

1-1-1975

## Disclosure of Client Confidences By Securities Attorney Named as a Defendant in a Civil Action Does Not Violate Code of Professional Responsibility

Howard B. Possick

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

---

### Recommended Citation

Howard B. Possick, *Disclosure of Client Confidences By Securities Attorney Named as a Defendant in a Civil Action Does Not Violate Code of Professional Responsibility*, 29 U. Miami L. Rev. 376 (1975)  
Available at: <https://repository.law.miami.edu/umlr/vol29/iss2/12>

This Case Note is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

trary to the policy that the privilege against self-incrimination is to be liberally construed and applied.<sup>21</sup> Regardless of the manner in which an attorney obtains possession of tax records and documents, it should be recognized that he possesses them constructively for his client in order to prepare his client's defense.

Of course, it must be noted, the court was not forced to overrule *White* in order to reach a proper and just decision in *Kasmir*. Hopefully, when the Fifth Circuit is again faced with a situation in which the taxpayer has not actually touched the documents en route to his attorney, it will acknowledge that such a slight distinction from *Kasmir* does not justify denial of the taxpayer's privilege. Today, a careful attorney can insure that his client's privilege will not be jeopardized by involving the taxpayer in any transfer of documents to him.

The *Kasmir* decision is an important one,<sup>22</sup> necessary to the safeguard of constitutional guarantees and protection of the attorney-client relationship. The Fifth Circuit has recognized that the Supreme Court's pronouncements in *Couch* do not defeat the taxpayer's claim of privilege with respect to documents in his attorney's possession, but rather, serve to strengthen that claim.<sup>23</sup> It is to be hoped that other circuits will follow the *Kasmir* court in its protection of the rights of taxpayers.

ELLEN R. GERSHOW

DISCLOSURE OF CLIENT CONFIDENCES BY SECURITIES  
ATTORNEY NAMED AS A DEFENDANT IN A CIVIL  
ACTION DOES NOT VIOLATE CODE OF  
PROFESSIONAL RESPONSIBILITY

Can an attorney, who is named as a defendant in a civil action along with his former corporate client, reveal client confidences to plaintiffs' counsel? Should plaintiffs' counsel be disqualified from participating in the suit on the grounds that he has received such

---

21. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

22. The field of taxation represents probably the greatest single area of contact between individuals and the force of the state. A slight invasion of the right against self-incrimination in this field has as great and baleful consequences upon the relations between the individual and the state as does an invasion of that right in the more dramatic areas of public life.

Application of House, 144 F. Supp. 95, 103 (N.D. Cal. 1956).

23. *But cf.* *United States v. Fisher*, 500 F.2d 683 (3d Cir. 1974), a post-*Couch* decision involving the same fact pattern as *Kasmir* but dealing with a non-criminal investigation. Cases which dealt with this issue prior to *Couch* include *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963); *Bouschor v. United States*, 316 F.2d 451 (8th Cir. 1963); *In re Fahey*, 300 F.2d 383 (6th Cir. 1961); *United States v. Boccuto*, 175 F. Supp. 886 (D.N.J. 1959), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956).

confidential information? These and other issues are to be examined in this note in light of the decision in *Meyerhofer v. Empire Fire and Marine Insurance Co.*<sup>1</sup>

Goldberg, an attorney, was involved in the preparation of a securities registration statement<sup>2</sup> filed on behalf of a client corporation with the United States Securities and Exchange Commission (SEC). Seven months after the registration statement became effective, Goldberg resigned from his law firm in a dispute with its partners over the non-disclosure of a compensation agreement<sup>3</sup> between the corporation and the law firm. Immediately after his resignation, Goldberg voluntarily appeared before the SEC and submitted an affidavit outlining the firm's activities in these matters. Three months later, in a Form 10-K filed with the SEC and in its annual report to stockholders, the corporation disclosed for the first time the compensation agreement.

Plaintiffs, two shareholders of the corporation, brought a class action<sup>4</sup> against the corporation, its law firm, Goldberg, and others.<sup>5</sup> Plaintiffs alleged that the registration statement and the prospectus under which the stock had been issued were materially false and misleading and in violation of the anti-fraud provisions of the securities laws.<sup>6</sup> Upon learning that he had been named as a defendant in the suit, Goldberg met with plaintiffs' counsel in an effort to exculpate himself from liability. In this connection, he gave plaintiffs' counsel a copy of the affidavit he had previously submitted to the SEC. Satisfied with Goldberg's explanation of his non-participation in the omission, plaintiffs moved to drop him as a defendant, which motion was granted by the court.

Shortly thereafter, the remaining defendants moved to bar plaintiffs' counsel and Goldberg from participating in any way in this or any future action against the corporation involving the same transac-

---

1. 497 F.2d 1190 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3274 (U.S. Nov. 12, 1974).

2. On May 31, 1972 Empire Fire and Marine Insurance Company made a public offering of 500,000 shares of its stock, pursuant to this registration statement.

3. The agreement included \$200,000 in attorneys' fees, a fact that was not disclosed in the registration statement.

4. Plaintiff Meyerhofer alleged that he sustained an unrealized loss of \$1000 on the stock he purchased. Plaintiff Federman alleged that he sustained a realized loss of \$237 and an unrealized loss of \$900 on the stock he purchased.

5. The action was brought under the following legal theories: violations of various sections of the Securities Act of 1933, 15 U.S.C. §§ 77a-aa (1970), the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-jj (1970), rule 10b-5, 17 C.F.R. § 240.10b-5 (1974), and common law negligence, fraud, and deceit.

6. Approximately five months after plaintiffs brought suit, the SEC filed a complaint seeking to enjoin the law firm, which had prepared the registration statement, from violating the securities laws through an alleged scheme to obtain undisclosed finders fees. The SEC charged the firm with violations of the securities laws by, among other things, failing to disclose the written compensation agreements and by filing materially false and misleading registration statements. In addition, the SEC asked for a mandatory injunction requiring the law firm to make disclosure with respect to any public offering of securities and any other filings with the SEC. *SEC v. Sitomer, Sitomer and Porges*, [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,184 (S.D.N.Y., filed Oct. 19, 1973).

tions. In addition, defendants moved to dismiss the complaint without prejudice and to enjoin plaintiffs' counsel and Goldberg from further disclosing confidential information about the corporation to others. The United States District Court for the Southern District of New York granted the motions and held that both Goldberg and counsel for plaintiffs had breached the ABA Code of Professional Responsibility: the former by revealing client confidences and by not avoiding an appearance of impropriety, the latter by encouraging and participating in the revelation.<sup>7</sup> On appeal, the United States Court of Appeals for the Second Circuit, *held*, reversed in part and affirmed in part: An attorney who is named as a defendant in a civil action along with his former corporate client is allowed to reveal certain of his client's confidences to counsel for plaintiffs in order to defend himself against charges of wrongdoing. Because there was no violation of the Code of Professional Responsibility, the defendant-attorney was not involved in a tainted relationship with counsel for plaintiffs. Accordingly, neither disqualification of plaintiffs' counsel from participating in the suit nor dismissal of the complaint without prejudice was justified. However, the defendant-attorney could properly be enjoined from acting as a party-plaintiff or as an attorney for a party-plaintiff in any action arising out of the same facts and could properly be enjoined from disclosing material information except on discovery or at trial. *Meyerhofer v. Empire Fire and Marine Insurance Co.*, 497 F.2d 1190 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3274 (U.S. Nov. 12, 1974).<sup>8</sup>

The Code of Professional Responsibility of the American Bar Association sets forth ethical standards and guidelines of conduct for practicing attorneys.<sup>9</sup> Canon 4 of the Code states that "a lawyer should preserve the confidences and secrets of a client."<sup>10</sup> In connection with this canon, the disciplinary rules mandate that a lawyer shall not reveal a confidence or secret of his client, nor use a confidence or secret of his client to the disadvantage of the client or for the advantage of himself.<sup>11</sup> The rationale behind this rule is that the fiduciary relationship existing between a lawyer and his client and the proper function-

---

7. *Meyerhofer v. Empire Fire and Marine Ins. Co.*, [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,152 (S.D.N.Y. 1973). A summary of the lower court's opinion will be found by reference to this citation. The full text of the memorandum opinion is unpublished at this time.

8. In their petition for certiorari, petitioners contended that allowing the plaintiffs and their attorneys to continue to prosecute their claims compromises the fairness, or the appearance of fairness, of federal court proceedings. CCH FED. SEC. L. REPORTS, No. 553 (Sept. 25, 1974).

9. ABA CODE OF PROFESSIONAL RESPONSIBILITY, PRELIMINARY STATEMENT.

10. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 4.

11. Disciplinary Rule 4-101(B) provides that with certain exceptions:

A lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(B).

ing of the legal system require that a client be secure in his belief that his lawyer will never disclose secrets confided in him.<sup>12</sup>

The import of *Meyerhofer* lies in the context of a recent trend of expanding responsibilities of securities attorneys.<sup>13</sup> While no other cases have interpreted the canons of ethics with regard to an attorney-defendant's right to reveal the confidences of his former client, there is a line of cases bearing some similarity to the instant decision. The cases generally involve factual situations in which an attorney participates in litigation, either as a party-plaintiff or as counsel to plaintiff, against one of his former clients. Typically, the issues presented to the court are whether the attorney should be disqualified from participating in the litigation<sup>14</sup> and whether he should be enjoined from disclosing confidential information acquired during the prior representation.

In order to protect the confidentiality of communications between attorney and client, the courts have generally disqualified an attorney whenever any substantial relationship may be shown between the subject matter of the attorney's former representation and that of a subsequent adverse representation.<sup>15</sup> Exemplifying this "substantial relationship" test is *Richardson v. Hamilton International Corp.*<sup>16</sup> in which the court held that an attorney was barred under Canon 4 of the Code from bringing a class action and a stockholders' derivative suit against a company he had previously represented in proceedings before the SEC and against certain of its directors and officers. Likewise, in *Hall v. A Corp.*,<sup>17</sup> the court determined that an attorney violated Canon 4 by bringing a stockholders' derivative action against his former client. Canon 4 is breached, the court emphasized, whenever an attorney would be required to do anything in present litigation which might adversely affect his former clients in a matter in which he formerly represented them or whenever he would be required to use against his former clients any knowledge or information acquired through his former relationship with them.<sup>18</sup> To remedy the breach,

---

12. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 4, EC 4-1. See *United States v. Standard Oil Co.*, 136 F. Supp. 345 (S.D.N.Y. 1955).

13. See notes 30-35 *infra* and accompanying text.

14. The power of a court to disqualify lawyers from participation in a case is based on the court's general supervisory powers. *Handelman v. Weiss*, 368 F. Supp. 258 (S.D.N.Y. 1973).

15. See, e.g., *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382 (3d Cir. 1972); *John Doe v. A Corp.*, 330 F. Supp. 1352 (S.D.N.Y. 1971), *aff'd sub nom. Hall v. A Corp.*, 453 F.2d 1375 (2d Cir. 1972) (per curiam); *T.C. & Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953).

16. 469 F.2d 1382 (3d Cir. 1972) [hereinafter referred to as *Richardson*].

17. 453 F.2d 1375 (2d Cir. 1972) [hereinafter referred to as *A Corp.*].

18. The United States District Court for the Southern District of New York presented a test for determining whether an attorney's actions run counter to the dictates of Canon 4:

The test under the canon is whether in this litigation . . . [the attorney] would be required to do anything which might injuriously affect his former clients in any matter in which he formerly represented them, or whether he would be called upon to use

the court enjoined plaintiff and his co-counsel from acting as counsel in any action arising out of the same facts upon which the litigation was based and from disclosing any secret or confidential information obtained by plaintiff during his representation of the former client.<sup>19</sup>

The cases discussed above led to the application of a "strict prophylactic rule" in both *Emle Industries, Inc. v. Patentex, Inc.*,<sup>20</sup> and in *Motor Mart, Inc. v. Saab Motors, Inc.*<sup>21</sup>

to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.<sup>22</sup>

Of concern to the courts in these cases was the deleterious consequence of not strictly enforcing high ethical standards. A client who fears that information he reveals to his lawyer on one day may be used against him subsequently would not be inclined to discuss his problems freely with his lawyer. The need to discourage this type of response was accordingly emphasized by the courts.

Against this background of case law, the *Meyerhofer* decision was reached. Unlike the cases before it, *Meyerhofer* involved a balancing of the interests of an attorney in defending himself against charges of wrong-doing with the interests of the attorney's former client in the preservation of its confidences and secrets.

Initially the court of appeals addressed itself to Canon 4 and Canon 9<sup>23</sup> of the Code of Professional Responsibility to determine whether Goldberg's meetings and discussions with counsel for plaintiffs constituted a violation thereof. The court noted that Goldberg had associated with and made certain disclosures to plaintiffs' counsel, which actions were contrary to the ethical precepts of preservation of client confidentiality and avoidance of the appearance of impropriety. The court of appeals then focused on the "right of self-defense" exception to client confidentiality which provision the District Court had not taken into account. This exception provides that a lawyer may reveal "confidences or secrets necessary . . . to defend himself . . . against an

---

against these former clients any knowledge or information acquired through his former connection with them.

*John Doe v. A Corp.*, 330 F. Supp. 1352, 1355 (S.D.N.Y. 1971).

19. Further, the court enjoined plaintiff and his co-counsel from contacting any other shareholders of the corporation for purposes of inducing them to commence or intervene in any action arising out of the same facts.

20. 478 F.2d 562 (2d Cir. 1973) [hereinafter referred to as *Emle Industries*].

21. 359 F. Supp. 156 (S.D.N.Y. 1973). The court followed the "strict prophylactic rule" of *Emle Industries* in enforcing Canon 4 by granting defendants' motion to disqualify plaintiff's counsel from appearing in the suit. The decision is notable in that counsel was disqualified without a finding of a breach of good conduct on the part of the attorney and without a finding of any violation of the Code. This holding apparently is an extension of the "strict prophylactic rule" for in *Emle Industries* the actions of the attorney were found to be in violation of Canon 4.

22. *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973).

23. Canon 9 states that "a lawyer should avoid even the appearance of professional impropriety." ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 9.

accusation of wrongful conduct."<sup>24</sup> The court determined that "this is exactly what Goldberg had to face when, in their original complaint, plaintiffs named him as a defendant who wilfully violated the securities laws."<sup>25</sup> Because he faced substantial potential liability as well as damages to his reputation, the court opined that "[u]nder these circumstances Goldberg had the right to make an appropriate disclosure with respect to his role in the public offering."<sup>26</sup>

Having determined that the method used by Goldberg to make his disclosure to plaintiffs' counsel was appropriate,<sup>27</sup> the court concluded that Goldberg had not violated the Code by revealing client's confidences and secrets. The logical conclusion to be drawn from the court's holding is that the interests of the attorney in defending himself should prevail over the interests of his former client in having its confidentiality maintained.

The second step in the court's determination was an analysis of prior case law. Implicit in references made to *Emle Industries* and *Richardson* is the premise that to follow these decisions would require the disqualification of plaintiffs' counsel and Goldberg from acting as and participating with counsel to plaintiffs in the conduct of the suit. Contrary to the lower court's opinion, the court of appeals decided that

[T]he irrebuttable presumption of *Emle Industries* has no application to the instant circumstances because Goldberg never sought to "prosecute litigation," either as a party . . . or as counsel for a plaintiff party.<sup>28</sup>

Because Goldberg did not *represent* the interests of the plaintiffs and had not violated the Code, and thus had not involved plaintiffs' counsel in a tainted relationship, the determination was made not to disqualify plaintiffs' counsel.

Submitted to close scrutiny, the court's reasoning appears less than perfect. In *Emle Industries* and in *Richardson*, the rationale for disqualifying plaintiffs and their counsel was the likelihood that confidences and secrets of the former client would be used in litigation against it. Notwithstanding the fact that Goldberg was not a party-plaintiff nor acted as counsel for plaintiffs, arguably he provided plaintiffs with information that bolstered their posture in litigation.<sup>29</sup>

---

24. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 4, DR 4-101(c)(3).

25. 497 F.2d at 1195.

26. *Id.*

27. The court appeared somewhat troubled by the fact that Goldberg gave plaintiffs' counsel a copy of the affidavit he had filed with the SEC. However, this method of disclosure was deemed appropriate since, according to the court, 1) Goldberg's situation was highly precarious, 2) Goldberg had consulted with his own attorney and special counsel to the SEC before handing over the affidavit, and 3) the most effective way for Goldberg to substantiate his story was for him to disclose the affidavit.

28. 497 F.2d at 1195.

29. This inference can be drawn from the fact that after the meetings between Goldberg and plaintiffs' counsel, plaintiffs amended their complaint and alleged more specific facts. *Id.* at 1193.

Such use of confidential information to the disadvantage of a client is conduct the courts and the Code seek to prohibit. The distinction between formally representing the plaintiffs and assisting in their cause by the disclosure of confidences and secrets of the defendant is, in the instant circumstances, not well-founded since the former client is placed in a disadvantageous position in either situation.

In addition, enjoining Goldberg from disclosing any further information and from acting as plaintiffs' counsel without enjoining plaintiffs' counsel from prosecuting the suit is not an adequate remedy for protecting the interests of the defendant-client. Having been the recipient of confidences and secrets of the defendant-client, plaintiffs' counsel must be barred from continuing his representation of plaintiffs else no real protection of client confidentiality has been afforded.

The decision of the court of appeals in *Meyerhofer* is best understood in light of what has emerged as a new ethic of disclosure in the field of securities law.<sup>30</sup> Within the last few years, the responsibilities and liabilities of attorneys in SEC practice have been significantly expanded by the SEC and the courts.<sup>31</sup>

Concomitantly, the traditional viewpoint that a securities attorney's sole allegiance is to his corporate client has been significantly eroded. Today the SEC appears to have adopted the view that securities attorneys owe a duty to the investing public that may take precedence over their duty to corporate clients. Representative of this aspect of the trend towards greater disclosure is the complaint filed by the SEC in *SEC v. National Student Marketing Corp.*<sup>32</sup> The basic

---

30. See Johnson, *The Expanding Responsibilities of Attorneys in Practice before the SEC: Disciplinary Proceedings under Rule 2(e) of the Commission's Rules of Practice*, 25 MERCER L. REV. 637 (1974); Karmel, *Attorneys' Securities Laws Liabilities*, 27 BUS. LAW. 1153 (1972); Koch, *Attorney's Liability: The Securities Bar and the Impact of National Student Marketing*, 14 WM. & MARY L. REV. 883 (1973); Lowenfels, *Expanding Public Responsibilities of Securities Lawyers: An Analysis of the New Trend in Standard of Care and Priorities of Duties*, 74 COLUM. L. REV. 412 (1974); *A New Ethic of Disclosure—National Student Marketing and the Attorney-Client Privilege*, 48 NOTRE DAME LAW. 661 (1973); *Securities and Exchange Commission v. National Student Marketing Corp.: The Attorney's Duty*, 46 TEMP. L.Q. 153 (1972).

31. See, e.g., *SEC v. Spectrum, Ltd.*, 489 F.2d 535 (2d Cir. 1973). In *Spectrum* the SEC sought an injunction against an attorney who had prepared an opinion letter used to sell unregistered securities in violation of the registration provisions and anti-fraud provisions of the securities laws. The court of appeals determined that in assessing the liability of the attorney as an aider and abettor a negligence standard is sufficient in the context of enforcement proceedings seeking equitable or prophylactic relief. In so determining, the court stated that "the preparation of an opinion letter is too essential and the reliance of the public too high to permit due diligence to be cast aside in the name of convenience." *Id.* at 542.

32. [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,360 (D.D.C., filed Feb. 3, 1972).

The SEC alleged that prior to the closing of a corporate merger involving National Student Marketing Corporation, certain attorneys were informed by the accounting firm certifying the financial statements that retroactive adjustments to the statements were necessary to accurately reflect the corporation's financial position. Notwithstanding the receipt of such information, the attorneys issued opinions that the appropriate steps to a merger had been undertaken and that, to their knowledge, no violation of securities laws had taken place.

The SEC asserted that the law firms should have refused to issue the opinion letters and

premise of the SEC in charging certain attorneys and their law firms with liability is that once an attorney has determined that client conduct may be in violation of the securities laws, the attorney has a duty to disclose to the SEC the possible violation.<sup>33</sup> As many commentators have noted,<sup>34</sup> such disclosure presents serious problems for the confidentiality of the attorney-client relationship.

On its face, the *Meyerhofer* decision appears consistent with this new ethic of disclosure and in line with the SEC's position in *National Student Marketing*. Clearly, counsel for plaintiffs, purchasers of a corporation's securities, may receive attorney-client confidences and secrets concerning the corporation from the corporation's former attorney who is made a defendant in the suit.<sup>35</sup> To the extent that they gain information potentially in support of their cause of action, plaintiff-investors benefit from such disclosure. However, it is submitted that the ultimate result of allowing such disclosure of client confidences is that full and fair disclosure to the investor regarding the issuance of securities is impeded rather than promoted.

The consequence of the holding of the court of appeals in *Meyerhofer* is the encouraging of attorneys who are bringing suit against public corporations to name the defendant's counsel, involved in the issuance of securities, as a party defendant. Joining defendant's counsel thus might force the revelation of confidential information at the expense of the counsel's corporate client. Since counsel might in the future be forced to reveal client confidences in order to clear himself from charges of wrongdoing, a client justifiably would be fearful that information communicated in confidence might later be used against it. This in turn would place corporate clients on their guard as to what they should or should not reveal to their counsel. Indeed, it is possible that some clients would not disclose potentially damaging information. Without such information, counsel would be in a relatively poor position to advise his client. More importantly, such information might never be disclosed to public investors since a reasonable investigation by counsel in many circumstances would not reveal certain information peculiarly within the knowledge of the corporate client. Hence, the net effect of the court's holding may be to reduce disclosure rather than to promote dissemination of information to the investing public.

Conversely, had the court of appeals disqualified plaintiffs' counsel from participating in the suit because it had received confidential information from the corporation's attorney, plaintiffs' counsel would

---

should have insisted that the financial statements be revised and the shareholders be resolicited. If that advice had been ignored, the SEC contended, the attorneys should have ceased representing their respective clients and informed the SEC of the misleading nature of the financial statements.

33. In *Meyerhofer*, the court expressly refused to consider the propriety of Goldberg's disclosures to the SEC.

34. See authorities cited in note 30 *supra*.

35. 497 F.2d at 1196.

not be encouraged to join the corporation's counsel as a party defendant. Corporate counsel would not be forced to reveal confidential information. In fact, had the court of appeals affirmed the lower court's decision, attorneys in Goldberg's position would not be allowed to disclose these confidences and secrets. This reaffirmation of the confidentiality between attorney and client would allay any fear on the part of the corporate client that its counsel would be forced to reveal confidential information. This in turn would result in greater disclosure of information to the investing public since corporate counsel would have better access to and a greater knowledge of the facts relevant to the issuance of the corporation's securities.

Although, the actual effect of the *Meyerhofer* decision is not yet known, it has been shown that it is likely to be inconsistent with the policy that the court was attempting to promote. It is submitted that at the very least the court of appeals in its opinion should have addressed itself to these potential consequences of its holding.

HOWARD B. POSSICK

PURCHASE MONEY SECURITY INTEREST PRIORITY UNDER  
§ 9-312(4) OF THE U.C.C.: FLORIDA SUPREME COURT  
REWRITES THE CODE\*

American National Bank of Jacksonville on April 8, 1969, executed a loan agreement with Machek Farms and took back a security interest which encumbered all equipment thereafter acquired by Machek Farms.<sup>1</sup> The bank filed a financing statement on April 10, 1969.<sup>2</sup> Subsequently, Machek Farms purchased farm equipment from Florida Truck on August 8, 1969, and executed a credit sales agreement to cover the entire purchase price of the equipment. Florida Truck assigned this credit sales contract to International Harvester Credit Corporation, which filed a financing statement on September 3, 1969.<sup>3</sup> After Machek Farms defaulted in payments owed to both creditors, *i.e.*, American National Bank and International Harvester, Florida Truck repossessed the farm equipment. American National

---

\* Florida adopted the Uniform Commercial Code (1962 version) effective Jan., 1, 1967. FLA. STAT. chs. 671-80 (1973). [The Uniform Commercial Code will hereinafter be cited as U.C.C. or the Code.]

1. U.C.C. section 9-204 validates after-acquired property as collateral for a loan. Section 9-204(3) states in pertinent part, "a security agreement may provide that collateral whenever acquired shall secure all obligations covered by the security agreement." Section 9-204(4) limits the application of an after-acquired clause.

2. U.C.C. section 9-302 requires a financing statement to be filed to perfect all security interests with some exceptions stated in subsection (1).

3. By not filing until September 3, 1969, International Harvester did not take advantage of a special exception to the "first to file, first in right" rule in U.C.C. section 9-312(4), regarding purchase money security interests in collateral other than inventory. U.C.C. § 9-312(4).