

1984

Book Review

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Recommended Citation

Ralph H. Demmler, *Book Review*, 22 Duq. L. Rev. 589 (1984).

Available at: <https://dsc.duq.edu/dlr/vol22/iss2/13>

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Book Review

FUNDAMENTALS OF SECURITIES REGULATION By *Louis Loss*. Boston, Massachusetts: Little, Brown and Company, 1983. Pp. XIX, 1269. \$42.50.

With current rhetoric about deregulation, with banks getting into discount brokerage, with the SEC prescribing disclosure requirements for banks owned by holding companies, with insurance holding companies acquiring investment banking and brokerage houses, with the Supreme Court and other courts according less sanctity to the SEC's more venturesome assertions of power, with the Commission's faltering footsteps toward a national market system, with controversy over the responsibilities of securities lawyers — some parts of any comprehensive book on securities regulation are certain to contain some paragraphs which are written in sand. The winds of change are blowing fast.

Nevertheless, there are fundamentals which run through and will continue to run through the American system of securities regulation regardless of what kind of entity performs what function in the process of issuing and trading securities. Essentially, those fundamentals are the subject matter of Professor Louis Loss's latest book, *Fundamentals of Securities Regulation*, (*Fundamentals*).

Loss is William Nelson Cromwell Professor of Law at Harvard Law School. Since his service at the Securities and Exchange Commission (1937-1952), where he became associate general counsel, he has contributed perhaps more than anyone else to the scholarly analysis and development of the law relating to securities regulation. He was the draftsman of the Uniform State Law on Regulation of Securities. He is the author of the six-volume work, *Securities Regulation*, the most authoritative, although aging (since 1969), text on the subject.¹ He was the Reporter for the American Law Institute and American Bar Association project for a Federal Securities Code and the commentator for the Institute's hardcover edition of the Code (1980). Recognition of his preeminence is attested by the not too inaccurate aphorism that a lawyer's standing

1. LOUIS LOSS, SECURITIES REGULATION (2d ed. 1951 & Supp. 1969).

in the securities bar is enhanced if he or she calls Professor Loss "Lou."

Fundamentals is designed to be used as a teaching tool — a text by Loss (75 percent of the total content) and a repository of leading cases, significant SEC releases, bar association reports and published articles. It is also designed to serve the practitioner as a research tool which provides not only perspective but also answers to specific problems. The coverage of *Fundamentals* is indicated by its detailed and descriptive table of contents. Such detail saves the reader much time which might otherwise be spent jumping between the index and the multiple pages cited. A minor adverse criticism of the format of *Fundamentals* is the fact that the reader must sometimes look twice to determine where the secondary material ends and Loss's writing resumes.

Securities regulation encompasses state law and federal law, judicial decisions and agency releases and decisions, not to mention the actions of self-regulatory bodies and some folklore known as "interpretative gloss." It encompasses original issue of securities, trading in securities both in markets and between parties and in take-over bids, the responsibilities of transfer agents, the extension of credit for the purchase of securities, the responsibilities of brokers, underwriters, investment advisors and investment companies, the protection of investors against loss from brokers' insolvency, solicitation of proxies for corporate elections, the conduct of lawyers and accountants in rendering professional services relating to the issuance and trading of securities and in corporate elections and civil and criminal liabilities in respect of any of these categories. *Fundamentals* discusses all these subjects in sufficient detail to provide both an overview of particular subjects and a road map to the answers to specific questions. The lawyer with a securities law problem cannot go wrong by starting his research with *Fundamentals*.

After an historical review of English and American antecedents of SEC law, a discussion of state blue sky laws and an analysis of the merit philosophy and the disclosure philosophy of securities regulation,² the author describes the SEC statutes one by one. This leads him into a lengthy discussion of the proposed Federal Securities Code.³ Loss had worked as the Reporter for the Code for a

2. LOUIS LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 1-38 (1983) [hereinafter cited as *FUNDAMENTALS*].

3. *Id.* at 38-54.

period of over ten years, a task at which he was aided by a group of consultants and advisors, among them this reviewer. His discussion of the Code is understandably lengthy and betrays the wound to his parental pride suffered by the fact that no senator or congressman has yet put it into the legislative hopper. The Code project, however, has stimulated desirable administrative reforms and judicial developments. Comments on the Code by courts, by critics, by law professors and by practicing lawyers have broadened the understanding of, and interest in, problems of securities regulation. With the benefit of hindsight the Code project might have enjoyed better public and legislative acceptance had it been a simple codification of existing law, with inconsistencies and overlaps removed, and in a more familiar format. However, the decision to prepare a more fundamental revision was made by the American Law Institute.

Chapters 2 through 6 of *Fundamentals* provide a comprehensive discussion of registration of securities under the Securities Act of 1933. A practitioner or a student who reads these chapters will put down the book with a reasonably good understanding of what must be registered, who must do what and when, what typical missteps should be avoided, and the reasons which underlie the answers to those questions. Even for experienced practitioners of the art of registration, Loss's exposition can serve as a helpful refresher course and a reminder of where the traps are set.

Chapters 7 and 8 contain a comprehensive discussion of registration and post-registration requirements of the Securities Exchange Act of 1934 including registration of securities traded on an exchange or in the over-the-counter markets, proxy solicitation, tender offers, market regulation, credit regulation, and the congressional mandate for a national market system. The treatment of the last mentioned subject is a good example of the author's use of another's expertise. He reprints most of an article by Professor Norman S. Poser which describes the thus far ineffectual efforts of the SEC to establish a national market system as contemplated by section 11A of the Securities Exchange Act.⁴ Poser's article, with its play-by-play description of efforts to set up a system which will assure competition, get customers the "best execution" of their orders, and treat the New York Stock Exchange and other stock exchanges fairly, demonstrates the futility of legislation directing a

4. *Id.* at 749-98. See Poser, *Restructuring the Stock Markets: A Critical Look at the SEC's National Market System, Parts II-VI*, 56 N.Y.U. L. Rev. 883 (1981).

government agency to prescribe a market structure. The Poser article concludes:

It is the conclusion of this writer that Congress and the SEC should reconsider the desirability of a project that has already cost millions of dollars of government and private resources, that has involved the SEC in activities for which it has little capacity, and that is based on an unproved and probably invalid presumption. Ten years of floundering is enough. Section 11A should be repealed and other avenues of improving the quality of the securities market should be pursued.⁵

Fundamentals becomes more of a traditional case book in its coverage of common law fraud in securities transactions, securities law fraud, insider trading, civil liability and scienter as an element of actionable or sanctionable violations. The several statutes define similar violations in different ways. In some cases a section expressly creates civil liability. In other cases, according to the courts, a section implies (or does not imply) civil liability. Some remedies are exclusive; others are cumulative. All this has made it necessary for Professor Loss to serve the reader with a smorgasbord of decisions, frequently by divided courts, from which to select those cases which taken together contain the material from which a practitioner can hope to make an intelligent analysis of a specific fact situation.⁶ The cases reproduced in *Fundamentals* do just that. It is not Loss's fault that they leave the reader confused. The times call for codification of provisions for civil liability in order to have fewer distinctions between similar or closely analogous situations.

Cases on substantive issues related to civil liability are supplemented by material on statutes of limitations.⁷ Some sections of the securities laws provide a specific limitation, but those sections in respect of which the courts have implied civil liability present the courts with multiple choice questions: state fraud statute, state blue sky statute, or analogous federal securities law statute.

Fundamentals ends with a chapter every securities lawyer should read. It is entitled "The SEC Lawyer."⁸ The material in this chapter is largely secondary: *SEC v. National Student Marketing Corp.*,⁹ *William R. Carter*¹⁰ and a report by the Special

5. FUNDAMENTALS, *supra* note 2, at 798. See Poser, *supra* note 4, at 958.

6. FUNDAMENTALS, *supra* note 2, at 799-1216.

7. *Id.* at 1164-75.

8. *Id.* at 1217-69.

9. 457 F. Supp. 682 (D.D.C. 1978).

10. 22 SEC Dock. 292 (1981).

Committee of Lawyer's Role in Securities Transactions set up by the Association of the Bar of the City of New York.¹¹ These sources provide a thoughtful and inclusive summary of the multiple dilemmas encountered by a securities lawyer in determining how far to push, or to be pushed by, a client.

Fundamentals is a book which, in the opinion of this reviewer, meets a felt need in both the legal profession and academe. Professor Loss's massive work, *Securities Regulation* is unwieldy and is becoming obsolescent.¹² There are many articles and treatises on specific topics by many qualified commentators, but *Fundamentals* provides coverage in one volume of the whole subject, from regulatory philosophies — disclosure versus evaluation of merit — through the statutory schemes administered by the Securities and Exchange Commission, state commissions and self-regulatory organizations and to the civil and penal sanctions faced by violators and professionals.

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11. 32 Bus. Law. 1879 (1977).

12. See *supra* note 1.

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