value of the securities at the time of suit. In holding that the value so attested by plaintiff must in all cases be the actual or "intrinsic" value of the security, rather than the market price then obtainable, the court in *Shonts v. Hirliman*[66] has further weakened the chances for recovery by plaintiffs resorting to the Act for relief. The main objection to use of the market exchange price has been that it does not necessarily reflect the true value of the security, and that the misrepresentation itself might affect the market, making the exchange price an inflated gauge of the security's true worth.[67] The Securities Act, however, contemplates only value soundings taken as of the time suit is

63. Siebenthaler v. Aircraft Acc. Corp., C. C. H. Securities Act Serv. ¶ 30,202 (W. D. Mo. 1940). Thus the fact that the securities were in this case shipped from Los Angeles to Kansas City was held immaterial.

64. It has been suggested that the measure of the "damages" should be the federal common law test of the difference between the sum paid and the value of the security on the purchase date, rather than that of § 11. (1936) 31 ILL. L. REV. 532; MCCORMICK, DAMAGES (1935) 461.

65. Deckert v. Independent Shares Corp., 27 F. Supp. 763 (E. D. Pa. 1939); *rev'd in part*, 108 F. (2d) 51 (C. C. A. 3d, 1939), *cert. granted*, 309 U. S. 648 (1940). The court refused to pass on the issue of whether plaintiffs might get later injunctive relief in aid of a judgment previously secured and otherwise unenforceable.

66. 28 F. Supp. 478 (S. D. Cal. 1939). In this case there was no market value, the defendant company having become a bankrupt. It is possible that the court would have allowed a positive market value as "some" evidence of "intrinsic value."

67. Hotaling v. Leach, 247 N. Y. 84, 159 N. E. 870 (1928); RESTATEMENT, TORTS (1938) § 549, Comment c; MCCORMICK, DAMAGES (1935) 457.

brought, when the representations' falsity will be known, and its abnormal effects upon the market counteracted.[68]

It might be difficult for plaintiffs to meet any requirement that they affirmatively show the intrinsic value of given securities: where capitalization of earnings is not available as a test of value, such a figure could only be derived at high cost[69] through a valuation of the entire wealth of the corporate defendant.[70] The fairest settlement of the problem would probably be to allow proof of the market value as plaintiffs' *prima facie* case, subject to possible later correction by defendant's showing of a different actual value.[71] This method would prove especially applicable where, due to bankruptcy, the market value has been completely extinguished and where proof of the actual value of the securities would be even further beyond the capabilities of most claimants.[72] The absence of all market value would appear to indicate, not that this test of valuation had broken down, but rather that there was no present actual value of the security as an investment; any evidence which might tend to show otherwise would be more likely to be within the reach of defendants than of the defrauded investor.

Only by reference to the effect of the decided cases upon the Securities Act can a fair appraisal be made of the amendments now being proposed to the civil liability sections of the Act. That a fear psychology may have gripped the investment banking world as a direct result of passage of the Act need not be denied; just such a deterrent effect was intended, as a brake upon the harmful excesses previously existent.[73] The possibility that further qualification of the liability might encourage a return to active investment by the more adventurous spirits in the financial community does not make such modification *per se* desirable. If the present wording is to be interpreted along the restrictive lines indicated in a majority of the decisions to date, recovery by plaintiffs will be infrequent and difficult; Congress should hesitate to weaken the remedial provisions still further merely to allay imaginary fears. On the other hand, any amendments clarifying the areas of uncertainty, without substantially impinging upon the rights of injured

68. RESTATEMENT, TORTS (1938) § 549, Comment c. Discovery of the fraud or misrepresentation may depress the market temporarily below the actual value. The chance for such an unearned profit, however, will largely be obviated if defendant is given an opportunity to bring in evidence of a differing actual value.

69. Plaintiff in the *Shonts* case figured that, counting experts' fees and all other items, the valuation would cost about $8,000. Communication to the YALE LAW JOURNAL from the plaintiff's counsel, October 19, 1939, p. 2 *ff*.

70. Hotaling v. Leach, 247 N. Y. 84, 159 N. E. 870 (1928); Davis v. Coshnear, 129 Me. 334, 151 Atl. 725 (1930); RESTATEMENT, TORTS (1939) § 911, Comment f.

71. See Legis. (1934) 48 HARV. L. REV. 107, 114. But see Comment (1934) 44 YALE L. J. 456.

72. For discussion of difficulty of valuation of bankrupt corporations, see Hotaling v. Leach, 247 N. Y. 84, 159 N. E. 870 (1928).

73. See note 5 *supra*.

investors, should not be dismissed because the unamended Act has proven less favorable to plaintiffs than might have been desired.

The most important current proposals for amendment are those that have been advanced by the Committee on Securities Laws and Regulations of the American Bar Association,[74] and the so-called "Brown Bill,"[75] already introduced into Congress at the behest of the Investment Bankers Association of America. The Bar Association has until recently advocated widespread limitation of claimants' rights provided in the Act,[76] but their representatives are now highly skeptical of the necessity for any major alterations in the civil liability provisions.[77] Their main objective now appears to be a greater uniformity between the liability sections of the various security regulation acts.[78] To the extent that the different problems involved in each act permit, such uniformity appears desirable, but it does not follow that this consonance must be sought on the level of the "less stringent" provisions of the Securities Exchange Act or the Public Utility Holding Company Act.[79] The other Bar Association proposal would extend the present immunity from liability for actions taken in conformity with a rule or regulation of the SEC[80] to include courses of action pursuant to one of the legal opinions

74. A.B.A., *Report of the Special Committee on Securities Laws and Regulations*, ADVANCE PROGRAM, 63D ANNUAL MEETING, p. 188 (1940). See also *Report of the Special Committee on Securities Laws and Regulations* (1939) 64 A.B.A. REP. 337 for a full exposition of the current proposals.

75. S. 3985, 76th Cong., 3d Sess. (introduced May 14, 1940). All action by Congress on the bill has been suspended until after Jan. 1, 1941, pending a thorough investigation by the Commission. S. E. C. Releases, June 19 and 21, 1940.

76. Amendments to §§ 11 and 13 proposed by the Special Committee on Amendments to the Securities Act of 1933 apparently were influential in the amending of the Act in 1934. 59 A.B.A. REP. 212 (1934). Amendments proposed by the Association in 1935 were similar to those now introduced by the Investment Bankers' Association. 60 A.B.A. REP. 539 (1935).

77. ". . . Generally, the committee sees no special need for relaxing the civil liability provisions in view of the experience under them, but we recognize that the provisions present a psychological, if not a legal, difficulty to the financial community . . ." A.B.A. *Report of the Special Committee on Securities Laws and Regulations*, ADVANCE PROGRAM, 63D ANNUAL MEETING, p. 193 (1940). The committee specifically disapproves of the amendments sponsored by the Investment Bankers Association.

78. SECURITIES ACT, §§ 11, 12; SECURITIES EXCHANGE ACT, §§ 9(e), 18; PUBLIC UTILITY HOLDING CO. ACT § 16, 49 STAT. 838 (1935), 15 U. S. C. § 79p (Supp. 1939); TRUST INDENTURE ACT OF 1939, § 324, 53 STAT. 1149 (1939), 15 U. S. C. § 77www (Supp. 1939).

79. *Report of the Special Committee on Securities Laws and Regulations* (1939) 64 A.B.A. REP. 337. This would mean a general adoption of the provisions of § 18 of the Securities Exchange Act, 48 STAT. 881 (1934), 15 U. S. C. § 78 r (1934). It differs from the Securities Act mainly in that it requires plaintiff to prove "reliance" upon the misrepresentation, even if he purchases within a year of the issuing date, allows recovery only where the original sale price was affected by the misrepresentation, and then only to the extent plaintiff can show that the damages resulted from the misrepresentation.

80. SECURITIES ACT, § 19(a).

occasionally made public by the General Counsel of the Commission. The fairness of such a suggestion need hardly be questioned.[81]

The various amendments offered in the "Brown Bill" are more far reaching in scope, and would restrict the provisions for civil suit to a far greater degree. An amendment exempting any solicitation to buy or any attempted disposal from the definition of "sell" in Section 2(3) of the Act would apparently wipe out any liability of brokers under the terms of Section 12.[82] As has been indicated, the injured party will often have no real chance for recovery unless he is to be given the option of proceeding directly against the broker responsible for the misrepresentation.

Section 11 has been altered in the pending bill so that plaintiff could recover only such damages as he could prove were caused by the false representation, and this sum has been limited to the difference between the price at which the securities were offered to the public, and "the amount which such securities would have been worth at the time of offering . . . if the untrue statement had been known . . ."[83] Requiring the plaintiff to show the proportion of his losses directly traceable to the defendant's misrepresentation adds one further proof problem to the impressive list claimants already must meet. The defendant, by hypothesis, will have already been shown to have made a material misstatement for which some damages are owed, and, other things being equal, it is probably better to risk having the innocent plaintiff recover somewhat more than he might otherwise be entitled to, than to have the defendant escape all penalty for his error.[84] The proposed test would further eliminate any recovery for losses due to a decline in the value of the securities after the time of purchase. To be sure, a subsequent decline in value may be due in part to sources unconnected with the misrepresentation. But as the falsity may have induced the injured party to buy the security in question rather than some other, or to hold it as an investment after the market has declined, it seems fair to allow plaintiffs to recover post-purchase losses which defendant cannot clearly allocate to other causes.[85]

81. Such a provision, however, might have the actual effect of discouraging the General Counsel of the SEC from making public any opinions under the Act.

82. The proposed language would read: "The term 'sale' or 'sell' shall include every sale or other disposition of a security . . . ; such term shall not include . . . (b) any attempt or offer to sell or otherwise dispose of, or solicitation to buy any security." S. 3985, 76th Cong., 3d Sess. (introduced May 14, 1940), § 1.

83. S. 3985, 76th Cong., 3d Sess. (introduced May 14, 1940) § 12. If by chance the price at which the security were purchased were less than the offering price, the new wording would make possible an amount of recovery in excess of the loss sustained.

84. Dodd, *Amending the Securities Act* (1935) 45 YALE L. J. 199, 221.

85. The present Act is not new or unique in allowing damages for losses sustained subsequent to purchase, due to continued retention of the security. Hotaling v. Leach, 247 N. Y. 84, 159 N. E. 870 (1928); Hindman v. First Nat. Bank, 112 Fed. 931 (C. C. A. 6th, 1902), *cert. denied,* 186 U. S. 483 (1902). The test has often been set at value as of the time of discovery. Cartwright v. Hughes, 226 Ala. 464, 147 So. 399 (1933); Munson v. Fishburn, 183 Cal. 206, 190 Pac. 808 (1920).

Section 12 would further be modified by the introduction of a requirement that sale of unregistered securities (where registration is required) or by means of a defective prospectus, must be "willful or grossly negligent" to produce liability. Thus the bill would establish as a standard in civil actions a canon developed for gauging criminality.[86] The necessity for any such change is yet to be demonstrated; no cases have, as yet, been brought under this section, and there seems to be no reason why potential sellers could not first take precautionary measure to see that the securities complied with the simple provisions of Section 5.

Section 12(2) has been split into two divisions in the proposed bill, one for securities for which a prospectus "is required to be delivered in connection with the sale," and the other, far more restrictive upon possible plaintiffs, for securities exempted from this requirement.[87] In the latter situation no statement would incur liability which did not "affect" the price at which the security was sold[88] and, where the statement did affect the market, plaintiff could still only recover those damages which he could prove were caused by his reliance upon the misstatement.[89] It is apparent that under such restrictions recovery by any plaintiff would be extremely unlikely.[90] Moreover, it has not been made clear why sellers of securities exempted from compulsory production of a prospectus should not be liable for false oral communications or for any untruths contained in a prospectus which they, by option, choose to issue.

Both of the proposed divisions adopt as a test of an untrue statement[91] one similar to that used in the Securities Exchange Act,[92] and advocated as a "better equivalent" for the wording of the Securities Act by the Bar Association in 1935.[93] The suggested advantage of the proposed change is

86. A similar amendment was unsuccessfully proposed by a committee of the Bar Association in 1934. *Report of the Special Committee on Amendments to the Securities Act of 1933* (1934) 59 A.B.A. REP. 578.

87. S. 3985, 76th Cong., 3d Sess. (introduced May 14, 1940) § 13(2), (3).

88. *Id.*, § 13(3).

89. *Ibid.* See similar suggestion in *Report of the Special Committee on Amendments to the Securities Act of 1933* (1934) 59 A.B.A. REP. 578.

90. However, the requirement for reliance before there can be any recovery seems more reasonable here than it would in Section 11. Where there is a direct sale the misrepresentation is generally individual in effect and unlike a false statement in a registration certificate, will not be likely to influence the general market price of the security. Dodd, *Amending the Securities Act* (1935) 45 YALE L. J. 199; A.B.A., *Report of the Committee on Securities Laws & Regulations, loc. cit. supra* note 74.

91. ". . . By means of a prospectus or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in the light of the circumstances under which they were made not misleading . . ." S. 3985, 76th Cong., 3d Sess. (introduced May 14, 1940) § 13, p. 23.

92. ". . . Which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact." SECURITIES EXCHANGE ACT, § 18.

93. *Report of the Special Committee on Amendments to the Securities Act of 1933* (1935) 60 A.B.A. REP. 543.

to make clear that the materiality of a misrepresentation is to be judged as of the time the statement was made, or the security purchased.[94] But this would seem the normal interpretation of the present wording, whereas the substitute would apparently absolve sellers of all liability where the statements contain omissions of a material fact, but where such omissions do not make the remaining statement false or misleading.[95]

It is clear that further general modifications of the liability provisions of the Act do not stem from any current rash of excessive recoveries; this fact alone, however, would not condemn them. The proposed I.B.A. amendments, it should be noted, are largely of the same calibre of technical restraint on suit that has been utilized by the courts, acting on their own initiative, to hinder recovery. They have left intact the basic rights provided for injured parties, but have surrounded them with barriers making actual relief for any plaintiff improbable. While the courts continue to impose limits of their own, general amendment along the same line would seem untimely; if the Securities Act is to provide a real forum for relief, such procedural obstructions must be avoided in the Act as well as in its court interpretation.

With a few exceptions, plaintiffs in civil actions have been victims of extreme legalism in the application of the Act. In limiting the scope of liability the courts have concentrated on restrictive rulings on procedure and the situs of the burden of proof to make recovery exceptional. It is probably incorrect to say that success under the Securities Act is more difficult than under the common law, but motivating much of the strict construction apparently is the idea that the Act, in permitting freer suit against a greater number of potential defendants, is in derogation of the common law and therefore should be limited to the literal meaning of its words.

Signs are not entirely lacking of a newer tendency to construe the Act more in accord with its obvious intent of providing easier recovery for injured investors. The extension of joint or class suits may help in the avoidance of any continuing procedural impediments by making greater financial resources available for suit. The present adolescent stage in the Act's development is not of indefinite duration, yet its influence on the mature Act will work to prevent any excessive recoveries. Final judgment must wait upon high court decisions of the more important points of controversy; it is to be hoped that a countervailing liberalism will prevent the civil remedies from becoming merely an impotent symbol of Congressional regard for the rights of investors.

94. *Ibid.*

95. Dodd, *Amending the Securities Act* (1935) 45 YALE L. J. 199, 216. Thus omitting the name of a dishonest promoter would not make the remaining statement untrue, but would be highly material in that, had it been divulged, many persons would not have bought the security.