University of Miami Law Review

Volume 8
Number 3
Volume 8 Issues 2-3 (Winter-Spring 1954)
Survey of Florida Law

Article 12

5-1-1954

Corporate Finance

Hugh L. Sowards

CORPORATE FINANCE

HUGH L. SOWARDS*

The scope of this article is confined solely to Florida legislation and cases during the last two years which dealt with the financial aspects of corporate law. The bulk of new corporate legislation and cases is ably discussed in the section on Corporation Law.

Blue Sky Legislation

At the 1951 session of the Florida Legislature, the state securities law,[1] known to attorneys as the "Blue Sky Law," was amended in two respects. First, and perhaps most important, the criminal liability section of the Act[2] was amended to increase the maximum fine and imprisonment penalties as well as the statute of limitations for prosecution of offenses. Formerly, one convicted of violating any of the provisions of the Act was subject to a maximum fine of $1000 or a maximum prison sentence of two years. Convicted violators now face a maximum fine of $5000 or five years in prison. In addition, the statute of limitations was increased from two to five years.[3] A factor sometimes overlooked in this connection is that *each sale* in violation of the Act may constitute a *separate* count in a criminal charge. The second amendment effected by the 1951 Legislature exempted securities of certain agricultural cooperatives from compliance with the Act.[4] It should be noted that only securities of "agricultural" cooperatives were added to the exempt list by this amendment. In all probability, securities of *consumers'* cooperatives as well as all other types of cooperative enterprises would not qualify as exempt securities.

The absence of any reported litigation under the Act during the past two years does not mean that attorneys and business men have not been dealing with it. Indeed, contact with the Act has increased markedly in the last two years. In this connection, the attention of attorneys should be called to the fact that the Act allows "technical" violators to escape its civil and criminal liability provisions by "purging" themselves of the

*Professor, University of Miami School of Law.

1. Fla. Stat. c. 517 (1951).
2. Fla. Stat. § 517.30 (1951).
3. Perhaps it was mere coincidence, but just prior to the enactment of this amendment a Florida newspaper carried the following item:

> It's possible to get off with a light fine for swindling the public out of a fortune under the Florida securities regulation, but it doesn't pay to steal a hog. You go straight to jail. The securities law provides for a maximum fine of $1000 or up to two years in the clink. Hog-stealing is handled under a special statute that provides for no fine but a jail sentence from two to five years. Steal a second hog and you get from five to 20 years. Miami Daily News, Feb. 21, 1951, p. 1, col. 4.

4. Fla. Stat. § 517.05(11) (1951): All agricultural cooperatives organized under Chapter 618, Florida Statutes, and operating wholly within the borders of a

violations.[5] By way of illustration, let us suppose that the ABC corporation sells its securities in violation of the Act. Unless this violation is "wilful" ABC can purge itself by making a bona-fide written offer to refund all money paid by purchasers, together with interest from the date of purchase. Normally, this written offer is accompanied by a waiver provision, which, if signed by the purchaser, waives his right to the refund of his money. ABC then proceeds to register its securities in the usual manner, as it should have done in the first place, admitting that it is in "technical" violation of the Act and requesting that the securities be registered for public sale. Such requests are usually granted by the Florida Securities Commission.[6]

Two common misconceptions regarding the Act on the part of attorneys which have caused them and their clients considerable embarrassment during the past two years are worthy of mention at this point. First, there is *no* exemption for corporate employees. For example, suppose that ABC corporation employs D as its executive manager, but D holds no ABC stock. A sale of ABC shares to D, in this situation, is not an exempt transaction; such sale must be registered under the Act. Nor would it matter that D was president of ABC. Suppose, however, that D or any other stockholder *does* own ABC stock. Sales of additional shares to D or other ABC stockholders would not be exempt transactions.[7] The second misconception, however, concerns this situation with a slight change in facts. Suppose that instead of owning ABC stock D owned ABC bonds only. Sales of ABC shares to D would *not* be exempt transactions. Attorneys should note carefully that the Act exempts "the issuance of additional *capital stock* by it among its own *stockholders* exclusively."[8] (Italics supplied).

Securities Litigation

Four cases concerned with securities, all of them involving either fraud or duress, were decided by the Supreme Court of Florida during the last two years.[9] In all four the contentions that fraud or duress were present met rejection by the court.

---

single county and all its stockholders are bona fide legal residents of such county, and no non-resident promoter is interested therein, shall be exempt from compliance with any of the provisions of the Florida securities law, same being Chapter 517, Florida Statutes.

5. Fla. Stat. § 517.21 (1951).

6. Attorneys should also note that the Securities Act of 1933 has no such "purge" provision. Instead, the violator must disclose the violation as a "contingent liability" in the prospectus, usually as a footnote to the balance sheet. Or, if the money has been refunded, there is no contingent liability to disclose. In either event, however, although it is not common practice, the Federal Securities and Exchange Commission, through the office of the Attorney General, could prosecute criminally.

7. Fla. Stat. § 517.06 (4)(1951).

8. *Ibid.*

9. As stated previously, the bulk of Florida corporate litigation during the past two years is the subject of discussion in the Corporation Law Section in this Survey.

In the first of these cases, *Nam. Han, Inc. v. Yedlin*,[10] a corporation which purchased the stock of a restaurant attempted to rescind the contract of sale on the ground that there had been fraudulent concealment of the real indebtedness of the restaurant at the time of the sale. In rejecting the argument that the purchasing corporation had been defrauded, the court stated that the evidence sustaned the finding of the lower court that the corporate buyer had acquired knowledge of the true amount of indebtedness shortly after acquiring possession of the restaurant, but that it had elected to rely upon an indemnification agreement with the sellers, and that the real reason for a later attempted rescission was predicated upon business losses in connection with the restaurant during its operation by the buyer.

In *Gordon v. Citizens and Southern National Bank*,[11] a Florida business man financed the organization of an airline of which he was the controlling stockholder through the medium of money advances from a commercial bank. As security for its advances the bank demanded and received securities owned by the business man. Upon severe losses in the operation of the airline, the business man resigned as its president. He then sought to have the transfer of his securities to the bank set aside on the basis of fraud and duress. In holding that the agreement to transfer the securities was natural under the circumstances, the court found no evidence of fraud or duress, either in the making of the agreement itself, or in the subsequent attempts of the bank to enforce collection of its depositors' money when the obligations were in default.

In *Harpold v. Stock*,[12] the defendant, a purchaser of a business and its capital stock formerly owned by the plaintiff, gave his note secured by the same mortgage as that given by an intermediate buyer. Subsequently, defendant became dissatisfied with the business. He and the plaintiff then entered into an agreement providing for liquidation and payment of one-half of the proceeds of the business to the plaintiff until the inventory was reduced to a stated amount, thereby releasing plaintiff's mortgage security. The defendant received substantial monetary benefits from this liquidation. When plaintiff brought suit on his note, the defendant interposed the defense of fraudulent representation in the sale of the business. The court held, however, that the making of the agreement with plaintiff operated as a waiver of defendant's right to interpose successfully, this defense.

The last of the four securities cases, *Gerken v. Streit*,[13] was the most recent of a long line of cases involving Maule Industries. Three stockholders of Maule, including plaintiff's husband, entered into a contract to sell 440,000 Maule shares to defendant. This amount included shares

10. 56 So.2d 133 (Fla. 1952).
11. 56 So.2d 531 (Fla. 1952).
12. 65 So.2d 477 (Fla. 1953).
13. 66 So.2d 245 (Fla. 1953).

individually owned by plaintiff, who contended that she allowed her husband to include her shares in the deal only after duress. In asking for rescission of the agreement and return of her shares, plaintiff had testified that her husband informed her that he would have to go to jail on Christmas unless she indorsed her shares for use in the deal. In rejecting this argument, the court found no duress and no knowledge on defendant's part of such alleged activity by plaintiff's husband. Rather, it termed plaintiff's argument a "baby act."

It is submitted that the Supreme Court of Florida, in rejecting the fraud and duress arguments in these cases, rendered its decision, in each instance, in accord with sound legal principles.

Conclusion

Although Florida's securities legislation affords ample public protection from the standpoint of evaluation of securities proposed to be sold, it is regrettable that the legislature once again has failed to strengthen that law with regard to those persons who are permitted to deal in securities.

While the Florida Securities Law does provide for the registration of brokers and dealers,[14] and does require that the applicant have a "good repute,"[15] the Act grants to the Florida Securities Commission no authority whatever to pass upon the *mental* qualifications of the applicant. No examination of any kind is made a condition precedent to registration as a dealer in securities. In short, if the applicant is found to be of good moral character, the commission must register him as a securities dealer. Recent dealer registrations have included those individuals whose background was that of a garment salesman, a butcher, and a beautician. It seems strange indeed that although real estate brokers, insurance salesmen, and even barbers, must pass examinations in their respective fields before receiving a license from the state, a securities dealer need not do so.

The law in its present form is inadequate with respect to the qualifications of those individuals who deal in other people's money. Remedial legislation is certainly in order if proper investor protection in this important area is to be achieved.

14. Fla. Stat. § 517.12 (1951).
15. *Ibid.*