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# Express and Implied Civil Liability Provisions in State Blue Sky Laws

Robert L. Matia

# *Express and Implied Civil Liability Provisions in State Blue Sky Laws*

WITH THE PASSAGE of the principal federal securities legislation in the decade following the enactment of the Securities Act of 1933,[1] state regulation of the offer and sale of securities has been overshadowed and much overlooked. These state statutes, commonly known as "blue sky laws,"[2] carry criminal liabilities which can be quite severe.[3] However, enforcement of the blue sky laws is generally not left to criminal sanctions alone. The typical state securities law also provides express civil liabilities for violations of the act so that situations may occur in which an injured buyer could conceivably select his remedy from those available at common law, those under the federal acts, or those under the state blue sky laws.[4] The subject to be considered herein is the civil liability provisions in state blue sky laws. A consideration of the common law and federal statutory liabilities is beyond the scope of this treatment.[5]

Civil liabilities under the state laws can be classified into express and implied liabilities. Express civil liabilities fall into several general types. One of the most common is that which is known as a voidability provision. Under such a provision, the buyer's remedy for violation of the state act is limited to rescission of the contract of sale and a recovery of the purchase price and in some cases interest, attorneys' fees, and court costs, depending upon the provisions of the particular state act. Of the forty-five states which have some statutory provisions for civil liability resulting from a securities transaction,[6] forty-one have a voidability provision of some kind[7] with seven of these making voidability the exclusive remedy.[8]

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[1] 48 Stat. 74, as amended, 15 U.S.C. §§ 77a-aa (1964).

[2] This term apparently first came into use in Kansas "to describe legislation aimed at promoters who 'would sell building lots in the blue sky in fee simple.'" See 1 LOSS, SECURITIES REGULATION 27 (1961).

[3] For example, the Ohio criminal sanction for a violation of specifically enumerated duties is imprisonment for one to five years or a fine of not more than five thousand dollars or both. OHIO REV. CODE § 1707.99.

[4] See 3 LOSS, *op. cit. supra* note 2, at 1623.

[5] For a good discussion of these subjects, see 3 LOSS, *op. cit. supra* note 2.

[6] Delaware has no securities law of any kind. In addition, Idaho, New York, Pennsylvania, and Rhode Island do not provide express civil liabilities in their statutory scheme of securities regulation.

[7] ALA. CODE tit. 53, § 45(a) (Supp. 1963); ALASKA STAT. § 45.55.220(a) (1962); ARIZ. REV. STAT. ANN. § 44-2001 (1956); ARK. STAT. ANN. § 67-1256(a) (1966); CAL. CORP. CODE § 26100; COLO. REV. STAT. ANN. § 125-1-21(1) (1963);

It is the liability provisions of the thirty-eight states which create civil liability beyond voidability provisions on which this discussion will center.[9]

Also to be reviewed herein are the bonding provisions contained in most state securities laws. It will be seen that some of these provisions do little more than create a fund out of which judgments based on other statutory sections may be satisfied. On the other hand, some bonding provisions seem to create new liability, independent of other provisions of the securities act or the common law remedies.

Finally, the applicability of the doctrine of implied liability to the state blue sky laws will be discussed. There have been many thorough treatments of the doctrine of implied liability[10] and no consideration in depth will be given to that subject here. However, what will be examined is the language in some of the state securities acts which might prevent the application of that doctrine in this area.

## I. EXPRESS LIABILITY PROVISIONS IN STATE BLUE SKY LAWS

In the states which have comprehensive blue sky regulation, two patterns can be seen in regard to the acts leading to liability. The first pattern might be referred to as the specific versus general

CONN. GEN. STAT. ANN. § 36-312a(a) (1960); FLA. STAT. ANN. § 517.21 (1962); GA. CODE ANN. § 97-114 (Supp. 1965); HAWAII REV. LAWS § 199-16 (Supp. 1961); ILL. ANN. STAT. ch. 121½, § 137.13 (Smith-Hurd 1965); IND. STAT. ANN. § 25-873 (a) (Supp. 1965); IOWA CODE ANN. § 502.23 (1949); KAN. STAT. ANN. § 17-1268 (a) (1964); KY. REV. STAT. ANN. § 292.480(1) (1963); LA. REV. STAT. ANN. § 51:715 (1965); MD. ANN. CODE art. 32A, § 34(a) (Supp. 1965); MASS. ANN. LAWS ch. 110A, § 18 (1947); MICH. STAT. ANN. § 19.776 (410) (a) (Supp. 1965); MISS. CODE ANN. § 5374 (Supp. 1964); MO. ANN. STAT. § 409.240 (1952); MONT. REV. CODES ANN. § 15-2022 (Supp. 1965); NEB. REV. STAT. § 81-347 (1958); NEV. REV. STAT. § 90.200(1) (Supp. 1963); N.J. STAT. ANN. § 49:3-19(a) (Supp. 1965); N.M. STAT. ANN. § 48-18-31 (Supp. 1965); N.C. GEN. STAT. § 78-22 (1965); N.D. CENT. CODE § 10-04-17 (1960); OHIO REV. CODE § 1707.43; OKLA. STAT. ANN. tit. 71, § 408(a) (1965); ORE. REV. STAT. § 59.250 (1961); S.C. CODE ANN. § 62-309 (1962); TENN. CODE ANN. § 48-1645 (1964); TEX. REV. STAT. ANN. art. 581-33 (1964); UTAH CODE ANN. § 61-1-22(1) (Supp. 1965); VT. STAT. ANN. tit. 9, § 4225 (1959); VA. CODE ANN. § 13.1-522 (1964); WASH. REV. CODE ANN. § 21.20.430(1) (1961); W. VA. CODE ANN. § 3273(18) (1961); WIS. STAT. ANN. § 189.18 (1957); WYO. STAT. ANN. § 17-117.22(a) (1965).

[8] Georgia, Hawaii, Illinois, Louisiana, North Carolina, North Dakota, Wisconsin. See note 7 *supra*, for the code sections.

[9] For a discussion of voidability provisions under state securities laws see Note, *Voidability Provisions Under State Blue Sky Laws*, 17 W. RES. L. REV. 1148 (1966).

[10] See, *e.g.*, 2 LOSS, *op. cit. supra*, note 2, at 932-46; Shipman, *Two Current Questions Concerning Implied Private Rights of Action Under the Exchange Act: Authority of the Administrative Agency to Negate; Existence for Violation of Self-Regulatory Requirements*, 17 W. RES. L. REV. 925 (1966).

dichotomy. By this is meant that some of the statutes state that a violation of "any" of the requirements of the act shall result in liability[11] whereas other statutes provide that a failure to comply with specifically enumerated sections will result in liability.[12] The significance of this difference is that under the "any" statutes, even a technical violation of the act, a violation which might have no effect on the understanding of the buyer, would result in the specified liability. In some instances, therefore, a buyer who was disappointed with the financial progress of his security could utilize a technical violation of the act to rescind the contract at any time within the limitations period.

Generally, under the statutes which specifically enumerate the violations which will result in liability, the enumerated acts relate to the qualifications of the seller, the proper registration of the security, and other fundamental segments of the transaction. Thus, in light of the purpose of blue sky legislation, namely, to prevent fraud and deceit and to protect the investor from buying worthless securities or a piece of "blue sky," it would seem that the statutes which specifically enumerate the proscribed acts more nearly approach the desired result, for the "any" provision type of statute actually puts the buyer in a more favorable position than the statute presumably was intended to do.

The second pattern relates to whether liability will arise from an offer as well as from a sale. Most of the state statutes provide that any offer *or* sale in violation of the provisions listed will result in liability.[13] Others provide merely that any sale in violation of the provisions of the statute is the act for which the seller will be liable.[14] Admittedly, no liability arises unless the buyer can show that he was damaged by the seller's violation of the act. At first blush, therefore, it might seem that, since a sale would ultimately have to occur in order for a buyer to have been damaged and thus before any liability would arise, there is no substantial difference between the results under the different language. However, it is con-

[11] See, *e.g.*, ALA. CODE tit. 53, § 45(a)(1) (Supp. 1963); MO. ANN. STAT. § 409.250 (Supp. 1965).

[12] See, *e.g.*, ALASKA STAT. § 45.55.220(a) (1962); ARK. STAT. ANN. § 67-1256 (a) (1966). The Uniform Securities Act has adopted this form. See Uniform Securities Act § 410(a), found in LOSS & COWETT, BLUE SKY LAW 389 (1958) [hereinafter cited as UNIFORM ACT].

[13] See, *e.g.*, ALA. CODE tit. 53, § 45(a)(1) (Supp. 1963); OHIO REV. CODE § 1707.43 (the code states only "sale" or "contract of sale" but the definition of "sale" includes an offer).

[14] See, *e.g.*, VA. CODE ANN. § 13.1-522 (1964).

ceivable that under statutes which proscribe only selling in violation of the statute, a seller could substantially violate the act while offering the security for sale but could correct the violation before the sale was completed and thus escape liability under a strict reading of the statute. This is a desirable result where the violation was merely a technical one and did not cause any misunderstanding on the part of the buyer. But consider the case where the seller materially misrepresented in the offer of the security, but later and before the sale corrected the misrepresentation by a printed circular or in a printed contract of sale which the buyer may or may not have read. It would seem that although the seller would not have violated the letter of the law, he would have violated the spirit of the law, but yet the courts might find him not liable under the statute.

As the statutes are discussed below it will be helpful to keep in mind which of the patterns is indicated by the statute under discussion.

### *A. Uniform Securities Act*

*(1) Acts Leading to Liability.*—The liability provisions of the Uniform Securities Act have been adopted in twenty states in one form or another.[15] Under this act, liability is incurred by committing any one of eight specifically enumerated acts in the offer or sale of any security covered by the act:[16] by offering or selling in violation of the registration requirements for dealers[17] or securities,[18] by making false or misleading statements about the meaning or implications of proper registration or exemption,[19] by failing to have sales literature approved before its use,[20] by failing to distribute a prospectus to

[15] ALA. CODE tit. 53, § 45 (Supp. 1963); ALASKA STAT. § 45.55.220 (1962); ARK. STAT. ANN. § 67-1256 (1966); COLO REV. STAT. ANN. § 125-1-21 (1963); CONN. GEN. STAT. ANN. § 36-312a (1960); IND. STAT. ANN. § 25-873 (Supp. 1965); KAN. STAT. ANN. § 17-1268 (1964); KY. REV. STAT. ANN. § 292.480 (1963); MD. ANN. CODE art. 32A, § 34 (1957); MICH. STAT. ANN. § 19.776(410)(a) (Supp. 1965); MONT. REV. CODES ANN. § 15-2022 (Supp. 1965); NEV. REV. STAT. § 90.200 (Supp. 1963); N.J. STAT. ANN. § 49:3-19 (Supp. 1965); OKLA. STAT. ANN. tit. 71, § 408 (1965); S.C. CODE ANN. § 62-309 to -316 (1962); TEX. REV. CIV. STAT. ANN. art. 581-33 (1964); UTAH CODE ANN. § 61-1-22 (Supp. 1965); VA. CODE ANN. § 13.1-522 (1964); WASH. REV. CODE ANN. § 21.20.430 (1961); WYO. STAT. ANN. § 17-117.22 (1965).

[16] UNIFORM ACT § 410(a)(1).

[17] UNIFORM ACT § 201. For a discussion of the registration provisions under the Ohio Securities Act, see Note, *Registration Provisions Under the Ohio Blue Sky Laws*, 17 W. RES. L. REV. 1126 (1966).

[18] UNIFORM ACT § 301.

[19] UNIFORM ACT § 405(b).

[20] UNIFORM ACT § 403.

each offeree,[21] by failing to meet the escrow or impounding provisions of the act,[22] or by failing to use the special form of subscription or sales contract for securities registered by qualification or coordination.[23] Section 410(a) further provides that offering or selling by means of untrue statements or by an omission to state a material fact necessary in the light of the circumstances to not mislead the buyer also renders the seller liable under the act.[24]

*(2) Defenses to Liability.*—Under the Uniform Act, there are no enumerated defenses that apply specifically to the liabilities spelled out in section 410(a)(1). However, the defense of the statute of limitations would apply to these liabilities as well as the liability for fraud contained in section 410(a)(2). Section 410(e) provides that no action shall be commenced under this section more than two years after the contract of sale. In addition to this time limitation, section 410(e) contains another defense which appears to be an affirmative defense. If the plaintiff under this section failed either to accept within the prescribed time limit an offer of rescission, properly made, at a time when he owned the securities or to reject within the prescribed time limit an offer of rescission, properly made, when he no longer owned the securities, he will be unable to bring an action under this section of the Uniform Act.[25] Thus, a buyer cannot unduly profit by the seller's error if this error is brought to the attention of the buyer through an offer of rescission by the seller. Without this provision, it would seem that a buyer could ignore the seller's offer and wait to see how his acquisition was going to fare. Then if the securities did not within two years make enough financial progress to satisfy the buyer, he could file his action either for rescission or for damages if he sold the securities. However, with this provision, such an advantageous position for the buyer would arise only where he knows of the violation and

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[21] UNIFORM ACT § 304(d).

[22] UNIFORM ACT § 305(g).

[23] UNIFORM ACT § 305(h).

[24] UNIFORM ACT § 410(a)(2). This provision is based upon § 12(2) of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U.S.C. § 77*l*(2) (1964).

[25] Section 410(e) states, in pertinent part:

> No person may sue under this section (1) if the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at six percent per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within thirty days of its receipt, or (2) if the buyer received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within thirty days of its receipt.

the seller either does not know of the violation or does not make an offer of rescission.

In addition to these two general affirmative defenses to liability under sections 410(a)(1) and (2), there are two specific defenses to liability provided for in section 410(a)(2) of the Uniform Act. If the buyer knows of the untruth or omission to state a material fact (the bases of liability under part (2) of section 410(a)) then according to the terms of the section he cannot base his recovery upon this provision.[26] Thus, the buyer could not know of the untruth, as discussed in the preceding paragraph, and still recover if the shares did not make sufficient financial progress. However, what was said there still holds for the buyer who knows of a violation of one of the seven enumerated sections of the act. Second, section 410(a)(2) provides that if the seller can show lack of knowledge of or the impossibility of discovering the truth or omission if reasonable care had been exercised, he will not be liable under the provisions of this section.[27]

*(3) Persons Liable Under Section 410.*—Under the provisions of subsection (a) of section 410 of the Uniform Act, any person who offers or sells in violation of its provisions is liable under the section. In addition, however, every person who controls a seller liable under 410(a) is also liable according to section 410(b).[28] Further, if the violator is a partnership or corporation or similar business group, every partner, officer, or director and every employee of such a seller, who materially aids such seller is liable jointly and severally with and to the same extent as the seller unless these persons can also make out the same defenses as specified in the above section.[29]

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[26] Section 410(a)(2) provides as follows:

> (a) Any person who . . . (2) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission . . . .

It at first appears that this provision is based upon reliance; however, the draftsmen's comment states that the " 'by means of clause' . . . is not intended as a requirement that the buyer prove *reliance* on the untrue statement or the omission. He must show only that he *did not know of it.*"

[27] For the text of this provision, see note 26 *supra.*

[28] Section 410(b) includes both direct and indirect control.

[29] The one defense specified in this section is that the non-seller is not liable if he sustains the burden of proof "that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is

It is not clear whether the use of the word "seller" in section 410(b) was meant to exclude persons who materially aid violating offerors or whether this was merely an oversight on the part of the draftsmen. The liability defined in section 410(a) is phrased in terms of "any person who offers or sells" in violation of the provisions of that section. Section 410(b) could easily have been phrased in similar terms if the draftsmen had intended to include persons who aid violating *offerors*; the section could state that "every person who directly or indirectly controls a *person* liable under subsection (a) is also liable." Neither the official comment nor the draftsmen's comment makes any reference to this word change. It is fundamental in statutory interpretation that where different words are used, it is presumed that a different meaning was intended. Yet it is hard to believe, in view of the underlying purpose of including offerors within the provision of section 410(a), that the use of the word "seller" was intended to exclude from the coverage of section 410(b), persons who materially aid or control a violating offeror. Under such an interpretation, in the case where an offer is made in violation of the provisions of section 410(a), but the violation is corrected before the sale is made, persons who control or materially aid in the transaction would not be liable, even though there is a good chance that the buyer could have been damaged by the violative offer. It would be surprising if this were the intent of the draftsmen.

*(4) Waiver Provisions.*—The Uniform Securities Act provides simply that provisions by which a waiver of liability is attempted are void.[30] Waiver provisions of this nature could be found only in the statutes which resembled closely the Uniform Act.

### *B. The Ohio Securities Act*

Ohio has not adopted the Uniform Securities Act provisions on civil liability. It would appear that Ohio has not adopted any part of the Uniform Act; however, as to the provisions other than civil liabilities, other sections of this symposium should be consulted. The sixth and final draft of the proposed Ohio Securities Act[31] did

alleged to exist." UNIFORM ACT § 410 (b). However, by virtue of the fact that liability under this section is dependent upon the liability of the violator, if any of the defenses to liability under § 410(a) can be established, it will effectively preclude liability under this section.

[30] UNIFORM ACT § 410(g).

[31] See the *Report of Ohio State Bar Association Committee on Corporation Law and Committee on Blue Sky Law* in 1 OHIO BAR No. 42 (1929).

not contain civil liability provisions such as the present act contains. The only provision pertaining to civil liabilities was section 38 of the final draft which simply provided as follows: "This Act shall create no new civil liabilities nor limit or restrict common law liabilities for deception or fraud."[32] The committee comments indicated rather clearly that it was the opinion of the drafters that the proposed Ohio Securities Act did not and should not provide additional express liabilities. Their comments stated:

> It is not the function of a Blue Sky Law either to limit, increase or otherwise affect the civil liabilities for fraud established by general law. . . . The law of fraud and the civil liabilities which attach thereto are so clearly established in the law that it is believed that the courts will have no more difficulty in the future than they have had in the past to attach civil liabilities to persons who are found to have engaged in acts, practices or transactions which are fraudulent under the General Code or which are so defined by this act.[33]

Whether the legislature agreed with this statement of policy by the drafters cannot be determined with any reliability because of the absence of legislative history in Ohio. The only source from which legislative intent can be determined or estimated is the wording of the statutes taken against the backdrop of the legislative pattern into which the particular language in question is placed. In the case of the Ohio Securities Act of 1929, the legislature did add express civil liability provisions. The legislature added a section dealing with the civil liability of a seller for fraud,[34] and another section covering the civil liability of an adviser.[35] The voidability remedy for purchasers was added later.[36] These provisions are substantially the same today as they were when enacted.[37]

*(1) Civil Liability of Seller for Fraud.*—Section 1707.41 provides for civil liability of a very limited nature where there has been a material misrepresentation. Attesting to the fact that this section provides very limited liability is the fact that there have been no reported cases which have been brought directly under the section.

*(a) Acts Leading to Liability.*—Section 1707.41 proscribes the offering of any security for sale by means of a written or printed

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[32] *Id.* at 88.

[33] *Ibid.*

[34] 113 Ohio Laws 242 (1929).

[35] 113 Ohio Laws 243 (1929).

[36] 117 Ohio Laws H.794 (1938). For a discussion of the Ohio voidability remedy see Note, *supra* note 9.

[37] For the present provisions see OHIO REV. CODE §§ 1707.41, .42, .43.

circular, prospectus, or advertisement, which contains a material statement which is false.[38] Any person either offering a security for sale or receiving the profits therefrom shall be liable "to any person who purchased such security relying on such circular, prospectus, or advertisement, for the loss or damage sustained by such relying person by reason of the falsity of any material statement contained therein."[39] It should be noted that this section does not cover oral misrepresentations.

*(b) Persons Liable Under Section 1707.41.*—There are two classes of persons who may incur liability under this section: "any person who . . . offers any security for sale" and any person who "receives the profits accruing from such sale."[40] Thus, in the normal situation, this would include both the salesman and the broker-dealer of securities. In addition to this, however, the statute makes very specific provision for the liability of a corporation when it is the party making the sale. The section provides that whenever a corporation is *so liable*, then each director of the corporation is "likewise" liable.[41] Presumably, "likewise" liable means to the full extent of liability, for the section later provides that a director against whom a judgment was so obtained shall be subrogated to the rights of the plaintiff against the corporation and shall have the right of contribution against his fellow directors who would have been individually liable under the section.

*(c) Defenses to Liability Under Section 1707.41.*—The liabilities contained in this section will not be imposed if the person who receives the profits or the offeror establishes that "he had no knowledge of the publication thereof prior to the transaction complained of, or had just and reasonable grounds to believe such statement to be true."[42] It is further provided, however, that "lack of reasonable diligence in ascertaining the fact of such publication or the falsity of any statement contained in it shall be deemed knowledge of such publication and of the falsity of any untrue statement in it."[43] There have been no cases reported under this statute indicating what is meant by "reasonable diligence."

In addition to this defense, it can presumably be shown by way

38 OHIO REV. CODE § 1707.41.

39 *Ibid.*

40 *Ibid.*

41 Note that the italicized wording obviates the confusion resulting from the use of the word "seller" in § 410(b) of the Uniform Act. See discussion p. 1179 *supra.*

42 OHIO REV. CODE § 1707.41.

43 *Ibid.*

of defense that there was no reliance by the buyer on the publication complained of. As was noted above, one of the elements of the liability provided for under this section is that the violator is liable "to any person who purchased such security relying on such circular . . . ."[44]

Non-materiality is also a defense to an action based on section 1707.41. In order to make out liability, the plaintiff must show that he was damaged by reason of the falsity of any material statement contained in the written matter.[45]

There is one further defense available to directors. The second paragraph of section 1707.41 provides that an action brought against a director, based upon this section, must be brought within "two years after the purchase of securities by the person so damaged or after the payment of the judgment for which contribution is sought."[46] Nothing is said, however, in regard to the time within which any action must be brought against a non-director who violates this section. No cases have been reported which indicate that this was an intentional omission and that another statutory period of limitation is to be applied. That the general statute of limitations for fraud is to govern actions against non-directors is the opinion held by some securities practitioners.[47] Thus, as to non-directors, the statute of limitations would be four years.[48] If Ohio maintained an official legislative history, perhaps this question would not have to be left to speculation.

*(2) Civil Liability of Advisers.*—The Ohio Securities Act provides in section 1707.42 for the liability of persons less directly connected with the securities transaction than those described immediately above:

> Whoever, with intent to secure financial gain to himself, advises and procures any person to purchase any security, and receives any commission or reward for such advice or services without disclosing to the purchaser the fact of his agency or his interest in such sales, shall be liable to such purchaser for the amount of such purchaser's damage thereby, upon tender of such security to, and suit

[44] *Ibid.*

[45] The only Ohio example of a judicial consideration of what constitutes a material misrepresentation in the securities field was a case decided under a statute which was repealed by the 1929 Ohio Securities Act. See Citizens Banking & Savings Co. v. Spitzer, Rorick & Co., 65 Ohio App. 309, 29 N.E.2d 892 (1938).

[46] OHIO REV. CODE § 1707.41.

[47] Letter from Deputy Commissioner of Securities, Ohio Division of Securities to the Author, July 11, 1966.

[48] OHIO REV. CODE § 2305.09.

> brought against, such adviser, by such purchaser. No such suit shall be brought more than one year subsequent to such purchase.[49]

That the exact scope, meaning, and intent of this section is not clear will be seen below.

*(a) Acts Leading to Liability.*—Failure to disclose an agency or interest is the central concern of section 1707.42. Under the express language of this section, if a transaction is legal in every respect, but an agent or other person with an interest in the sale was responsible for inducing or procuring the purchaser to buy the securities and he receives "any commission or reward" for such advice without disclosing his agency or interest to the purchaser, apparently the purchaser may maintain an action for the amount of his damage "thereby." Thus, liability is based upon five elements: (i) intent to secure financial gain; (ii) advising and procuring a person to purchase a security; (iii) the receipt of a commission or reward for the giving of the advise; (iv) failure to disclose the agency or interest to the purchaser; and (v) damage to the purchaser "thereby."

The last element, damage "thereby," would seem to be a very difficult element to establish. Certainly the purchaser was not damaged merely by the fact that he did not know of the undisclosed agency or interest in the transaction. About the only situation in which it could truly be said that the purchaser was damaged "thereby" would be one in which the purchaser maintains that he would not have bought the security in question but for his reliance on what he thought was the disinterestd advice of the agent. If the buyer must, in fact, meet this difficult "but for" burden of proof, such a test makes this section less useful to an injured purchaser than it at first appears.

*(b) Persons Liable Under Section 1707.42.*—The language of this section would seem to encompass not only agents and salesmen of the seller but also persons who have a pecuniary interest in the effectuation of the sale in question. The section says "whoever . . . advises and procures . . . and receives any commission or reward for such advice or services . . ." shall be liable.[50] Whether the relationship of the adviser or procurer is found to be one of agency does not seem to be of central importance for the section makes the person liable for failure to disclose "the fact of his agency *or* his interest in such sales." If a person has any interest in the outcome of a sales negotiation by way of commission or reward and he, with intent to

[49] OHIO REV. CODE § 1707.42.

[50] *Ibid.*

gain financially, procures the purchaser without informing him of his interest, he might be held liable under this section.

*(c) Defenses to Liability Under Section 1707.42.*—As noted above, there are five elements which must be established before a recovery will be awarded under this section.[51] By way of defense, the proof that any one of these elements is lacking would negative liability under this section. In addition to this, the affirmative defense of the statute of limitations would of course be available. Section 1707.42 provides that a suit under this section must be brought within one year subsequent to the purchase.

*(3) Liability for Violations of Administrative Action.*—It is expressly provided in the act that there are to be no civil liabilities for the failure to comply with orders, requirements, rules, or regulations made by the Division of Securities.[52] This restriction on civil liability would most directly affect the liabilities under the voidability provision which incorporates by reference all the other sections of the Ohio Securities Act. There are many regulations and rulings pertaining to registration of dealers and securities but violations of these would not result in liability under the voidability section unless the section of the act upon which the regulations were based also contained the language upon which liability was being contended.

### C. *Liability Provisions in Other States not Having the Uniform Securities Act*

Excluding Ohio, there are twenty-four states which have some provision for express civil liabilities[53] but which do not follow the scheme of the Uniform Securities Act.[54] Although it would be beyond the limited scope of this article to examine in detail the liability provisions in each of these states, some of the more interesting and unique of these will be briefly treated here.

Florida, for example, provides in addition to voidability,[55] that the laws of the United States are to govern the remedies of pur-

[51] See discussion *supra* p. 1183.

[52] OHIO REV. CODE § 1707.40.

[53] Arizona, California, Florida, Iowa, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, Oregon, South Dakota, Tennessee, Vermont, West Virginia. In addition to these seventeen states, there are seven states which make voidability the exclusive remedy and thus are beyond the scope of this article: Georgia, Hawaii, Illinois, Louisiana, North Carolina, North Dakota, Wisconsin.

[54] For the states following the Uniform Act, see note 15 *supra.*

[55] Voidability is covered in FLA. STAT. ANN. § 517.21 (1962).

chasers.[56] Thus, Florida has apparently authorized a state cause of action for the liabilities specified in the federal securities acts, an action which could prove helpful where federal jurisdiction could not be obtained.[57]

In Minnesota, the only provision for civil liability, other than the bonding section,[58] is found in the section defining the period of limitations within which an action upon a sale of securities must be brought.[59] The acts leading to liability are all associated with registration of the security or the dealer.

Missouri enacted the following unique provision:

> Any person interested in securities sold in violation of any provision of this chapter may maintain in the name of the issuer an action at law or in equity for the use of the issuer against the solicitor, agent, or broker to recover all moneys in excess of twenty per cent of the proceeds . . . and not turned into the treasury of the issuer.[60]

It appears from this provision that if a sale violates the provisions of the Missouri Code, the seller or solicitor may not take more than twenty per cent of the proceeds as a commission. Apparently, if the sale does not violate any provisions, then there is no limit on the amount of the proceeds that may be retained by the seller or solicitor.

In addition to a voidability provision, West Virginia provides for additional liability where the sale was made to a bank employee or officer and a copy of the bill, confirmation, or order was not sent. Such a failure will render the salesman or dealer liable to the bank, trust company, or savings institution involved.[61]

## II. Express Remedies Under State Blue Sky Laws

### *A. The Uniform Securities Act*

The Uniform Act provides different remedies for an injured purchaser depending upon whether the security transferred in the al-

[56] Fla. Stat. Ann. § 517.23 (1962).

[57] For example, § 12 of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U.S.C. § 77*l* (1964) requires that the offer or sale be "by the use of any means or instruments of transportation or communication in interstate commerce or of the mails . . . ." See also 3 Loss, Securities Regulation 1624 (1961).

[58] Minn. Stat. Ann. § 80.13 (Supp. 1965).

[59] "In any suit . . . civil or criminal . . . it shall not be necessary to negative any of the exemptions or exceptions provided by sections 80.05 to 80.27 . . . ." Minn. Stat. Ann. § 80.25 (1946).

[60] Mo. Ann. Stat. § 409.250 (1952).

[61] W. Va. Code Ann. § 3273(12) (Supp. 1965).

legedly illegal sale is still in his possession. If it is, then his remedy is rescission under the voidability provision of the Uniform Act[62] If the plaintiff has not retained the security to the time of the action, his remedy is for damages which are equal to the amount that would have been recoverable upon tender of the security less the value of the security when sold plus six per cent interest on the difference from the date of disposition.[63] The amount that would be recoverable upon tender is the consideration paid plus six per cent interest, costs, and reasonable attorneys' fees less any income derived from the security.[64] These are the damages specified for any liability arising under section 410 of the Uniform Act.

It seems clear from the above provisions that if the complaining purchaser still owns the security, he has no choice as to his remedy. He must seek rescission. Only if he has disposed of the security does the damage formula apply. It could be argued that even the damage remedy provided by section 410 is a voidability provision in that the effect of the damage formula is to put the plaintiff in exactly the same position he would have been in had he not disposed of the security.[65] Technically speaking, however, it seems doubtful whether this should be classified as a voidability section merely because the damage formula effects a result which is identical, or nearly so, to that which would result in a rescission action.

Recovery may be had against the bond provided for in section 202(e) of the Uniform Act. Section 202(e) states that the bond shall be used to satisfy any suit brought under section 410 of the act.[66]

One other point is worthy of mention. Under the Uniform Act,

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[62] UNIFORM ACT § 410(a).

[63] *Ibid.* Section 410(a) states in pertinent part:

> Any person who . . . [commits the specified violations] is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security and any income received on it, *or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent per year from the date of disposition.* (Emphasis added.)

[64] *Ibid.*

[65] Even the official comment to § 410(a) acknowledges this. It says that the measure of damages, when the injured party cannot tender the securities upon which his action is based, "is designed to be the substantial equivalent of rescission." This official comment is found in LOSS & COWETT, BLUE SKY LAW 390 (1958).

[66] UNIFORM ACT § 202(e). The details of this bond provision are discussed *infra.*

the cause of action under section 410 survives the death of either the plaintiff or the defendant.[67]

### B. *The Ohio Securities Act*

Exactly what remedies are specified by the language of the Ohio act is not clear. Sections 1707.41 to 1707.43 each provide civil liabilities, but only section 1707.43 specifically provides a remedy for the injured purchaser.[68] Section 1707.41, for example, dealing with fraud in printed circulars or advertisements, provides that the offeror or other person profiting from the proscribed sale shall be liable "for the loss or damage sustained."[69] This is not very helpful. Section 1707.42 provides that the agent or adviser shall be liable "for the amount of such purchaser's damage thereby, upon tender of such security. . . ." There is no damage formula provided; however, since tender of the security is a prerequisite to recovery, it would seem that the purchaser might recover the total purchase price. Nothing is said about what remedy is available under section 1707.42 where the purchaser no longer owns the security and therefore cannot make tender. Consider further that the language of section 1707.43 purports to cover sales or contracts made in violation of the above section as well as section 1707.42, dealing with the civil liability of advisers. Section 1707.43 states:

> Every sale or contract for sale made in violation of *sections 1707.01 to 1707.45*, inclusive, of the Revised Code, is voidable at the election of the purchaser. . . .[70]

If the italicized language is read strictly, then all violations of the act can be remedied by resort to section 1707.43. The absence of damage formulas in sections 1707.41 and 1707.42 might be interpreted as indicating that the legislature intended the remedies in section 1707.43 to govern in all cases of civil liability. This interpretation could be difficult to sustain, however, in view of the fact that both section 1707.41 and section 1707.42 provide their own statute of limitations and that sections 1707.42 and 1707.43 require tender whereas section 1707.41 does not. If it is held that sections 1707.41 and 1707.42 do provide remedies independent of

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[67] UNIFORM ACT § 410(d).

[68] The remedy provided is rescission. For a discussion of this remedy, see Note, *Voidability Provisions Under State Blue Sky Laws*, 17 W. RES. L. REV. 1148 (1966).

[69] OHIO REV. CODE § 1707.41.

[70] OHIO REV. CODE § 1707.43. (Emphasis added.)

1707.43, then presumably the common law damage formulas would be applied.[71]

### C. *Remedies Provided in Other States*

Excluding Delaware, which has no blue sky statute, and the four additional states which have no civil liability provisions,[72] forty-one states provide the remedy of rescission in varying degrees.[73] Four states do not provide for rescission for any violation[74] and two of these states limit the remedy available to an action on the bond required of the specified persons dealing in securities.[75] Of the forty-one states providing for voidability, seven states seem to make this remedy exclusive,[76] while the other thirty-four states provide for voidability along with another remedy, most often an action on the bond for the damage sustained by virtue of the proscribed activity.[77]

Generally speaking, in states that have not adopted the civil liabilities of the Uniform Securities Act, the measure of damages is not specified in the statutes. In Arizona, for example, the amount

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[71] See generally, MCCORMICK, LAW OF DAMAGES 62-69 (1935).

[72] Idaho, New York, Pennsylvania, Rhode Island.

[73] For a listing of these states, see note 7 *supra.*

[74] Maine, Minnesota, New Hampshire, South Dakota.

[75] Maine, South Dakota. See the discussion of bond provisions at pp. 1189-93 *supra.*

[76] GA. CODE ANN. § 97-114 (Supp. 1965); HAWAII REV. LAWS § 199-16 (Supp. 1961); ILL. ANN. STAT. ch. 121½, § 137.13 (Smith-Hurd 1965); LA. REV. STAT. ANN. § 51:715 (1965); N.C. GEN. STAT. § 78-22 (1965); N.D. CENT. CODE § 10-04-17 (1960); WIS. STAT. ANN. § 189.18 (1957).

[77] The states and the statutory sections providing for the remedy other than voidability are as follows: ALA. CODE tit. 53, §§ 29(c), 45(a) (Supp. 1963); ALASKA STAT. § 45.55.220(a) (1962); ARIZ. REV. STAT. ANN. §§ 44-1943, 44-2001 (1956); ARK. STAT. ANN. § 67-1256(a) (1966); CAL. CORP. CODE §§ 25703, 26100; COLO. REV. STAT. ANN. § 125-1-21 (1963); CONN. GEN. STAT. ANN. § 36-312a (1960); FLA. STAT. ANN. §§ 517.12-.14, .23 (1962); IND. STAT. ANN. § 25-873(a) (Supp. 1965); IOWA CODE ANN. § 502.18 (1949); KAN. STAT. ANN. § 17-1268(a) (1964); KY. REV. STAT. ANN. §§ 292.330(3)(c), 292.480(1) (1963); MD. ANN. CODE art. 32A, § 34(a) (1957); MASS. ANN. LAWS ch. 110A, § 18 (1947); MICH. STAT. ANN. § 19.776 (410)(a) (Supp. 1965); MISS. CODE ANN. § 5371 (Supp. 1964); MO. ANN. STAT. § 409.250 (1952); MONT. REV. CODES ANN. § 15-2022(1) (Supp. 1965); NEB. REV. STAT. § 81-321 (1958); NEV. REV. STAT. § 90,200(1) (Supp. 1963); N. J. STAT. ANN. § 49:3-19(a) (Supp. 1965); N. M. STAT. ANN. § 48-18-20.6 (Supp. 1965); OHIO REV. CODE § 1707.41, .42; OKLA. STAT. ANN. tit. 71, § 408(a) (1965); ORE. REV. STAT. § 59-310 (1961); S. C. CODE ANN. § 62-309 (1962); TENN. CODE ANN. § 48-1624 (A)(14) (1964); TEX. REV. CIV. STAT. ANN. art. 581-33 (1964); UTAH. CODE ANN. § 61-1-22(1) (Supp. 1965); VT. STAT. ANN. tit. 9, § 4216 (1959); VA. CODE ANN. § 13.1-522(a) (1964); WASH. REV. CODE ANN. § 21.20.430(1) (1961); W. VA. CODE ANN. § 3273 (12) (Supp. 1965); WYO. STAT. ANN. § 17.117.22(a) (1965). Maine and South Dakota were omitted from this listing because they have a bond remedy only.

that can be recovered under the voidability remedy is specified, but the amount of damages that can be recovered is not specified.[78]

## III. Bond Provisions in State Blue Sky Laws

It is difficult to classify bond provisions in general as liability provisions. Some of the bond statutes do not actually create any new liabilities but rather merely provide a fund out of which judgments based on other liability provisions may be satisfied. Of the thirty-two states which have bond provisions in their securities statutes,[79] eighteen merely create a fund out of which liabilities may be paid,[80] while the other fourteen appear to create liabilities independent of any other section of the securities law.[81] Before entering into a discussion of this matter, it might be helpful to consider the general pattern of bonding provisions in the states.

### *A. Persons Required to Obtain Bond*

In almost all states having bond provisions, broker-dealers either are or may be required to obtain a bond if the net worth or minimum capital of such dealership is below a certain specified minimum.[82] In addition, other states require agents and investment

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[78] Ariz. Rev. Stat. Ann. § 44-2001 (1956).

[79] The states having no bond provisions in their securities laws are Connecticut, Georgia, Idaho, Illinois, Louisiana, Massachusetts, New Hampshire, New York, North Carolina, Ohio (provides by regulation DS-4), Pennsylvania, Rhode Island, Texas, Washington, West Virginia, Wisconsin, Wyoming. Delaware does not have a securities law.

[80] Alaska Stat. § 45.55.040 (1962); Ark. Stat. Ann. § 67-1238(e) (1966); Colo. Rev. Stat. Ann. § 125-1-3(5) (1963); Hawaii Rev. Laws § 199-11(c) (Supp. 1961); Ind. Stat. Ann. § 25-863(b) (Supp. 1965); Kan. Stat. Ann. § 17-1254 (Supp. 1965); Md. Ann. Code art. 32A, § 16e (1957); Mich. Stat. Ann. § 19.776 (202)(e) (Supp. 1965); Minn. Stat. Ann. § 80.13 (Supp. 1965); Mo. Ann. Stat. § 409.140 (Supp. 1965); Mont. Rev. Codes Ann. § 15-2006(2) (Supp. 1965); Nev. Rev. Stat. § 90.130(6) (Supp. 1963); N.J. Stat. Ann. § 49:3-10(e) (Supp. 1965); N.D. Cent. Code § 10-04-10 (Supp. 1965); Okla. Stat. Ann. tit. 71, § 202(e) (1965); S.C. Code Ann. § 62-111 (1962); Utah Code Ann. § 61-1-4 (5) (Supp. 1965); Va. Code Ann. § 13.1-505 (1964).

[81] Ala. Code tit. 53, § 29(c) (Supp. 1963); Ariz. Rev. Stat. Ann. § 44-1943 (1956); Cal. Corp. Code § 25703; Fla. Stat. Ann. §§ 517.12-.14 (1962); Iowa Code Ann. § 502.11 (Supp. 1965); Ky. Rev. Stat. Ann. § 292.330(3)(c) (1963); Me. Rev. Stat. Ann. tit. 32, § 852 (1965); Miss. Code Ann. § 5371 (Supp. 1964); Neb. Rev. Stat. § 81-321 (1958); N.M. Stat. Ann. § 48-18-20.6 (Supp. 1965); Ore. Rev. Stat. § 59-310 (1961); S.D. Code § 55.1912 (Supp. 1960); Tenn. Code Ann. § 48-1624(A)(14) (1964); Vt. Stat. Ann. tit. 9, § 4216 (1959).

[82] This minimum net worth or stated capital varies from $10,000 in many states to $100,000 in Michigan.

advisers to obtain bonds[83] or, in the alternative, allow the dealers to take out blanket bonds to cover all of the salesmen or advisers associated with them.[84] The Uniform Securities Act, for example, states that the administrator *may require* broker-dealers, agents, and investment advisers to obtain bonding from a surety, except that where the net capital of the agency or dealership making application for registration is in excess of 25,000 dollars, no bond may be required.[85] Many states have one or another variation of this scheme, but the provisions are so varied that they escape meaningful classification or categorization.[86] One of the more exceptional provisions is that of Arkansas which provides that the Commissioner *shall* require a bond for dealers and agents;[87] however, the statute provides more exceptions than the typical statute.[88] Oregon states that a dealer *must* obtain a bond.[89] Hawaii, on the other hand, provides that no bond need be obtained for applicants who are members of recognized stock or bond exchanges which have been in existence since 1926.[90]

### B. *Amount of the Bond*

There is also significant variation as to the amount of the bond that is required or may be required. Michigan leads the list of states by providing that the bond may run as high as 100,000 dollars.[91] Three of the more typical bond amounts are 5,000, 10,000, and 25,000 dollars.[92] In Iowa, no amount is specified in the bond

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[83] See, *e.g.*, Arizona, Arkansas, Colorado. For the relevant code sections, see notes 77 and 78 *supra.*

[84] See, *e.g.*, MINN. STAT. ANN. § 80.13 (Supp. 1965).

[85] UNIFORM ACT § 202(e).

[86] Even the states which have adopted the Uniform Act have not followed its bond section exactly.

[87] ARK. STAT. ANN. § 67-1238(e) (1966).

[88] The statute exempts "broker-dealers dealing exclusively in municipal or government securities; broker-dealers registered with the Securities and Exchange Commission who are also members of the National Association of Securities Dealers, or their agents registered with the National Association of Securities Dealers; or investment advisers registered with the Securities and Exchange Commission." *Ibid.*

[89] ORE. REV. STAT. § 59-310 (1961).

[90] HAWAII REV. LAWS § 199-11(C) (Supp. 1961).

[91] MICH. STAT. ANN. § 19.776 (202)(e) (Supp. 1965).

[92] See, *e.g.*, KAN. STAT. ANN. § 17-1254 (Supp. 1965) ($5,000); KY. REV. STAT. ANN. § 292.330(3)(c) (1963) (up to $10,000); ME. REV. STAT. ANN. tit. 32, § 852 (1965) (up to $10,000); MO. ANN. STAT. § 409.140 (Supp. 1965) ($5,000); N. J. STAT. ANN. § 49:3-10(e) (Supp. 1965) ($25,000); VA. CODE ANN. § 13.1-505 (1964) ($25,000).

statute.[93] The Uniform Securities Act provides that the bond may reach a maximum of 10,000 dollars and that cash or securities shall be accepted in lieu of the bond.[94] Here, as in the case of persons covered, the individual schemes of the states defy meaningful classification so the reader is advised to consult the individual provisions of the states in which he has an interest.

### C. *Statutes of Limitations for Actions on the Bond*

Most of the bonding statutes provide that an action brought against the bond must be commenced within two years after the sale or other act upon which it is based.[95] At least one state provides for a one year statute of limitations[96] and other states do not provide any period of limitation in the bonding statute.[97]

### D. *Liability on the Bond*

As was previously mentioned, in fourteen states, the bonding provisions appear to create or authorize liabilities additional to those contained in the other provisions of the act.[98] At first glance, it might appear that the Uniform Securities Act bonding section creates new liabilities: "Every bond shall provide for suit thereon by any person who has a cause of action under section 410 [the civil liabilities section] and, if the [administrator] by rule or order requires, by any person who has a cause of action not arising under this act."[99] No new civil liabilities are created by this section. Rather, the administrator is authorized to allow by rule or order that

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[93] IOWA CODE ANN. § 502.11 (Supp. 1965).

[94] UNIFORM ACT § 202(e).

[95] See, *e.g.*, ARK. STAT. ANN. § 67-1238(e) (1966); CAL. CORP. CODE § 25703.

[96] FLA. STAT. ANN. § 517.15 (1962).

[97] See ARIZ. REV. STAT. ANN. § 44-1943 (1956); HAWAII REV. LAWS § 199-11(c) (Supp. 1961); KAN. STAT. ANN. § 17-1254 (Supp. 1965); ME. REV. STAT. ANN. tit. 32, § 852 (1964); MINN. STAT. ANN. § 80.13 (Supp. 1965); MISS. CODE ANN. § 5371 (Supp. 1964); MO. ANN. STAT. § 409.140 (Supp. 1965); NEB. REV. STAT. § 81-321 (1958); ORE. REV. STAT. § 59-310 (1961); VT. STAT. ANN. tit. 9, § 4216 (1959); VA. CODE ANN. § 13.1-505 (1964). This fact is not unusual where the bond is merely a fund out of which a judgment is paid, for normally the statute of limitations is a part of the remedy section. However, confusion could arise where bond sections which create liabilities and remedies independent of the other civil liability provisions, do not contain a separate limitations period for this separate remedy. This is the case with Arizona, Maine, Mississippi, Nebraska, Oregon, and Vermont. See the statutory sections cited above.

[98] See note 81 *supra* and accompanying text.

[99] UNIFORM ACT § 202(e).

non-statutory causes of action may be satisfied out of the bond. Contrast this with the following language:

> conditioned upon a strict compliance with the provisions of this chapter, which bond shall be approved by and filed with the Commission. Any person or persons injured by a violation of the conditions of such bond or the Attorney General may bring an action in the name of the state on said bond . . . .[100]

This is the bonding provision of South Dakota and seems to create new liabilities, namely, for the noncompliance with the conditions of the bond. It should be noted, however, that South Dakota does not have any other express liability provisions. The more ambiguous situation is where the statute in question does have a liabilities section and has a bond section which could be read as creating new liabilities. Consider, for example, the following language in the Alabama Code:

> Said bond . . . shall be conditioned upon the faithful accounting of all moneys and securities of another and for the payment of any judgment rendered by a court of competent jurisdiction against such dealer or agent of such dealer, one or both, in any action at law or suit in equity in Alabama of any security. *Any original purchaser of securities from or through any such registered dealer or other person damaged by any breach in the conditions of said bond shall have a right of action upon said bond for the damage suffered thereby.*[101]

Alabama has a liabilities provision closely analogous to section 410 of the Uniform Securities Act.[102]

The official comments to section 202(e) of the Uniform Securities Act, the bond provision, state that it is "designed to avoid the frequently ambiguous provisions concerning who may sue on the bond by making those conditions of any required bond coterminous with the liability provisions of § 410 *so far as causes of action under the Act are concerned.*"[103] Thus, the only question remaining under the Uniform Act's bond provision is what suits the administrator may allow for non-statutory causes of action.[104] However, under Alabama's bond section, it appears that the italicized language could create liabilities not covered by its civil liabilities

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[100] S.D. CODE § 55.1912 (Supp. 1960).

[101] ALA. CODE tit. 53, § 29(c) (Supp. 1963). (Emphasis added.)

[102] Only the dealer is covered by the Alabama bond section. Also the section states that the bond is payable to the state and is subject to actions for fraud or for a breach of the conditions of the bond. Otherwise the sections are the same.

[103] See the official comment in LOSS & COWETT, BLUE SKY LAW 267 (1958).

[104] See note 99 *supra* and accompanying text.

section. The only way to make this determination is to compare the bond conditions to the violations defined in the liabilities section of the act. If the conditions of the bond include more than the liabilities section, obviously the bond section would create additional liability.

Thus, it can be seen that as to liability on the bond, there are three groups of states involved: those whose bond provisions provide the only civil liability provision of the securities law, those patterned after the Uniform Act where the conditions of the bond are made co-extensive with the liability provisions in the rest of the securities act, and those states where there appear to be liability provisions both in the bond section and in another section of the act. In the latter group, confusion may arise as to exactly who is entitled to sue on the bond.

## IV. Implied Liabilities Under State Blue Sky Laws

The doctrine of implied liability could be described as the doctrine whereby statutory duties, which carry only express criminal or administrative sanctions, give rise to implied civil remedies to private parties who are injured by a breach of the stated duty.[105] Much has been written on the doctrine and on its applicability under the federal securities laws;[106] therefore, there will be no discussion in depth here on the fundamentals of that doctrine. However, the question to be considered herein is whether the doctrine of implied liability has been applied to state blue sky laws, and if so, to what extent.

Before discussing the present status of the doctrine of implied liability under state blue sky laws, one word of caution should be heeded. Implied liabilities and common law liabilities are not the same. Implied liabilities arise through a breach of express statutory directives, or perhaps through a breach of rules and regulations promulgated thereunder. Common law liabilities exist irrespective of the statutory language, unless, of course, the statute specifically provides that the statutory liabilities are intended to replace and entirely supersede common law liabilities.

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[105] See generally 2 Loss, Securities Regulation 932-43 (1961).

[106] See, *e.g.*, Shipman, *Two Current Questions Concerning Implied Private Rights of Action Under the Exchange Act: Authority of the Administrative Agency to Negate; Existence for Violation of Self-Regulatory Requirements*, 17 W. Res. L. Rev. 925 (1966).

### *A. Implied Liabilities Under the Uniform Securities Act*

The civil liabilities section of the Uniform Act provides that legal and equitable actions existing at common law are preserved, but that no liabilities beyond those set out in sections 410[107] and 202(e)[108] are created by the act.[109] It is entirely clear that the draftsmen of the Uniform Act intended that the doctrine of implied liabilities should not be applied under the act. The official comment to section 410 (h) states as follows:

> The mere presence of certain specific liability provisions in a statute is no assurance that other liabilities will not be implied by the courts under the doctrine which creates a common-law tort action for violation of certain criminal statutes. . . . Notwithstanding the presence of several specific liability provisions in each of the several SEC statutes, the federal courts have implied a civil cause of action by a defrauded seller against the buyer under SEC Rule X-10B-5 [now 240.10b-5]. . . . *The "but" clause in § 410(h) is designed to assure that no comparable development is based on violation of § 101 of this Act* [fraudulent and other prohibited practices].[110]

Thus, it is certain that the doctrine of implied liabilities was to have no application under the Uniform Securities Act, if the intent of the draftsmen is to be given weight. It is interesting to note, however, that some of the states which have adopted the Uniform Act have not adopted the "but" clause of section 410(h).[111]

### *B. Implied Liabilities Under the Ohio Securities Act*

Although Ohio has not adopted the Uniform Securities Act, it does have a statutory provision resembling the "no new liabilities" clause of the Uniform Act. It provides as follows:

> Sections 1707.01 to 1707.45, inclusive, of the Revised Code create no new civil liabilities, and do not limit or restrict common law liabilities for deception or fraud other than as specified in sections 1707.41, 1707.42, and 1707.43 of the Revised Code . . . .[112]

There have been no cases found which deal with the meaning of this section. It is doubtful that the fact that it resembles the provision of the Uniform Act will be of any help, for Ohio has not

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[107] See notes 16-24 *supra* and accompanying text.

[108] See note 85 *supra* and accompanying text.

[109] UNIFORM ACT § 410(h).

[110] The official comment is found in LOSS & COWETT, *op. cit. supra* note 65 at 395. (Emphasis added.)

[111] Alabama, Kansas, Kentucky, Montana, Texas, Virginia, and Washington, which have adopted the Uniform Act, have not adopted the "but" clause of section 410 (h).

[112] OHIO REV. CODE § 1707.40.

adopted that act. Moreover, this provision has been included in the Ohio statutes since the present securities law was enacted in 1929.[113] Thus, the legislature could hardly be said to have adopted the subsequent reasoning or rationale of the draftsmen of the Uniform Act.

It is further interesting to note that the expressed view of the drafters of the present Ohio Securities Act seems to indicate an express ratification of the doctrine of implied liability. Consider the following language taken from the Report of the Ohio State Bar Association Committee on Corporation Law and Committee on Blue Sky Law:

> A Blue Sky Law is a police measure and if it sought to set up new and additional liabilities for fraud it would be found either that the courts, in interpreting the statute, would ignore the attempt to rewrite the law of fraud or would frequently find themselves in the position of being obliged to attach a civil liability to persons who were not guilty of any act other than a technical non-compliance with the statute. The law of fraud and the civil liabilities which attach thereto are so clearly established in the law that it is believed that the courts will have no more difficulty in the future than they have had in the past *to attach civil liabilities to persons who are found to have engaged in acts, practices or transactions which are fraudulent under the General Code or which are so defined by this Act.*[114]

From the above language it appears that the draftsmen of the Ohio Securities Act envisioned an act without express civil liabilities and remedies, the civil enforcement of which would be achieved by the courts attaching "civil liabilities to persons who are found to have engaged in acts, practices or transactions which are fraudulent under the General Code or which are so defined by this act." This is implied civil liability.

The significance of this language in the committee report is probably minimal because of the fact that the Ohio Legislature refused to follow the committee recommendation in this regard and instead did provide express civil liabilities under the Ohio Act.[115] It might be argued that such a specific enumeration of civil liability indicates a legislative intent that the stated remedies are to be the exclusive ones. On the other hand, the draftsmen of the Uniform Act argued that the experience under the federal statutes is clear support for the proposition that a specific enumeration of civil liabilities and remedies will not deter the courts from implying addi-

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[113] 113 Ohio Laws 216, 245 (1929).

[114] *Report of Ohio State Bar Association Committee on Corporation Law and Committee on Blue Sky Law* in 1 OHIO BAR No. 42, at 88 (1929). (Emphasis added.)

[115] See notes 34 and 35 *supra* and accompanying text.

tional civil liabilities for the breach of statutory duties.[116] And discovering legislative intent in Ohio is not made easier by the fact that there is no recorded legislative history in Ohio. Thus, one is left to glean legislative intent from the statutory language itself and the pattern of the regulatory scheme of which the specific language is but one part. Therefore, it is difficult to predict whether the doctrine of implied liability will be applied to the Ohio Securities Act.[117]

### C. *Implied Liabilities in Other States*

Among the states which have adopted major portions of the Uniform Securities Act,[118] seven states have omitted the "no new liabilities" clause of section 410(h) of the final draft.[119] It would seem that only two reasonable inferences can be drawn from the omission of the clause: either the legislatures of these states did not wish to take a position on this matter, or the legislatures meant to allow application of the doctrine of implied liabilities.

Of the states which have not adopted the Uniform Act to any considerable extent, only two states have enacted language similar to that of the "no new liabilities" clause of section 410(h).[120] In addition, the Rhode Island statutes mention that alternative remedies shall be unimpaired but the statutes say nothing about the creation or prohibition of civil liabilities.[121] Since the Rhode Island securities act contains no express civil liabilities, it is likely that the doctrine of implied liabilities will be applied.

Finally, it is interesting that only one state expressly adopts the doctrine of implied liabilities in its securities law. Nebraska statutes provide that new liabilities may be provided by implication.[122]

## V. CONCLUSION

The civil liability provisions of the non-Uniform Act states defy precise classification. Almost all have some voidability provision

[116] Such was the case under § 12 of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U.S.C. § 77*l* (1964), even though one part of § 12 contained a specific enumeration.

[117] The Deputy Commissioner of Securities, Ohio Division of Securities, stated that the Division would be guided by the draftsmen's comment, reprinted in part in the text at note 114. Letter from Deputy Commissioner of Securities, Ohio Division of Securities, to the Author, July 11, 1966.

[118] See the statutes listed at note 15 *supra.*

[119] The states are listed at note 111 *supra.*

[120] OHIO REV. CODE § 1707.40; WIS. STAT. ANN. § 189.18(7) (1957).

[121] R.I. GEN. LAWS. ANN. § 7-11-27 (1956).

[122] NEB. REV. STAT. § 81-331 (1958).

with seven states making this the exclusive remedy. Ohio also provides for voidability but in addition provides a civil remedy for fraud and a remedy against advisers with an undisclosed interest in the sale.

Most of the states have bond provisions, but these vary greatly from state to state. Some of the states have created liability, additional to that specified in the civil liabilities section, for failure to comply with the conditions of the bond, conditions which are not necessarily co-extensive with the proscriptions of the civil liabilities section.

Whether the doctrine of implied liabilities is to be applied under state securities laws is far from clear. Under the Uniform Act, the official comment to section 410(h) indicates that the drafters intended that the doctrine was not to be applied. However, some states have not adopted the "no new liabilities" language of section 410(h) of the Uniform Act.

Finally, most states expressly reserve common law remedies. Thus, in states which do not provide express civil liabilities, injured buyers, generally, should be able to rely on implied remedies and common law remedies.

At present, purchasers of securities seem well protected under most state blue sky laws. In some instances, they are too well protected, as where a purchaser may recover his purchase price or damages for a technical and non-material violation of the act when he discovers within the period of the statute of limitations that his acquisition has not fared as well as he had hoped. This preferred position could be eliminated by restricting liability to cases where the violation could have caused a material misunderstanding on the part of the buyer and to cases where the liability is necessary to enforce the registration provisions of the act.

The Uniform Act's civil liabilities and remedies are designed to return an injured purchaser to his pre-purchase position. There appears to be no attempt at punishment through civil liability. Although it is difficult to predict the future rate of adoption of the Uniform Act, if the present trend continues, it could become the law in more than half the American jurisdictions within five years. If uniformity of law among the states is a desirable end, then this trend is to be applauded.

ROBERT L. MATIA