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Blue Sky Legislation

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fessional conduct of its attorneys, as officers of the court. . . .²⁹ The Supreme Court has determined that this summary process does not violate the Seventh Amendment of the Constitution requiring jury trials.³⁰ Once the fee has been found unreasonable under section 60(d), the excess is recoverable from the attorney by the trustee or the bankrupt, as the case may be, by contempt proceedings rather than by a judgment.³¹

How much effect these two amendments will have will be demonstrated only after they have been given time to operate. It seems likely, however, that both the courts and the trustee will take advantage of the added powers given to them. This will permit creditors to receive increased assets and will require greater diligence by the debtor's attorney, who will feel the weight of an increased scrutiny of his fee.

E. CARL UEHLEIN, JR.

BLUE SKY LEGISLATION

UNIFORM SECURITIES ACT

There has been extensive legislation in the area of state security regulation, including many significant amendments to existing laws and the adoption or substantial adoption of the Uniform Securities Act¹ by Nevada² and Utah.³ Codifying it in its entirety, Utah became the sixteenth state to adopt Professor Loss's Uniform Act.⁴ The substitution by Utah of the Uniform Securities Act for its previous blue sky law continues a definite trend toward uniformity in this field of state regulation.⁵

Nevada, which previously did not have a blue sky law, has now enacted such legislation, adopting certain sections of the Uniform Act.⁶ This leaves Delaware as the only state with no legislation in this area of the law.⁷

Nevada, rather than adopting the three methods of registration of securities prescribed by the Uniform Act,⁸ selected only one method.⁹ The

²⁹ *In re Debbins*, 53 F.2d 1018, 1020 (E.D. Mich. 1931).

³⁰ *In re Wood and Henderson*, 210 U.S. 246, 258 (1908).

³¹ *In the matter of A. & V. Appliance Co.*, 149 F. Supp. 3, 4 (E.D.N.Y. 1957).

¹ For an analysis of the Uniform Securities Act, its background and the extent of its adoption see *Legislation*, 3 B.C. Ind. & Com. L. Rev. 455 (1962); *Blue Sky L. Rep.* ¶ 4901-4953.

² Nev. Rev. Stat. §§ 7.2-.22 (Supp. 1963).

³ Utah Code Ann. §§ 61-1-1—61-1-30 (1953).

⁴ For a list of states accepting all or portions of the Uniform Securities Act see *Blue Sky L. Rep.* ¶ 4901.

⁵ *Supra* note 3. For a brief analysis of the four basic parts of the Uniform Securities Act see *Legislation*, 3 B.C. Ind. & Com. L. Rev. 218 n.2 (1961).

⁶ *Supra* note 2.

⁷ *Blue Sky L. Rep.* ¶ 11,101.

⁸ The Uniform Securities Act provides for registration by notification, § 302; coordination, § 303; qualification, § 304. For an explanation of these three types, see *Legislation*, 3 B.C. Ind. & Com. L. Rev. 461-64 (1962).

⁹ Nev. Rev. Stat. §§ 7.15-16 (Supp. 1963).

method adopted parallels the qualification type of registration under the Uniform Act,¹⁰ and this is the most complicated of the three. Registration of securities is one area of blue sky legislation where state uniformity is essential, especially for lawyers who are working on multi-state offerings.¹¹ Because of the differing methods of registration in the various states, much needless time and money is being spent on registration of multi-state offerings.

Nevada chose not to adopt the exemptions¹² of the Uniform Act, but rather incorporated¹³ the exemption provisions of the Securities Exchange Act.¹⁴ These exemptions, although parallel to those of the Uniform Act, do not include as it does, for example, either exemptions for securities secured by a real or chattel mortgage or by deed or trust,¹⁵ or exemptions for isolated sales.¹⁶ This is another area of blue sky legislation which demands uniformity.

The Nevada Legislature enacted the administrative provisions of the Uniform Act.¹⁷ This is not an area where uniformity is essential since administration of the Act has no direct impact upon a multi-state offering which has complied with the registration provisions of the law.

Nevada adopted the definitions of the Uniform Act.¹⁸ In so doing Nevada chose the alternative, appendix C-1,¹⁹ provided for in the Act, rather than the standard provision. The alternative section makes no provision for the registering of investment advisers as does the standard section of the Uniform Act. This alternative provision is a concession by the draftsman of the Uniform Act who strove to make the Act acceptable to as many states as possible.

Nevada accepted the Uniform Act provision for consent to service.²⁰ This section provides that irrevocable consent must be filed by the issuer of the security when registration is made, and that conduct violative of the blue sky act is tantamount to consent to the appointment of the administrator to receive process for the violator where personal jurisdiction cannot otherwise be secured.²¹ The criminal provision of the Uniform Act was also

¹⁰ Uniform Securities Act § 304.

¹¹ Blair-Smith, *More on the Project for a Uniform State Securities Act*, 11 *Bus. Law.* 111, 116 (1956). Fourteen out of the sixteen states adopting the Uniform Act have included all three types of registration.

¹² All blue sky laws make provisions for exempting certain securities and transactions from registering under the laws.

¹³ Nev. Rev. Stat. § 7.15(a)(3) (Supp. 1963).

¹⁴ 48 Stat. 75 (1934), 15 U.S.C. § 77c (1958).

¹⁵ Uniform Securities Act § 402(b)(5).

¹⁶ Uniform Securities Act § 402(b)(9).

¹⁷ Nev. Rev. Stat. §§ 7.17-.18 (Supp. 1963).

¹⁸ Nev. Rev. Stat. §§ 7.3-.10 (Supp. 1963).

¹⁹ Uniform Securities Act, Appendix C-1. Eleven of the sixteen states adopting the Uniform Act do require investment advisers to register. For the total amount of states having such requirements, see *Legislation*, 3 *B.C. Ind. & Com. L. Rev.* 459 (1962).

²⁰ Nev. Rev. Stat. § 7.22-.7 (Supp. 1963).

²¹ This provision is similar to that used to obtain jurisdiction over non-resident motorists, and its constitutionality has been upheld. *Mulhern v. Gerold*, 116 F. Supp. 22 (D.D.C. 1953). Cf. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1916).

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adopted by the Nevada legislature.²² Most states have parallel criminal and consent provisions, although many states do not make provision for consent to service where no personal jurisdiction can be secured.

In summary, while Nevada has accepted substantial sections of the Uniform Securities Act, including the definitions, provisions for registration of brokers and dealers,²³ and the administrative and criminal provisions, the legislature failed to achieve uniformity in the necessary areas of registration of securities and exemptions which directly affect multi-state offerings.

AMENDMENTS

There have been many recent amendments to existing blue sky laws which, for clarity, will be discussed under the headings of registration, administration, misrepresentation, and exemption.

REGISTRATION

Florida, a state which has not adopted the Uniform Act,²⁴ amended the registration provisions of its blue sky law to provide that the administrator of its securities regulation act may suspend the registration of any dealer or salesman for cause.²⁵ However, like the parallel provision of the Uniform Act, the legislature has limited the administrator's power to suspend the license of a dealer or salesman by requiring that certain conditions exist before a license can be suspended.²⁶ Although not adopting the Uniform Act provision, Florida had provided certain definite criteria for suspension of dealers and salesmen in that state.

New York, another state which has not adopted the Uniform Act, amended its blue sky law by adding a provision requiring any registered broker-dealer to maintain a minimum amount of capital.²⁷ This provision also sets forth the procedure for determining such capital. The Uniform Act contains such a requirement, but does not enumerate the details as to the amount of capital or how the amount of capital should be determined. The draftsman felt such amounts and procedures should be determined by the individual states in light of its peculiar interests and needs.²⁸

Tennessee, a non-Uniform Act state, amended its registration provision to require that a prospectus sanctioned by the Commissioner precede or accompany each offer to sell any security for which registration is needed.²⁹ By comparison, the Uniform Act permits the Commissioner to order such prospectus to accompany an offer only if the security has to be registered

²² Nev. Rev. Stat. § 7.20 (Supp. 1963).

²³ Nev. Rev. Stat. § 7.13 (Supp. 1963).

²⁴ Blue Sky L. Rep. ¶ 13,101 — 13,410.

²⁵ Fla. Stat. Ann. § 517.16 (1941).

²⁶ Uniform Securities Act § 306. Although the Florida amendment is not an adoption of the Uniform Act, many of the conditions are parallel. E.g., Florida has no provision for suspension or revocation if the person has been convicted of a felony or misdemeanor within the last ten years involving a security or any aspect of the securities business. Uniform Securities Act § 306(a)(2)(C).

²⁷ N.Y. Gen. Bus. Law § 352-k.

²⁸ Uniform Securities Act § 202(d).

²⁹ Tenn. Code Ann. § 48-1608(5) (Supp. 1963).

by qualification, the most detailed method of registration. Even then, under the Uniform Act, it is optional with the Commissioner to order such accompaniment.³⁰ It would appear that Tennessee, by passing such an amendment, has indicated its feeling that registration alone is not sufficient to protect the public against fraudulent sales; but that the additional protection of a sanctioned prospectus for every registered security is necessary. Such a provision represents added expense to a company issuing securities in Tennessee that have to be registered, for a copy of a sanctioned prospectus must be made available to every potential buyer.

Texas, a non-Uniform Act state, has added a provision to its blue sky law requiring that dealers, agents and salesmen pass a written examination given by the administrator in order to qualify for registration.³¹ The Uniform Act also gives the administrator this power of examination. However, under the Uniform Act this requirement is optional with the administrator.³² Thus, Texas is following the trend of the states and the Uniform Act by providing stricter registration requirements for dealers and brokers of securities.

ADMINISTRATION

Arkansas, which previously adopted the Uniform Securities Act, has amended its blue sky law to give the Commissioner the power to issue cease and desist orders when he has sufficient reason to believe a person is engaging in a violation of the act.³³ This power supplements the Commissioner's power to bring suit in equity against persons violating the state's blue sky law. Such an order, if issued, is effective only for twenty days. However, this amendment still gives the Commissioner more power than granted to him under the Uniform Act,³⁴ where the Commissioner merely had the power to sue in equity for an injunction. Seven other states,³⁵ including two Uniform Act states,³⁶ have similar provisions giving the Commissioner power to issue temporary cease and desist orders. The Uniform Act provision was modeled after a similar provision in the Securities Exchange Act.³⁷ Most states have also used the Securities Act as a guide for their injunction provisions.³⁸ A provision such as Arkansas has adopted might be advantageous in permitting the Commissioner to act swiftly to prevent possible irreparable harm to the buying public.³⁹

³⁰ Uniform Securities Act § 304(d). This section simply authorizes the administrator to require the use of a prospectus in those unusual cases where he deems it in the public interest. This Uniform Act, unlike the federal statute and many state statutes, is not primarily a disclosure act.

³¹ Tex. Rev. Civ. Stat. art. 581-13D (Supp. 1958).

³² Uniform Securities Act § 204(b)(6).

³³ Ark. Stat. Ann. § 67.1220 (Supp. 1959).

³⁴ Uniform Securities Act § 408.

³⁵ Arizona, Georgia, Indiana, Mississippi, Missouri, Tennessee, and Virginia.

³⁶ Indiana and Virginia.

³⁷ 49 Stat. 899 (1936), 15 U.S.C. § 78(a) (1952).

³⁸ Loss and Cowett, Blue Sky Law 387 (1958).

³⁹ The Commissioner's order issued with reasonable cause and good faith is not subject to review by an equity court for twenty days. Such a review provision would seem adequate to protect the rights of an alleged violator.

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MISREPRESENTATION

Florida amended its blue sky law to make it unlawful for any person selling any security within that state to falsely represent or imply that the security or company has been guaranteed, sponsored, recommended or approved by the state or by the United States.⁴⁰ This provision also makes it unlawful for any person registered or required to be registered under the act to represent that his qualifications have been approved by an officer of the state or of the United States.⁴¹ Most registration statutes contain language disclaiming governmental approval or recommendation merely because the security is registered. These state statutes also provide that misrepresenting such registration to be an official endorsement is fraudulent or unlawful.

EXEMPTIONS

California, a state which has not adopted the Uniform Act,⁴² amended its blue sky law to provide that certificates of interest or participation in an oil or gas title or lease will be exempted from the provisions of registration if each person who is a party to the transaction involving the certificate is and has been for the preceding two years primarily engaged in the business of drilling for, producing, or refining oil or gas; or has been substantially engaged in the above businesses.⁴³ Although no such exemption is provided for in the Uniform Act,⁴⁴ such an exemption does not contravene the basic policy of a blue sky law. The exemption is only applicable to an assumed informed portion of the buying public which presumably does not need the protection of registered certificates of this type. However, the test of "primarily" and "substantially engaged in" might prove to be too vague and lead to much litigation in deciding when a certificate transaction is exempt under this provision.

Florida has repealed its requirement that insurance be obtained on bonds and notes secured by mortgages which are exempt from registration under its blue sky act.⁴⁵ This parallels the exemption of the Uniform Act⁴⁶ and brings Florida into line with the majority of states which have no such insurance requirement on exempt securities.

Iowa, not a Uniform Act state, has repealed its exemption for securities issued by benevolent or charitable corporations, although it did retain the exemption for securities issued by religious, educational, fraternal or reformatory corporations.⁴⁷ Securities of a benevolent and charitable corporation are also exempt under the Uniform Act.⁴⁸ Similar exemptions are

⁴⁰ Fla. Stat. Ann. § 517.311 (1941). Florida did not have such a provision before as does the Uniform Securities Act § 405.

⁴¹ *Ibid.*

⁴² For a quick reference concerning the controversy over the Uniform Act in California, see *Legislation*, 3 B.C. Ind. & Com. L. Rev. 456 n.10 (1962).

⁴³ Cal. Corp. Code § 25100(N).

⁴⁴ Uniform Securities Act §§ 401-402.

⁴⁵ Fla. Stat. Ann. § 517.06(7) (1941).

⁴⁶ Uniform Securities Act § 402(b)(5).

⁴⁷ Iowa Code Ann. § 502.44 (1958).

⁴⁸ Uniform Securities Act § 402(a)(9).

found in the majority of state blue sky laws, although there is a wide variation in the particular corporate purposes specified.

Minnesota, which also has not adopted the Uniform Act, has added athletic, chamber of commerce, trade or professional association's securities to its exemptions.⁴⁹ Prior Minnesota exemptions included securities of social, religious, educational, benevolent, fraternal, charitable and reformatory corporations. All of these classes of securities are also exempt under the Uniform Act,⁵⁰ and under the majority of state blue sky laws.⁵¹ Minnesota has also added an exemption for any security issued or guaranteed by any common carrier subject to regulation or supervision as to the issuance of its own securities by a public commission, board or officer of the government of the United States.⁵² By adding this exemption, Minnesota has followed the lead of the majority of the states⁵³ and the Uniform Act.⁵⁴

Tennessee amended its definition of "security" to exclude from registration any annuity, variable or fixed, offered or sold by any insurance company regulated by the Commissioner of Insurance and Banking of that state.⁵⁵ The Uniform Act also has such a provision⁵⁶ which includes both fixed and variable annuities.⁵⁷ The Uniform Act further provides, in another provision of the Act,⁵⁸ that only such annuities offered by an insurance company organized and authorized by the laws of the state are exempt.

Texas amended its blue sky law⁵⁹ to provide that any offer to the issuer's existing security holders is exempt if no commission, other than a stand-by commission, is paid for soliciting any security holder in the state. Under Texas' prior exemption no commission at all could be paid for such solicitation. The Uniform Act⁶⁰ has a similar provision that also allows payment of a stand-by commission. The "stand-by commission" is designed to permit payment to an underwriter for his risk and services in connection with his commitment to take down any portion of the offering which is not taken down by a security holder. Such a commission would seem necessary if the exemption is to be at all meaningful, since, without it, it would seem improbable that any underwriter would undertake the risk involved without any compensation.⁶¹ Another Texas amendment made exempt the issue or sale of any investment contract in connection with an employees' benefit plan.⁶² Texas never had such an exemption; but such a situation is exempted

⁴⁹ Minn. Stat. Ann. § 80.05(7) (1957).

⁵⁰ *Supra* note 48.

⁵¹ Loss, *op. cit. supra* note 38, at 360.

⁵² Minn. Stat. Ann. § 80.05(4) (1957).

⁵³ Loss, *op. cit. supra* note 38, at 358.

⁵⁴ Uniform Securities Act § 402(a)(7).

⁵⁵ Tenn. Code Ann. § 48-1602(J) (Supp. 1963).

⁵⁶ Uniform Securities Act § 401(1).

⁵⁷ Loss, *op. cit. supra* note 38, at 350.

⁵⁸ Uniform Securities Act § 402(a)(5).

⁵⁹ Tex. Rev. Civ. Stat. Ann. art. 581-5(E) (Supp. 1958).

⁶⁰ Uniform Securities Act § 402(b)(11).

⁶¹ Loss, *op. cit. supra* note 38, at 376.

⁶² Tex. Rev. Civ. Stat. Ann. art. 581-5(H) (Supp. 1958).

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under the Uniform Act.⁶³ Such a provision is necessary for many state administrators and the Securities Exchange Commission⁶⁴ have taken the position that employees' benefit plans involve an offering of a security and thus are subject to registration under blue sky laws if there is no statutory exemption.

CONCLUSION

As evidenced by the above amendments, the states are realizing the shortcomings of their existing blue sky laws in the areas which demand uniformity. The amendments demonstrate the trend of the states to follow the lead of the Uniform Securities Act in providing this uniformity. No doubt this does produce a degree of uniformity among state blue sky laws, but it is slow and unorganized. It would seem far better for a state to start with the Uniform Securities Act and amend *it* to serve the needs of the state, rather than to attempt in a piecemeal fashion to amend the existing laws to conform to some type of uniform blue sky law.

DWIGHT W. MILLER

FEDERAL TAXATION

Primarily due to congressional efforts to formulate an acceptable tax relief program for 1963, there has been little major legislation enacted recently in the field of federal taxation. It is important, however, to note that a recent amendment to Section 214 of the Internal Revenue Code facilitating the use of the child care deduction for deserted wives will become effective during the present taxable year.¹

This amendment manifests congressional cognizance of the financial problems which often confront a deserted wife. It is primarily designed to grant a deserted wife the care expense deduction privileges which were formerly afforded only to widows, widowers, or women legally separated from their husbands under a decree of divorce or separate maintenance.² The amendment does not, however, affect any provisions applicable to other per-

⁶³ Uniform Securities Act § 402(a)(11).

⁶⁴ Loss, *op. cit. supra* note 38, at 361.

¹ 77 Stat. 4 (1963). This section amends Int. Rev. Code of 1954, 214(c)(3) by adding 214(c)(3)(B). Section 214(c)(3) now reads:

DETERMINATION OF STATUS—A woman shall not be considered as married if (A) she is legally separated from her spouse under a decree of divorce or of separate maintenance at the close of the taxable year, or (B) *she has been deserted by her husband, does not know his whereabouts (and has not known his whereabouts at any time during the taxable year), and has applied to a court of competent jurisdiction for appropriate process to compel him to pay support or otherwise to comply with the law or a judicial order, as determined under regulations of the Secretary or his delegate.* (Added provisions italicized.)

The added provisions became effective for taxable years ending after April 2, 1963.

² S. Rep. No. 69, 88th Cong., 1st Sess. (1963), U.S. Code Cong. & Ad. News 394 (April 20, 1963).