California
Fair Political
Practices Commission

August 24, 1988

Paul La Bonte
3179 Flanagan Drive
Simi Valley, CA 93063

Re: Your Public Records Act
Request; Our File G-88-330

Dear Mr. La Bonte:

Your request for documents, made pursuant to the California Public Records Act, was received yesterday. We have conducted a search for documents of the type which you describe and have found none. The only written correspondence received by this office on the subject of a Simi Valley newsletter is the letter from your attorney, Ms. Jennifer Shaw, to which you have made reference.

If you have questions regarding this letter, I may be reached at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

Robert E. Leidigh

By: Robert E. Leidigh
Counsel, Legal Division

REL:ld:LaBonte

AUG 23 8 42 AM 88

3179 Flanagan Drive
Simi Valley, CA 93063
August 18, 1988

Ms. Jeanne Pritchard
Chief, Technical Assistance and
Analysis Division
Fair Political Practices Commission
P. O. Box 807
Sacramento, CA 95804-0807

RE: Request for Documents

Dear Ms. Pritchard:

In a recent letter to my attorney, Jennifer Shaw, you mentioned that when a person requests advice under the Political Reform Act, and related laws, policies and regulations, the request letter and the FPPC's response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

A controversy has arisen in the City of Simi Valley, concerning the publication of a newsletter by the City, at public expense, which the City Council states just "coincidentally" relates to the topic of an initiative measure on the November 8, 1988 ballot in the City. The topic is local traffic congestion. I am one of the proponents of the ballot initiative.

Please consider this letter a request, under the California Public Records Act, for copies of any correspondence to the FPPC from the City Attorney, City Manager, City Clerk, City Council Members, of Simi Valley, or any other staff member from the City of Simi Valley, or any law firm they may have retained, requesting information or advice concerning the publication of any newsletters. Similarly, please consider this letter a request, under the act, for any response by the FPPC or its staff, to such City of Simi Valley officials' requests.

Please note that there may be no such requests or responses. The City could easily be relying on the FPPC's general advice letters and ruling concerning newsletters.

Within the next few days, I will be filing a complaint with the FPPC concerning the newsletter. As a result, I would appreciate an expedited search for the advice and information requests described in this letter. If you determine that there are, or are not, any such requests and replies, would you kindly telephone me at (805) 494-2615 to give me the preliminary results of your search.

Sincerely,

Paul LaBonte

Paul La Bonte

S... search

ROBERT D. BLASIER, JR.
ROGER BROWN
JUDITH SPROUL DAVIS
STEVEN R. CROOKS
FAIR POLITICAL PRACTICES COMMISSION
1100 K Street
Sacramento, CA 95814
Telephone: (916) 322-6443

Attorneys for
Fair Political Practices Commission

BEFORE THE CALIFORNIA

FAIR POLITICAL PRACTICES COMMISSION

In the Matter of of the Investigation of alleged violations of Title 9 of the Government Code by: Assemblyman Bruce Young, et al., Respondents.	FPPC No. SI-81/07 POINTS AND AUTHORITIES IN RESPONSE TO DEMURRER TO REPORT IN SUPPORT OF FINDING OF PROBABLE CAUSE

INTRODUCTION

In the Report in Support of Finding of Probable Cause (the Report), the Enforcement Division requested the Fair Political Practices Commission's (the Commission) Executive Director to make a finding of probable cause pursuant to Government Code Section 83115.5 and 2 Cal. Adm. Code Section 18361, that, inter alia, the Respondents MICHAEL GORDON and BRUCE YOUNG violated Sections 84102(e), 84200(b) and 84305 of the Political Reform Act (the Act)[1/]. The

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[1/] The Political Reform Act, as amended, Government Code Section 81000 et seq. All statutory references are to California Government Code unless otherwise noted.

violations of those statutes alleged are: Section 84102(e) -Failure to file Statements of Organization as controlled committees (Counts 1-4), Section 84200(b) - Failure to file the required campaign statements of a controlled committee (Counts 5-14), Section 84305 - Failure to correctly identify the sender of mass mailings (Counts 25-29). The evidence supporting the alleged violations is described in the Report and incorporated herein by reference.

In their Demurrer to the Report, the Respondents contend that MICHAEL GORDON is not liable for the violations alleged in Counts 1-14 and 25-29 because the statutes violated are not applicable to him since he was not a candidate, committee, or treasurer. At the Probable Cause Conference held on January 6, 1983, the Respondents similarly contended that for the same reasons alleged in their Demurrer with respect to MICHAEL GORDON, respondent BRUCE YOUNG is not liable for the violations alleged in Counts 25-29 since he was not a committee. The Respondents' arguments as to why the statutes violated supposedly are not applicable to them.

1) The respondents had no duty under the Act to comply with the provisions violated;

2) Application of the sections of the Act violated to the respondents would be unconstitutional because the sections do not provide notice to the respondents that the sections apply to them, and because the sections are uncertain and vague.

In this response, the Enforcement Division will show:

1) Respondents are liable for the sections violated because:

(A) MICHAEL GORDON was the de facto treasurer of the committees and therefore is subject to direct duties under the Act.

(B) Both respondents voluntarily engaged in conduct regulated by the Act that created a duty for them to follow the Act's requirements and both respondents aided and abetted the treasurers and committees in causing the violations.

2) The statutes violated give fair notice of the conduct proscribed and are not uncertain or vague and therefore are consitutional.

I

BECAUSE MICHAEL GORDON WAS THE COMMITTEES' DE FACTO TREASURER, AND BY ANALOGY TO LIABILITY THEORIES OF TORT AND CRIMINAL LAW, RESPONDENTS SHOULD BE HELD LIABLE FOR THE SECTIONS VIOLATED

A. By performing the functions of a committee treasurer, and having relieved the designated treasurers of their duties under the Act, MICHAEL GORDON was the actual treasurer of the respondent committees and should be held liable for the sections violated by the committees for failure to use reasonable diligence in performance of a treasurer's duties under the Act.

Under the Act, a treasurer is required under Section 81004 to use reasonable diligence in preparation of committee campaign statements. The Act's implementing regulations at 2 Cal. Adm. Code Section 18427 provide certain steps for the treasurer to take to ensure that reasonable diligence has been used in preparation of the statements.2/

With respect to mass mailings by a committee, Section 84100 requires the treasurer to authorize committee expenditures. Therefore the treasurer has a duty to comply with the mass mailing requirements of Section 84305 when authorizing the expenditures that are made to produce a mass mailing.

The designated treasurers of the respondent committees have stated that they delegated their treasurer duties to MICHAEL GORDON and agreed with him that they would be treasurers in name only. The evidence in the report confirms this arrangement as it was MICHAEL GORDON who kept committee records, processed contributions, wrote committee expenditure checks, and prepared committee campaign

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2/ (1) Establish a system of record keeping sufficient to ensure that receipts and expenditures are recorded promptly and accurately, and sufficient to comply with regulations established by the Commission related to record keeping; (2) Either maintain the records personally or monitor such record keeping by others; (3) Take steps to ensure that all requirements of the Act concerning the receipt and expenditure of funds and the reporting of such funds are complied with; (4) Either prepare campaign statements personally or review with care the campaign statements and underlying records prepared by others; (5) Correct any inaccuracies or omissions in campaign statements of which the treasurer knows, and cause to be checked, and, if necessary, corrected, any information in campaign statements which a person of reasonable prudence would question based on all the surrounding circumstances of which the treasurer is aware or should be aware by reason of his or her duties under this regulation.

statements. These are the precise steps that Regulation Section 18427 requires a treasurer to take in exercising reasonable diligence to comply with the Act's requirements. Since he organized the committees together with BRUCE YOUNG in addition to receiving and banking the committees' contributions, MICHAEL GORDON knew or should have known that BRUCE YOUNG controlled the committees; for the most part, the treasurers were ignorant of these facts since they were really only committee workers who took no active part in committee finances or campaign statement preparation. Therefore MICHAEL GORDON was the respondent committees' actual treasurer and should be liable for the alleged violations for failure to adequately perform the duties of reasonable diligence that the Act directly imposes on the treasurer.

Since the treasurer is responsible under Section 84100 for authorizing committee expenditures, the de facto treasurer MICHAEL GORDON is liable for the mass mailing violations alleged because the mailings were paid for by a committee of which he was the actual treasurer. The evidence in the Report shows that MICHAEL GORDON contacted the candidates for whom the mailings were done, made the arrangements with typographers and printers for production of the mailings, wrote the expenditure checks to the vendors for the costs of the mailings, and had the wrong committee identified as the mailings' sender. Therefore MICHAEL GORDON is liable as the committee's treasurer for the alleged mass mailing violations.

What case law there is in other contexts of imposing liability for de facto acts, supports the Enforcement Division's position. With regard to persons holding themselves out to the public as public officers or who act as officers de facto, the courts have relied on public poilicy reasons to estop the persons from denying they are officers de jure[3].

Similar public policy considerations have been relied on by California courts numerous times when construing the intent and purpose of various statutes. The courts have adopted policies of construing statutes such that absurd applications are avoided and of interpreting a measure adopted by vote of the people in such a manner as to give effect to the intent of the voters adopting it. Ex parte Cregler 56 Cal. 2d 308 (1961), Burger v. Employees' Retirement System 101 Cal. App. 2d 700 (1951). Moreover, the spirit of the law takes precedence over the letter of the law when the two appear to be in conflict. U.S. v. Yee Ngee How 105 F. Supp. 517 (D.C. Cal. 1952).

Therefore although persons other than the actual

3/ See People ex rel. Dunn v. Bunker 70 Cal. 212 (1886) wherein the court found that the commissioner of immigration had held himself out as a state officer for purposes of collecting port duties and had to turn over to the state those fees he collected although the statute under which he collected the money was unconstitutional thus voiding his powers as a state officer for that purpose, and Buck v. City of Eureka 109 Cal. 504 (1895) where for public policy reasons, the court held that the person who had acted as the city's attorney and dealt with the public as such was the de facto city attorney although technically there was no such office because the city council had not followed the necessary procedure to create the office.

treasurer of the committees, MICHAEL GORDON, signed the committees' statements as treasurers, to hold MICHAEL GORDON blameless for violations of the Act he committed in his capacity as treasurer, would be a fraud on the people of California and a fallacious interpretation of the Act and its purposes.

B. Respondents are under an implied duty to comply with the Act's requirements by voluntarily engaging in activities regulated by the Act and are liable as principals for aiding and abetting the treasurers to commit the violations.

Since Section 91004 states that there may be either negligent or intentional violations of the Act, the principles of tort law with respect to negligence are applicable in determining who should be held liable for violations of the Act. California courts have held that a duty may arise out of a voluntary assumed relationship even though there would otherwise be none, and there is no privity of contract between the parties. The ultimate question is whether public policy dictates that a duty should exist.

In Walnut Creek Aggregates v. Testing Engineers 248 Cal. App. 2d 690 (1967), the court relied on broad public policy reasons to find that a voluntary course of action by the defendant created a duty with respect to the plaintiff. In the present case, the people of California are in the role of the plaintiff since they receive the benefit of the information required by the Act in campaign statements and mass-mailing identification. From the evidence discussed in the Report, it is evident that public policy requires that the respondents should be held liable for those campaign statement and mass mailing violations with which they are charged. The committee treasurers have stated that they delegated the treasurer's duties to MICHAEL GORDON and agreed with him that he would take all responsibility for preparation of the committee campaign statements. It was not the official committee treasurers but MICHAEL GORDON who voluntarily attempted to perform those steps in Regulation Section 18427 which are required in the exercise of reasonable diligence. Therefore, MICHAEL GORDON voluntarily performed the functions of a committee treasurer and should be held liable for the Statements of Organization and controlled committee campaign statements.

With regard to the mass mailing violations, the evidence in the Report shows that both respondents were instrumental in preparing the mass mailings and making the expenditures for production of the mailings. Consequently, they voluntarily engaged in conduct that the Act requires to be performed in a specifically described manner and therefore are under an implied duty to comply with the Act's provisions. Section 84305 does not limit liability to any particular individual but simply says "no person" when describing who is responsible for proper sender identification. The definition of person in Section 82047 is very broad including individuals or a group of persons acting in concert. Moreover, Section 84400 provides that, "the commission shall have no power to exempt any person, including any candidate or committee, from any of the requirements imposed by the provisions of this chapter." Therefore, since MICHAEL GORDON and BRUCE YOUNG voluntarily engaged in the production of mass mailings, conduct which is regulated under the Act, they should be held liable for failure to use reasonable diligence in complying with the Act's requirements with respect to sender identification of mass mailings.

In their Demurrer, respondents suggest a very narrow reading of the Act claiming that only treasurers, candidates, and elected officials have any duty under the Act to comply with the Act's requirements. In essence, respondents are thus arguing that unless an individual is in one of these three positions, they may engage in any conduct regulated by the Act with impunity thereby making the Act totally meaningless. There is no indication in Regulation Section 18401 that only those three particular classes of individuals have a duty under the Act; that section simply defines specific duties as to those individuals. Section 81003 states that the Act "should be liberally construed to accomplish its purposes." In this situation, a mere common sense approach dictates that those persons who violated the Act should be held responsible.

Regulation Section 18361(d)(4) provides that the Executive Director may find probable cause to believe a violation has occurred with respect to a respondent who committed or caused a violation. This authority to impose broad liability for violations of the Act is consistent with language in the Act itself: Section 91000(a) states "[a]ny person who knowingly or willfully violates any provision of this title is guilty of a misdemeanor" (emphasis added); Section 91004 states "[a]ny person who intentionally or negligently violates any of the reporting requirements of this act shall be liable in a civil action . . . " (emphasis added). In addition, Section 91006 specifically says that "[i]f two or more persons are responsible for any violation, they shall be jointly and severally liable."

If the reading of the Act suggested by respondents was adopted, it becomes readily apparent what aberrations could be created in the organizations of committees and campaign statement reporting. A person or persons who wished to escape liability for violations of the Act could have a minor or incompetent person sign his or her name to campaign statements as a committee's treasurer although another person did the recordkeeping, preparing of campaign statements, and deliberately violated the Act in the process. The person signing as treasurer could not be held legally responsible and therefore the enforcement provisions of the Act would be meaningless. Such a result is contrary to one of the Act's purposes in Section 81002(f) that "[a]dequate enforcement mechanisms should be provided to public officials and private citizens in order that this title will be vigorously enforced." Since persons other than the treasurer may be responsible for violations of the Act, Section 84102 requires a committee's Statement of Organization to include the name, street address, and telephone number of each person with which the committee is affiliated and of the principal officers of the committee.

With respect to respondent BRUCE YOUNG's liability for the mass mailing violations, he has acknowledged control of the committee that paid for the mailings in question and he participated in designing at least two of the mailings. The definition of a controlled committee in Section 82106 is quite broad as it includes those situations where a candidate participates in making committee expenditures and has a "significant influence on the actions or decisions of the committee." The evidence in the Report demonstrates that BRUCE YOUNG's control over the committee that paid for the mass mailings is established by his activity in regard to the mass mailings that violated the Act. The argument that a candidate or officeholder may control a committee and yet not be responsible for those actions of the committee that violate the Act, is not persuasive.

Respondents further argue that the Commission may not find that the respondents had any duties under the Act because such a finding supposedly may only be made by the courts or the Legislature. The respondents cite the case of <u>Amaya v. Home Ice, Fuel & Supply Co.</u> 59 Cal. 2d 295 (1963) for this proposition but misinterpret the issue before the court. The court was determining whether the court or the trier of fact should determine the existence of a duty. Since the existence of a duty is a question of law, the court said that it should decide if the defendant owed a duty to the plaintiff. The court in that case did not at any time consider whether an administrative agency may determine the existence of a legal duty, contrary to respondents' contention. Moreover, with respect to the Commission, the Act specifically provides in Section 83114 that the Commission may issue an opinion on a person's duties under the Act. For purposes of resolving the issue of duty in the present case, a more apropos quotation from the Amaya court is that court's quote from another case and the law review article Palsgraf Revisited 52 Mich. L. Rev. 1,15, saying "[d]uty is only a word with which we state our conclusion that there is or is not to be liability." In the present case, there hardly could be a more compelling set of facts calling for liability to be placed squarely on the respondents.

The respondents may also be held liable for the violations alleged because they aided and abetted the treasurers to commit the violations. Section 91000 provides that there may be criminal violations of the Act if any person knowingly or willfully violates the Act. Accordingly other principles of criminal law should be considered by analogy in determining liability for violations of the Act. There is no direct evidence that respondents intentionally violated the Act. However, to find that a person had the necessary intent in determining his liability for the crime committed, it is only necessary to show that he intended to engage in the conduct which constitutes the crime, and not that he intended to violate the applicable law. See 17 Cal. Jur. 3d Section 59. Therefore the criminal law principle of aiding and abetting should be considered by analogy for imposing liability on the respondents because the evidence in the Report demonstrates that they intended to engage in that conduct which the Act regulates.

Section 31 of the California Penal Code defines a "principal" in a crime as one who advises, encourages or by command compels another to commit any crime. Therefore, although a particular person may not be mentioned specifically in a statute as to liability, the person still may be found liable as a principal for the crime committed if the person aided and abetted the individual named in the statute to commit the crime.

This theory of liability has been relied on by the courts with respect to a variety of crimes. In Hutchins v. Municipal Court 61 Cal. App. 3d 77 (1976), the court found an attorney liable as a principal for a violation of Business and Professions Code Section 6152. That section makes it unlawful for a "runner" or "capper" (defined as a person who is agent for attorney in soliciting business) to solicit business for an attorney. The attorney had instructed and encouraged other persons to bring her business. The court said there was no legislative intent shown that the general rule of Penal Code Section 31 should not apply; the mere fact that the statute does not explicitly provide for punishment of the attorney did not necessarily show an affirmative legislative intent that the attorney was to go unpunished. Moreover, the court considered the fact that the attorney is likely to be the instigator or manager of the scheme and is the person who profits financially from it.[4/]

Applying this aiding and abetting theory to the facts of the present case further substantiates the finding of liability as to these respondents. The evidence in the Report shows that MICHAEL GORDON was principally responsible for preparing the committees' campaign statements and was paid by the committees for his work. Both MICHAEL GORDON and BRUCE YOUNG were responsible for producing the mass mailings that improperly identified the sender. To say that those respondents aided and abetted the treasurers in committing the violations alleged would even be an understatement as the evidence in the Report shows that those respondents wrested from the treasurers all the duties and functions which a treasurer normally performs. The respondents should be held liable for the violations of the Act that they committed.

II

THE STATUTES THAT THE RESPONDENTS VIOLATED ARE NEITHER UNCERTAIN NOR VAGUE AND THEREFORE ARE FULLY CONSTITUTIONAL

The issue of substantive due process has been addressed numerous times by both state and federal courts. The basic question in all those cases is whether or not a

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4/ See also People v. Thompson 122 Cal. App. 2d 567 (1954) wherein the court held a person not a records officer liable as a principal for violating Government Code Section 6201. That section makes a records officer liable for removing or destroying a public record. The court held the non-officer liable despite the fact that another code section provided liability for a non-officer as a lesser offense.

particular statute is worded specifically enough to inform people as to what the statute requires a person to do or not to do so as to not violate the law. The courts have pronounced various "rules" in determining a statute's sufficiency on a case by case basis. In People v. Weger 251 Cal. App. 2d 584 (1967), the court said that a statute must be sufficiently definite to give notice of the required conduct to one who would avoid the penalties. In People v. Anderson 29 Cal. App. 3d 551 (1972) the court said if an accused can reasonably understand by the terms of the statute that his conduct is prohibited, the statute is not vague.

In the present case, the statutes violated are very specific. Sections 84102(e) and 84200(b) state precisely that controlled committees must file Statements of Organization and campaign statements as such. Section 84305 and its implementing regulation at 2 Cal. Adm. Code Section 18435 discuss in detail the requirements for identifying the sender of a mass mailing. These are the statutes that define what a person must do to conform their conduct to the requirements of the law. The respondents do not claim that these statutes are vague or uncertain and yet these are the provisions the respondents are charged with violating. By the terms of the statutes, it is elemental that if a person files Statements of Organization and campaign statements or sends out mass mailings, the person is required to do so as the statute requires. In light of the rules stated in the two cases cited above, anyone reading the statutes in question would know precisely what the Act requires.

The essence of respondents' arguments of unconstitutionality is that because the statutes do not specifically name the respondents as persons to whom the statutes apply, they did not have notice that they were required to comply with the statute's requirements. There is no authority for this proposition in either state or federal case law. All the cases cited by respondents discuss vagueness and uncertainty in the context of what a statute prohibits and not to who the statute applies. Because elsewhere in the Act, specific duties are set forth for treasurers, candidates, and elected officials, the respondents conclude that no one but persons in those positions are required to comply with the Act's requirements. The respondents erroneously state in their Demurrer that the sections allegedly violated contain no reference to individuals other than treasurers, candidates, or elected officials. Actually, the sections violated relating to controlled committees refer only to committees as being required to file Statements of Organization and campaign statements. The mass mailing section simply says "any person" to describe who must comply with that section's requirements. As discussed at length in the Report, and emphasized again in this Response, MICHAEL GORDON was responsible for preparing the committees' statements assuming the duties of a treasurer, and both he and BRUCE YOUNG produced the mass mailings in question. Arguing for a construction of the Act that would permit a loophole for widespread unpunishable violations is totally without merit.

The respondents cite United States v. L. Cohen Grocery Co. 225 U.S. 81 (1921) for the proposition that the term "any person" is so vague that the statute in which it is used is unconstitutional. This is an incorrect statement of the case. The court never even considered the term "any person" for vagueness but struck down the statute as a whole for using the words "unjust" and "unreasonable" in prohibiting excessive prices for necessities during wartime. If respondents' reading of the case were accurate, thousands of state and federal statutes would also be unconstitutional for using the terms "any person" or "no person."

CONCLUSION

For the reasons discussed above, the respondents MICHAEL GORDON and BRUCE YOUNG should be held liable for those violations of the Act that they caused. Arguments for a loophole of impunity in the Act are not worthy of serious consideration because they only serve to undermine the purposes of the Act and invite further violations.

Therefore the Executive Director should dismiss respondents' Demurrer without leave to amend.

DATED: January 13, 1983

Respectfully submitted

Steven R. Crooks
Attorney for complainant
Enforcement Division
Fair Political Practices Commission

10-b

§ 78j. Manipulative and deceptive devices

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

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

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

June 6, 1934, c. 404, Title I, § 10, 48 Stat. 891.

Historical Note

Transfer of Functions. For transfer of the functions of the Securities and Exchange Commission, with certain exceptions, to the chairman of such commission, see Reorg.Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

[illegible] regulatory policies,
Securities Act of 1933, see 17 CFR 230.100 et seq.
Securities Exchange Act of 1934, see 17 CFR 240.0-1 et seq.
Information, requests, etc., see 17 CFR 200.80 et seq.

§11

Notes of Decisions

1. Generally

A prospectus relating to a security must contain, with specified exceptions, all information contained in registration statement, and, in turn, registration statement must contain certain information, including use of proceeds, estimated net proceeds, price at which security will be offered to public and any variation therefrom, and all commissions or discounts paid to underwriters directly or indirectly. Securities and Exchange Commission v. Manor Nursing Centers, Inc., C.A.N.Y.1972, 458 F.2d 1082.

2. False, inaccurate, or misleading information

Implicit in provision of this section that prospectus relating to a security contain certain information is requirement that such information be true and correct; therefore a prospectus does not meet requirements if information disclosed is materially false or misleading. Securities and Exchange Commission v. Manor Nursing Centers, Inc., C.A.N.Y.1972, 458 F.2d 1082.

A prospectus fails to comply with this section and thus violates prospectus-delivery requirement of section 77e(b)(2) of this title, even though it sets forth [illegible] information as registration statement [illegible] Id.

Lawyers are not free to ignore the commercial substance of a transaction which could obviously be misleading to stockholders and the investing public when preparing documents which will be relied upon in connection with sale of securities. Securities and Exchange Commission v. National Student Marketing Corp., D.C.D.C.1975, 402 F.Supp. 641.

3. Amendment or supplementation of prospectus

Decisions of Commission holding that registration statement need not be amended to reflect posteffective development nevertheless recognize that prospectus must be amended or supplemented in some manner to reflect such changes. Securities and Exchange Commission v. Manor Nursing Centers, Inc., C.A.N.Y. 1972, 458 F.2d 1082.

Assuming that prospectus relating to public stock offering spoke only as of the effective date of registration statement and that prospectus contained no false or misleading statements as of effective date, corporation and its principals were nevertheless under a duty to amend or supplement prospectus to reflect posteffective developments, and their failure to do so operated to strip prospectus of compliance with this section and operated to violate prospectus-delivery requirement of section 77e(b)(2) of this title. Id.

4. Injunction

Commission was entitled to preliminary injunction to enjoin corporation and others from engaging in acts and practices violating this subchapter and Securities Exchange Act section 78a et seq. of this title, in sale of corporation's stock, where prospectus used in sale of stock did not meet requirements of this subchapter, and investors had been induced to purchase stock by misrepresentations and misstatements. Securities and Exchange Commission v. North Am. Finance Co., D.C.Ariz.1959, 214 F.Supp. 197.

§ 77k. Civil liabilities on account of false registration statement

Persons possessing cause of action; persons liable

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material

fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

Persons exempt from liability upon proof of issues

(b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, 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 (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

May 27, 1933, c. 38, Title I, § 12, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 9, 68 Stat. 686.

Historical Note

1954 Amendment. Act Aug. 10, 1954 inserted in pars. (1) and (2) "offers or" preceding "sells".

Effective Date of 1954 Amendment. Amendment effective 60 days after Aug. 10, 1954, see section 501 of Act Aug. 10, 1954, set out as an Effective Date of 1954 Amendment note under section 77b of this title.

Legislative History. For legislative history and purpose of Act Aug. 10, 1954, see 1954 U.S.Code Cong. and Adm.News, p. 2973.

Cross References

Information and documents to determine eligibility of indenture trustee and analysis of indenture, section as inapplicable to, see section 77eee of this title.

Liability of controlling persons under this section, see section 77o of this title.

Limitation of actions, see section 77m of this title.

Federal Rules of Civil Procedure

One form of action, see rule 2, Title 28, Judiciary and Judicial Procedure.

Library References

Securities Regulation ⚿103, 149, 151. C.J.S. Securities Regulation §§ 96, 98, 152, 152, 157.

Notes of Decisions

§12(2)

from stock purchases made in reliance upon a false and misleading registration statement, motion to require stockholders to post $50,000 security for costs would be denied where defendants did not sufficiently establish that they could not have foreseen downturn in corporation's business which formed the basis for the action and thus were unable to show that plaintiff's complaint was obviously without merit. Id.

Two basic elements of this section relating to posting of undertaking to cover costs of suit under this subchapter are that matter is within proper discretion of the court and that for motion to succeed defendant must demonstrate that suit is without merit. General Inv. Co. of Conn. v. Ackerman, D.C.N.Y.1964, 37 F.R.D. 38.

Defendants, sued by investment companies under this section for alleged misrepresentations which induced purchase of securities, failed to show suit was of a frivolous nature and their motion to require posting of bond to cover costs of suit, including reasonable attorneys' fees, was denied. Id.

Where affidavits of plaintiff stockholders in action against corporation under this subchapter based on alleged misstatements or omission in registration statement in connection with issuance of convertible preferred stock did not dispel notion that plaintiffs knew of alleged misleading statements before time alleged in complaint, plaintiffs would be required to file security. Fischman v. Raytheon Mfg. Co., D.C.N.Y.1949, 9 F.R.D. 707.

85. Findings

An award of attorney's fees against plaintiff whose action against a broker based on violations of the federal securities law was dismissed with prejudice could not be upheld in absence of findings of fact and conclusions of law with respect to frivolity of the complaint. Klein v. Shields & Co., C.A.N.Y.1972, 470 F.2d 1344.

In view of district court's failure to set down its findings of fact and conclusions of law and to specifically make a finding as to whether suit against defendants for alleged violations of this subchapter, relative to registration and misstatement or omission of material fact was without merit, court of appeals could not determine whether district court's award of an attorney's fee to one of the defendants after a voluntary dismissal of suit was proper. Oil & Gas Income, Inc. v. Woods Exploration & Producing Co., C.A.La.1966, 362 F.2d 309.

86. Issues reviewable

Orders denying applications for security are appealable when court considered itself without power to give requested relief. Donlon Industries, Inc. v. Forte, C.A.N.Y.1968, 402 F.2d 935.

Orders granting applications for security are appealable when appeal challenges court's power. Id.

Stockholders appealing from order dismissing complaint for losses arising out of alleged untruthful statements in and fraudulent conduct in use of prospectus or registration statement could challenge validity of requirement of bond as condition of repleading, since failure to comply with condition led to the final order of dismissal. Fischman v. Raytheon Mfg. Co., C.A.N.Y.1951, 188 F.2d 783.

Where complaint containing two counts set forth only one claim for relief, based in part on the common law and in part on this section and section 77o of this title, neither an order granting motion to dismiss one count nor judgment dismissing such count leaving the other pending would be an appealable "final decision" of the district court. Wright v. Gibson, C.C.A.Cal.1942, 128 F.2d 865.

87. Reversal

In view of erroneous determinations of class action issues as well as fraud issue, reviewing court was constrained to reverse trial court's orders dismissing actions with prejudice after plaintiffs had refused to accept settlements proffered by defendants. Williams v. Sinclair, C.A.Cal.1975, 529 F.2d 1383, certiorari denied 96 S.Ct. 2651, 426 U.S. 936, 49 L.Ed.2d 388.

§ 77l. Civil liabilities arising in connection with prospectuses and communications

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph

General regulatory policies,

Securities Act of 1933, see 17 CFR 230.100 et seq.

Securities Exchange Act of 1934, see 17 CFR 240.0–1 et seq.

Information, requests, etc., see 17 CFR 200.80 et seq.

§11

Notes of Decisions

1. Generally

A prospectus relating to a security must contain, with specified exceptions, all information contained in registration statement, and, in turn, registration statement must contain certain information, including use of proceeds, estimated net proceeds, price at which security will be offered to public and any variation therefrom, and all commissions or discounts paid to underwriters directly or indirectly. Securities and Exchange Commission v. Manor Nursing Centers, Inc., C.A.N.Y.1972, 458 F.2d 1082.

2. False, inaccurate, or misleading information

Implicit in provision of this section that prospectus relating to a security contain certain information is requirement that such information be true and correct; therefore a prospectus does not meet requirement if information disclosed is materially false or misleading. Securities and Exchange Commission v. Manor Nursing Centers, Inc., C.A.N.Y.1972, 458 F.2d 1082.

A prospectus fails to comply with this section and, thus, violates prospectus-delivery requirement of section 77e(b) (2) of this title, even though it sets forth same information as registration statement, if information is inaccurate or incomplete. Id.

Lawyers are not free to ignore the commercial substance of a transaction which could obviously be misleading to stockholders and the investing public when preparing documents which will be relied upon in connection with sale of securities. Securities and Exchange Commission v. National Student Marketing Corp., D.C.D.C.1975, 402 F.Supp. 641.

3. Amendment or supplementation of prospectus

Decisions of Commission holding that registration statement need not be amended to reflect posteffective development nevertheless recognize that prospectus must be amended or supplemented in some manner to reflect such changes. Securities and Exchange Commission v. Manor Nursing Centers, Inc., C.A.N.Y. 1972, 458 F.2d 1082.

Assuming that prospectus relating to public stock offering spoke only as of the effective date of registration statement and that prospectus contained no false or misleading statements as of effective date, corporation and its principals were nevertheless under a duty to amend or supplement prospectus to reflect posteffective developments, and their failure to do so operated to strip prospectus of compliance with this section and operated to violate prospectus-delivery requirement of section 77e(b) (2) of this title. Id.

4. Injunction

Commission was entitled to preliminary injunction to enjoin corporation and others from engaging in acts and practices violating this subchapter and Securities Exchange Act, section 78a et seq. of this title, in sale of corporation's stock, where prospects used in sale of stock did not meet requirements of this subchapter, and investors had been induced to purchase stock by misrepresentations and misstatements. Securities and Exchange Commission v. North Am. Finance Co., D.C.Ariz.1950, 214 F.Supp. 197.

§ 77k. Civil liabilities on account of false registration statement

Persons possessing cause of action; persons liable

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material

fact or omitted to state a material fact [illegible] or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

Persons exempt from liability upon proof of issues

(b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

General regulatory policies,
Securities Act of 1933, see 17 CFR 230.100 et seq.
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§11

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(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

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31(c)

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Where affidavits of plaintiff stockholders in action against corporation under this subchapter based on alleged misstatements or omission in registration statement in connection with issuance of convertible preferred stock did not dispel notion that plaintiffs knew of alleged misleading statements before time alleged in complaint, plaintiffs would be required to file security. Fischman v. Raytheon Mfg. Co., D.C.N.Y.1949, 9 F.R.D. 707.

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Where complaint containing two counts set forth only one claim for relief, based in part on the common law and in part on this section and section 77o of this title, neither an order granting motion to dismiss one count nor judgment dismissing such count leaving the other pending would be an appealable "final decision" of the district court. Wright v. Gibson, C.C.A.Cal.1942, 128 F.2d 865.

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§ 77l. Civil liabilities arising in connection with prospectuses and communications

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph

(2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, 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 (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

May 27, 1933, c. 38, Title I, § 12, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 9, 68 Stat. 686.

Historical Note

1954 Amendment. Act Aug. 10, 1954 inserted in pars. (1) and (2) "offers or" preceding "sells".

Effective Date of 1954 Amendment. Amendment effective 60 days after Aug. 10, 1954, see section 501 of Act Aug. 10, 1954, set out as an Effective Date of 1954 Amendment note under section 77b of this title.

Legislative History. For legislative history and purpose of Act Aug. 10, 1954, see 1954 U.S.Code Cong. and Adm.News, p. 2973.

Cross References

Information and documents to determine eligibility of indenture trustee and analysis of indenture, section as inapplicable to, see section 77eee of this title.
Liability of controlling persons under this section, see section 77o of this title.
Limitation of actions, see section 77m of this title.

Federal Rules of Civil Procedure

One form of action, see rule 2, Title 28, Judiciary and Judicial Procedure.

Library References

Securities Regulation ⇐=263, 146, 151. C.J.S. Securities Regulation §§ 96, 99, 152, 152, 157.

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Id. at 273 (emphasis added).

See also Lorber v. Beebe, 407 F.Supp. 279, 286 (S.D.N.Y.1975) ("[A] plaintiff, in order to have a valid § 11 cause of action, must plead and prove that his stock was issued pursuant to the particular registration statement alleged to be defective."); *Unicorn Field, Inc. v. Cannon Group, Inc.*, 60 F.R.D. 217, 226 (S.D.N.Y.1973). This Court concurs fully with Judge Friendly's conclusions. If plaintiff is to state a cause of action under section 11, he must allege that he purchased new stock. Alleging or proving that the stock, purchased in the open market, might have been issued pursuant to the registration statement does not meet this requirement. *See Lorber v. Beebe, supra*, 407 F.Supp. at 287 ("[I]t is insufficient that stock 'might' have been issued pursuant to a defective statement."). For this reason alone, the section 11 claim must be dismissed. Even apart from this, plaintiff can only state a cause of action under section 11 against certain defendants.

1. Officers and Directors.

[7] It is undisputed that Memorex's directors bear potential section 11 liability whether or not they signed the registration statement. But the same does not hold true of officers. Section 6(a) of the 1933 Act, 15 U.S.C. § 77f, requires that an issuer's principal executive officer, its principal financial officer, and its principal accounting officer sign a registration statement. Memorex contends that only two of its officers who were not also directors signed the registration statement. Memorandum of Points and Authorities in Support of Motion to Dismiss at 6 (filed Oct. 1, 1978). Direct liability under section 11 is limited to these two officers and to the directors. The nonsigning officers cannot be held liable under section 11. *See In re Gap Stores Securities Litigation*, 457 F.Supp. 1135, 1143 (N.D.Cal.1978) (section 11 liability "is limited to persons who are signators of the registration statement, directors or partners of the issuer, experts named as preparing or certifying a portion of the registration statement, or underwriters with respect to the issue").

[8] Plaintiff asserts that he can state a section 11 claim against the nonsigning officers under a section 15 "controlling person" theory. As will be discussed below, plaintiff has not adequately alleged any Section 15 claim. But even if he had, Section 15 does not make control persons directly liable under section 11.

Relying on *In re Caesars Palace Securities Litigation*, 360 F.Supp. 366, 384 (S.D.N.Y. 1973), plaintiff also suggests that the nonsigning officers can be held liable under section 11 for aiding and abetting other wrongdoers. In that case, the court did permit co-conspirator and aider and abettor liability under section 11. This Court declines, however, to follow what it regards as a minority position. Judge Lucas' reasoning in *In re Equity Funding Corp. of America Securities Litigation*, 416 F.Supp. 161 (C.D. Cal. 1976), is more persuasive:

> There are other limitations on the plaintiffs' aider and abettor claims. Most of the statutes on which plaintiffs base these claims specifically limit the categories of persons that can be held liable under those statutes . . . This court is of the opinion that *where a statute specifically limits those who may be held liable for the conduct described by the statute, the courts cannot extend liability, under a theory of aiding and abetting, to those who do not fall within the categories of potential defendants described by the statute. To impose such liability would circumvent the express intent of Congress in enacting these statutes that proscribe narrowly defined conduct and allow relief from precisely defined parties.*

Id. at 1[illegible]1 (emphasis added).

To sanction a theory of aiding and abetting would be to essentially gut the statutory definitions of meaning. Such a theory is not novel. If Congress had intended that this theory apply to section 11, it would have so stated either in the statute or in the legislative history. Because it did not do so, this Court will not move beyond the clear and apparent meaning of the statutory formulation.

2. *Accountants.*

[9] The accountants cannot be held liable under section 11 as the complaint is drafted. The language of that section plainly states that an accountant may be sued *only* with respect to that part of a registration statement "which purports to have been prepared or certified by him." 15 U.S.C. § 77k(a)(4) (1976). Thus, even if part of a registration statement is misleading, there is no accountant liability unless the misleading data can be expressly attributed to the accountant. *See, e. g., Grimm v. Whitney-Fildago Seafoods, Inc.*, [1977–78 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 96,029, at 91,608–09 (S.D.N.Y. 1973).

[10] As discussed above, the accountants are named in the registration statement as having prepared or certified only the consolidated financial statements for the years 1974 through 1977. The complaint when liberally construed, challenges the 1978 financial information. The registration statement prominently labels all financial statements or summaries of operations for 1978 as "unaudited." [15] Because of this, the accountants can bear no section 11 liability for any misstatement of the 1978 financial data.

Plaintiff contends that he has alleged that the audited statements are misleading as well. As discussed above, this bare allegation cannot state a claim under section 11. More significant, however, is the argument that

> The accountants' potential liability under § 11 also arises from the fact that they were involved in the preparation and review of the unaudited financial statements of the company for the six months ended June 30, 1978. In this regard, they provided "cold comfort" letters and other reports and valuations to the underwriters (and most likely to other defendants herein) which were used "in connection with the registration statement."

Plaintiff's Memorandum at 31–32.

This argument is flawed because section 11(a)(4) *limits* liability. Because the accountants are not "named as" having prepared the allegedly misleading portions of the registration statement, their participation in the preparation of the misleading figures is irrelevant to section 11.

Plaintiff's speculation regarding any "cold comfort" letter is equally unavailing. Such speculation need not of course be considered, but even if plaintiff had properly raised the point, he has no standing to base a section 11 claim on a letter to the underwriters. *See, e. g., Escott v. BarChris Constr. Corp.*, 283 F.Supp. 643, 698 (S.D.N.Y. 1968) ("Plaintiffs may not take advantage of any undertakings or misrepresentations in this letter. . . . [T]hat is a matter which relates only to the crossclaims which defendants have asserted against each other."); *Grimm v. Whitney-Fildago Seafoods, Inc., supra* at 91,609.

Contrary to the assertion that "Deloitte, Haskins & Sells' participation in the preparation of these statements is a question of fact." (Plaintiff's Memorandum at 33), this Court concludes as a matter of law that "an independent accountant's liability under section 11 is limited to those figures which he certifies." *Id.* at 91,608. The *only* question is whether the accountants are "*named* as having prepared or certified any part of the registration statement." 15 U.S.C. § 77k(a)(4) (emphasis added). The accountants' potential section 11 liability is limited to properly identified misleading statements in the certified financial data included in the registration statement.[16]

15. *See* Amended Registration Statement at 6 ("The Consolidated Statements of Operations for the three months ended March 31, 1978, and 1977 have not been examined by independent certified public accountants").

16. On December 26, 1979, the Securities and Exchange Commission adopted a rule providing that a report prepared or certified by an accountant within the meaning of section 11 of the 1933 Act shall *not* include a report by an independent accountant on a review of unaudited interim financial information, thereby excluding accountants issuing such reports from section 11(a) liability. The SEC noted that its new rule was consistent with existing case law. "Under existing case law, Section 11(a) liability . . . an accountant who has consented to being

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was proposed in December 1971. Markizon discussed with Birkenmeyer whether the stock was restricted and concluded that AF should not buy because he did not trust the legal opinions that had been already rendered on the question.

(3) Markizon sent a newspaper clipping to AF outside counsel, which stated that a certain broker-dealer had been enjoined from trading in several securities, including those of Oceanography.

(4) On December 6, 1972, AF sold its Oceanography holdings at nearly a total loss.

AF responded to these factual assertions with an affidavit from Alan Markizon. He swore that Randolph made all investment decisions for AF until his departure in June 1972. Not until February or March of 1973 did he (Markizon) first become aware of improprieties in relation to AF's portfolio stocks. He said that the Cantor transaction was cancelled because he was unwilling to give the hold harmless letter. There was no discussion of the affairs or securities of Oceanography. The Birkenmeyer transaction was cancelled because he believed AF's position in Oceanography was sufficient. He explained the newspaper clipping sent to AF as unrelated to AF's Oceanography holdings.

We have held that the question when fraud is discovered is for the trier of fact. *Briskin v. Ernst & Ernst*, 589 F.2d 1363 (9th Cir. 1978); *Hilton v. Mumaw*, 522 F.2d 588 (9th Cir. 1975). *Cf. Ohio v. Peterson*, 651 F.2d 687 (10th Cir. 1981) (because tolling is equitable doctrine, judge may decide).

[4, 5] Because our precedent dictates that the question of notice of fraud is for the trier of fact, the party seeking summary disposition has an extremely difficult burden to show that there exists no issue of material fact regarding notice. With this in mind, viewing Jones' submissions in a light most favorable to AF, and assuming AF's submissions to be true, we find that Jones has not clearly shown that Markizon or others at AF were put on notice of the alleged misrepresentation that the Oceanography shares were unrestricted.

Markizon's letter to Cantor may be read as applying only to the purchase from Servicios Mundiales. Refusal of the Birkenmeyer purchase may be explained by the investment decision that AF held a sufficient amount of Oceanography. The newspaper clipping does appear unrelated, and the decline in the stock's value may be explained by mismanagement, economic decline, etc. *See Briskin v. Ernst & Ernst*, 589 F.2d at 1368.

Though it is our prerogative to affirm summary judgment on grounds other than those used by the trial court, we decline to do so here. We turn to Jones' assertion that he cannot be liable under § 12(2) because he was not a "seller."

[6] 2. *Section 12(2) Sellers.* The meaning of "seller" for purposes of § 12 has been judicially expanded beyond the person who transfers title to include "participants" in the transaction. The test is whether the injury to the plaintiff flowed directly and proximately from the actions of the defendant.[3] *SEC v. Murphy*, 626 F.2d 633, 650 (9th Cir. 1980); *Pharo v. Smith*, 621 F.2d 656, *rehrg. granted*, 625 F.2d 1226 (5th Cir. 1980); *Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680, 692–93 (5th Cir. 1971).

AF argues that Jones' position as an "agent" of Oceanography was sufficient to make him directly liable as a "seller." In this position he planned and effectuated the transaction. In the alternative, AF argues that Jones is at least liable under the section as a coconspirator or as an aider and abettor of primary violators. Because we believe there exists an issue of material fact regarding the extent of Jones' participation in the transaction, we do not consider the latter theories of liability.[4]

3. Note that the broad reading of "seller" may be in some doubt in light of recent Supreme Court cases [illegible] strict [illegible] construction [illegible] and reject the expansion [illegible] nal theories. *See Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301 at 1311 n.12 (9th Cir. 1982).

4. Though some courts have applied coconspira[illegible] terms of § 10(b) and Rule

We do not believe that on this record the district court could rule as a matter of law that Jones was not a "seller" within the meaning of § 12(2). The extent of his relationship with Oceanography is not clear.

There is disagreement about his participation in negotiations between Oceanography and ICA concerning the defaulted debenture as well as about the degree and purpose of his participation in the final arrangements for the sale of the ICA shares to MacIntyre. Nor is it clear what role Jones played in the decision that the stock issued to ICA should not bear a restrictive legend.

Material issues of fact remain regarding the extent of his participation in the transaction as a whole. We reverse summary judgment on the § 12(2) claim and remand for hearing of the evidence.

II. *Exchange Act Violations*

AF asserts that Jones is liable for violation of § 10(b) of the Exchange Act and Rule 10b-5 thereunder. On appeal of the summary judgment for Jones, AF argues that there is a material issue of fact regarding Jones' scienter for purposes of direct, coconspirator, or aider and abettor liability under the section and rule. We agree.

We have set out the provisions of § 10(b) and Rule 10b-5 in our discussion of the Ernst & Ernst part of this litigation. *See Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d at 1301 (9th Cir. 1982). There we discussed the scienter requirement of *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976), and the possible existence of secondary liability under the section and rule. *See Admiralty Fund, supra*, 677 F.2d at 1311 n.12.

[7] We have said that when intent is at issue, the court should be cautious in granting summary judgment. *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1220 (9th Cir. 1980). In such a case, the moving party bears a heavier burden of showing that there exists no genuine issue of material fact.

[8] Here Jones offered neither affidavits or other proof that he did not know of the alleged fraud. He argued only that scienter had been inadequately pleaded. This was insufficient to meet his burden.[5] Although his motion relied generally upon pleadings, depositions, and other documents on file, he failed to argue that these established as a matter of law that he lacked scienter sufficient for some violation of the securities laws.

The evidence does not show that AF could not prove a violation of the securities laws. It does show that Jones actively par-

10b-5, see e.g., Pashley v. Susquehanna Corp., 780 F.2d 202 (5th Cir.), cert. denied, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 470 (1967); Texas Continental Life Ins. Co. v. Dunne, 307 F.2d 242 (6th Cir. 1962); Kardon v. National Gypsum Co., 69 F.Supp. 512 (E.D.Pa.1946), it has not been applied in § 12(2). The section has been read expansively, however, to impose liability on aiders and abettors. See, e.g., In re Caesar's Palace Securities Litigation, 360 F.Supp. 366 (S.D.N.Y. 1973).

We note little difference between the scope of liability under an aider and abettor theory and that under the participant theory relied upon in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980). We note the doubtful nature of both in light of recent Supreme Court cases that prescribe a strict statutory construction approach to the securities acts and reject their expansion with tort and criminal theories. See *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d at 1311 n.12 (9th Cir. 1982).

We note also that the district courts have read the section strictly. *See, e.g., In re Gap Stores Securities Litigation*, 457 F.Supp. 1135 (N.D.Cal.1978); *In re Equity Funding Corporation of America Securities Litigation*, 416 F.Supp. 161 (C.D.Cal.1976).

5. The general denials in Jones' answer are insufficient to support summary judgment. *Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970). We note also that this is not a case in which there is no basis for allegations that Jones knew of the fraud. He participated in various steps of the sale of the stock to AF, and he knew of Oceanography's poor financial condition.

ter is required to make out a cause of action. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). The Supreme Court has defined "scienter" as "intent to deceive, manipulate, or defraud," but specifically left open the question whether, in some circumstances, recklessness will fulfill the requirement. *Id.* at 194 n.12, 96 S.Ct. at 1381 n.12. We have decided that it will. *Nelson v. Serwold*, 576 F.2d 1332 (9th Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 464, 58 L.Ed.2d 431 (1978).

Secondary liability has also been implied under the section and rule. Tort and criminal theories have supported the implication of aider and abettor, coconspirator, and respondeat superior liability. We concern ourselves here only with potential liability for aiding and abetting.

At least one court has enumerated its elements as being: (1) some other party has committed a securities law violation, (2) the accused party had general awareness that his role was part of an overall activity that is improper, and (3) the accused knowingly and substantially assisted the violation. *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94-5 (5th Cir. 1975) (citations omitted).[12]

In support of its motion, Ernst & Ernst presented the affidavit of the auditor in charge of the audit of the financial statements in the DMS registration statement and prospectus. It stated that the audit had been performed in accordance with generally accepted accounting standards.[13] Pursuant to these standards, enumerated procedures were followed to assure the accuracy of the financial statements.

The affidavit stated explicitly that the backlog was not audited and explained that a backlog is not susceptible of audit because there is no way to verify supporting financial data. To support the proposition that any certification of the backlog figure would be misleading, Maxwell argued, as an example, that if DMS management had additional construction contracts with different parties, but failed to report them to the accounting firm, there would be no means of discovering them. For further support he authenticated and attached a copy of

acknowledged that "the existence of a private cause of action for violations of the statute and the Rule is now well established." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196, 96 S.Ct. 1375, 1382, 47 L.Ed.2d 668 (1976) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730, 95 S.Ct. 1917, 1922, 44 L.Ed.2d 539 (1975); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 150-54, 92 S.Ct. 1456, 1470-72, 31 L.Ed.2d 741 (1972); *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9, 92 S.Ct. 165, 169 n.9, 30 L.Ed.2d 128 (1971)).

12. The parties here assume that there is potential aiding and abetting liability. Though we have suggested that there may be aiding and abetting liability under the securities acts, *see Strong v. France*, 474 F.2d 747, 752 (9th Cir. 1973), we have not directly confronted the issue. On the record before us, we decline to do so now.

Aiding and abetting and other "add-on" theories of liability have been justified by reference to the broad policy objectives of the securities acts. *See generally* Kuehnle, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, etc.*, 120 U.Pa.L.Rev. 597 (1972).

The Supreme Court has rejected this justification for an expansive reading of the statutes and instead prescribed a strict statutory construction approach to determining liability under the acts. *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

Noting the Supreme Court's new approach to the implication of rights of action under the acts, Professor Fischel has said that if confronted with the issue now, the Court would probably not recognize secondary liability theories as valid. He argues in fact that *Ernst & Ernst v. Hochfelder*, *supra*, implicitly holds that aiding and abetting liability does not exist as an area of liability distinct from liability that could be imposed for a direct violation of the section and rule. *See* Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 Cal.L.Rev. 80 (1981).

13. "Generally accepted accounting standards" are general standards of conduct relating to the auditor's professional qualities and to the judgments exercised by him in the performance of his examination and report. *See SEC v. Arthur Young & Co.*, 590 F.2d 785, 788 n.2 (9th Cir. 1979) (citing AICPA, Professional Standards, *Statements on Auditing Standards* No. 1, § 150.01).

Herman & MacLean

greater protection to purchasers of registered securities. It is hardly a novel proposition that the two Acts prohibit some of the same conduct. Cf. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185. A cumulative construction of the remedies under the Acts is also supported by the fact that when Congress comprehensively revised the securities laws in 1975, federal courts had consistently recognized an implied private right of action under § 10(b) even where express remedies under § 11 or other provisions were available. A cumulative construction of the securities laws also furthers their broad remedial purposes.

2. Persons seeking recovery under § 10(b) need prove their cause of action by a preponderance of the evidence only, not by clear and convincing evidence. The preponderance standard has been consistently employed in private actions under the securities laws. Cf. *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344. Reference to the traditional use of a higher burden of proof in civil fraud actions at common law is unavailing here. An important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry. The balance of the parties' interests in this case warrants use of the preponderance standard, which allows both parties to share the risk of error in roughly equal fashion. While defendants face the risk of opprobrium that may result from a finding of fraudulent conduct, the plaintiffs—investors—are among the very individuals Congress sought to protect in the securities laws, and if they prove that it is more likely than not that they were defrauded, they should recover.

640 F.2d 534, affirmed in part, reversed in part, and remanded.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the cases.

JUSTICE MARSHALL delivered the opinion of the Court.

These consolidated cases raise two unresolved questions concerning Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b). The first is whether purchasers of registered securities who allege they were defrauded by misrepresentations in a registration statement may maintain an action under Section 10(b) notwithstanding the express remedy for misstatements and omissions in registration statements provided by Section 11 of the Securities Act of 1933, 15 U. S. C. § 77k. The second question is whether persons seeking recovery under Section 10(b) must prove their cause of action by clear and convincing evidence rather than by a preponderance of the evidence.

I

In 1969 Texas International Speedway, Inc. ("TIS"), filed a registration statement and prospectus with the Securities and Exchange Commission offering a total of $4,398,900 in securities to the public. The proceeds of the sale were to be used to finance the construction of an automobile speedway. The entire issue was sold on the offering date, October 30, 1969. TIS did not meet with success, however, and the corporation filed a petition for bankruptcy on November 30, 1970.

In 1972 plaintiffs Huddleston and Bradley instituted a class action in the United States District Court for the Southern District of Texas[1] on behalf of themselves and other purchasers of TIS securities. The complaint alleged violations of Section 10(b) of the Securities Exchange Act of 1934 ("the 1934 Act") and SEC Rule 10b-5 promulgated thereunder, 17 CFR 240.10b-5.[2] Plaintiffs sued most of the participants in the offering, including the accounting firm, Herman & MacLean, which had issued an opinion concerning certain financial statements and a pro forma balance sheet[3] that were contained in the registration statement and prospectus. Plaintiffs claimed that the defendants had engaged in a fraudulent scheme to misrepresent or conceal material facts regarding the financial condition of TIS, including the costs incurred in building the speedway.

After a three-week trial, the District Judge submitted the case to the jury on special interrogatories relating to liability. The judge instructed the jury that liability could be found only if the defendants acted with scienter.[4] The judge also instructed the jury to determine whether plaintiffs had proven their cause of action by a preponderance of the evidence. After the jury rendered a verdict in favor of the plaintiffs on the submitted issues, the judge concluded that Herman & MacLean and others had violated Section 10(b) and Rule 10b-5 by making fraudulent misrepresentations in the TIS registration statement.[5] The court then determined the amount of damages and entered judgment for the plaintiffs.

On appeal, the United States Court of Appeals for the Fifth Circuit held that a cause of action may be maintained under Section 10(b) of the 1934 Act for fraudulent misrepresentations and omissions even when that conduct might also be actionable under Section 11 of the Securities Act of 1933 ("the 1933 Act"). *Huddleston* v. *Herman & MacLean*, 640 F. 2d 534, 540-543 (1981). However, the Court of Appeals disagreed with the District Court as to the appropriate standard of proof for an action under Section 10(b), concluding that a plaintiff must prove his case by "clear and convincing" evidence. *Id.*, at 545-546. The Court of Appeals reversed the District Court's judgment on other grounds and remanded the case for a new trial. *Id.*, at 547-559, 560.

We granted certiorari to consider whether an implied cause of action under Section 10(b) of the 1934 Act will lie for conduct subject to an express civil remedy under the 1933 Act, an issue we have previously reserved,[6] and to decide the standard of proof applicable to actions under Section 10(b).[7]

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[1] The case was transferred to the United States District Court for the Northern District of Texas in January, 1973.

[2] Plaintiffs also alleged violations of Section 17(a) of the Securities Act of 1933, 15 U. S. C. § 77q(a). We have repeatedly reserved decision on whether Section 17(a) affords a private remedy, *International Brotherhood of Teamsters* v. *Daniel*, 439 U. S. 551, 557, n. 9 (1979), and do so once again. Plaintiffs have abandoned their Section 17(a) claim, Brief at 4, n. 6, and the Court of Appeals did not address the existence of a separate cause of action under Section 17(a). Accordingly, there is no need for us to decide the issue.

[3] A pro forma balance sheet is one prepared on the basis of assumptions as to future events.

[4] The judge stated that reckless behavior could satisfy the scienter requirement. While this instruction reflects the prevailing view of the courts of appeals that have addressed the issue, see *McLean* v. *Alexander*, 599 F. 2d 1190, 1197, and n. 12 (CA3 1979) (collecting cases), we have explicitly left open the question whether recklessness satisfies the scienter requirement. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, n. 12 (1976).

[5] The jury also found that Herman & MacLean had aided and abetted violations of Section 10(b). While several courts of appeals have permitted recovery under an aiding and abetting theory, see *IIT, An International Investment Trust* v. *Cornfeld*, 619 F. 2d 909, 922 (CA2 1980) (collecting cases), we again reserve the question. See *Ernst & Ernst* v. *Hochfelder*, supra, 425 U. S., at 191-192, n. 7. Cf. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, ___ U. S. ___ (1982) (recognizing liability for participants in a scheme to violate the Commodity Exchange Act provision).

[6] See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 752, n. 15 (1975).

[7] The Fifth Circuit's adoption of a clear-and-convincing-evidence standard in a private action under Section 10(b) appears to be unprecedented. See E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 95.01 (1977). The other courts have employed a preponderance-of-the-evidence standard in private actions under the securities laws. See, e.g., *Mallis* v. *Bankers Trust Co.*, 615 F. 2d 68, 824-825; *Mathis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F. 2d 1174 (CA2 1974); *Cross* v. *Data Research Service, Inc.*, 415 F. 2d 1263, 1269 (CA2 1969), cert. denied, 397 U. S. 913 (1970); *Franklin Savings Bank* v. *Commonwealth Edison Co.*, 451 F. Supp. 602, 607 (N.D. Ill. 1978), aff'd on other grounds, 598 F. 2d 1109 (CA7), cert. denied, 444 U. S. 900 (1979).

—— U. S. —— (1982). We now affirm the court of appeals' holding that plaintiffs could maintain an action under Section 10(b) of the 1934 Act, but we reverse as to the applicable standard of proof.

II

The Securities Act of 1933 and the Securities Exchange Act of 1934 "constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 206 (1976). The Acts created several express private rights of action,[1] one of which is contained in Section 11 of the 1933 Act. In addition to the private actions created explicitly by the 1933 and 1934 Acts, federal courts have implied private remedies under other provisions of the two laws.[2] Most significantly for present purposes, a private right of action under Section 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years.[3] The existence of this implied remedy is simply beyond peradventure.

The issue in this case is whether a party should be barred from invoking this established remedy for fraud because the allegedly fraudulent conduct would apparently also provide the basis for a damage action under Section 11 of the 1933 Act.[4] The resolution of this issue turns on the fact that the two provisions involve distinct causes of action and were intended to address different types of wrongdoing.

Section 11 of the 1933 Act allows purchasers of a registered security to sue certain enumerated parties in a registered offering when false or misleading information is included in a registration statement. The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability[5] on the parties who play a direct role in a registered offering.[6] If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his *prima facie* case. Liability against the issuer of a security is virtually absolute," even for innocent misstatements. Other defendants bear the burden of demonstrating due diligence. See 15 U. S. C. §77k(b).

Although limited in scope, Section 11 places a relatively minimal burden on a plaintiff. In contrast, Section 10(b) is a "catchall" antifraud provision,[8] but it requires a plaintiff to carry a heavier burden to establish a cause of action. While a Section 11 action must be brought by a purchaser of a registered security, must be based on misstatements or omissions in a registration statement, and can only be brought against certain parties, a Section 10(b) action can be brought by a purchaser or seller of "*any* security" against "*any* person" who has used "*any* manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security. 15 U. S. C. §78j (emphasis added). However, a Section 10(b) plaintiff carries a heavier burden than a Section 11 plaintiff. Most significantly, he must prove that the defendant acted with scienter, *i. e.*, with intent to deceive, manipulate, or defraud.[9]

Since Section 11 and Section 10(b) address different types of wrongdoing, we see no reason to carve out an exception to Section 10(b) for fraud occurring in a registration statement just because the same conduct may also be actionable under Section 11.[10] Exempting such conduct from liability under Section 10(b) would conflict with the basic purpose of the 1933 Act: to provide greater protection to purchasers of registered securities. It would be anomalous indeed if the special protection afforded to purchasers in a registered offering by the 1933 Act were deemed to deprive such purchasers of the protections against manipulation and deception that Section 10(b) makes available to all persons who deal in securities.

While some conduct actionable under Section 11 may also be actionable under Section 10(b), it is hardly a novel proposition that the Securities Exchange Act and the Securities Act "prohibit some of the same conduct." *United States* v. *Naftalin*, 441 U. S. 768, 778 (1979) (applying Section 17(a) of the 1933 Act to conduct also prohibited by Section 10(b) of the 1934 Act in an action by the SEC). "'The fact that there may well be some overlap is neither unusual nor unfortunate.'" *Ibid.*, quoting *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 468 (1969). In savings clauses included in the 1933 and 1934 Acts, Congress rejected the notion that the express remedies of the securities laws would preempt all other rights of action. Section 16 of the 1933 Act states unequivocally that "[t]he rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U. S. C. §77p. Section 28(a) of the 1934 Act contains a parallel provi-

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[1] Securities Act, §§11, 12, 15, 15 U. S. C. §§77k, 77l, 77o; Securities Exchange Act, §§9, 16, 18, 15 U. S. C. §§78i, 78p, 78r.

[2] See, *e. g.*, *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964) (Section 14(a) of the Securities Exchange Act); [illegible] 1210 (CA1 1980), cert. denied, 449 [illegible] (Section [illegible] of the Securities Exchange Act); *Kirshner* [illegible] 24 [illegible] (1978), cert. denied, 442 U. S. 909 (1979) (Section 17(a) of the [illegible] Act). But see, *e. g.*, *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979) (no implied private right of action under Section 17(a) of the Securities Exchange Act); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1 (1977) (defeated tender offeror has no implied private right of action under Section 14(e) of the Securities Exchange Act).

[3] The right of action was first recognized in *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (ED Pa 1946). By 1961, the Court of Appeals and several district courts in other circuits had recognized the existence of a private remedy under Section 10(b) and Rule 10b-5, and only one district court decision had reached a contrary conclusion. See III L. Loss, Securities Regulation 1763-1764 and nn. 250, 251 (2d ed. 1961) (collecting cases). By 1969, the existence of a private cause of action had been recognized by ten of the eleven courts of appeals. See VI L. Loss, Securities Regulation 3871-3873 (2d ed. Supp. 1969) (collecting cases). When the question of whether an implied cause of action can be brought under Section 10(b) and Rule 10b-5 was first considered in this Court, we confirmed the existence of such a cause of action without extended discussion. See *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13, n. 9 (1971). We have since repeatedly reaffirmed that "the existence of a private cause of action for violations of the statute and the Rule is now well established." *Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U. S., at 196 (citing prior cases).

[4] The Court of Appeals noted that the plaintiffs "apparently did have a Section 11 remedy." 640 F. 2d, at 541, n. 3. While accurate as to the two other defendants, this conclusion may be open to question with respect to Herman & MacLean. Accountants are liable under Section 11 only for those matters which purport to have been prepared or certified by them. 15 U. S. C. §77k(a)(4). Herman & MacLean [illegible] "expertise" at least some of the materials [illegible] Tr. of Oral Arg. at 6-8, which [illegible] with respect to these materials.

[5] See H. R. Rep. No. 85, [illegible] ates "correspondingly heavier [illegible] the public."

[6] A Section 11 action can be brought only against the issuer, its directors or partners, underwriters, and accountants who are named as having prepared or certified the registration statement. See 15 U. S. C. §77k(a). At the same time, Sections 3 and 4 of the 1933 Act exclude a wide variety of securities (such as those issued by the government and certain banks) and transactions (such as private ones and certain small offerings) from the registration requirement. §77c and d.

[7] See *Feit* v. *Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 575 (EDNY 1971); R. Jennings & H. Marsh, Securities Regulation [illegible] (1977).

[8] See *Chiarella* v. *United States*, 445 U. S. 222, 234-235 (1980).

[9] See *Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U. S., at 193.

[10] Cf. *Mills* v. *Electric Auto-Lite*, 396 U. S. 375, 390-391 (1970) (existence of express provisions for recovery of attorneys' fees in §§9(e) and [illegible] does not preclude award of attorneys' fees under §14(a) of [illegible]).

10-b

§ 78j. Manipulative and deceptive devices

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

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

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

June 6, 1934, c. 404, Title I, § 10, 48 Stat. 891.

Historical Note

Transfer of Functions. For transfer of the functions of the Securities and Exchange Commission, with certain exceptions, to the chairman of such commission, see Reorg.Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

The United States LAW WEEK

Supreme Court Opinions

January 25, 1983 • THE BUREAU OF NATIONAL AFFAIRS, INC. WASHINGTON, D.C. • Volume 51, No. 28

OPINIONS ANNOUNCED JANUARY 24, 1983

The Supreme Court decided:

OIL AND GAS—Price Ceilings

Kansas Natural Gas Price Protection Act, which prohibits consideration of ceiling prices set by federal authorities in application of governmental price escalator clauses or price redetermination clauses contained in intrastate gas supply contracts, and which limits price increases under such escalator clauses to interstate gas ceiling price established under §109 of federal Natural Gas Policy Act of 1978, does not impair contracts between gas supplier and public utility in violation of Contract Clause, and therefore contract price may not be escalated under price escalator clauses to federal Act's §102 ceiling applicable to "new" interstate gas; §105 of federal Act, which provides that ceiling price of intrastate gas shall be lower of §102 price or price under terms of existing contracts on date of enactment, does not automatically trigger governmental price escalator clauses in gas supply contracts; Kansas Supreme Court's decision that government price escalator clauses at issue were insufficient to escalate gas price is interpretation of state law to which U.S. Supreme Court defers. (Energy Reserves Group, Inc. v. Kansas Power and Light Co., No. 81-1370)

. . . . .page 4106

SECURITIES AND EXCHANGES—Antifraud Provisions

Securities purchasers who claim they were defrauded by misrepresentations in registration statement and prospectus for securities have cause of action under §10(b) of 1934 Securities Exchange Act even when conduct complained of might also be actionable under §11 of 1933 Securities Act; persons seeking recovery under §10(b) need prove their cause of action by mere preponderance of evidence. (Herman & MacLean v. Huddleston, Nos. 81-680 & 81-1076) . . . . page 4099

TAXATION—State Franchise Tax

Tennessee tax on net earnings of banks doing in-state business violates immunity of federal obligations from state and local taxation, as provided in 31 USC 742, to extent it includes in bank's taxable net earnings income from obligations of United States and its instrumentalities. (Memphis Bank & Trust Co. v. Garner, No. 81-1613) . . . . page 4104

NOTICE: These opinions are subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

Full Text of Opinions

No. 81-680 AND 81-1076

HERMAN & MacLEAN, PETITIONER
81-680 *v.*
RALPH E. HUDDLESTON ET AL.

RALPH E. HUDDLESTON ET AL., PETITIONER
81-1076 *v.*
HERMAN & MacLEAN

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Syllabus

No. 81-680. Argued November 9, 1982—Decided January 24, 1983*

Alleging that they were defrauded by misrepresentations in a registration statement and prospectus for certain securities, purchasers of such securities brought a class action in Federal District Court against most of the participants in the offering, seeking recovery under § 10(b) of the Securities Exchange Act of 1934 (1934 Act), which makes it unlawful for "any" person to use "any" manipulative or deceptive device or contrivance in the purchase or sale of "any" security. The trial judge instructed the jury to determine whether the plaintiffs had proved their cause of action by a preponderance of the evidence, and judgment was entered on the basis of a jury verdict in plaintiffs' favor. The Court of Appeals held that a cause of action may be maintained under § 10(b) for fraudulent misrepresentations and omissions even when, as in this case, that conduct might also be actionable under § 11 of the Securities Act of 1933 (1933 Act), which expressly allows purchasers of a registered security to sue certain enumerated parties who play a direct role in a registered offering when false or misleading information is included in a registration statement. However, the Court of Appeals concluded that a plaintiff seeking recovery under § 10(b) of the 1934 Act must prove his case by "clear and convincing" evidence, and reversed and remanded on other grounds.

Held:

1. The availability of an express remedy under § 11 of the 1933 Act does not preclude defrauded purchasers of registered securities from maintaining an action under § 10(b) of the 1934 Act.

(a) The two provisions involve distinct causes of action and were intended to address different types of wrongdoing. Under § 11, a plaintiff need only show a material misstatement or omission in a registration statement to establish a prima facie case. Such an action must be brought by a purchaser of a registered security, and can only be brought against certain parties. In contrast, § 10(b) is a "catchall" antifraud provision and requires a purchaser or seller of a security, in order to establish a cause of action, to prove that the defendant acted with scienter.

(b) To exempt conduct actionable under § 11 from liability under § 10(b) would conflict with the basic purpose of the 1933 Act: to provide

*Together with No. 81-1076, *Huddleston et al. v. Herman & MacLean et al.*, also on certiorari to the same court.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released * * * at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

greater protection to purchasers of registered securities. It is hardly a novel proposition that the two Acts prohibit some of the same conduct. *Cf. Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185. A cumulative construction of the remedies under the Acts is also supported by the fact that when Congress comprehensively revised the securities laws in 1975, federal courts had consistently recognized an implied private right of action under § 10(b) even where express remedies under § 11 or other provisions were available. A cumulative construction of the securities laws also furthers their broad remedial purposes.

2. Persons seeking recovery under § 10(b) need prove their cause of action by a preponderance of the evidence only, not by clear and convincing evidence. The preponderance standard has been consistently employed in private actions under the securities laws. *Cf. SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344. Reference to the traditional use of a higher burden of proof in civil fraud actions at common law is unavailing here. An important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry. The balance of the parties' interests in this case warrants use of the preponderance standard, which allows both parties to share the risk of error in roughly equal fashion. While defendants face the risk of opprobrium that may result from a finding of fraudulent conduct, defrauded investors are among the very individuals Congress sought to protect in the securities laws, and if they prove that it is more likely than not that they were defrauded, they should recover.

640 F.2d 534, affirmed in part, reversed in part, and remanded.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the cases.

JUSTICE MARSHALL delivered the opinion of the Court.

These consolidated cases raise two unresolved questions concerning Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b). The first is whether purchasers of registered securities who allege they were defrauded by misrepresentations in a registration statement may maintain an action under Section 10(b) notwithstanding the express remedy for misstatements and omissions in registration statements provided by Section 11 of the Securities Act of 1933, 15 U. S. C. § 77k. The second question is whether persons seeking recovery under Section 10(b) must prove their cause of action by clear and convincing evidence rather than by a preponderance of the evidence.

I

In 1969 Texas International Speedway, Inc. ("TIS"), filed a registration statement and prospectus with the Securities and Exchange Commission offering a total of $4,398,900 in securities to the public. The proceeds of the sale were to be used to finance the construction of an automobile speedway. The entire issue was sold on the offering date, October 30, 1969. TIS did not meet with success, however, and the corporation filed a petition for bankruptcy on November 30, 1970.

In 1972 plaintiffs Huddleston and Bradley instituted a class action in the United States District Court for the Southern District of Texas[1] on behalf of themselves and other purchasers of TIS securities. The complaint alleged violations of Section 10(b) of the Securities Exchange Act of 1934 ("the 1934 Act") and SEC Rule 10b-5 promulgated thereunder, 17 CFR 240.10b-5.[2] Plaintiffs sued most of the participants in the offering, including the accounting firm, Herman & MacLean, which had issued an opinion concerning certain financial statements and a pro forma balance sheet[3] that were contained in the registration statement and prospectus. Plaintiffs claimed that the defendants had engaged in a fraudulent scheme to misrepresent or conceal material facts regarding the financial condition of TIS, including the costs incurred in building the speedway.

After a three-week trial, the District Judge submitted the case to the jury on special interrogatories relating to liability. The judge instructed the jury that liability could be found only if the defendants acted with scienter.[4] The judge also instructed the jury to determine whether plaintiffs had proven their cause of action by a preponderance of the evidence. After the jury rendered a verdict in favor of the plaintiffs on the submitted issues, the judge concluded that Herman & MacLean and others had violated Section 10(b) and Rule 10b-5 by making fraudulent misrepresentations in the TIS registration statement.[5] The court then determined the amount of damages and entered judgment for the plaintiffs.

On appeal, the United States Court of Appeals for the Fifth Circuit held that a cause of action may be maintained under Section 10(b) of the 1934 Act for fraudulent misrepresentations and omissions even when that conduct might also be actionable under Section 11 of the Securities Act of 1933 ("the 1933 Act"). *Huddleston* v. *Herman & MacLean*, 640 F. 2d 534, 540–543 (1981). However, the Court of Appeals disagreed with the District Court as to the appropriate standard of proof for an action under Section 10(b), concluding that a plaintiff must prove his case by "clear and convincing" evidence. *Id.*, at 545–546. The Court of Appeals reversed the District Court's judgment on other grounds and remanded the case for a new trial. *Id.*, at 547–550, 560.

We granted certiorari to consider whether an implied cause of action under Section 10(b) of the 1934 Act will lie for conduct subject to an express civil remedy under the 1933 Act, an issue we have previously reserved,[6] and to decide the standard of proof applicable to actions under Section 10(b).[7]

[1] The case was transferred to the United States District Court for the Northern District of Texas in January, 1973.

[2] Plaintiffs also alleged violations of, *inter alia*, Section 17(a) of the Securities Act of 1933, 15 U. S. C. § 77q(a). We have previously reserved decision on whether Section 17(a) affords a private remedy, *International Brotherhood of Teamsters* v. *Daniel*, 439 U. S. 551, 557, n. 9 (1979), and do so once again. Plaintiffs have abandoned their Section 17(a) claim, Brief, at 4, n. 6, and the Court of Appeals did not address the existence of a separate cause of action under Section 17(a). Accordingly, there is no need for us to decide the issue.

[3] A pro forma balance sheet is one prepared on the basis of assumptions as to future events.

[4] The judge stated that reckless behavior could satisfy the scienter requirement. While this instruction reflects the prevailing view of the courts of appeals that have addressed the issue, *see McLean* v. *Alexander*, 599 F. 2d 1190, 1197, and n. 12 (CA3 1979) (collecting cases), we have explicitly left open the question whether recklessness satisfies the scienter requirement. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, n. 12 (1976).

[5] The trial court also found that Herman & MacLean had aided and abetted violations of Section 10(b). While several courts of appeals have permitted aider and abettor liability, see *IIT, An International Investment Trust* v. *Cornfeld*, 619 F. 2d 909, 922 (CA2 1980) (collecting cases), we specifically reserved this issue in *Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U. S., at 191–192, n. 7. Cf. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, — U. S. —, — (1982) (discussing liability for participants in a conspiracy under analogous Commodity Exchange Act provision).

[6] See, *e. g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 752 n. 15 (1975).

[7] The Fifth Circuit's adoption of a clear-and-convincing-evidence standard in a private action under Section 10(b) appears to be unprecedented. See E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 98.04, at 930 (1981 Cum. Supp.). Other courts have employed a preponderance-of-the-evidence standard in private actions under the securities laws. See, *e. g.*, *Mihara* v. *Dean Witter & Co.*, 619 F. 2d 814, 824–825 (CA9 1980); *Dzenits* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F. 2d 168, 171, n. 2 (CA10 1974); *Globus* v. *Law Research Service, Inc.*, 418 F. 2d 1276, 1291 (CA2 1969), cert. denied, 397 U. S. 913 (1970); *Franklin Life Insurance Co.* v. *Commonwealth Edison Co.*, 451 F. Supp. 602, 607 (SD Ill. 1978), aff'd *per curiam*, 598 F. 2d 1109 (CA7), cert. denied, 444 U. S. 900 (1979).

—— U. S. —— (1982). We now affirm the court of appeals' holding that plaintiffs could maintain an action under Section 10(b) of the 1934 Act, but we reverse as to the applicable standard of proof.

II

The Securities Act of 1933 and the Securities Exchange Act of 1934 "constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 206 (1976). The Acts created several express private rights of action,[7] one of which is contained in Section 11 of the 1933 Act. In addition to the private actions created explicitly by the 1933 and 1934 Acts, federal courts have implied private remedies under other provisions of the two laws.[8] Most significantly for present purposes, a private right of action under Section 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years.[9] The existence of this implied remedy is simply beyond peradventure.

The issue in this case is whether a party should be barred from invoking this established remedy for fraud because the allegedly fraudulent conduct would apparently also provide the basis for a damage action under Section 11 of the 1933 Act.[10] The resolution of this issue turns on the fact that the two provisions involve distinct causes of action and were intended to address different types of wrongdoing.

Section 11 of the 1933 Act allows purchasers of a registered security to sue certain enumerated parties in a registered offering when false or misleading information is included in a registration statement. The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability[11] on the parties who play a direct role in a registered offering.[12] If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his *prima facie* case. Liability against the issuer of a security is virtually absolute,[13] even for innocent misstatements. Other defendants bear the burden of demonstrating due diligence. See 15 U. S. C. § 77k(b).

Although limited in scope, Section 11 places a relatively minimal burden on a plaintiff. In contrast, Section 10(b) is a "catchall" antifraud provision,[14] but it requires a plaintiff to carry a heavier burden to establish a cause of action. While a Section 11 action must be brought by a purchaser of a registered security, must be based on misstatements or omissions in a registration statement, and can only be brought against certain parties, a Section 10(b) action can be brought by a purchaser or seller of "*any* security" against "*any* person" who has used "*any* manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security. 15 U. S. C. § 78j (emphasis added). However, a Section 10(b) plaintiff carries a heavier burden than a Section 11 plaintiff. Most significantly, he must prove that the defendant acted with scienter, i. e., with intent to deceive, manipulate, or defraud.[15]

Since Section 11 and Section 10(b) address different types of wrongdoing, we see no reason to carve out an exception to Section 10(b) for fraud occurring in a registration statement just because the same conduct may also be actionable under Section 11.[16] Exempting such conduct from liability under Section 10(b) would conflict with the basic purpose of the 1933 Act: to provide greater protection to purchasers of registered securities. It would be anomalous indeed if the special protection afforded to purchasers in a registered offering by the 1933 Act were deemed to deprive such purchasers of the protections against manipulation and deception that Section 10(b) makes available to all persons who deal in securities.

While some conduct actionable under Section 11 may also be actionable under Section 10(b), it is hardly a novel proposition that the Securities Exchange Act and the Securities Act "prohibit some of the same conduct." *United States* v. *Naftalin*, 441 U. S. 768, 778 (1979) (applying Section 17(a) of the 1933 Act to conduct also prohibited by Section 10(b) of the 1934 Act in an action by the SEC). "'The fact that there may well be some overlap is neither unusual nor unfortunate.'" *Ibid.*, quoting *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 468 (1969). In savings clauses included in the 1933 and 1934 Acts, Congress rejected the notion that the express remedies of the securities laws would preempt all other rights of action. Section 16 of the 1933 Act states unequivocally that "[t]he rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U. S. C. § 77p. Section 28(a) of the 1934 Act contains a parallel provi-

[7] Securities Act, §§ 11, 12, 15, 15 U. S. C. §§ 77k, 77l, 77o; Securities Exchange Act, §§ 9, 16, 18, 15 U. S. C. §§ 78i, 78p, 78r.

[8] See, *e. g.*, *J.I. Case Co.* v. *Borak*, 377 U. S. 426 (1964) (Section 14(a) of the Securities Exchange Act); *Dan River, Inc.* v. *Unitex Ltd.*, 624 F. 2d 1216 (CA4 1980), cert. denied, 449 U. S. 1101 (1981) (Section 13 of the Securities Exchange Act); *Kirshner* v. *United States*, 603 F. 2d 234, 241 (CA2 1978), cert. denied, 442 U. S. 909 (1979) (Section 17(a) of the Securities Act). But see, *e. g.*, *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979) (no implied private right of action under Section 17(a) of the Securities Exchange Act); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1 (1977) (defeated tender offeror has no implied private right of action under Section 14(e) of the Securities Exchange Act).

[9] The right of action was first recognized in *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (ED Pa 1946). By 1961, four courts of appeals and several district courts in other circuits had recognized the existence of a private remedy under Section 10(b) and Rule 10b-5, and only one district court decision had reached a contrary conclusion. See III L. Loss, Securities Regulation 1763-1764 and nn.260-263 (2d ed. 1961) (collecting cases). By 1969, the existence of a private cause of action had been recognized by ten of the eleven courts of appeals. See VI L. Loss, Securities Regulation 3871-3873 (2d ed. Supp. 1969) (collecting cases). When the question whether an implied cause of action can be brought under Section 10(b) and Rule 10b-5 was first considered in this Court, we confirmed the existence of such a cause of action without extended discussion. See *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13, n. 9 (1971). We have since repeatedly reaffirmed that "the existence of a private cause of action for violations of the statute and the Rule is now well established." *Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U. S., at 196 (citing prior cases).

[10] The Court of Appeals noted that the plaintiffs "apparently did have a Section 11 remedy." 640 F. 2d, at 541, n. 5. While accurate as to the two other defendants, this conclusion may be open to question with respect to Herman & MacLean. Accountants are liable under Section 11 only for those matters which purport to have been prepared or certified by them. 15 U. S. C. § 77k(a)(4). Herman & MacLean contends that it did not "expertise" at least some of the materials that were the subject of the lawsuit. Tr. of Oral Arg. at 6-8, which if true could preclude a Section 11 remedy with respect to these materials.

[11] See H. R. Rep. No. 85, 73d Cong. 1st Sess. 9 (1933) (Section 11 creates "correspondingly heavier legal liability" in line with responsibility to the public).

[12] A Section 11 action can be brought only against the issuer, its directors or partners, underwriters, and accountants who are named as having prepared or certified the registration statement. See 15 U. S. C. § 77k(a). At the same time, Sections 3 and 4 of the 1933 Act exclude a wide variety of securities (such as those issued by the government and certain banks) and transactions (such as private ones and certain small offerings) from the registration requirement. § 77c and d.

[13] See *Feit* v. *Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 575 (EDNY 1971); R. Jennings & H. Marsh, Securities Regulation 428-429 (1977).

[14] See *Chiarella* v. *United States*, 445 U. S. 222, 234-235 (1980).

[15] See *Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U. S., at 193.

[16] Cf. *Mills* v. *Electric Auto-Lite*, 396 U. S. 375, 390-391 (1970) (existence of express provisions for recovery of attorneys' fees in §§ 9(e) and 18(a) of 1934 Act does not preclude award of attorneys' fees under § 14(a) of the Act).

ing an action under Section 10(b) of the 1934 Act. To this extent the judgment of the court of appeals is affirmed.

III

In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence.[24] Similarly, in an action by the SEC to establish fraud under Section 17(a) of the Securities Act, 15 U. S. C. § 77q(a), we have held that proof by a preponderance of the evidence suffices to establish liability. *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U. S. 344, 355 (1943). "Where . . . proof is offered in a civil action, as here, a preponderance of the evidence will establish the case . . . ." *Ibid.* The same standard applies in administrative proceedings before the SEC[25] and has been consistently employed by the lower courts in private actions under the securities laws.[26]

The Court of Appeals nonetheless held that plaintiffs in a Section 10(b) suit must establish their case by clear and convincing evidence. The Court of Appeals relied primarily on the traditional use of a higher burden of proof in civil fraud actions at common law. 640 F. 2d, at 545–546. Reference to common law practices can be misleading, however, since the historical considerations underlying the imposition of a higher standard of proof have questionable pertinence here.[27] See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 744–745 (1975) ("[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years from the world of commercial transactions to which Rule 10b-5 is applicable."). Moreover, the antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud.[28] Indeed, an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common law protections by establishing higher standards of conduct in the securities industry. See *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186 (1963). We therefore find reference to the common law in this instance unavailing.

Where Congress has not prescribed the appropriate standard of proof and the Constitution does not dictate a particular standard, we must prescribe one. See *Steadman* v. *SEC*, 450 U. S. 91, 95 (1981). See generally *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, 421 U. S., at 749 (private cause of action under Section 10(b) and Rule 10b-5 must be judicially delimited until Congress acts). In doing so, we are mindful that a standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). See also *In re Winship*, 397 U. S. 358, 370–371 (1970) (Harlan, J., concurring). Thus, we have required proof by clear and convincing evidence where particularly important individual interests or rights are at stake. See, *e. g.*, *Santosky* v. *Kramer*, —— U. S. —— (1982) (proceeding to terminate parental rights); *Addington* v. *Texas*, *supra* (involuntary commitment proceeding); *Woodby* v. *INS*, 385 U. S. 276, 285–286 (1966) (deportation).[29] By contrast, imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence. See, *e. g.*, *United States* v. *Regan*, 232 U. S. 37, 48–49 (1914) (proof by a preponderance of the evidence suffices in civil suits involving proof of acts that expose a party to a criminal prosecution). Thus, in interpreting a statutory provision in *Steadman* v. *SEC*, *supra*, we upheld use of the preponderance standard in SEC administrative proceedings concerning alleged violations of the antifraud provisions. The sanctions imposed in the proceedings included an order permanently barring an individual from practicing his profession. And in *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S., at 355, we held that a preponderance of the evidence suffices to establish fraud under Section 17(a) of the 1933 Act.

A preponderance-of-the-evidence standard allows both parties to "share the risk of error in roughly equal fashion." *Addington* v. *Texas*, 421 U. S., at 423. Any other standard expresses a preference for one side's interests. The balance of interests in this case warrants use of the preponderance standard. On the one hand, the defendants face the risk of opprobrium that may result from a finding of fraudulent conduct, but this risk is identical to that in an action under Section 17(a), which is governed by the preponderance-of-the-evidence standard. The interests of defendants in a securities case do not differ qualitatively from the interests of defendants sued for violations of other federal statutes such as the antitrust or civil rights laws, for which proof by a preponderance of the evidence suffices. On the other hand, the interests of plaintiffs in such suits are significant. Defrauded investors are among the very individuals Congress sought to protect in the securities laws. If they prove that it is more likely than not that they were defrauded, they should recover.

We therefore decline to depart from the preponderance-of-the-evidence standard generally applicable in civil actions.[30] Accordingly, the Court of Appeals' decision as to the appropriate standard of proof is reversed.

IV

The judgment of the Court of Appeals is affirmed in part and reversed in part and otherwise remanded for proceedings consistent with this opinion.

It is so ordered.

[24] See *Addington* v. *Texas*, 441 U. S. 418, 423 (1979).

[25] See *Steadman* v. *SEC*, 450 U. S. 91 (1981).

[26] See note 7, *supra*.

[27] A higher standard of proof apparently arose in courts of equity when the chancellor faced claims that were unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parole evidence rule. See Note, Appellate Review in the Federal Courts of Findings Requiring More than a Preponderance of the Evidence, 60 Harv. L. Rev. 111, 112 (1946). Concerned that claims would be fabricated, the chancery courts imposed a more demanding standard of proof. The higher standard subsequently received wide acceptance in equity proceedings to set aside presumptively valid written instruments on account of fraud. See *United States* v. *American Bell Telephone Co.*, 167 U. S. 224, 240–241 (1897); *Southern Development Co.* v. *Silva*, 125 U. S. 247, 249–250 (1888); *Colorado Coal Co.* v. *United States*, 123 U. S. 307, 316–319 (1887); *Maxwell Land-Grant Case*, 121 U. S. 325, 381 (1887) ("We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."). Such proceedings bear little relationship to modern lawsuits under the federal securities laws.

[28] See *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 194 (1963) (common law doctrines of fraud which developed around transactions involving tangible items of wealth are ill-suited to the sale of intangibles such as securities); III L. Loss, Securities Regulation 1435 (2d ed. 1961).

[29] In *Vance* v. *Terrazas*, 444 U. S. 252, 266 (1980), we held that the Due Process Clause did not require proof beyond a preponderance of the evidence even in an expatriation proceeding. *Cf. Nishikawa* v. *Dulles*, 356 U. S. 129, 135–136 (1958) (in the absence of evidence of congressional intent to adopt a particular standard of proof, Court imposes clear-and-convincing-evidence standard in expatriation cases).

[30] The Court of Appeals also noted that the proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence. If anything, the difficulty of proving the defendant's state of mind supports a lower standard of proof. In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient. *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 330 (1960). See *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 463, and n. 24 (1976).

sion. 15 U. S. C. § 78bb(a). These provisions confirm that the remedies in each Act were to be supplemented by "any and all" additional remedies.

This conclusion is reinforced by our reasoning in *Ernst & Ernst* v. *Hochfelder*, *supra*, which held that actions under Section 10(b) require proof of scienter and do not encompass negligent conduct. In so holding, we noted that each of the express civil remedies in the 1933 Act allowing recovery for negligent conduct is subject to procedural restrictions not applicable to a Section 10(b) action.[18] 425 U. S., at 208–210. We emphasized that extension of Section 10(b) to negligent conduct would have allowed causes of action for negligence under the express remedies to be brought instead under Section 10(b), "thereby nullify[ing] the effectiveness of the carefully drawn procedural restrictions on these express actions." *Id.*, at 210 (footnote omitted). In reasoning that scienter should be required in Section 10(b) actions in order to avoid circumvention of the procedural restrictions surrounding the express remedies, we necessarily assumed that the express remedies were not exclusive. Otherwise there would have been no danger of nullification. Conversely, because the added burden of proving scienter attaches to suits under Section 10(b), invocation of the Section 10(b) remedy will not "nullify" the procedural restrictions that apply to the express remedies.[19]

This cumulative construction of the remedies under the 1933 and 1934 Acts is also supported by the fact that, when Congress comprehensively revised the securities laws in 1975, a consistent line of judicial decisions had permitted plaintiffs to sue under Section 10(b) regardless of the availability of express remedies. In 1975 Congress enacted the "most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act in 1934."[20] See Securities Acts Amendments of 1975, Pub. L. No. 94–29, 89 Stat. 97. When Congress acted, federal courts had consistently and routinely permitted a plaintiff to proceed under Section 10(b) even where express remedies under Section 11 or other provisions were available.[21] In light of this well-established judicial interpretation, Congress' decision to leave Section 10(b) intact suggests that Congress ratified the cumulative nature of the Section 10(b) action. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, — U. S. —, — (1982); *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978).

A cumulative construction of the securities laws also furthers their broad remedial purposes. In enacting the 1934 Act, Congress stated that its purpose was "to impose requirements necessary to make [securities] regulation and control reasonably complete and effective." 15 U. S. C. § 78b. In furtherance of that objective, Section 10(b) makes it unlawful to use "*any* manipulative or deceptive device or contrivance" in connection with the purchase or sale of any security. The effectiveness of the broad proscription against fraud in Section 10(b) would be undermined if its scope were restricted by the existence of an express remedy under Section 11.[22] Yet we have repeatedly recognized that securities laws combating fraud should be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180, 195 (1963). Accord: *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 12 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972). We therefore reject an interpretation of the securities laws that displaces an action under Section 10(b).[23]

Accordingly, we hold that the availability of an express remedy under Section 11 of the 1933 Act does not preclude defrauded purchasers of registered securities from maintain-

[18] For example, a plaintiff in a Section 11 action may be required to post a bond for costs, 15 U. S. C. § 77k(e), and the statute of limitations is only one year, § 77m. In contrast, Section 10(b) contains no provision requiring plaintiffs to post security for costs. Also, courts look to the most analogous statute of limitations of the forum state, which is usually longer than the period provided for Section 11 actions. See *Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U. S., at 210, n. 29.

[19] See *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783, 786–787 (CA2 1951); A. Bromberg & L. Lowenfels, Securities Fraud & Commodities Fraud § 2.4(403), at 2:179–2:180 (1982).

[20] Securities Acts Amendments of 1975: Hearings on S. 249 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. 1 (1975). As the conference report on the legislation explained, the 1975 amendments were the culmination of "the most searching reexamination of the competitive, statutory, and economic issues facing the securities markets, the securities industry, and, of course, public investors, since the 1930's." H. R. Rep. No. 94–229, 94th Cong., 1st Sess. 91 (1975).

[21] See, *e. g.*, *Schaefer* v. *First National Bank*, 509 F. 2d 1287, 1292–1293 (CA7 1975), cert. denied, 425 U. S. 943 (1976); *Wolf* v. *Frank*, 477 F. 2d 467, 475 (CA5), cert. denied, 414 U. S. 975 (1973); *Jordan Bldg. Corp.* v. *Doyle, O'Connor & Co.*, 401 F. 2d 47, 51 (CA7 1968); *Ellis* v. *Carter*, 291 F. 2d 270, 273–274 (CA9 1961); *Fischman* v. *Raytheon Mfg. Co.*, *supra*, 188 F. 2d, at 786–787; *Orn* v. *Eastman Dillon, Union Sec. & Co.*, 364 F. Supp. 352, 355 (C.D. Cal. 1973); *Stewart* v. *Bennett*, 359 F. Supp. 878, 886 (D Mass. 1973); *Trussell* v. *United Underwriters, Ltd.*, 228 F. Supp. 757, 765–766 (D Colo. 1964). Cf. *Gilbert* v. *Nixon*, 429 F. 2d 348, 355 (CA10 1970) (recognizing overlapping actions but resolving conflict in favor of express remedy where that remedy is "explicit"). Two early district court decisions had refused to recognize an action under Rule 10b–5 in the face of overlap with Section 11. *Rosenberg* v. *Globe Aircraft Corp.*, 80 F. Supp 123 (ED Pa. 1948); *Montague* v. *Electronic Corp. of America*, 76 F. Supp. 933 (SDNY 1948). The latter case was not subsequently followed in the Southern District, *e. g.*, *Osborne* v. *Mallory*, 86 F. Supp. 869 (SDNY 1949), and it has no precedential value in light of the Second Circuit's decision in *Fischman* v. *Ratheon Mfg. Co.*, *supra*. The *Rosenberg* decision stood alone at the time of the 1975 amendments, and even that decision had not been followed in the district in which it was decided, *Premier Industries, Inc.* v. *Delaware Valley Financial Corp.*, 185 F. Supp. 694 (ED Pa. 1960), or elsewhere within the same circuit, *Dauphin Corp.* v. *Redwall Corp.*, 201 F. Supp. 466 (D Del. 1962). Since the 1975 amendments, the lower courts have continued to recognize that an implied cause of action under Section 10(b) can be brought regardless of whether express remedies are available. See, *e. g.*, *Berger* v. *Bishop Investment Corp.*, — F. 2d — (CA8 1982); *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F. 2d 342, 354–359 (CADC 1980), cert. denied, 452 U. S. 954 (1981); *Ross* v. *A.H. Robins Co.*, 607 F. 2d 545, 551–556 (CA2 1979), cert. denied, 446 U. S. 946 (1980); *Pearlstein* v. *Justice Mortgage Investors*, [1979] CCH Fed. Sec. L. Rptr. ¶ 96,760 at 94,973–94,974 (ND Tex 1978); *In re Clinton Oil Company Securities Litigation*, [1977–1978] CCH Fed. Sec. L. Rptr. ¶ 96,015 at 91,575 (D Kan. 1977).

[22] Moreover, certain individuals who play a part in preparing the registration statement generally cannot be reached by a Section 11 action. These include corporate officers other than those specified in 15 U. S. C. § 77k(a), lawyers not acting as "experts," and accountants with respect to parts of a registration statement which they are not named as having prepared or certified. If, as Herman & MacLean argues, purchasers in registered offerings were required to rely solely on Section 11, they would have no recourse against such individuals even if the excluded parties engaged in fraudulent conduct while participating in the registration statement. The exempted individuals would be immune from federal liability for fraudulent conduct even though Section 10(b) extends to "any person" who engages in fraud in connection with a purchase or sale of securities.

[23] We also reject application of the maxim of statutory construction, *expressio unius est exclusio alterius*. See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1173–1174 (tent. ed. 1958); Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285, 290–291 (1963). As we stated in *SEC* v. *Joiner Corp.*, 320 U. S. 344, 350–351 (1943), such canons "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose." See generally *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963) (favoring "an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted"). We believe the maxim cannot properly be applied to a situation where the remedies redress different misconduct and where the remedial purposes of the Acts would be undermined by a presumption of exclusivity.

Regulations of the Fair Political Practices Commission
(Title 2, Division 6 of the California Administrative Code)

18427. Duties of Treasurers and Candidates With Respect to Campaign Statements (Gov. Code Sections 81004, 84100, 84213, 91004)

(a) Treasurers. The treasurer of a committee must verify that to the best of his or her knowledge the committee campaign statements are true and complete and must use all reasonable diligence in the preparation of such statements. To comply with these duties the treasurer shall:

(1) Establish a system of record keeping sufficient to ensure that receipts and expenditures are recorded promptly and accurately, and sufficient to comply with regulations established by the Commission related to record keeping;

(2) Either maintain the records personally or monitor such record keeping by others;

(3) Take steps to ensure that all requirements of the Act concerning the receipt and expenditure of funds and the reporting of such funds are complied with;

(4) Either prepare campaign statements personally or review with care the campaign statements and underlying records prepared by others;

(5) Correct any inaccuracies or omissions in campaign statements of which the treasurer knows, and cause to be checked, and, if necessary, corrected,

not exercising all reasonable diligence in the performance of his or her duties;

(3) Review with care the campaign statements prepared for filing by the committee;

(4) Correct any inaccuracies and omissions in campaign statements of which the candidate knows, and cause to be checked, and, if necessary, corrected, any information in campaign statements which a person of reasonable prudence would question based on all the surrounding circumstances of which the candidate is aware or should be aware by reason of his or her duties under this regulation and the Act;

(5) Perform with due care any other tasks assumed in connection with the raising, spending or recording of campaign funds insofar as such tasks relate to the accuracy of information entered on campaign statements;

(6) Unless such steps are required to meet the standards set forth in the foregoing paragraphs (1) through (4), a candidate is not responsible for establishing a record keeping procedure for a committee, monitoring committee record keeping, reviewing campaign finance records other than campaign statements, or personally taking steps to corroborate any information contained on a campaign statement.

concerning the questionable nature of the contribution and neither, through performance of their respective duties (such as monitoring campaign records or reviewing campaign statements), could have learned any facts that would lead one to question the contribution, the candidate and treasurer have no duty of inquiry with respect to the contribution. There is no duty of inquiry even though if Smith were asked he would have revealed the true source of the funds.

Once the known circumstances are such that a question is raised concerning the accuracy of information on a campaign statement, an inquiry is required. It is not possible in a regulation to describe with particularity every factual situation that might trigger such an inquiry since the variety of circumstances that could arise with respect to any particular campaign transaction are endless. By way of example, however, such circumstances might include the following in the case of a contribution: The size of the contribution, the reported source, the likelihood of that source making a contribution of the size reported, the circumstances surrounding receipt, and the manner in which the contribution is recorded in campaign records.

The burden of inquiry is likely to fall more heavily upon the treasurer because it is he, rather than the candidate, upon whom the major record keeping and reporting responsibility falls. Therefore, the treasurer is more likely than the candidate to be the person who, by reason of performance of duties, is aware of or should be aware of facts which would give rise to a duty of inquiry.