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Corporations - Proxy Regulations - Federal Courts Can Grant Complete Relief in Shareholder's Suit for Violation of Section 14(a) of Securities Exchange Act of 1934

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requirements of the tax law. What the effects of this form will be in fields other than taxation is for the state courts to decide under their own corporate law. *Alleigro* determined a problem similar to the one involved here by one method. The court in the instant case found it unnecessary to go so far and determined the answer by viewing the fiduciary duties of the parties involved. This appears to be the simpler method, and the result seems correct.[24]

Conrad J. DeSantis

CORPORATIONS—PROXY REGULATIONS—FEDERAL COURTS CAN GRANT COMPLETE RELIEF IN SHAREHOLDER'S SUIT FOR VIOLATION OF SECTION 14(a) OF SECURITIES EXCHANGE ACT OF 1934.

Borak v. J. I. Case Co. (7th Cir. 1963)

Plaintiff, the owner of 2,000 shares of J. I. Case Company stock, brought a private suit in the federal district court to have a merger between Case and the American Tractor Corporation declared illegal and void. He also sought to have Case and its directors enjoined from taking any action to consummate the plan. Injunctive relief was denied on both the original complaint and a subsequent amended complaint. The district court decided that only a derivative cause of action arose for violation of section 14(a) of the Securities Exchange Act of 1934[1] on which the amended complaint was based and that under this section only declaratory relief could be granted.

On appeal, the Seventh Circuit reversed, *holding* that a private right of action did exist under section 14(a) and that section 27 of the act[2] gave

24. It is interesting to note that the court's decision means Central's potential share of the tax saving in the form of dividends would still be $3,060,573.60. It would seem the additional investment of $1,000,000, even without the disproportionate allocation agreement, is an extremely lucrative one and makes Central's duty to its stockholders and to Mahoning, clear.

1. It shall be unlawful for any person, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
Securities and Exchange Act, § 14(a), 48 Stat. 895 (1934), 15 U.S.C. 78n(a) (1958).

2. The district courts of the United States, . . . and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have *exclusive jurisdiction* of violations of this chapter or the rules and regulations thereunder, and *of all suits in equity and actions at law brought to*

the federal courts jurisdiction to award to the plaintiff whatever relief the merits of the controversy required. *Borak v. J. I. Case Co.*, 317 F.2d 838 (7th Cir. 1963).

The issues in controversy are whether a private cause of action arises from a violation of the proxy rules of the Securities Exchange Act, and if so, whether a plaintiff is entitled to more than declaratory relief for such violation. Prior to 1961 there was an apparent trend toward granting a private cause of action for violation of section 14(a) of the act,[3] but it was not until *Dann v. Studebaker-Packard Corp.*[4] that a federal court stated conclusively that such a private cause of action did exist.

The basis of implied liabilities giving rise to this private action is the common-law tort doctrine which bases a private action on the violation of a statute. For this doctrine to be applicable, however, the invaded interest must be that which the enactment was intended to protect.[5] In the ordinary case where the statute makes no mention of a civil remedy, "the obvious conclusion is that the legislature either did not have the civil action in mind at all, or deliberately omitted to provide for it."[6] This, however, cannot be said to prove whether or not there was the intention to create a private right in this situation.[7] The Securities and Exchange Commission has argued, as amicus curiae, that a private right should exist under section 10(b) and the proxy rules,[8] and it appears that the court's decision in *Dann* was the logical culmination of the trend that had been established in prior cases, and thus upheld the true intent of the statute.[9]

The court in *Dann,* however, refused to grant all of the relief for which the plaintiff asked, holding that since the act regulates proxy solicitations prior to the corporate election under section 14(a), the federal court had no power to grant retroactive relief.[10] "The obvious purpose of section 14(a)," as the court in the instant case argues, "is the protection of the right of shareholders to a full and fair disclosure of all material facts which affect corporate election by proxy. For the achievement of that purpose, the jurisdiction conferred by section 27 must be broad enough to effectively protect that right."[11] If the court's statement of the purpose of the section is correct, it's conclusion as to construction would seem to be

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enforce any liability or duty created by this chapter or the rules and regulations thereunder. . . . (Emphasis added.)
Securities and Exchange Act, § 27, 48 Stat. 902 (1934), as amended, § 127, 63 Stat. 107 (1949), 15 U.S.C. 78aa (1958).

3. For a more complete history of the law in this area prior to Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961), see Loss, *The SEC Proxy Rules in the Courts,* 73 HARV. L. REV. 1041, 1045-58 (1960); 62 COLUM. L. REV. 375 (1962); 75 HARV. L. REV. 637 (1962); 7 VILL. L. REV. 125 (1961).

4. Dann v. Studebaker-Packard Corp., *supra* note 3.

5. Loss, *supra* note 3, at 1044.

6. PROSSER, TORTS 153 (2d ed. 1955).

7. Loss, *supra* note 3, at 1054.

8. Phillips v. United Corp., 5 S.E.C. 758, 764 (1948), *appeal dismissed sub nom.* Phillips v. SEC, 171 F.2d 180 (2d Cir. 1948).

9. 7 VILL. L. REV. 125, 128 (1961).

10. Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961).

11. Borak v. J. I. Case Co., 317 F.2d 838, 848 (7th Cir. 1963), *cert. granted sub nom.,* J. I. Case Co. v. Borak, 375 U.S. 901, 84 S.Ct. 195 (1963) (No. 402).

well founded, and it's divergence from the limitation of *Dann* justified. Construing a similar grant under the Securities Act of 1933,[12] the Supreme Court gave added force to this court's determination when it held that jurisdiction to "enforce" included the power to utilize any remedy to which the parties would normally be entitled.[13] Injunction here would seem to be within the bounds of that principle.

The Supreme Court in *Bell v. Hood*,[14] held that the federal courts have the power, under a general grant of jurisdiction, to enforce a federal statute and to grant all of the relief which may be commensurate with the effective enforcement of the statute and the protection of rights thereby created, notwithstanding the failure of the statute to specify the remedies which may be employed. Section 27 has often been construed in conjunction with section 10(b) as enabling courts to award damages and retrospective relief.[15] By a parity of reasoning the same result is demanded here.

If the federal courts refuse to grant any relief other than a declaratory judgment, a plaintiff must necessarily look to the state courts for further satisfaction. It is possible that the state court could refuse to assume jurisdiction;[16] a cause of action might not lie since there may have been no violation of state law, no common-law tort action, or violation of contractual right. Even if an action does lie in the state courts the result would nevertheless be cumbersome. The plaintiff would be forced to prosecute two suits at added expense and inconvenience. If there were no action in the state court, he would find himself possessing what might be a valueless declaratory judgment.

Simply stated the problem is this: federal law has prohibited certain acts which have injured the plaintiff. To declare these acts illegal, leaving all other relief to be given by the state courts, is only half a remedy. The situation could not be more ripe for the federal court to evoke the principles of judicial economy and provide the plaintiff with full and adequate relief. If the court does not grant the complete relief requested, consideration of state law will be necessary to determine the proper remedy for violation of a federal right. It hardly seems in line with these principles of economy for the federal court to follow this procedure and increase not only the expense of justice to the plaintiff, but also the amount of pending litigation in the courts.[17] The action should be considered to be purely federal in

12. Securities Act, § 22(a), 48 Stat. 86 (1933), 15 U.S.C. 77v(a) (1958).

13. Deckert v. Independence Shares Corp., 311 U.S. 282, 61 S.Ct. 229 (1940); *accord*, SEC v. Fiscal Fund, Inc., 48 F. Supp. 712 (D. Del. 1943).

14. 327 U.S. 678, 684, 66 S.Ct. 773, 777 (1946).

15. *E.g.*, Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814, 81 S.Ct. 695 (1961); Smith v. Bear, 237 F.2d 79 (2d Cir. 1956); Kohler v. Kohler Co., 208 F. Supp. 808 (E.D. Wis. 1962).

16. See Investment Associates, Inc. v. Standard Power & Light Corp., 29 Del. Ch. 225, 48 A.2d 501 (Ch. 1946), *aff'd*, 29 Del. Ch. 593, 51 A.2d 572 (Sup. Ct. 1947).

17. See Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586 (1933); *cf.* Bank of the United States v. Planters' Bank, 22 U.S. 904 (1824). See generally 3 Loss, SECURITIES REGULATION 2031-32 (1961).

its governing law, as would be an injunctive action brought by the Commission itself under the proxy rules.

If the *Dann* case was correct in it's holding that the same causes of action are open to a private individual as are open to the Commission[18] it would seem logically to follow, as at least one authority has stated, that similar remedies should be granted regardless of who brings the action.[19] It has been held that the trial court "possesses the authority to make any order necessary to enforce liabilities or duties created by the Act or rules. . . ."[20] Once the violation of the federal right is established, *Bell v. Hood*,[21] makes it clear that the federal courts may use any available remedy to vindicate that right. To render complete justice, a federal court should bring into play the full scope of its equity powers, go beyond the immediate claim on which its jurisdiction is predicated and give whatever relief the exigencies of the case may demand.[22]

Though complete justice to a plaintiff would alone seem to justify the result reached by the court here, federal policy must also be considered. Under section 27 the federal courts have been granted exclusive jurisdiction over violations of the proxy sections of the act. One of the purposes of this grant must certainly have been to maintain uniformity in the enforcement of the act, that is, to insure that all plaintiffs and all defendants in similar situations were accorded the same treatment. The standards of relief for similar causes of actions in the various states would no doubt vary considerably. Thus to grant only declaratory relief, leaving additional remedies to the state courts and state law, would destroy the desired uniformity. To construe the act so narrowly may leave the plaintiff in one state with a federal right without an adequate remedy and another plaintiff in a different state with a full remedy. This could well serve to weaken the act and, in effect, defeat Congress' apparent purpose in giving the federal courts exclusive jurisdiction under section 27. They would have exclusive jurisdiction, but could do little justice with it. The state courts would, in all practical considerations, be the only ones capable of granting total relief, and this would in practice, if not in theory, actually usurp the power granted to the federal courts by Congress under the act. Therefore, it appears that the court in this case has wisely taken the step toward complete justice that *Dann* refused to take. Its decision, if followed, will unquestionably serve to strengthen the act and accomplish the purposes for which it was established.

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18. Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961).

19. Loss, *supra* note 3, at 1068.

20. SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947), *cert. denied*, 332 U.S. 847, 68 S.Ct. 351 (1948).

21. 327 U.S. 678, 66 S.Ct. 773 (1946).

22. Porter v. Warner Holding Co., 327 U.S. 395, 401-03, 66 S.Ct. 1086, 1090-91 (1946); see Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332 (1960).