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Voidability Provisions Under State Blue Sky Laws

THE ALMOST LIMITLESS possibilities which exist for the practice of deception in the sale of securities have prompted state governments to enact legislation to protect the unwary purchaser.¹ In general, this legislation has the dual purposes of regulating the sale of securities and preventing the perpetration of fraud.² An Ohio court has stated that such laws act as "a regulation of business and [constrain] . . . conduct only to the end of protecting the public against the imposition of unsubstantial schemes and the securities based upon them."³ Blue sky laws⁴ are "designed to be prophylactic if possible, remedial only if necessary."⁵

While state law normally provides criminal penalties for fraud in the sale of securities,⁶ these sanctions are often unattractive to purchasers for several reasons. First, there exists a natural reluctance on the part of businessmen to institute criminal proceedings. Similarly, state administrators are also reluctant to bring a criminal action against a seller who has unsuccessfully attempted to comply with the many technical requirements of blue sky laws. Additional factors such as inadequate state budgets, uneven enforcement, and a lack of administrative procedures to effect rescission of a contract make civil liability an appealing alternative to a criminal proceeding.⁷

A purchaser who decides to forego a criminal action may proceed under common law, a state securities act provision, or federal law.⁸ The common law remedies of breach of warranty,

¹ While this Note will in general discuss the remedies available to a *purchaser* who has been victimized by an unlawful sale, some reference will be made to the circumstances where it is the seller who is seeking relief. See text accompanying notes 100-104 *infra*.

² *Miller v. Griffith*, 196 N.E.2d 154 (Ohio C.P. 1961).

³ *Id.* at 155.

⁴ The term "blue sky law" derives from the fraudulent practices of some promoters who were characterized as being so underhanded, that they would, if possible, sell building lots in the blue sky in fee simple. LOSS & COWETT, *BLUE SKY LAW* 7 n.22 (1958).

⁵ *Jackson v. Robertson*, 90 Ariz. 405, 410, 368 P.2d 645, 648 (1962).

⁶ See LOSS & COWETT, *op. cit. supra* note 4, at 23-24.

⁷ *Id.* at 129-30.

⁸ While a purchaser is free to proceed under a combination of any of these remedies, his recovery is generally limited to his damages or the maximum amount recoverable

rescission and deceit often impose insurmountable obstacles in the path of a purchaser who is seeking recovery from an unscrupulous seller. For example, a purchaser choosing to sue for a breach of warranty will generally not be permitted to introduce parol evidence in order to show promises or representations which were not included in the written contract.⁹ A common law rescission action may normally be brought only by one in privity with the seller.¹⁰ A tort action for deceit, while not requiring privity, will usually impose upon the purchaser the burden of proving causation, damage and, most importantly, scienter.¹¹

Nor does federal law always supply a method of redress for the victimized purchaser. While the provisions of the Securities Act of 1933¹² and the Securities Exchange Act of 1934¹³ offer comforting relief to most victims of illegal sales, these federal acts are often limited in their application by such factors as jurisdiction¹⁴ and exemptions.¹⁵ When a situation arises in which there is no federal remedy and no convenient common law alternative, a defrauded purchaser may seek civil relief under the applicable state securities act or blue sky law.

It is the purpose of this Note to examine one form of relief often available under state securities acts — the so-called "voidability" remedy.¹⁶ Special emphasis will be given to the types of violations which give rise to this remedy, the ramifications of declaring a contract void or voidable, the liability of specific parties to voidable transactions, and various defenses which may be available to these parties. Of greatest importance is the effect of the recent widespread adoption of the Uniform Securities Act on the

under any particular remedy, whichever is greater. 3 LOSS, SECURITIES REGULATION 1624 (2d ed. 1961). The elements of a violation under each particular method are, of course, independent of those required for a violation in either of the other two areas. Cf. *Derwiler v. Clavin*, 377 Mich. 1, 138 N.W.2d 336 (1965).

⁹ 3 LOSS, *op. cit. supra* note 3, at 1626.

¹⁰ *Id.* at 1627.

¹¹ *Id.* at 1628.

¹² 48 Stat. 74 (1933), as amended, 15 U.S.C. §§ 77a-77aa (1958).

¹³ 48 Stat. 881 (1934), as amended, 15 U.S.C. §§ 78aa to hh-1 (1964).

¹⁴ See Annot., 165 A.L.R. 1232 (1946).

¹⁵ See, *e.g.*, *Ohio Nat'l Life Ins. Co. v. Struble*, 82 Ohio App. 480, 81 N.E.2d 622 (1948).

¹⁶ Nine states have no voidability remedy: Delaware, Idaho, Maine, Minnesota, New Hampshire, New York, Rhode Island, Pennsylvania, and South Dakota. In most of these states, however, other civil liability is provided by statute. For a discussion of other possible remedies under state acts, see Note, 17 W. RES. L. REV. 1173 (1966).

subject of voidability.¹⁷ This act, together with the Ohio voidability provision,¹⁸ will be the subject of special analysis.

I. VIOLATIONS GIVING RISE TO ACTIONS FOR RESCISSION

A. *Types of Violations*

The specific acts or omissions which will allow a purchaser of a security to void the contract of sale vary widely among the states. The only classification which seems possible is the separation of those states which provide a remedy for *any* violation of the blue sky law from those states which restrict the class of voidable contracts either specifically or systematically.

(1) *Statutory Relief for Any Violation*.—Fifteen states currently permit the purchaser of a security to void the contract of sale if the seller did not comply with even the most technical and unimportant requirement of the state's blue sky law.¹⁹ Among the less obvious errors which have resulted in a purchaser voiding the contract are the seller's failure to file reports, advertising brochures, or amendments, his failure to maintain required records, to deliver a prospectus, to use subscription blanks or to pay required fees.²⁰ Tennessee, North Dakota and New Mexico further extend the seller's already precarious position by rendering voidable those contracts which violate an order of the commissioner made pursuant to the state act.²¹

The criticisms generally levelled at the states allowing voidability for any violation are that (1) these statutes place a tremendous burden on sellers who must thoroughly search the state

¹⁷ At this writing, § 410 of the UNIFORM SECURITIES ACT (which is the section corresponding to the voidability section in other state statutes) had been substantially adopted in the following states: Alabama, Alaska, Arkansas, Colorado, Connecticut, Indiana, Kansas, Kentucky, Maryland, Michigan, Montana, Nevada, New Jersey, Oklahoma, South Carolina, Texas, Utah, Virginia, Washington and Wyoming.

¹⁸ OHIO REV. CODE § 1707.43.

¹⁹ ALA. CODE tit. 53, § 45 (Supp. 1963); FLA. STAT. ANN. § 517.21 (1962); GA. CODE ANN. § 97-114 (Supp. 1965); HAWAII REV. LAWS § 199-16 (Supp. 1961); ILL. ANN. STAT. ch. 121½, § 137.13 (Smith-Hurd Supp. 1965); IOWA CODE ANN. § 502.23 (1949); MISS. CODE ANN. § 5374 (Supp. 1964); MO. ANN. STAT. § 409.240 (1952); N.M. STAT. ANN. § 48-18-31 (Supp. 1965); N.C. GEN. STAT. § 78-22 (1965); N.D. CENT. CODE § 10-04-17 (1960); ORE. REV. STAT. § 59.250 (1961); TENN. CODE ANN. § 48-1645 (1964); VT. STAT. ANN. tit. 9, § 4225 (1958); W. VA. CODE ANN. § 3273(18) (1961).

²⁰ LOSS & COWETT, *op. cit. supra* note 4, at 135.

²¹ N.M. STAT. ANN. § 48-18-31 (Supp. 1965); N.D. CENT. CODE § 10-04-17 (1960); TENN. CODE ANN. § 48-1645 (1964). Compare OHIO REV. CODE § 1707.40. See also N.J. STAT. ANN. § 49:3-20 (Supp. 1965).

securities act in order to be familiar with every technical detail; (2) such statutes allow an often complex contract to be avoided on the basis of a minute detail; and (3) these all-encompassing statutes will permit a buyer who may be very sophisticated in his knowledge of securities sales to take unfair advantage of a less-experienced seller by entering into a contract for sale with knowledge that if the securities decrease in value, the contract may be voided.²² These criticisms are well-founded. It is not difficult to envision the situation of a buyer who has become dissatisfied with the progress of securities which he has recently purchased searching the records of a corporation until he discovers a technical violation of the state blue sky law which will allow him to void his contract and regain his original investment. The obvious inequity inherent in such a case would seem to constitute a sufficient indictment of this type of voidability provision.

(2) *Voidability in Ohio*.—Section 1707.43 of the Ohio Revised Code²³ allows a purchaser to void a contract for the sale of securities if the contract was made in violation of sections 1707.01 to 1707.45 of the Ohio Securities Act *and* if that violation *materially affects* the protection contemplated by the violated provision. The wording of the statute seems to achieve the balance required between observance of the rights of the seller, on the one hand, and the obvious policy against fraudulent sales, on the other. For exam-

²² UNIFORM SECURITIES ACT § 410(a) (draftsmen's comments) found in LOSS & COWETT, *op. cit. supra* note 4, at 390-91.

²³ Section 1707.43 states:

Every sale or contract for sale made in violation of sections 1707.01 to 1707.45, inclusive, of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person who has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to such purchaser, in an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by such purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision.

No action for the recovery of the purchase price as provided for in this section, and no other action for any recovery based upon or arising out of a sale or contract for sale made in violation of sections 1707.01 to 1707.45, inclusive, of the Revised Code, whether based upon contract or tort, and whether legal or equitable in nature, shall be brought after two years from the date of such sale or contract for sale.

No purchaser is entitled to the benefit of this section who has failed to accept, within thirty days from the date of such offer, an offer in writing made after two weeks from the date of such sale or contract of sale, by the seller or by any person who has participated in or aided the seller in any way in making such sale or contract of sale, to take back the security in question and to refund the full amount paid by such purchaser.

ple, the buyer is not required to show that any misrepresentation was knowingly made as long as the misrepresentation materially affected the protection envisioned by the act.²⁴ This is an obvious improvement over the common law action for rescission which in Ohio required a knowing misrepresentation.²⁵ The buyer's position is further strengthened by the absence of any necessity for proof of fraud. In *Crane v. Courtright*,²⁶ an Ohio court of appeals stated:

Transactions subject to Section 1707.43, Revised Code, need not be fraudulent, nor does it follow that the security sold is necessarily worthless. It may in fact be quite valuable. In these respects, compare the remedial provisions of Section 1707.38, Revised Code (violation does not invalidate the security), and Section 1707.41, Revised Code (liability for fraud). Upon failure to register, the statute involved here simply grants the purchaser the right to a unilateral rescission of the transaction and provides for mutual restitution, i.e., the security for the purchase price. The statute is not, therefore, a penalty provision in the usual sense. It is not even compensatory since the purchaser's right is to obtain restitution of the purchase price, but does not include the right to recover damages.²⁷

From the seller's point of view, the Ohio statute is an obvious improvement over the broader provisions previously discussed.²⁸ For example, the seller's failure to register the securities within the time prescribed²⁹ would not allow the buyer to void the contract unless this failure materially affected the protection contemplated by the statute. This requirement avoids the harsh results often reached under statutes allowing voidability for any violation. However, it should be noted in this respect that Ohio courts have generally imposed upon the defendant the burden of showing that the violation committed was not material.³⁰ In *Biernbaum v. Midwest Oil & Gas Co.*,³¹ the court went even further, requiring the defendant to show that there was "no rele-

²⁴ OHIO REV. CODE § 1707.41 places the burden of showing no knowledge of a misrepresentation on the defendant.

²⁵ Cf. *Cross v. Ledford*, 161 Ohio St. 469, 475, 120 N.E.2d 118, 122 (1954).

²⁶ 2 Ohio App. 2d 125, 206 N.E.2d 913 (1964).

²⁷ *Crane v. Courtright*, 2 Ohio App. 2d 125, 127-28, 206 N.E.2d 913, 915 (1964).

²⁸ See text accompanying notes 19-22 *supra*.

²⁹ See OHIO REV. CODE § 1707.07. For a discussion of the registration requirements, see Note, 17 W. RES. L. REV. 1126 (1966).

³⁰ *Biernbaum v. Midwest Oil & Gas Co.*, 108 Ohio App. 560, 566, 160 N.E.2d 410, 414 (1959); *Miller v. Griffith*, 196 N.E.2d 154 (Ohio C.P. 1961).

³¹ 108 Ohio App. 560, 160 N.E.2d 410 (1959).

vant connection between the protection intended by the Securities Act and the violation in question."³²

A question which will undoubtedly arise time and again under the Ohio voidability provision involves the determination of what violations are material. This was the issue presented in *Miller v. Griffith*³³ which involved an action by the buyer of stock against the officers of a corporation to recover the purchase price on the ground that the corporation had not filed the required registration statement. The defendants claimed that plaintiff's losses were occasioned by the corporation's insolvency rather than because of any statutory violation. In rejecting this defense, the court stated:

This is the very type of situation that the Securities Act was supposed to regulate because it is only in those cases where the corporation fails or never gets off the ground that there is a need for the protection of the Securities Act. The fact that the plaintiff hoped to make a profit is not a defense either because anyone who owns shares in a corporation does so with the hope of profit and it is not enough to say that he took a chance and lost. If the corporation made profits even though the Securities Act was not followed there would naturally be a claim on the part of plaintiff so the court feels that the Securities Act is remedial in nature and should be interpreted to provide the protection that it intended to give, namely, to people who own shares in corporations in the hope of making a profit and then learn that there was never any substance to the corporation in the beginning.³⁴

In holding for the plaintiffs, the court further noted that while the filing of an incomplete registration might not materially affect the buyer's statutory protection, the failure to file anything resulted in there being "no protection whatsoever that could be affected one way or the other."³⁵ The emphasis of the *Miller* decision on the facts in that case indicates that courts generally will look to the facts in each case to answer the materiality issue in the future. Where the violation involves something as substantial as an affirmative misrepresentation or a failure to register, however, there is little doubt that the court will find a material effect on the buyer's protection.

(3) *Uniform Securities Act*.—Section 410(a) of the Uni-

³² *Biernbaum v. Midwest Oil & Gas Co.*, 108 Ohio App. 560, 566, 160 N.E.2d 410, 414 (1959). (Emphasis added.)

³³ 196 N.E.2d 154 (Ohio C.P. 1961).

³⁴ *Miller v. Griffith*, 196 N.E.2d 154, 156 (Ohio C.P. 1961).

³⁵ *Ibid.*

form Securities Act³⁶ allows a purchaser to recover the consideration paid for a security together with interest, costs, and attorneys fees less any income received on the security, where an offer to sell or a sale was made in violation of certain provisions of the act or by means of a misrepresentation of a material fact. The specificity which characterizes this statute is undoubtedly its finest attribute. Because it limits the violations which may give rise to a cause of action for rescission, it avoids the difficulty encountered under general voidability provisions which permit an action for even the most technical violation.³⁷ And because section 410(a)

³⁶ § 410(a) states:

[Violation of Registration or Fraud Provision]

(a) Any person who

(1) offers or sells a security in violation of section 201 (a), 301 or 405 (b), or of any rule or order under section 403 which requires the affirmative approval of sales literature before it is used, or of any condition imposed under section 304(d), 305 (g), or 305 (h), or

(2) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security and any income received on it, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six per cent.

This section has been adopted with some variation in the following states: ALA. CODE tit. 53, § 45 (Supp. 1963); ALASKA STAT. § 45.55.220 (1962); ARK. STAT. ANN. § 67-1256 (1966); COLO. REV. STAT. ANN. § 125-1-21 (1963); CONN. GEN. STAT. ANN. § 36-312a(a) (1960); IND. ANN. STAT. § 25-873 (Supp. 1965); KAN. STAT. ANN. § 17-1268 (1964); KY. REV. STAT. ANN. § 292.480 (1963); MD. ANN. CODE art. 32A, § 34 (Supp. 1965); MICH. STAT. ANN. § 19.776(410) (a) (Supp. 1965); MONT. REV. CODES ANN. § 15-2022 (Supp. 1965); NEV. REV. STAT. § 90.200 (Supp. 1963); N.J. STAT. ANN. § 49:3-19 (Supp. 1965); OKLA. STAT. ANN. tit. 71, § 408 (1965); S.C. CODE ANN. § 62-309 (1962); TEX. REV. CIV. STAT. ANN. art. 581-33 (1964); UTAH CODE ANN. § 61-1-22 (Supp. 1965); VA. CODE ANN. § 13.1-522 (1964); WASH. REV. CODE ANN. § 21.20.430 (1961); WYO. STAT. ANN. § 17-117.22 (1957). A provision somewhat similar to § 410(a) is contained in the Nebraska code. NEB. REV. STAT. § 81-347 (1958). The specific variations adopted by each of these states, and the reasons therefor, are, unless otherwise indicated, beyond the scope of this Note. The reader is cautioned to consult the specific state statute rather than rely on the provisions of the Uniform Act.

³⁷ This rather obvious fact makes the action of the Alabama legislature in adopting § 410(a) all the more mysterious. The legislature chose to forego naming specific violations which would allow voidability and instead substituted the words "any violation." ALA. CODE tit. 53, § 45 (Supp. 1963). This substitution, of course, negates the drafters' purpose in phrasing the statute in specific terms. See UNIFORM SECUR-

is not framed in terms of "material violations" it bypasses the problems of factual interpretation likely to occur under the Ohio statute.³⁸

Section 410(a)(1) permits an action for rescission whenever an offer or sale violates one or more of seven provisions of the act: (1) section 201(a) requiring the registration of broker-dealers, agents, and investment advisers; (2) section 301 prescribing the methods of registration of securities; (3) section 405(b) prohibiting misrepresentation as to the effect of registration or exemption; (4) section 403 prohibiting the violation of any rule or order relating to the filing of sales literature; (5) section 304(d) requiring the use of a prospectus; (6) section 305(g) prescribing the escrow of securities and the impounding of proceeds; and (7) section 305(h) requiring the use of certain contract forms in sales transactions.³⁹ The general policy running through all of these requirements seems to be one of full disclosure to the purchaser. The registration provisions will allow the state administrative agency to lend its talent to increasing the buyer's protection by scrutinizing both the sellers and the securities being sold.

While the provisions of section 410(a)(1) of the Uniform Act appear to be fairly straightforward, more difficulty may be incurred under subsection (2) which prohibits fraud or misrepresentation. In essence section 410(a)(2) contains four elements: (1) the offer to sell or sale of a security (2) by means of any untrue statement of a material fact or by a misleading omission to state a material fact (3) where the buyer shows that he did not know of the untruth or omission and (4) where the seller is unable to prove that he did not know or could not with reasonable care have found out about the untruth or misleading omission. While these elements are not easily applied, the near identity of section 410(a)(2) with section 12(2) of the Securities Act of

ITIES ACT § 410(a) (draftsmen's comments) found in LOSS & COWETT, *op. cit. supra* note 4, at 390-91.

It should be noted that some states which have not adopted the Uniform Act nevertheless restrict the voidability remedy to specific violations. ARIZ. REV. STAT. ANN. § 44-2001 (1956); CAL. CORP. CODE § 26100; LA. REV. STAT. § 51:715 (1965); MASS. ANN. LAWS ch. 110A, § 18 (1954); WIS. STAT. ANN. § 189.18 (1957).

³⁸ See, e.g., *Miller v. Griffith*, 196 N.E.2d 154 (Ohio C.P. 1961).

³⁹ See UNIFORM SECURITIES ACT § 410(a) (draftsmen's comments) found in LOSS & COWETT, *op. cit. supra* note 4, at 391.

1933⁴⁰ allows "an interchangeability of federal and state judicial precedence in this very important area."⁴¹

Several aspects of section 410(a)(2) deserve special attention. First, with respect to the "by means of" clause, it has been stated that this "clause is not intended to require the buyer to show reliance on the untruth. He must only show that he did not know of it."⁴² In this regard, the statutory remedy⁴³ is superior to the common law remedy of rescission which required a showing of reliance.⁴⁴

Second, it should be noted that in order for the buyer to have a remedy under section 410(a)(2) the misrepresentation must be as to a material fact. A statement of "fact" in this instance must be distinguished from a mere statement of opinion.⁴⁵

The issue which will very likely be the most common to occur under section 410(a)(2) is whether the misrepresentation was of a *material* fact. This requirement is not imposed on a buyer who is proceeding under a common law action for rescission if the misrepresentation was intentionally made.⁴⁶ Thus, in this respect, the statutory remedy may be more difficult to pursue than common law rescission. However, it seems doubtful that any court would deny a plaintiff statutory relief where there was some connection between plaintiff's injury and the representation made. For example, redress has been given where the plaintiff was misinformed as to the time of consummation of a securities transaction⁴⁷ and where the defendants misrepresented the cost of a secu-

⁴⁰ 48 Stat. 84 (1933), as amended, 15 U.S.C. § 771(2) (1964).

⁴¹ UNIFORM SECURITIES ACT § 410(a)(2) (draftsmen's comments) found in LOSS & COWETT, *op. cit. supra* note 4, at 391.

⁴² UNIFORM SECURITIES ACT § 410(a)(2) (draftsmen's comments) found in LOSS & COWETT, *op. cit. supra* note 4, at 392. See *Murphy v. Cady*, 30 F. Supp. 466, 468 (D. Me. 1939), *aff'd*, 113 F.2d 988 (1st Cir.), *cert. denied*, 311 U.S. 705 (1941).

⁴³ This discussion of section 410(a)(2) will often rely upon authority which has reference to section 12(2) of the Securities Act.

⁴⁴ 3 LOSS, *op. cit. supra* note 8, at 1627.

⁴⁵ *Id.* at 1700-01.

⁴⁶ *Id.* at 1705. However, where the misrepresentation was innocently made, the requirement of materiality was imposed even at common law. *Cf. Shulton, Inc. v. Rubin*, 239 Md. 669, 212 A.2d 476 (Ct. App. 1965). See also 5 WILLISTON, CONTRACTS § 1500 (rev. ed. 1936); RESTATEMENT, CONTRACTS §§ 470, 476 (1933); RESTATEMENT, RESTITUTION §§ 9, 28 (1937).

⁴⁷ *Guardian Inn Corp. v. Rubinstein*, 192 A.2d 296 (D.C. App. 1963).

urities sale to plaintiff.⁴⁸ Thus, the disadvantage in choosing the statutory remedy does not appear to be substantial.

Section 410(a)(2) contains two clauses relating to the burdens of proof in a rescission action. The buyer is required to show that he did not know of the untruth or omission while the seller in order to escape liability has the burden of proving that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission. The latter opportunity is one which was not given to the seller at common law.⁴⁹ At least one Uniform Act state has refused to adopt this portion of the statute.⁵⁰

B. *Stage of a Transaction at Which a Violation Occurs*

In addition to analyzing the types of violations which may give rise to an action for rescission under state securities acts, it is necessary to note which stages of a transaction are subject to the mandate of the statute. The major issue which occurs in this area is whether an offer which is made before the offeror has complied with all of the blue sky requirements can be the basis for an action for rescission if the subsequent sale is not consummated until all of the requirements have been satisfied.⁵¹ While the state courts have been divided on this question,⁵² the modern and majority view appears to be that a purchaser may void a contract even if the alleged illegality attached only to the offer.⁵³ The majority view was adopted by an Illinois court in *Silverman v. Chicago Ramada Inn, Inc.*⁵⁴ In holding for the plaintiff-purchaser, the court stated:

The solicitation by the defendants constituted a sale under the statute as did the payments made . . . [thereafter]. The plaintiffs, if they had known that the securities were illegally sold, could have instituted their rescission action after the agreement to purchase was reached; they could have sued to recover after the first pay-

⁴⁸ *Shulton, Inc. v. Rubin*, 239 Md. 669, 212 A.2d 476 (Ct. App. 1965). See also *Fourth Nat'l Bank v. Webb*, 131 Kan. 167, 290 Pac. 1 (1930); 3 POMEROY, EQUITY JURISPRUDENCE § 878c (5th ed. 1941).

⁴⁹ 3 LOSS, *op. cit. supra* note 8, at 1704.

⁵⁰ TEX. REV. CIV. STAT. ANN. art. 581-33 (1964).

⁵¹ It is well recognized that an illegal offer does not give rise to a civil cause of action if no sale results. 3 LOSS, *op. cit. supra* note 8, at 1695.

⁵² Compare *Bauer v. Bond & Goodwin, Inc.*, 285 Mass. 117, 188 N.E. 708 (1934) (contract not rescindable), with *United Bank & Trust Co. v. Joyner*, 40 Ariz. 229, 11 P.2d 829 (1932) (contract not enforceable).

⁵³ 3 LOSS, *op. cit. supra* note 8, at 1696.

⁵⁴ 63 Ill. App. 2d 96, 211 N.E.2d 596 (1965).

ment or after any one of the interim payments. All were sales under the Act and all were voidable at the option of the purchasers.⁵⁵

Where case law has not extended the coverage of the securities acts to mere solicitations or offers, many states have done so by statute. While the Ohio voidability provision⁵⁶ refers only to "sales" or "contracts for sale," its coverage is extended by the definition of sale contained in section 1707.01(C)(1). That section includes within the meaning of sale all attempts to dispose of securities, options of sale, solicitations of sale, solicitations of offers to buy, subscriptions and offers to sell.

Section 410(a) of the Uniform Securities Act by its own terms clearly extends to both offers to sell and actual sales. The draftsmen's comments to section 410(a) list four major reasons for extending the statute's coverage to offers: (1) the majority of cases favor such an extension; (2) the only method of controlling so-called "pre-effective" or "pre-filing" offers seems to be by the threat of civil liability; (3) the "thirty-day out clause" of section 410(e) may be used by a seller to escape liability where the violation was inadvertent; (4) section 12(2) of the Securities Act of 1933, upon which section 410(a)(2) is modeled, was amended in 1954 to extend to offers as well as to sales.⁵⁷

The extension of the rescission remedy to offers seems supportable from a public policy viewpoint. In many cases, the solicitation or offer, rather than the actual sale, is the source of various representations. To allow an unscrupulous seller to escape liability by complying with various formalities after an offer or a fraudulent solicitation has been made would seem to create an unnecessary loophole in the protection contemplated by blue sky laws.

II. EFFECT OF A VIOLATION

The rights of the parties to a contract for the sale of securities are obviously affected by the existence of a blue sky violation on the part of the seller. In general, these rights may be affected in three ways: first, the contract may be voidable by the buyer; sec-

⁵⁵ *Silverman v. Chicago Ramada Inn Inc.*, 63 Ill. App. 2d 96, 102, 211 N.E.2d 596, 599 (1965).

⁵⁶ OHIO REV. CODE § 1707.43.

⁵⁷ UNIFORM SECURITIES ACT § 410(a) (draftsmen's comments) found in LOSS & COWETT, BLUE SKY LAW 391 (1958).

ond, the contract may be entirely void; or third, the contract may be unenforceable by the seller.

A. Voidability by the Buyer

It is well recognized in most states that a buyer may sue to recover the purchase price of a transaction which was carried out in violation of the state securities act.⁵⁸ Of course, where the state statute merely denominates the transaction as voidable, the purchaser may elect to go through with the sale despite the violation by the seller.⁵⁹

(1) *Ohio*.—The right of the purchaser to void his contract where the seller has violated the securities act has been recognized in Ohio both by statute⁶⁰ and by case law.⁶¹ Section 1707.43 of the Ohio Revised Code makes such contracts "voidable at the election of the purchaser." In *Crane v. Courtright*,⁶² an Ohio court of appeals recognized section 1707.43 as creating "a statutory remedy for restitution of the purchase price."⁶³ The section was also relied upon by the purchaser in *Yoder v. So-Soft of Ohio, Inc.*⁶⁴ There, the plaintiffs and defendants entered into a contract by which the plaintiffs, in exchange for consideration, were to receive a water softener plus the right to 100 dollars for every customer which plaintiff referred to defendant and which subse-

⁵⁸ See, e.g., *Ham v. Blankenship*, 194 F.2d 430 (5th Cir. 1952); *Moore v. Manufacturers Sales Co.*, 335 Mich. 606, 56 N.W.2d 397 (1953); *Farrar v. Hood*, 56 N.M. 724, 249 P.2d 759 (1952). While this Note is specifically concerned with voidability provisions, an extensive discussion of such subjects as the measure of damages permitted under such statutes or the statutes of limitation which apply would be of little use since these questions are almost always decided by statute. Most statutes limit damages to the consideration paid plus costs, interest and, in some cases (including the Uniform Act), attorneys' fees. Ohio allows the purchaser to recover only the amount paid plus reasonable court costs. OHIO REV. CODE § 1707.43. Similarly, most require a deduction for any interest derived from the securities.

The statutes of limitation prescribed by the statutes usually vary between one and three years. While the majority of states provide that the statute begins to run at the time of the sale, several statutes state that the statute does not commence to run until the buyer learns of the violation. The Uniform Act provides that "no person may sue under this section more than two years after the contract of sale." UNIFORM SECURITIES ACT § 410(e). Ohio provides that an action must be commenced within two years of the sale or the contract for sale. OHIO REV. CODE § 1707.43. See generally, 48-2 OHIO JUR. 2D *Securities Regulation* § 18, at 769-71 (1966).

⁵⁹ Cf. *Moore v. Manufacturers Sales Co.*, *supra* note 58.

⁶⁰ OHIO REV. CODE § 1707.43.

⁶¹ *Crane v. Courtright*, 2 Ohio App. 2d 125, 206 N.E.2d 913 (1964); *Yoder v. So-Soft of Ohio, Inc.*, 202 N.E.2d 329 (Ohio C.P. 1963).

⁶² 2 Ohio App. 2d 125, 206 N.E.2d 913 (1964).

⁶³ *Crane v. Courtright*, 2 Ohio App. 2d 125, 127, 206 N.E.2d 913, 914 (1964).

⁶⁴ 202 N.E.2d 329 (Ohio C.P. 1963).

quently purchased a water softener from defendant. The court held that this contract constituted the sale of a security under Ohio Revised Code section 1707.01 and that the defendant thus had to be licensed as a securities dealer.⁶⁵ His failure to do so gave the purchaser the option to void the entire contract.⁶⁶

(2) *Uniform Securities Act*.—The relationship between section 410(a) of the Uniform Securities Act and the normal type of voidability provision is not precisely clear. Instead of expressly allowing a defrauded purchaser to void his contract of sale, section 410(a) gives him the right to "sue either at law or in equity to recover the consideration paid" plus interest, costs and attorneys' fees less any income received. At first glance, this language appears to be merely a different method of allowing the purchaser to rescind. But the draftsmen's comments to the section at least imply that the statute is not a voidability provision in its normally-understood meaning:

There are two basic difficulties with the pattern most commonly found, which is one of declaring any sale or contract to be "*voidable*" if its making violated any provision of the statute. First, the seller has to search every substantive provision of a typically complicated statute before he knows whether his contract or sale is voidable. Secondly, there are so many substantive provisions, and they are often so technical, that voiding a substantial contract seems to be a remedy out of all proportion to the seriousness of the violation. For example, why should a sophisticated buyer be able to recover the purchase price from the seller when the market generally has gone down just because he later discovers that the seller filed a required report a day late?⁶⁷

Careful analysis of the two criticisms presented in the comments reveals that they are not (or should not be) directed at the voidability remedy itself. Rather, both criticisms concern the voiding of contracts for merely technical, as opposed to substantial, violations. Thus, both criticisms can be met by merely limiting the violations for which voidability is allowed to those of major proportions. This has been done in the Uniform Act and, therefore, there does not seem to be any logical reason for excluding the voidability terminology from the act's provisions.

There are two interpretations which can be placed upon section 410(a). First, the section's omission of the term voidable

⁶⁵ Yoder v. So-Soft of Ohio, Inc., 202 N.E.2d 329, 331 (Ohio C.P. 1963).

⁶⁶ *Ibid.*

⁶⁷ UNIFORM SECURITIES ACT § 410(a) (draftsmen's comments) found in LOSS & COWETT, *op. cit. supra* note 52, at 390-91.

may be considered to be meaningless in practical application since the result achieved appears to be the same as that which will occur under a voidability provision. In this respect, the language of an English court in 1692 may be relevant:

[E]very contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, tho' the statute it self doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, tho' there are no prohibitory words in the statute.⁶⁸

Thus, despite the ambiguous words of the draftsmen's comments, section 410(a) may reasonably be called a voidability provision.

But another interpretation of section 410(a) is equally plausible. It may be that the drafters were concerned with the voiding of substantial contracts, of which the sale of securities was only one aspect, when there was a violation of the securities act. For example, a single contract may contain provisions by which a corporation sells assets, goods, and stock to an individual in exchange for cash. Assuming that the stock was not properly registered, would the buyer then be able to rescind the *entire* contract and regain the money which he paid for the assets and goods as well as the stock. Section 410(a)'s limitation on recovery to the "consideration paid for the security" would seem to limit the purchaser in this situation to the amount of cash exchanged for stock. Thus, the rest of the transaction would be enforceable by the seller. A different result might be reached under a pure voidability provision. An excellent example is the case of *Yoder v. So-Soft of Ohio, Inc.*⁶⁹ which was previously discussed. There, the original contract covered both a water softener and securities. The seller's failure to obtain a license allowed the buyer to rescind the *entire* contract including that portion covering the water softener.

It is submitted that section 410(a) be interpreted to allow a purchaser to void an entire contract (including non-securities provisions) *only* where it appears to the court that the purchaser would not have agreed to the non-stock provision *but for* the fact that he was receiving securities as a part of the transaction. This interpretation would seem to allow a more equitable result especially in cases where the securities provisions of a contract constitute only a small portion of the entire transaction.

⁶⁸ *Bartlett v. Vinor*, Carth. 252, 90 Eng. Rep. 750 (K.B. 1692). See *Northern v. Elledge*, 72 Ariz. 166, 171, 232 P.2d 111, 114 (1951).

⁶⁹ 202 N.E.2d 329 (Ohio C.P. 1963).

B. *Violation Causing a Void Contract*

The state securities acts in California and Oregon contain provisions which declare that either the security sold or the sale made in violation of the state's blue sky requirements is void.⁷⁰ While there are judicial decisions outside of these two states which have reached a similar conclusion,⁷¹ no other states so provide by statute.

There are two important results which follow from the fact that a security⁷² or the sale of a security is void. First, no subsequent act of the buyer, no matter how affirmative, may ratify the contract for sale.⁷³ Second, the subsequent assignment of the security to a bona fide purchaser does not validate the stock.⁷⁴ An opposite result would be reached where the transaction is merely voidable. In such a case, the buyer could transfer good title to a bona fide purchaser.⁷⁵ Similarly, ratification by the buyer would be recognized under a voidability statute.⁷⁶

While the void-voidable distinction might once have been considered of prime importance in the area of state blue sky laws, Professor Loss has stated that "the void-voidable dichotomy has no great practical significance in the blue sky field today, if it ever did."⁷⁷ The ability of modern courts to fashion an equitable decree has nearly obliterated the hardships which formerly resulted from a strict application of the "void" terminology.⁷⁸

C. *Unenforceability by the Seller*

What appears to be the majority rule on the enforceability of a contract for the sale of securities which was made in viola-

⁷⁰ CAL. CORP. CODE § 26100 (security void); ORE. REV. STAT. § 59.250 (1961) (sale void).

⁷¹ See, e.g., *Anderson v. Mikel Drilling Co.*, 287 Minn. 487, 489 n.2, 102 N.W.2d 293, 296 n.2 (1960).

⁷² Ohio specifically provides that a security sold in violation of the state blue sky law is not void or invalid. OHIO REV. CODE § 1707.38.

⁷³ *Pollak v. Staunton*, 210 Cal. 656, 293 Pac. 26 (1930). See LOSS & COWETT, *op. cit. supra* note 57, at 132; Annot., 87 A.L.R. 42 (1933).

⁷⁴ *Becker v. Stineman*, 115 Cal. App. 740, 2 P.2d 444 (1931). See LOSS & COWETT, *op. cit. supra* note 57, at 132.

⁷⁵ *Edsun v. O'Connell*, 190 Minn. 444, 252 N.W. 217 (1934).

⁷⁶ 3 LOSS, SECURITIES REGULATION 1633 (2d ed. 1961), quoting, RESTATEMENT, CONTRACTS § 475 comment b (1933).

⁷⁷ 3 LOSS, *op. cit. supra* note 76, at 1633.

⁷⁸ Cf. *Dahlquist, Regulation and Civil Liability Under the California Corporate Securities Act: III*, 34 CALIF. L. REV. 543 (1946).

tion of a provision of the state blue sky law was stated in *United Bank & Trust Co. v. Joyner*:⁷⁹

Since . . . the contract herein sued on was made in violation of the provisions of the statutes, it conferred no rights upon the company and will not be enforced by the courts, and defendant was authorized to set up its illegality as a defense to an action by the company on his subscription.⁸⁰

The *United Bank* decision is representative of the fact situation which ordinarily gives rise to the enforceability issue, that is, the seller who has not complied with the provisions of the state securities act suing to obtain the purchase price from the buyer. While the better view seems to be that the buyer can interpose the illegality of the sale as a defense, cases have often held to the contrary.⁸¹ It is difficult to justify a holding that the seller can obtain the purchase price in such a situation in view of the fact that the buyer may subsequently rescind the contract and thus regain the purchase price. It may be for this reason that the drafters of the Uniform Securities Act included a provision prohibiting any suit on a contract made in violation of a provision of the act.⁸²

A dispute has arisen among courts as to whether a person engaged in a so-called joint venture may enforce a contract for the sale of securities against his fellow-adventurer where the contract involved a blue sky violation.⁸³ In *Gales v. Weldon*,⁸⁴ the Missouri Supreme Court defined a joint adventure as follows:

A 'joint adventure' is founded entirely on contract, either express or implied. It can exist only by the voluntary agreement of the parties to it. It has been defined as 'an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge.' 48 C.J.S. Joint Adventures § 1a. It is in the nature of a partnership, generally governed by the same rules of law, the principal difference being that a joint adventure is usually limited to a single transaction. As a general rule, in order to constitute a joint adventure, there must be a community of interest in the accomplishment of a common purpose, a mutual right of control, a right

⁷⁹ 40 Ariz. 229, 11 P.2d 829 (1932).

⁸⁰ *United Bank & Trust Co. v. Joyner*, 40 Ariz. 229, 235, 11 P.2d 829, 832 (1932).

⁸¹ See 3 LOSS, *op. cit. supra* note 76, at 1671 and cases cited therein.

⁸² UNIFORM SECURITIES ACT § 410(f).

⁸³ Compare *Hathway v. Porter Royalty Pool, Inc.* 296 Mich. 90, 295 N.W. 571, *modified*, 292 Mich. 733, 299 N.W. 451 (1941) (joint adventure not within Blue Sky Law), with *Jackson v. Robertson*, 90 Ariz. 405, 368 P.2d 645 (1962) (joint adventure subject to Blue Sky Law).

⁸⁴ 282 S.W.2d 522 (Mo. Sup. Ct. 1955).

to share in the profits and a duty to share in such losses as may be sustained.⁸⁵

Those courts which exempt joint ventures from the coverage of the blue sky laws do so apparently on the theory that any violations would affect only the participants in the venture as opposed to the general public.⁸⁶ This view was rejected in *Jackson v. Robertson*⁸⁷ where the court concluded that

if use of the corporate form by joint ventures violates the Securities Act the public may be injured nonetheless. . . . [I]t is . . . obvious that the Securities Act was not enacted to protect any of the parties to this law suit. Nevertheless, the contract herein called for issuance of corporate securities which might very well have been foisted upon the investing public by any of the five men involved. It is the capacity for harm and danger to the public as well as accomplished fraudulent transactions to which the Securities Act is directed.⁸⁸

It is submitted that the conflict among the courts on this point could be settled through the application of the following principle: If the defendant can show by a preponderance of the evidence that the securities in question might reasonably find their way into the hands of parties other than those participating in the venture, then the plaintiff's attempt to enforce the contract should be denied. A lack of such a showing, however, should be a sufficient indication to the court that its enforcement of the contract will not be contrary to the purposes of the blue sky laws.

III. PERSONS LIABLE

A. Seller and Related Parties

Voidability provisions in general describe the parties who may be liable for a violation of a state securities act. While a few states expressly limit liability to the seller alone,⁸⁹ the majority of states which have not adopted the Uniform Securities Act extend liability to the seller and to officers, directors, and agents of the selling corporations who participated or aided in the making of the sale. Participation or aid has been interpreted as implying "some

⁸⁵ *Gales v. Weldon*, 282 S.W.2d 522, 527 (Mo. Sup. Ct. 1955).

⁸⁶ *Cf. Campbell v. Degenther*, 97 F. Supp. 975 (W.D. Pa. 1951).

⁸⁷ 90 Ariz. 405, 368 P.2d 645 (1962).

⁸⁸ *Jackson v. Robertson*, 90 Ariz. 405, 408-09, 368 P.2d 645, 647 (1962).

⁸⁹ See, e.g., MASS. ANN. LAWS ch. 110A, § 18 (1954); MISS. CODE ANN. § 5374 (Supp. 1964); W. VA. CODE ANN. § 3273(18) (1961).

activity in inducing the purchaser to invest."⁹⁰ In this regard, a Florida appellate court in *Hughes v. Bie*⁹¹ held that a corporate attorney could not be held liable under that state's voidability provision where the attorney's participation was limited to the preparation and execution of the legal documents involved in the sale. Similarly, the willingness of a bank to become the depository of funds does not amount to a personal participation or an aid in making a sale.⁹² On the other hand, in *Foreman v. Holsman*⁹³ an Illinois court of appeals held the trustee of a mutual ownership trust liable as a seller for the consideration paid by investors for a beneficial interest in the trust which interest was sold in violation of the state securities act. The court noted that the trustee had important functions and powers for the protection of investors and, in effect, made the project in question possible by means of the trust.

Section 1707.43 of the Ohio Revised Code, which extends liability to the seller and those persons participating in or aiding the sale, has been interpreted as indicating "an intent on the part of the General Assembly to reach all persons who have had anything to do with the sale of the securities in violation of the Securities Act."⁹⁴ In *Crane v. Courtright*,⁹⁵ an Ohio court of appeals held that allegations that the defendant had provided active assistance to the sellers, had encouraged the buyer to purchase, and had acted as an intermediary in the sale were sufficient, if proven, to hold the defendant liable. These interpretations by the Ohio courts are representative of the liberal approach which is generally taken towards the question of how far voidability coverage should be extended.⁹⁶

⁹⁰ *Nichols v. Yandre*, 151 Fla. 87, 95, 9 So. 2d 157, 160 (1942). See also *Trump v. Badet*, 84 Ariz. 319, 327 P.2d 1001 (1958); *Davis v. Walker*, 170 Neb. 891, 104 N.W.2d 479 (1960); *Robinton & Sowards, Florida Securities Act: A Re-Examination*, 12 U. MIAMI L. REV. 1 (1957).

⁹¹ 182 So. 2d 281 (Fla. App. 1966).

⁹² *Sorenson v. MacElrod*, 286 F.2d 72 (5th Cir. 1960).

⁹³ 16 Ill. App. 2d 466, 148 N.E.2d 595 (1957).

⁹⁴ *Miller v. Griffith*, 196 N.E.2d 154 (Ohio C.P. 1961).

⁹⁵ 2 Ohio App. 2d 125, 206 N.E.2d 913 (1964).

⁹⁶ See, e.g., *Brown v. Cole*, 155 Tex. 624, 291 S.W.2d 704 (1956). In *Brown*, the court extended the definition of "seller" to include any person who represents a link in the chain of the selling process. The drafters of the Texas Securities Act, which is based upon the Uniform Securities Act, specifically noted that *Brown* is still to be regarded as the ruling case law in Texas as to who is liable. TEX. REV. CIV. STAT. ANN. art. 581-33 (1964) (drafters' comment). For a further discussion on the extent of liability under blue sky laws, see Annot., 59 A.L.R.2d 1030 (1958).

Section 410(b) of the Uniform Securities Act is more specific in its coverage than the majority of the older voidability provisions. It extends to persons who control the seller, to partners, officers and directors of the seller and those persons occupying similar capacities, and to employees and broker-dealers who materially aid in the sale. The position of these non-sellers is enhanced, however, by the act's provision allowing the non-seller to escape liability by proving that he did not know, and in the exercise of reasonable care could not have known, of the violation. It seems reasonable to infer that the lack of knowledge, in order to constitute a defense, must be as to the actual fact of the violation rather than to the legal requirement itself. An excellent example of this distinction was presented in a recent Oregon case, *Spears v. Lawrence Sec., Inc.*⁹⁷ There, the defendants, who were salesmen for the actual seller, claimed that while they knew of the non-registration of certain securities which were sold, they did not know that the law required the securities to be registered. The Oregon Supreme Court held that by requiring a non-seller to have knowledge of the violation in order to be liable,⁹⁸ the Oregon legislature intended only that the person knew the security was not registered. "[I]t is not necessary, in addition, to prove that the person knew that the law required the security to be registered."⁹⁹

B. *Liability of the Buyer*

Occasionally, a situation may arise in which the bad faith attached to the sale of a security is on the part of the buyer rather than the seller. In general, the courts have refused to extend the voidability remedy to the seller in these situations.¹⁰⁰ In *Brown v. Cole*,¹⁰¹ the Texas Supreme Court stated explicitly that "the Act does not undertake to regulate purchasers or to protect sellers against purchasers. Only sellers and sales are regulated."¹⁰² Only one state, Arizona, gives statutory relief to the defrauded seller by allowing

⁹⁷ 239 Ore. 583, 399 P.2d 348 (1965). It should be noted that this case was not decided under the Uniform Securities Act. Nevertheless, it amply demonstrates the distinction under discussion.

⁹⁸ ORE. REV. STAT. § 59.250 (1961).

⁹⁹ *Spears v. Lawrence Sec., Inc.*, 239 Ore. 583, 587, 399 P.2d 348, 350 (1965).

¹⁰⁰ See *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256 (1951).

¹⁰¹ 155 Tex. 624, 291 S.W.2d 704 (1956).

¹⁰² *Brown v. Cole*, 155 Tex. 624, 628-29, 291 S.W.2d 704, 708 (1956) (dictum).

him to recover damages plus interests and costs from the unscrupulous buyer.¹⁰³

It is submitted that all state legislatures would be wise to adopt a statute similar to that of Arizona in order to give the defrauded seller the same protection afforded the buyer in these situations. Forcing the seller to pursue his common law remedies¹⁰⁴ in order to gain relief seems no more desirable than limiting the buyer to these remedies in like circumstances.

IV. DEFENSES AVAILABLE TO THE SELLER IN A VOIDABILITY ACTION

A discussion of some of the defenses which may be raised by a seller against whom a purchaser is proceeding is necessary to a complete presentation of the subject of voidability.¹⁰⁵ It should be recalled that two possible defenses under the Uniform Securities Act have already been discussed. The seller may be able to prove that he did not know and could not have known of an untruth which has given rise to a buyer's action under section 410(a)(2).¹⁰⁶ Similarly, non-sellers are given an equal chance to escape liability by showing a lack of knowledge of a violation under section 410(b).¹⁰⁷

A. Failure to Tender

States which extend the voidability remedy to a purchaser of securities generally require the buyer to tender the securities back to the seller in order to obtain a judgment against him. Since the purpose of this requirement is obviously to insure restitution¹⁰⁸ and prevent unjust enrichment, the buyer's failure to tender would bar him from recovery. In discussing the proper time and place for a tender to be made, the court in *Crane v. Courtright*¹⁰⁹ observed:

[Tender] is merely one means of affording such protection to the

¹⁰³ ARIZ. REV. STAT. ANN. § 44-2002 (1956).

¹⁰⁴ That this is the only recourse left open to the seller, see 3 LOSS, *op. cit. supra* note 76, at 1636.

¹⁰⁵ There are, of course, innumerable defenses which might be raised depending upon the facts of a particular case. Those discussed appeared to be the most meritorious of defenses which are often raised. For a discussion of a less-successful defense, see Annot., *Waiver of Rights or Release of Liability in Advance of Controversy Under State Securities Act or Blue Sky Law*, 61 A.L.R.2d 1308 (1958).

¹⁰⁶ See text accompanying note 49 *supra*.

¹⁰⁷ See text accompanying notes 96-99 *supra*.

¹⁰⁸ *Crane v. Courtright*, 2 Ohio App. 2d 125, 206 N.E.2d 913 (1964).

¹⁰⁹ 2 Ohio App. 2d 125, 206 N.E.2d 913 (1964).

defendant. Its origin lies in the historical practice of the common law courts (King's Bench, Common Pleas and Exchequer), and arose out of the fact that those courts generally refused to grant conditional judgments. . . . The chancellor was not circumscribed by such inflexibility, and could and did assure that there would be mutual restitution by simply conditioning his final decree upon the plaintiff's tendering restitution. Even assuming that we must continue to honor such procedural anachronisms of the common law in common law actions, it is certainly competent for the Legislature to provide that in this statutory action a tender in open court is sufficient.¹¹⁰

The court concluded that since tender in open court was sufficient, no allegation of tender need be included in the plaintiff's petition.¹¹¹

The Ohio statutory requirement that the tender be made "to the seller in person or in open court"¹¹² has been construed as permitting tender in open court to be made to any participant who is liable rather than merely to the seller.¹¹³ The Ohio provision is similar to approximately one-half of the other voidability statutes in this respect and there is no reason to believe that these other statutes will not be construed in a similar manner.¹¹⁴ Similarly, the Uniform Securities Act allows tender to be made at any time before the entry of judgment.¹¹⁵ Texas, however, omitted this provision when it adopted the Uniform Act.¹¹⁶ Thus, it seems likely that tender will be required at an earlier time under the statute—possibly before the filing of the complaint.

B. *Failure to Accept Seller's Offer to Buy Back*

The vast majority of voidability provisions bar an action for rescission by the buyer if the buyer has failed to accept within a specified time (usually thirty days) a written offer by the seller to take back the security and refund the buyer's money.¹¹⁷ Thus, if a seller can show the buyer's failure in this respect, it will constitute a complete defense to an action for rescission. The purpose of such provisions is obviously to provide a seller who has made an inno-

¹¹⁰ Crane v. Courtright, 2 Ohio App. 2d 125, 128, 206 N.E.2d 913, 915-16 (1964).

¹¹¹ *Ibid.* See also Bullard v. Garvin, 1 Ariz. App. 249, 401 P.2d 417 (1965).

¹¹² OHIO REV. CODE § 1707.43.

¹¹³ Crane v. Courtright, 2 Ohio App. 2d 125, 129, 206 N.E.2d 913, 916 (1964).

¹¹⁴ See Cross v. Pasley, 270 F.2d 88, 93 (8th Cir. 1959), *cert. denied*, 362 U.S. 902 (1960); 3 LOSS, *op. cit. supra* note 76, at 1674.

¹¹⁵ UNIFORM SECURITIES ACT § 410(c).

¹¹⁶ TEX. REV. CIV. STAT. ANN. art. 581-33 (1964) (drafters' comments).

¹¹⁷ Professor Loss lists twenty states as having such a provision. 3 LOSS, *op. cit. supra* note 76, at 1641.

cent mistake with an opportunity to rectify his error without having to wait for the buyer's decision on whether to sue. The seller, if he so desires, is thus able to avoid a situation in which he relies on a certain purchase only to have the buyer re-appear at a later date and rescind the sale.

Ohio Revised Code section 1707.43 contains a unique and curious limitation on the seller's right to make an offer to repurchase. No such offer is effective to start the thirty-day period in which the buyer must accept if the offer is made within two weeks from the date of the sale or the contract for sale. This provision does not appear to have been interpreted by any Ohio cases and no reason for its existence is readily apparent. No such limitation appears in the Uniform Act.¹¹⁸ This restriction on the seller seems even more illogical when one considers that many inadvertent violations might be discovered by the seller within this period. Forcing him to delay his offer to repurchase until two weeks after the sale appears to be an unnecessary restriction on the seller's rights which could result in serious financial injury if the value of the stock drops sharply.

Section 410(e) of the Uniform Securities Act allows the seller to make a written offer to repurchase at any time before suit. The offer must be to refund not only the purchase price but also six per cent interest; however, the seller may deduct any income which the buyer has received from the stock. As in most of the states with strict voidability provisions, the Uniform Act bars any action by the buyer if he fails to accept such an offer within thirty days.¹¹⁹

C. Estoppel and *Pari Delicto*

The issue of whether a seller against whom a buyer of securities is proceeding for rescission can avail himself of the defenses of estoppel or *pari delicto*¹²⁰ has arisen in innumerable cases.¹²¹ Estoppel is the broader of the two terms, of course, since it may extend to situations in which the plaintiff's actions, while not actually wrongful, operate in some manner to create an equitable defense in the seller. Many cases, however, seem to use the terms almost in-

¹¹⁸ UNIFORM SECURITIES ACT § 410(e).

¹¹⁹ An interesting question occasionally arises when the sale is made to joint purchasers. Must the offer to repurchase be made to both buyers? One court has answered this in the affirmative and refused to bar a subsequent action for rescission by the joint purchasers. *Hummel v. Kranz*, 126 N.W.2d 786 (N.D. Sup. Ct. 1964).

¹²⁰ *Pari delicto* refers to the maxim that "where the wrong of both parties is equal, the position of the defendant is the stronger." Annot., 48 A.L.R.2d 479, 491 (1962).

¹²¹ For a partial listing of these cases, see Annot., 84 A.L.R.2d 479 (1962).

terchangeably when dealing with blue sky law violations. This is especially true where the alleged defense arises out of the buyer's participation in the organization or management of the corporation.

(1) *Estoppel*.—Various activities on the part of buyers have been held to estop them from rescinding a securities sale. In general, however, these activities may be grouped into one of two categories: (1) The buyer received some financial benefit from the securities before attempting to rescind; or (2) The buyer actively participated in the management of the corporation's activities before bringing suit.

Representative of the first category of cases is *In re Racine Auto Tire Co.*¹²² where certain stock subscribers attempted to rescind their purchase. The court held that the buyers were estopped on the basis that they had received dividends over a period of two years, had participated in stockholder meetings, and had exchanged their old stock certificates for new ones when the capital stock was increased.

Estoppel through participation in corporate management was found in *Tucker v. McDell's Inc.*¹²³ There, the buyer was elected a vice-president and a director of the corporation, took an active part in corporate affairs, attended directors' and shareholders' meetings for more than a year, and voted for liquidation. The court concluded that this conduct estopped the buyer from rescinding the stock purchase.¹²⁴

An Ohio court of appeals recognized the validity of the estoppel defense in *Cleveland Printing Ink Co. v. Phipps*.¹²⁵ The court held that, "where [a] formula for which stock was issued by corporation was worth par value of the stock, and corporation used the formula for a long period, and stock was issued, and persons receiving it became officers and voted the stock, directors were estopped to seek cancellation on ground that transaction was contrary to Blue Sky Law."¹²⁶ The basic consideration running through all of the estoppel cases in this category seems to be the degree of con-

¹²² 290 F. 939 (7th Cir. 1923).

¹²³ 50 Tenn. App. 62, 359 S.W.2d 597 (1961).

¹²⁴ *Tucker v. McDell's Inc.*, 359 S.W.2d 597 (Tenn. App. 1961). See also *Moore v. Manufacturer's Sales Co.*, 335 Mich. 606, 56 N.W.2d 397 (1953); *Schrifer v. B & B Oil Co.*, 311 Mich. 118, 18 N.W.2d 392 (1945).

¹²⁵ 30 Ohio App. 161, 164 N.E. 641 (1928).

¹²⁶ *Cleveland Printing Ink Co. v. Phipps*, 30 Ohio App. 161, 164 N.E. 641 (1928) (syllabus 1).

trol over and contact with the corporation. Where these elements are lacking, courts will generally not apply the estoppel doctrine.¹²⁷

(2) *Pari delicto*.—Generally, courts will refuse to find a buyer and seller of securities in *pari delicto* unless they are equally culpable.¹²⁸ This requirement has occasionally been carried to an amazing extreme. For example, in *Schvaneveldt v. Noy-Burn Milling & Processing Corp.*,¹²⁹ the buyer, in addition to purchasing stock in a company, served as its general manager, bought shares in a related corporation with the promise of a directorship, attended meetings where the purported incorporation of the related business was discussed, and encouraged other persons to buy stock in the new corporation. Nevertheless, in an action for rescission, the Utah Supreme Court refused to find that these activities placed the buyer in *pari delicto* with the seller. One might well inquire here as to whether the court should have at least found equitable estoppel.

A less extreme situation was faced by the Arizona Supreme Court in *Trump v. Badet*.¹³⁰ The buyer in *Trump* was required by the sale agreement to serve as an officer and to attempt to sell more stock. In rejecting the defendant's claim that these facts allowed the defense of *pari delicto*, the court stated:

The answer to that contention is simply that the transaction was outlined in the original subscription agreement and that the bona fide acts of the purchaser of stock in compliance with the terms of the original agreement do not import illegality to such purchaser in effectuating the terms of such an agreement.¹³¹

It seems reasonable to conclude that the *pari delicto* defense has been greatly restricted by the courts, almost to the point of its complete obliteration in blue sky cases. In any event, it is safe to say that estoppel surely presents a much more inviting and promising alternative to the seller who is confronted with a voidability action.

V. CONCLUSION

An examination of state voidability provisions reveals the impressive lengths to which the courts and legislatures have gone in attempting to discourage and eliminate underhanded tactics in the

¹²⁷ See, e.g., *Monroe v. Dixon*, 152 So. 2d 744 (Fla. App. 1963).

¹²⁸ *Schvaneveldt v. Noy-Burn Milling & Processing Corp.*, 10 Utah 2d 1, 347 P.2d 553 (1959).

¹²⁹ 10 Utah 2d 1, 347 P.2d 553 (1959).

¹³⁰ 84 Ariz. 319, 327 P.2d 1001 (1958).

¹³¹ *Trump v. Badet*, 84 Ariz. 319, 322, 327 P.2d 1001, 1004 (1958).

sale of securities. Some inroads still must be made, however, especially in those states which still provide the voidability remedy for overly-technical violations. Legislatures would do well to consider the virtues of the Uniform Securities Act in this respect.

The Ohio legislators should examine closely any reasons for the two-week restriction on the seller's right to offer to rescind, as provided in section 1707.43. Certainly, Ohio's unique position on this question is relevant in judging the merits of this limitation.

The major conclusion that is derived from a study of the area of voidability is that the legislatures and courts have now gone as far as they should in seeking to protect the purchaser of securities. Attention should now be turned towards the possibility that the extensive rights of buyers may be abused. The pendulum of advantage, which for so long had been on the side of the seller, has now swung towards the center. The utmost care is necessary to prevent its momentum from carrying it to the opposite extreme.

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