Hastings Law Journal

Volume 25 | Issue 2 Article 1

1-1974

Symposium: Introduction

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Introduction

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Articles in a symposium issue of a law review pose interesting opportunities for speculation. Frequently they are the result of conscious effort on the part of editors to relate them to a central topic; *e.g.*, Volume 44 of the *St. John's Law Review* on "Conglomerate Mergers and Acquisitions"; Volume 21, Number 4 of the *Case Western Reserve Law Review* on tender offers; Volume XIII, Number 5 of the *Boston College Industrial and Commercial Law Review* dealing with mutual funds. Other symposia are connected by the simple desire to honor a distinguished contributor to legal thought; *e.g.*, Volume 1972 of the *Duke Law Review* honoring Dean Elvin R. Latty.

Of as much interest certainly are symposia which do not appear to be consciously designed to develop or explore a theme or honor a personage, but rather reflect the inclinations and proclivities of those invited to participate in the symposium. Such symposia provide insight into the priorities and concerns of those who write about a topic, the prevailing styles of analysis, and frequently the essays are indications of the direction in which the law is likely to develop.

The essays in this symposium do, indeed, provide in abundance these insights—and in so doing, perform a valuable service to those concerned with the development of thought in the field of securities law.

It is evident from the essays in this symposium that the problems of the past are much with us yet, including some basic definitional ones. After forty years of experience in defining "securities," Messrs. Hannan and Thomas have contributed significantly to the effort to develop a framework within which to determine whether a given group of rights creates something which is called a "security" in the various federal statutes; if it is, that fact triggers a complex group of duties, responsibilities and liabilities on the part of the creator or purveyor of the "security," and perhaps also activates the interest of aggressive regula-

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tory agencies in the bundle. One would imagine that in the course of four decades of judicial and administrative wrestling with the concept there would be little that is new or perplexing. That, of course, is not so, simply because the ingenuity of the promoter is inexhaustible—and so, for that matter, is the imagination of the staff of the Securities and Exchange Commission [SEC] when confronted with a new configuration that might somehow be fitted within the statutory definition of "security."

Someone has suggested that, instead of stretching the meaning of "security" in the Securities Act of 1933 and the Securities Exchange Act of 1934 to meet the new creations of promoters, perhaps Congress should create a new agency which would have regulatory and enforcement authority over "dirty tricks" regardless of the form they take. This agency would field those inflictions upon the public which somehow or other fall outside the jurisdiction of the Federal Trade Commission, the SEC and such other agencies as have concerns with protecting the individuals of the nation against being put upon. Thus it would not be necessary to engage in intricate reasoning to find that a pyramid scheme or a membership in a country club was a security, thus sharing a concept with common stock and bonds.

This notion may not be without merit in this consumer-oriented age. However, until such a notion is adopted, courts will continue to be confronted with the necessity of judging whether a particular congeries of rights constitutes a security In doing that they should be assisted by the perceptive remarks of Messrs. Hannan and Thomas who have indeed sought to relate the definitional problem to "economic reality" and "risk." This is a useful analysis.

Among the other definitional problems which continue, forty years after, to plague administrators, judges and practitioners is that of defining the limits of "public offering" as used in section 4(2) of the Securities Act of 1933. This problem, discussed ably by Messrs. Borton and Rifkind, with which securities lawyers dealt with relative confidence for so long, was suddently thrust into confusion by a series of cases that seemed to narrow the concept so much that it threatened to become useless in the context of counseling.[1] To meet this threat, as well as to respond to a long-standing yearning of the securities bar for the introduction of certainty into areas too long characterized by ambiguity and hazard, the SEC proposed Rule 146 and has, after receiving considerable comment, proposed for further comment a revised version

1. *E.g.*, SEC v. Continental Tobacco, 463 F.2d 137 (5th Cir. 1972).

adopting changes remarkably responsive to many of the comments. Both the original rule and the revised one constitute a reaffirmation of the primacy of disclosure in the federal scheme and it is probable that the final rule adopted will preserve this affirmation. Under the rule as now proposed there are established clear and unambiguous standards of disclosure which must be met if the rule is to be relied upon as the source of an exemption under section 4(2)

It is worth noting that, though the 140 Rules are generally regarded as instruments for introducing certainty into uncertain areas, they constitute significant extensions of traditional disclosure concepts. The lore before Rule 144 put little, if any, official emphasis upon the necessity of information in the market place before disposition of "restricted securities" was permitted, or before controlling persons might rely on Rule 154, now a significant quantum of disclosure is a prerequisite to reliance upon the rule. Similarly Rule 133 was totally unconcerned with disclosure in the context of an acquisition transaction (although, of course, the proxy rules and Rule 10b-5 might mandate such), now acquisition transactions must be accompanied by disclosure of an order historically mandated for public offerings of securities registered under the 1933 Act. Finally, Rule 146 formalizes the somewhat amorphous, and often neglected, mandate of the *Ralston Purina* case[2] that for there to be a proper reliance on the section 4(2) exemption offerees must be furnished information equivalent to that which would be in a registration statement.

Ms. Anderson's analysis of "The Disclosure Process in Federal Securities Regulation" is an admirable, remarkably well-researched and documented, effort to find continuous threads through what often appear to be inconsistent commission pronouncements—and her analysis may very well be valid. Her analysis is very convincing that the commission has swung from concern with protecting the proverbial "Aunt Janes" from the blandishments and worse of the city slickers to providing to the skilled analysts the raw materials from which they might deduce meaningful conclusions concerning the investment quality of securities. Often the commission has pointed in both directions at once. In this connection it is noteworthy that recently the commission on two occasions—apparently for the first times—expressly recognized that new disclosure requirements were primarily designed to provide additional useful information for the professional.[3] This has

2. SEC v. Ralston Purina Co., 346 U.S. 119 (1953).

3. Securities Act Rel. No. 5427 (Oct. 4, 1973); Securities Act Release No. 5436 (Nov. 13, 1973); Securities Act Rel. No. 5441 (Nov. 28, 1973).

not mitigated the concern of the commission for developing suitable means for properly informing and protecting the individual investor, particularly these days when protection can be lost in the verbosity and professional precision of the typical prospectus.

It is likely that the informational emphasis in disclosure will increase. In addition to the trend that is commonly called the "institutionalization of the market," there is a concomitant trend for individual investors to rely upon professionals for advice even though they retain the ultimate investment decision themselves. Thus, there is good reason to place in the forefront of disclosure the needs of the professionals. A significant portion of the commission's 1973-74 budget increase is destined to augment its capacity to examine 1934 Act reports which are of principal use to the experienced investor and the professional.

Reflective of the concern felt by corporate counsel, officers and directors as a consequence of well publicized litigation, both privately and commission originated, is the very timely, and for that matter, largely seminal, article by Bruce Mann concerning means of preventing improper securities transactions by employees. Much has been written concerning the consequences of such transactions. Far too little has been said about the means of preventing them through programs which might preclude or at least reduce their likelihood. The commission has not been indifferent to this problem. As part of the consent order terminating its injunction action against Ligget and Meyers, Inc. and its public relations director, Liggett and Meyers agreed to adopt guidelines relating to the disclosure of material, nonpublic information and the conduct of employees in connection therewith.[4] While it may be doubtful that these guidelines will be as comprehensive as those suggested by Mr. Mann, nonetheless that consent order emphasizes the timeliness of this topic.

The commission has asked for response to the suggestion that it promulgate rules with respect to insider trading.[5] At the moment of writing extensive comments have been received, but there remains unresolved the question whether it is practical, or good policy, or simply a good thing to "codify" these rules. It may well be that a better solution is the one suggested by Mr. Mann. that corporations formulate their own rules on the basis of the sources now available. which, while perhaps in some instances ambiguous, are nonetheless abundant.

Mr. Corotto has dealt clearly with an area that is relatively foreign to even many experienced securities practitioners and has warned well

4. Litigation Rel. #6214 (Nov. 2, 1973).
5. Securities Exchange Act Rel. No. 10316 (Aug. 1, 1973).

of the limitations of the section 3(a)(10) exemption. His warnings to bankruptcy courts and to practitioners of the limitations of this exemption should deter too facile a reading of the exemptive language, and alternatively, encourage those who have not been the beneficiaries of the protections intended as substitutes for the registration process to explore the possibility of securing relief.

Finally, Professor Kassouf has touched upon one of the most difficult, but important, areas in securities law today. That is the manner in which our received dogmas should be related to new concepts of investment. The provocative thoughts of Professor James H. Lorie of the University of Chicago, Professor Burton G. Malkiel of Princeton University and Professor George Benston and Henry G. Manne of the University of Rochester do not permit unquestioning obedience to the lore of the past. Economists are engaged in meaningful analyses of the investment process[6] and they are compelling a re-examination of the manner in which that process is regulated. The challenge, as Professor Kassouf points out, is not confined to federal securities law; it extends to federal banking requirements and state concepts of fiduciary duty as well. The commission is presently undertaking a comprehensive survey of option trading.[7] Out of this may come some conclusions with respect to the role of this medium of investment and it may provide as well insights into the investment process as a whole.

In sum, the essays in this symposium provide an index to the concerns of the moment. Even while economists are questioning the very foundations of the entire system constructed during the last forty years, we are still grappling with fundamental concepts such as "security" and "public offering." While this might seem somewhat irrational, it is not. While global new concepts emerge we must conduct the here-and-now business of deciding cases, punishing fraud, and protecting investors. It is dangerously tempting to become so absorbed with the moment's demands that emerging insights are ignored until they thrust themselves into consciousness with excessive vigor. Fully as dangerous is to become so enamored with the novelty of emerging ideas that the crooks go unpunished and the public unprotected.

We must retain our balance. This volume happily retains its balance.

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6. HOWE & HAMILTON, THE STOCK MARKET (1973); MALKIEL, A RANDOM WALK DOWN WALL STREET (1973); Bentson, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 AM. ECON. REV. 132 (Mar. 1972); Manne, *Sins of Commission: A New Study Challenges SEC Disclosure Policies*, 53 BARRONS (Aug. 20, 1973).

7. Securities Exchange Act Rel. No. 10490 (Nov. 14, 1973).