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OVER-THE-COUNTER MARKET QUOTATIONS:
PINK, YELLOW, GREEN AND WHITE SHEETS
—A GRAY AREA IN THE LAW
OF EVIDENCE

Arnold I. Burns†

The author discusses the market quotations of over-the-counter securities, explaining the way they are compiled, the information reported, and the reliability of the quotations. He then considers their admissibility into evidence, concluding that they are generally admissible. He states, however, that the main problem with the "sheets" is not their admissibility but their probative value. After examination of the case law, he concludes that the probative value of the sheets must vary with the context in which they are offered as evidence and that once their business use and meaning are fully understood they should function with utility both in courts and before regulatory agencies.

For those knowledgeable in the ways of the over-the-counter securities markets in the United States, "pink sheets" are a shorthand reference to the stock quotations compiled and published daily in New York City by the National Quotation Bureau, Inc. in its Eastern Section. The pink sheets contain the "bid" and "asked" prices submitted by subscribing broker-dealers for the "inside" or professional dealer wholesale market.¹ In addition the Eastern Section contains bond quotations, referred to as "yellow sheets." The Bureau also publishes the Western and Pacific Coast Sections containing stock quotations called "green" and "white" sheets, respectively.²

Unlike the securities transactions effected on national or regional exchanges, for which there is a ticker-tape record, no ticker is used for over-the-counter market transactions. Nor is there any other public

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¹ "Under the Securities Exchange Act of 1934, the over-the-counter markets are deemed to include all transactions in securities which take place otherwise than upon a national securities exchange" S. Rep. No. 1455, 75th Cong., 3d Sess. 2 (1938); H.R. Rep. No. 2307, 75th Cong., 3d Sess. 2 (1938). The over-the-counter market has often been defined as that broad market in securities which takes place outside of the organized securities exchanges. Loeser, *The Over-the-Counter Securities Market 2* (Nat'l Quot. Bureau, Inc. 1940); Leffler, *The Stock Market* 402 (3d ed. 1963); Friend, Hoffman, & Winn, *The Over-The-Counter Securities Markets* 1 (1958); 2 Loss, *Securities Regulation* 1277 (2d ed. 1961).

² The pink sheets contain over 200 pages of daily quotations on stocks. The yellow sheets contain about 30 pages on bonds. The green sheets are printed in Chicago and contain about 30 pages. The white sheets are printed in San Francisco and contain about 42 pages. See, Report of Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 2, at 597 (1963) [hereinafter cited as Special Study].

record of actual transactions.³ Consequently, there is no ready method, short of consulting with broker-dealers who have effected transactions, of ascertaining at a given time whether, to what extent, or at what prices transactions have taken place in the over-the-counter market.⁴

A dealer interested in executing a transaction on the over-the-counter market will want to ascertain at a given time the wholesale market price of the security in which he is interested,⁵ the size of the market (*i.e.*, the number of shares available for purchase or sale), and whether a transaction can be consummated at the desired price in the wholesale market. To do this he must telephone and negotiate with other broker-dealers who have currently advertised their interest in the sheets, or whom he knows from prior advertisements or otherwise to be interested in effecting transactions in the desired security. A more accurate appellation for the so-called "over-the-counter" markets, since there are in truth no "counters" over which to bargain, would be "over-the-telephone" or "over-the-wire" markets.⁶

In recent years there has been a decided increase in the number of

³ See, Lesh, "Federal Regulation of Over-The-Counter Brokers and Dealers in Securities," 59 Harv. L. Rev. 1237, 1242 (1946):

There is no way for investors to find out the current market price of an over-the-counter security. There are no records maintained or published anywhere of the prices at which over-the-counter transactions actually are effected, as there are for stock-exchange transactions.

[Footnote omitted.] See also Barrett & Company, 9 S.E.C. 319, 323 (1941).

⁴ As stated in the Special Study, pt. 2, at 655-57, electronic data-processing devices are currently in use in the over-the-counter market to disseminate "retail" quotations on selected securities. Although primarily used in respect of listed securities, they are increasingly being used for the quotation of over-the-counter securities.

According to the National Association of Securities Dealers, Inc. (NASD), its Committee on Automated Quotations wrote to the firms manufacturing and operating the systems to learn whether an automated system could be devised for use in the over-the-counter market. A system is desired which would (1) permit broker-dealers in the over-the-counter market to obtain the names of firms making the highest bid and the lowest offer in a particular security; (2) provide the names of other houses in the sheets who were "close" to the market; and (3) permit the compilation of data so that actual transaction prices and volume of trading could be published. The committee is still in its exploratory stages in determining whether such an automated system is feasible. At present there are no plans to introduce a "ticker tape" similar to the one on the exchanges showing transactions in securities as they actually occur.

⁵ The public press has for some time published quotations respecting securities traded in the over-the-counter market. These quotations traditionally have been *retail* quotations, that is, prices which include the broker-dealer's "hidden markup." In 1963, at the insistence of the Securities and Exchange Commission, the NASD instituted the publication in newspapers of *wholesale* quotations respecting 1,300 actively-traded issues on the national list. Retail quotations continued to be published in newspapers for 2,700 small local issues. On October 11, 1966, the NASD announced that it would introduce as soon as possible a complete wholesale, or inside-dealer, quotation system for all over-the-counter stocks currently listed in newspapers. This innovation still would embrace only a small portion of securities traded in the over-the-counter market. The new publishing procedure would remove the broker-dealer's markup from the quotations made available to the public. The NASD decision to inaugurate the new procedure followed an independent study of the economic impact of the new system on the securities industry made by an independent management consulting firm.

⁶ See 2 Loss, *supra* note 1, at 1283; Mayer, Wall Street: Men and Money 10 (1955).

publicly owned corporations the securities of which are traded in the over-the-counter market.⁷ With increasing frequency quotations in the sheets have been at issue in a variety of litigated matters, such as those involving internal corporate matters,⁸ federal tax liabilities,⁹ state¹⁰ and federal securities regulations,¹¹ and alleged breaches of underwriting agreements.¹² They may be useful in determining the price and/or value of over-the-counter market securities and in providing information material to securities regulation.

Thus, courts and quasi-judicial bodies are increasingly called upon to answer questions which may, directly or indirectly, be affected by evidence of over-the-counter quotations. This article considers the admissibility of quotations and their value as evidence. As a predicate for understanding the problems posed, it is necessary to know how the sheets are compiled, what information they purport to provide, and the reliability of that information.

I

ANATOMY OF THE SHEETS

The Bureau, Its Subscribers, and the Securities Quoted

The National Quotation Bureau, Inc. is a privately owned, profit-oriented organization. It is not affiliated with or subject to supervision by the National Association of Securities Dealers, Inc. (NASD) or any other organization. Nor is it subject to the regulation or control of the Securities and Exchange Commission, which regulates the dissemination and use of quotations for securities listed and traded on exchanges.¹³

⁷ See Special Study, pt. 2, at 22.

⁸ See *Fistel v. Christman*, 135 F. Supp. 830 (S.D.N.Y. 1955) (suit to recover alleged short-swing profits from corporate officer); *Matter of Silverman*, 282 App. Div. 252, 122 N.Y.S.2d 312 (1st Dep't 1953) (appraisal proceeding brought by shareholder dissenting from corporate action).

⁹ *Rice v. Eisner*, 16 F.2d 358 (2d. Cir. 1926).

¹⁰ Quotations in the sheets may furnish evidence that securities were offered to the public in violation of state blue sky laws. See *Atkin v. Hill, Darlington & Grimm*, 15 App. Div. 2d 362, 224 N.Y.S.2d 553 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 940, 188 N.E.2d 790, 238 N.Y.S.2d 516 (1963); *Atkin v. Hill, Darlington & Grimm*, 44 Misc. 2d 863, 254 N.Y.S.2d 867 (Sup. Ct. New York County 1964), *aff'd* on other grounds, 23 App. Div. 2d 331, 260 N.Y.S.2d 482 (1st Dep't 1965).

¹¹ See, e.g., *SEC v. Scott Taylor & Co.*, 183 F. Supp. 904 (S.D.N.Y. 1959) (illusory or misleading quotations in sheets may evidence manipulative practices violating Securities Exchange Act of 1934); *Cortlandt Investment Corp., Securities Exch. Act Release No. 7682*, Aug. 24, 1965 (SEC proceeding to determine whether securities had been sold at prices exceeding the permissible mark-up). See also cases cited in notes 67-68 *infra*.

¹² *Kupferman v. Consolidated Research & Mfg. Corp., C.C.H. Fed. Sec. L. Rep. ¶ 91,197* (S.D.N.Y. 1962) (evidence of measure of damages for breach of underwriters' covenant). See note 31 *infra*. See also *Barber v. Ellingwood*, 144 App. Div. 512, 129 N.Y. Supp. 414 (1st Dep't 1911) (damages in customer's action for broker-dealer's alleged failure to execute either a buy or sell order).

¹³ Special Study, pt. 2, at 596. The Securities and Exchange Commission is empowered by Section 19(b) of the Securities Exchange Act of 1934, 48 Stat. 898, 15 U.S.C. § 78s (1964),

In January 1963 the Eastern, Western, and Pacific Coast Editions listed each day in the aggregate approximately 39,000 quotations covering approximately 10,000 securities which were submitted by between 1,000 and 1,300 broker-dealers throughout the country having subscription contracts with the Bureau. The pink sheets, by far the most numerous of the sheets, contain quotations of approximately 9,000 stocks each day.¹⁴

There are two categories of subscribers to the pink sheets—those broker-dealers who only receive copies of the daily sheets¹⁵ and those who not only receive the sheets but also insert quotations in them.¹⁶ The securities quoted and the broker-dealers submitting quotations vary from day to day, depending on the extent to which subscribers wish to advertise their interest in the particular securities to broker-dealers doing business in the inside wholesale market.¹⁷

Method of Compilation

The information forming the basis for quotations published in the pink sheets is picked up daily by messengers employed by the Bureau in New York City. Each stock is listed on a slip containing the subscriber's name and telephone number as well as a place for the insertion of bids and offerings. Quotations are also telephoned, wired, or mailed in from out of town. The selected quotations are mimeographed and delivered to subscribers in New York City by messenger on the morning of the day following the printing. Out-of-town subscribers receive the sheets by messenger service, railway express, third-class mail, or for an added fee, by first class or air mail.¹⁸

Most subscribers receive their sheets on the day following publication. A sheet dated January 2, 1967, will first reach the desk of a broker-dealer in New York City on the morning of January 3. The sheets

to alter or supplement exchange rules which deal with, among other things, "the reporting of transactions on the Exchange and upon tickers maintained by or with the consent of the Exchange."

¹⁴ Special Study, pt. 2, at 597.

¹⁵ Any broker-dealer registered with the Securities and Exchange Commission may subscribe to the sheets for a current annual fee of \$336. The sheets are also received by the Securities and Exchange Commission, the NASD, the Internal Revenue Service, state tax and securities commissions across the United States, certain banks, and investment advisors registered with the Securities and Exchange Commission. See Special Study, pt. 2, at 598.

¹⁶ Broker-dealers meeting Bureau requirements may insert 10 listings in the daily sheets for a current annual fee of \$564, which is inclusive of the cost of the subscription. Additional listings may be inserted at the current annual rate of \$240 for each additional 5 listings. According to Special Study, pt. 2, at 598, all broker-dealers inserting quotations were members of the NASD, and all but 25 of the broker-dealers receiving the sheets were NASD members.

¹⁷ Special Study, pt. 2, at 597.

¹⁸ According to Donald G. Seaman, Editor of Quotations of the Bureau in New York City, about 85% of the sheets are received the day after printing. See also Special Study, pt. 2, at 600; 2 Loss, *supra* note 1, at 1279.

contain quotations submitted by subscribers during the midday period of the day of publication. Inevitably, because of constant fluctuations, the published quotations are not necessarily representative of the market at the time a subscriber receives them. The bid and asked prices quoted may be stale and the size of the markets may have been dissipated or enlarged.

Information Reported

The columnar format of the sheets sets forth the name of the securities in alphabetical order, the name of the brokerage firm quoting, its telephone number, the "bid" price, and the "asked" price. The symbols "OW" in the bid column and/or "BW" in the offered column mean offer wanted and bid wanted, respectively, and signify that the broker-dealer did not wish to submit an actual bid or offer price. Blank price columns signify an interest on either side of the market. A quotation in the sheets indicates an interest to buy or sell 100 shares unless otherwise specified.¹⁹

The Report of Special Study of Securities Markets of the Securities and Exchange Commission,²⁰ commenting on the meaning of quotations, states:

Although not every appearance in the sheets represents the same type of [buying or selling] interest, . . . there is a direct correlation between the number of wholesale dealers inserting two-way quotations and the volume in a security

A dealer may appear in the sheets on both sides of the market, or on the one side only, or may advertise only its name without any indication of price. It may be identified in the sheets only on the side of the market in which it wishes to transact business or it may advertise a side of the market in which it does not wish to do business in order to conceal its interest. Even though it has a more or less continuous interest as market maker, it does not necessarily advertise that interest regularly. In the absence of any system for differentiating quotations of a continuous market maker from those of other dealers, a person using the sheets cannot ascertain from them whether a dealer is interested in both buying and selling, whether he is acting as a correspondent, or whether a dealer's two-way quotations reflect a continuous market of appreciable depth or permanence. In an individual case, particularly where there is not a substantial number of two-way quotations, it is difficult even for the professional to determine what kind of professional participation is represented, because of wide divergencies among dealers in respect of available capital, inventory positions, and concepts of responsibility in making markets.

. . . .

¹⁹ Special Study, pt. 2, at 598. Since February 1965 the symbol "SD" signifies that the quotation is ex-dividend, meaning that the purchaser of the stock is to acquire it without the right to receive a recently declared dividend. The symbol "VJ" indicates that the issuer of the securities quoted is in bankruptcy or receivership. An asterisk signifies that the broker-dealer inserting the quotation is doing so for a correspondent broker-dealer out of town.

²⁰ H.R. Doc. No. 95, 88th Cong., 1st Sess. (1963) [herein cited as Special Study].

. . . Widely known and actively traded issues are likely to appear regularly, with as many as 20 or 30 dealers quoting 2-way markets. For many other securities, entries may be quite sporadic with only one or two dealers appearing, and not even one indicating an interest in both buying and selling.²¹

Reliability of Quotations

The Bureau exercises certain controls over subscribing broker-dealers, the issues quoted, and the insertion of quotations. These controls are in no way comparable to requirements imposed by the national exchanges. Before an applicant broker-dealer is permitted to insert quotations, it must furnish the Bureau with a ten year history of its principals and a balance sheet showing a net worth of \$50,000 if it is a corporation, or of \$10,000 if it is an individual or partnership. The Bureau also obtains reports from credit-rating organizations and makes investigation into the applicant's prior history of violations of securities laws and reputation in the financial community.

The investigative staff of the Bureau, however, is limited. The balance sheets submitted by the applicant need not be certified and are not audited by the Bureau. Once a firm is approved as a subscribing broker-dealer, there is no requirement that balance sheets be updated to show maintenance of the minimum capital required.²²

The Bureau frequently requires subscribing broker-dealers to furnish certain information concerning issuing companies such as the issuer's location, the identity of its transfer agent, its date of incorporation and the par value of its stock, before quotations in respect to their securities are accepted for publication. With respect to new issues, the Bureau contacts the managing underwriter and occasionally the Securities and Exchange Commission to determine whether the registration statement has become effective. Nevertheless, because of dissolutions, mergers, and other corporate developments, the elementary information initially obtained by the Bureau is out of date or otherwise unreliable in a significant number of instances.²³

The Rules of Fair Practice of the NASD purport to establish standards in the securities industry for the insertion of quotations by its members. The rules provide that members may publish quotations of bid and asked prices only when "such member believes that [they represent] . . . a bona fide bid for, or offer of, such security."²⁴ Nevertheless, the Special

²¹ Special Study, pt. 2, at 570-71, 597. [Footnotes omitted.]

²² *Id.* at 601.

²³ *Id.* at 604.

²⁴ NASD Rules of Fair Practice art. III § 5, NASD Manual D-6. The rules also stipulate that "if nominal quotations are used or given, they shall be clearly stated or indicated to be only nominal quotations." *Ibid.*

Study expresses grave reservations as to whether a random sampling of quotations taken from the pink sheets can be considered reliable. It notes that a dealer "may advertise a side of the market in which it does not wish to do business in order to conceal its interest;"²⁵ that many quotations deviate substantially from those inserted by other dealers, and "one can only guess how many of the deviant quotations were fictitious;"²⁶ that inquiries to dealers publishing quotations frequently indicate that "the quoting dealer is not making a firm market;"²⁷ that "quotations of wholesale dealers which appear to be firm may turn out to be illusory;" that "'backing away' [from quotations] occurred with disturbing frequency;" that "the NASD apparently has not yet developed a regulatory program to deal with the problem of backing away;"²⁸ and that "in case after case broker-dealers have abused the wholesale quotation system through inserting fictitious quotations in connection with 'boiler rooming' worthless securities to the public."²⁹

Summary

From the foregoing, it appears that the following conclusions can be drawn. (1) Pink sheets provide a daily intercommunication system among broker-dealers, by which broker-dealers advertise interest in buying and selling securities, throw out leads and "feelers" to one another and drum up business among themselves. (2) Pink-sheet quotations ostensibly are intended for professional broker-dealers and are not meant to be seen by members of the public who deal in the "outside" or retail market at marked-up prices. They do, however, find their way into the hands of some retail customers in the "outside" market.³⁰ (3) A quotation, if bona fide and genuine, is at best an indication of interest by a broker-dealer in buying and/or selling securities, *at the time of submission*, at a given price if a price is quoted. (4) When subscribing broker-dealers receive the pink sheets, quoted prices are a day old and may bear little or no relationship to the then current market. (5) Pink sheets are not records of and do not reflect actual transactions between broker-dealers or between broker-dealers and members of the public. (6) The reliability of random pink-sheet quotations is suspect in view of the existence of illusory, misleading, and fictitious quotations. (7) There is a direct correlation between the number of broker-dealers inserting two-way quotations in a particular security and the volume in

²⁵ Special Study, pt. 2, at 571.

²⁶ *Id.* at 604-05.

²⁷ *Id.* at 572.

²⁸ *Id.* at 572-73.

²⁹ *Id.* at 605.

³⁰ See note 5 *supra*.

that security. One cannot tell whether a broker-dealer's two-way quotations reflect a continuous market of depth or permanence or, in an individual case, what kind of professional interest is truly represented. Nevertheless, the greater the number of two-way quotations and the better the reputation of the firm inserting them, the greater is the likelihood that transactions in the security are being effected in the "inside" wholesale broker-dealer market in the range of the prices quoted. It may similarly be inferred, if the number of two-way quotations is substantial enough, that the likelihood of transactions in the "outside" retail market would increase correspondingly at, of course, retail prices.

II

ADMISSIBILITY OF THE SHEETS

The pink sheets and the quotations they contain are hearsay for most purposes,³¹ and in the absence of an available exception to the hearsay rule they are inadmissible. But Dean Wigmore has indicated that "in a few narrow and usually well-defined classes of cases, recognition has been given, by way of exception to the Hearsay rule, to certain commercial and professional lists, registers, and reports."³² These, he says, should embrace "standard price-lists and market reports, indorsed by trade experience."³³

Like other exceptions to the hearsay rule, this one is founded on (1) the necessity of using reports, which stems from the practical inconvenience attendant upon summoning each individual whose personal knowledge contributed to compiling them, and (2) the circumstantial probability of trustworthiness based on the fact that such lists and reports are prepared for use of the trade or profession with the expectation that they will be relied upon for commercial and professional purposes.³⁴

³¹ Should the existence of a particular pink sheet or a particular quotation be material per se, as opposed to the truth or accuracy of the information contained therein, the sheet or quotation would be outside the operation of the hearsay rule and the question of an exception to the hearsay rule would not come into play. For example, members of an underwriting syndicate engaged in the distribution of securities to the public are usually obliged by the contract to make an effective distribution. If such securities find their way back into the over-the-counter market before the syndicate is closed and while the syndicate manager is engaged in market stabilization, and such shares are purchased for the account of the syndicate by the managing underwriter, the syndicate manager may under certain circumstances charge against the offending member's shares on the final accounting the commission expended on reacquiring the shares. In a dispute among syndicate members, the propriety of such a charge-back may turn on whether the syndicate manager notified syndicate members that he was purchasing for their account by publishing in the sheets what is called a "penalty bid." *B. C. Christopher & Co. v. Irving Weis & Co.*, N.Y. Stock Exch. Arbitration (unreported), decided Jan. 12, 1965.

³² 6 Wigmore, Evidence § 1702, at 22-23 (3d ed. 1940).

³³ *Id.* § 1704, at 26.

³⁴ There is a subjective test of trustworthiness, in that the author knows beforehand that his work will have no commercial or professional market unless it is found to have

According to Dean Wigmore, the admissibility of price lists and market reports "in some instances is placed upon judicial principle, in others arises solely from statutory innovation; but in most of the classes statute has carried out hints originally given judicially."³⁵

New York Law

Case law. Prior to the enactment in 1934 of Section 375-a of the Civil Practice Act,³⁶ the leading case on the admissibility of over-the counter market quotations as evidence of value or market price of securities was *Von Reitzenstein v. Tomlinson*.³⁷ In that case plaintiff sued for services rendered the owner of Havana Tobacco Company bonds in investigating the company's affairs. Among other things, plaintiff sought "an appropriate percentage" of the benefits accruing to his employer through his efforts, claiming, in *quantum meruit*, a portion of the value of the bonds following a corporate reorganization. A unanimous Court of Appeals reversed the judgments of the lower courts, finding the trial court's admission of quotations of the National Quotation Bureau as evidence of value of bonds and stock of the Havana Tobacco Company and its successor in reorganization to be an "infringement of the hearsay rule through the admission of unauthenticated price lists."³⁸ Chief Judge Cardozo described the data-gathering process of the Bureau and said:

There is no evidence that [the Bureau's] . . . employees did their work correctly. There is none that its price lists are generally recognized or acted upon as accurate by dealers in the market. This at least must be proved before quotations, not otherwise authenticated, become of value All that we have here is the fact that the bureau sells its service to subscribers in numbers not disclosed. On this basis without more the

usual accuracy and that its inaccuracies will probably be discovered; and further in that there is ordinarily no motive to deceive. There is an objective test, in that the habitual use of the work by the trade or profession has tested its usual and practical accuracy and has sanctioned its trustworthiness.

Id. § 1702, at 23.

A printed list of prices at which a class of goods is for sale to any purchaser, or a printed report of the prices obtained at actual sale in an open market, may become trustworthy so far as it is intended to be consulted by all persons who care to know the prices, and has been exposed to a test of accuracy by dealings with such persons on the faith of it, and has further been in their experience found generally reliable A price-current list or a market report which fulfills these conditions and has thus sufficed for the correct information of persons who transact commercial operations on the faith of it may well suffice for informing a court of justice. It would not be necessary that the compiler of it should have personal observation of each dealing reported or going to make up the market price reported, because the practical equivalent of personal observation here exists; a report based on direct consultation with dealers or with the officers of an exchange or a market is in commercial circles taken as equally reliable.

Id. § 1704, at 26.

³⁵ *Id.* § 1702, at 22.

³⁶ N.Y. Civ. Prac. Act § 375-a, now N.Y. Civ. Prac. Rule 4533.

³⁷ 249 N.Y. 60, 162 N.E. 584 (1928).

³⁸ *Von Reitzenstein v. Tomlinson*, 249 N.Y. 60, 66, 162 N.E. 584, 585 (1928).

witness was allowed to read from the price lists the bid and asked quotations . . . , for *actual sales there had been none*.³⁹

At first blush *Von Reitzenstein* might be taken as authority that pink-sheet quotations fall within the hearsay rule and are not admissible in evidence on questions of value. Citation by the court of *Watts v. Phillips-Jones Corp.*,⁴⁰ however, demonstrates that *Von Reitzenstein* held the market reports inadmissible solely because an insufficient foundation had been laid.⁴¹ In *Watts*, an action for damages based on defendant's alleged failure to accept and pay for cotton cloth, the trial court was upheld in admitting into evidence a trade paper, *The Daily News Record*, to prove the market price of the goods sold. The appellate division said that there was no "precise formula regarding the character of the preliminary showing required to authorize the admission in evidence of a trade paper quoting market prices."⁴² Despite the absence of proof concerning the means of compiling the market quotations, the court found that a sufficient foundation had been supplied by two expert witnesses called by the plaintiff, "both of whom testified that 'The Daily News Record' is recognized in the textile trade as an accurate statement and 'barometer' of market prices of such merchandise as was the subject of this action."⁴³

A recent case involving pink sheets as evidence—not on questions of

³⁹ *Id.* at 65, 162 N.E. at 585. [Emphasis added; footnotes omitted.]

⁴⁰ 211 App. Div. 523, 207 N.Y. Supp. 493 (2d Dep't 1925), *aff'd* without opinion, 242 N.Y. 557, 152 N.E. 425 (1926).

⁴¹ See also *Harrison v. Glover*, 72 N.Y. 451 (1878); *Burns Mfg. Co. v. Clinchfield Prods. Corp.*, 189 App. Div. 569, 178 N.Y. Supp. 483 (1st Dep't 1919), appeal dismissed, 231 N.Y. 561, 132 N.E. 888 (1921); *Blanding v. Cohen*, 101 App. Div. 442, 92 N.Y. Supp. 93 (1st Dep't 1905), *aff'd*, 184 N.Y. 538, 76 N.E. 1089 (1906).

⁴² *Watts v. Phillips-Jones Corp.*, 211 App. Div. 523, 529-30, 207 N.Y. Supp. 493, 500 (2d Dep't 1925).

⁴³ *Id.* at 531, 207 N.Y. Supp. at 500. Defendants, in urging that *The Daily News Record* was erroneously admitted, relied on *Whelan v. Lynch*, 60 N.Y. 469 (1875), which held the trial court erred in admitting a price list as evidence of value, again in the absence of a foundation:

[T]he court was also in error, I think in admitting the Shipping and Price Current List as evidence of the value of the wool, without some proof showing how or in what manner it was made up; where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales, or otherwise. It is not plain how a newspaper, containing the current price of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out. As there was no such testimony the evidence was entirely incompetent, and should not have been received.

Id. at 474. In *Watts*, three judges dissented in the Court of Appeals "on the ground that purported market reports were improperly received as evidence of prices." *Watts v. Phillips-Jones Corp.*, 242 N.Y. 557, 558, 152 N.E. 425, 426 (1926).

market value or price and therefore outside the scope of CPLR 4533—is *Atkin v. Hill, Darlington & Grimm*.⁴⁴ That was an action to recover the price paid to defendant brokerage firm for shares of stock of a foreign insurance company not authorized to engage in business in New York. Plaintiffs alleged that because the brokerage firm was never licensed the sales violated Section 51(1) of the Insurance Law which, subject to an exception in subdivision 6, declares it unlawful for anyone “to sell or propose to sell to the public” securities of “any insurer not authorized to do business” unless licensed by the Superintendent of Insurance.⁴⁵ Defendants relied on the subdivision 6 exclusion, which made the licensing requirement inapplicable to a security which had been sold “after one year from the first date upon which the security was offered to the public in this state.”⁴⁶ The trial court, without discussion of the evidentiary questions raised by plaintiffs’ objection, admitted a few quotations which appeared in the pink sheets more than one year prior to the sales to plaintiff as evidence that the stock had been “offered to the public” in New York.⁴⁷ The trial court apparently accepted as sufficient for foundation purposes testimony of a representative of the National Quotation Bureau concerning the nature of and business practices surrounding the pink sheets.

Statutory law. Section 375-a of the Civil Practice Act, enacted in 1934, provided:

Stock market reports as evidence. Whenever the market price or value of any article regularly sold or dealt in, in any regularly organized stock or commodity market, shall be in issue, reports published in newspapers or periodicals of general circulation purporting to be the reports of such markets shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight, but they shall not affect its admissibility.

In two separate actions brought in 1935 against the same underwriting firm for fraud in the sale of bonds,⁴⁸ section 375-a furnished the predicate for the admission of “periodicals, giving reports of bid and asked quotations . . . in the over-the-counter market.”⁴⁹ Although the quotations

⁴⁴ 44 Misc. 2d 863, 254 N.Y.S.2d 867 (Sup. Ct. New York County 1964), aff’d on other grounds, 23 App. Div. 2d 331, 260 N.Y.S.2d 482 (1st Dep’t 1965). See also *Atkin v. Hill, Darlington & Grimm*, 15 App. Div. 2d 362, 224 N.Y.S.2d 553 (1st Dep’t 1962), aff’d, 12 N.Y.2d 940, 188 N.E.2d 790, 238 N.Y.S.2d 516 (1963).

⁴⁵ N.Y. Ins. Law § 51(1).

⁴⁶ N.Y. Ins. Law § 51(6).

⁴⁷ *Atkin v. Hill, Darlington & Grimm*, 44 Misc. 2d 863, 866-69, 254 N.Y.S.2d 867, 872-73 (Sup. Ct. New York County 1964). For a discussion of the weight accorded such quotations, see text accompanying notes 69-100 *infra*.

⁴⁸ *People v. S.W. Straus & Co.*, 156 Misc. 642, 282 N.Y. Supp. 972 (Sup. Ct. Kings County 1935); *People v. S.W. Straus & Co.*, 158 Misc. 186, 285 N.Y. Supp. 648 (Sup. Ct. Kings County 1935), aff’d, 248 App. Div. 785, 289 N.Y. Supp. 209 (2d Dep’t 1936).

⁴⁹ *People v. S.W. Straus & Co.*, 158 Misc. 186, 218, 285 N.Y. Supp. 648, 681 (Sup. Ct. Kings County 1935).

were received in evidence, in both cases they were accorded no weight.⁵⁰ In *Matter of Silverman*,⁵¹ a stock appraisal proceeding brought under the Stock Corporation Law by stockholders dissenting from a corporate consolidation, pink-sheet quotations were received in evidence by a court appointed appraiser on the question of stock values. Neither the decision of the New York supreme court (affirming the appraiser's report) nor of the appellate division (modifying the appraiser's report) referred to Section 375-a of the Civil Practice Act.

In 1963 Rule 4533 of the Civil Practice Law and Rules was enacted. Except for minor language changes, the rule is the same as former section 375-a.⁵² As amended, the rule now states that:

A report of a regularly organized stock or commodity market published in a newspaper or periodical of general circulation or in an official publication or trade journal is admissible in evidence to prove the market price or value of any article regularly sold or dealt in on such market. The circumstances of the preparation of such a report may be shown to affect its weight, but they shall not affect its admissibility.⁵³

Under this provision, *on a question of market price or value of stocks or* "any article regularly sold or dealt in" on the over-the-counter market, quotations published by the National Quotation Bureau should be admissible in evidence: (1) if the sheets can be considered a report of a regularly organized stock or commodity market, (2) if the sheets can be considered a periodical of general circulation or a trade journal, and (3) if the stock or other securities in issue can be said to be regularly sold or dealt in on the over-the-counter market. The size, nature, and importance of the over-the-counter market in the United States today⁵⁴ dictate that, for purposes of CPLR 4533, it be considered a regularly organized stock

⁵⁰ *People v. S.W. Straus & Co.*, 156 Misc. 642, 650, 282 N.Y. Supp. 972, 980-81 (Sup. Ct. Kings County 1935); *People v. S.W. Straus & Co.*, 158 Misc. 186, 218-19, 285 N.Y. Supp. 648, 681 (Sup. Ct. Kings County 1935). See text accompanying notes 69-72, 88-90 infra.

⁵¹ 115 N.Y.S.2d 97 (Sup. Ct. New York County 1952), *aff'd* with modification, 282 App. Div. 252, 122 N.Y.S.2d 312 (1st Dep't 1953).

⁵² See text preceding note 48 supra.

⁵³ The 1964 amendment substituted "Market" for "Stock market" reports in the caption. Also, in the first sentence after the word "circulation" the words "or an official publication or trade journal" were added. One commentator has stated the changes to be "mechanical corrections" recommended by the Judicial Conference in its February 1, 1964 Report to the Legislature and has stated that "no change in substance was effected." 5 Weinstein, Korn & Miller, *New York Civil Practice* ¶ 4533, at 45-384 (1965). The amendment has not been construed to date by the courts.

Rule 4533 should be compared with Uniform Commercial Code Section 2-724. The Code section is in accord with the rule except that the former is limited to goods sold in a "commodity market" rather than "regularly organized stock or commodity market". See also Uniform Rule of Evidence 63 (30), 9A U.L.A. 640 (1965):

Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation [is admissible] to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them.

⁵⁴ See notes 3-6 supra and accompanying text.

or commodity market. Even though pink sheets and the other sheets published by the National Quotation Bureau are disseminated only to subscribing brokers and dealers, their wide circulation to subscribers across the United States⁵⁵ and their availability to members of the ordinary investing public through broker-dealers, libraries and other sources, likewise dictate that for purposes of the rule they be considered periodicals of general circulation or, in any event, trade journals.

Only one case since the enactment of Civil Practice Act Section 375-a has denied admission into evidence of quotations reported by a quotation service bureau. In *Horgan v. Frenkel, Kovac & Co.*,⁵⁶ an action for fraud and deceit in which plaintiff alleged that defendant made false and fraudulent representations in selling securities to him, the sheets in question bore a legend on their face which stated: "This is a confidential service compiled at the request of the subscribers for their exclusive use in the office to which it is delivered . . ." The court held the quotation sheets should not have been introduced into evidence at trial over defendant's objection, since the reports of quotations were rendered by the Quotation Service Bureau "only to its broker subscribers."⁵⁷ The court apparently concluded that the reports did not meet the statutory criterion of being "published in newspapers or periodicals of general circulation."⁵⁸ Because this was the apparent basis of the decision, the *Horgan* case should not be considered a bar to the admission in evidence of the quotation sheets of the National Quotation Bureau. While the sheets today are technically limited in circulation to subscribing brokers and dealers, they are available to members of the public and, in view of the size, extent, and importance of the over-the-counter market, must be considered publications of general circulation. Moreover, since the decision in *Horgan*, the governing statute has been broadened by the inclusion of official publications and trade journals within its purview.⁵⁹

⁵⁵ See notes 3-5 supra and accompanying text.

⁵⁶ 161 Misc. 493, 293 N.Y. Supp. 264 (Sup. Ct. 1st Dep't 1936).

⁵⁷ *Horgan v. Frenkel, Kovac & Co.*, 161 Misc. 493, 495, 293 N.Y. Supp. 264 (Sup. Ct. 1st Dep't 1936).

⁵⁸ See statute quoted in text preceding note 48 supra. The record on appeal in *Horgan* is no longer available at the court. Consequently, the author was unable to examine into the precise nature of the sheets involved in that case.

⁵⁹ At least one commentator has suggested that CPLR 4533 aside, market reports may be admissible under the "business entry" statute, CPLR 4518(a), which provides:

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility.

Summary. Despite the paucity of cases construing the governing statute, in New York it is clear that where the market price or value of stocks and bonds regularly traded in the over-the-counter market is in issue, the prerequisite of laying a foundation as a condition to admission of quotation sheets may be dispensed with.⁶⁰ Circumstances surrounding preparation of pink sheets affect weight, not admissibility. First-hand evidence of markets and actual transactions provided by over-the-counter brokerage firms can always be adduced to supplement, elaborate upon, or rebut evidence furnished by the sheets.

In cases not involving value and therefore outside the scope of CPLR 4533, pink sheets and other sheets published by the National Quotation Bureau are also admissible. The business entry statute aside,⁶¹ the sheets are nevertheless admissible if a foundation is laid showing they have been regularly prepared by a person in touch with the market and they are generally regarded as trustworthy and relied upon in business circles.

The Law in Other Jurisdictions

The problem of the admissibility of quotation sheets has not often arisen in states other than New York. One Texas decision which did rule on the point was *City Nat'l Bank v. Kiel*,⁶² a conversion case. The sheets were admitted on the issue of value after a stock dealer testified that they were reliable and were used in the day-to-day business of such dealers. The general rule, derived from a consideration of analogous cases in the various states, seems to be that market quotations such as pink sheets are admissible, subject to various qualifications which follow a particular state's approach to exceptions from its hearsay rule.⁶³ In Massachusetts, however, the person furnishing the data for publication is required to testify.⁶⁴

Although there is no statute governing the matter, the federal courts

The term business includes a business, profession, occupation and calling of every kind. 5 Weinstein, Korn & Miller, *supra* note 53, ¶ 4533.03 (1965) states:

Thus, while Horgan v. Frenkel, Kovac & Co., properly held that a private brokerage subscription service did not come within the predecessor of CPLR 4533, it might have been appropriate to bring it in as a business entry had the proper foundation been laid. A business which sells the data it collects must depend upon its reputation for accuracy and meets the minimum standards of credibility which CPLR 4518(a) is designed to guarantee.

⁶⁰ See 5 Weinstein, Korn & Miller, *supra* note 53, ¶¶ 4533.01-02.

⁶¹ See note 59 *supra*. The courts have to date not considered the applicability of rule 4518(a) and the legislative history did not specifically consider the question. See Advisory Committee on Practice and Procedure, Temporary Commission on the Courts, "Second Preliminary Report," N.Y. Leg. Doc. No. 13, 181 Sess. 266 (1958). See also Note, 46 Iowa L. Rev. 455 (1961).

⁶² 348 S.W.2d 260, 266 (Tex. Civ. App. 1961).

⁶³ See 6 Wigmore, *supra* note 32, § 1703; Note, 45 Mich. L. Rev. 748 (1947).

⁶⁴ See *Doherty v. Harris*, 230 Mass. 341, 119 N.E. 863 (1918); *National Bank of Commerce v. City of New Bedford*, 175 Mass. 257, 56 N.E. 288 (1900).

appear to agree that pink sheets are admissible into evidence.⁶⁵ The few reported cases, however, regard the sheets as of "limited probative value" in establishing value or market price.⁶⁶

In a considerable number of disciplinary proceedings instituted by the NASD, the Securities and Exchange Commission has been called upon to review cases where broker-dealers have been charged with selling securities to retail customers at unreasonable mark-ups.⁶⁷ The Commission, in establishing the contemporaneous market price or base upon which to determine whether or not the mark-up was unreasonable, consistently has permitted the pink-sheets quotations to be used as prima facie evidence of market price, subject to rebuttal evidence.⁶⁸

III

PROBITY OF THE SHEETS

Though it can be said with reasonable certainty that the sheets are admissible into evidence, no rule can be found or fashioned as to the

⁶⁵ *Virginia v. West Virginia*, 238 U.S. 202, 212-213 (1915). In *Rice v. Eisner*, 16 F.2d 358 (2d Cir. 1926), cert. denied, 273 U.S. 764 (1927), a taxpayer sued for the refund of taxes paid under protest to the federal government. The trial court accepted as evidence "bid and asked" quotations from "certain financial journals" which were proffered by the government. Judge Learned Hand stated:

Some of the witnesses for the defense testified that these were records of actual events, and were treated by brokers as a reliable index of value. Whatever might be our own judgment as to the value of such quotations, we cannot see how the judge could have excluded them under this proof. If genuine, "asked" prices are those at which holders will sell, and therefore their opinion of the worth of their securities. In the end value is no more than the opinions of those who have, and those who have not, when they coincide. When they do not, "asked" prices are a measure of the most sanguine opinions about the security; sellers can demand no more. It is well settled that the records, were competent [Citations omitted.]

Id. at 361.

There appears to be some question whether the federal courts, in diversity cases, are obliged to follow the state rules of evidence under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). 5 Moore, *Federal Practice* ¶ 43-04 (2d ed. 1964) states that rules of evidence are not substantive under the Erie doctrine. See Green, "Drafting Uniform Federal Rules of Evidence," 52 *Cornell L.Q.* 177, 200-08 (1967). However, Rule 43(a) of the Federal Rules of Civil Procedure states:

All evidence shall be admitted which is admissible under the statutes of the United States or under the rules of evidence heretofore applied by the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs

See also *Palmer v. Fisher*, 228 F.2d 603 (7th Cir. 1955) (holding questions of evidence to be governed by local law).

⁶⁶ See *Fistel v. Christman*, 135 F. Supp. 830 (S.D.N.Y. 1955); *Weber v. SEC*, 222 F.2d 822 (2d Cir. 1955); *Charles Hughes & Co., v. SEC*, 139 F.2d 434 (2d Cir. 1943); *Pandolfo v. U.S.*, 128 F.2d 917 (10 Cir. 1942). See also *SEC v. Scott Taylor & Co.*, 183 F. Supp. 904 (S.D.N.Y. 1959); 2 *Loss, Securities Regulation*, 1279-1281 (2d ed. 1961).

⁶⁷ *Moore & Co.*, 32 S.E.C. 191 (1951); *Charles Hughes & Co.*, 13 S.E.C. 676 (1943); *Herbert R. May & Russell H. Phinney*, 27 S.E.C. 814 (1948); *Allender Company, Inc.*, 9 S.E.C. 1043 (1941).

⁶⁸ *Cortlandt Investing Corp.*, Securities Exch. Act Release No. 7682, Aug. 24, 1965. See also, *Samuel B. Franklin & Co.*, Securities Exch. Act Release No. 7407, Sept. 3, 1964; *General Investing Corp.*, Securities Exch. Act Release No. 6316, May 15, 1964; *Maryland Securities Co.*, Securities Exch. Act Release No. 7232, Feb. 4, 1964; *Naftalin & Co.*, Securities Exch. Act Release No. 7220, Jan. 10, 1964; *Ross Securities, Inc.* 40 S.E.C. 1064 (1962); see text accompanying notes 98-99 infra.

weight which should be accorded to them. Depending on the context, the sheets may be of absolutely no probative value;⁶⁹ they may have some small significance;⁷⁰ or they may be entitled to great weight,⁷¹ possibly dispositive of an issue.⁷² Indispensable to the process of weighing their probative value, it is submitted, is a thorough understanding of what has been termed the anatomy of the sheets and covered in Part I above.

As we have seen, the sheets assume importance in various types of litigation, including disciplinary proceedings.⁷³ In determining the weight to be given quotations, the triers of fact in each instance must take into consideration *first*, the nature of the proceeding, *second*, the purpose for which the quotations are introduced, and *third*, the significance of the particular quotations involved. The following questions are among those which should be asked. Are the quotations one-way quotations indicating either buying or selling interest only? Are they two-way quotations and, if so, are they isolated and desultory quotations or are there many quotations repeated day after day? Are the quotations respecting a given security inserted by many large and reputable firms or by few and relatively unknown firms? Are there quotations sufficient to suggest a market of depth and permanence? Are there day-to-day fluctuations in prices quoted and, if so, what is the extent thereof? Are there small spreads between the bid and asked prices or are the spreads large? Is there a market of depth or is the stock thinly traded and therefore easily affected by the sale or attempted sale of securities in quantity?

Court Litigation

A comparison of the decision of the trial court⁷⁴ with the dissenting opinion of two judges of the appellate division⁷⁵ in the recent case of

⁶⁹ *People v. S.W. Straus & Co.*, 156 Misc. 642, 650, 282 N.Y. Supp. 972, 980-81 (Sup. Ct. Kings County 1935).

⁷⁰ *People v. S.W. Straus & Co.*, 158 Misc. 186, 218-19, 285 N.Y. Supp. 648, 681 (Sup. Ct. Kings County 1935), *aff'd*, 248 App. Div. 785, 289 N.Y. Supp. 209 (2d Dep't 1936); *Fistel v. Christman*, *supra* note 66; *United States v. Aluminum Co. of America*, 44 F. Supp. 97 (S.D.N.Y. 1941), certified and transferred to United States Court of Appeals, 322 U.S. 716 (1944), modified, 148 F.2d 416 (2d Cir. 1945); *Pearlman v. Feldmann*, 129 F. Supp. 162 (D. Conn. 1952), reversed, 219 F.2d 173 (2d Cir.), cert. denied, 349 U.S. 952 (1955).

⁷¹ *Matter of Silverman*, 282 App. Div. 252, 122 N.Y.S.2d 312 (1st Dep't 1935) modifying and, as modified, affirming 115 N.Y.S.2d 97 (Sup. Ct. New York County 1952). See also cases cited in notes 67-68 *supra*.

⁷² *Merritt, Vickers, Inc. v. SEC*, 353 F.2d 293 (2d Cir. 1965); *Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943). See *Atkin v. Hill, Darlington & Grimm*, 44 Misc. 2d 863 (Sup. Ct. New York County 1964), *aff'd* on other grounds, 23 App. Div. 2d 331, 260 N.Y.S.2d 482 (1st Dep't 1965). See also, *Charles Hughes & Co.*, 13 SEC 676 (1943); *Cortlandt Investing Corp., Securities Exch. Act Release No. 7682*, Aug. 24, 1965 (disciplinary proceedings against broker-dealers alleging unreasonable price mark-ups).

⁷³ See notes 8-12 *supra* and accompanying text.

⁷⁴ 44 Misc. 2d 863 254 N.Y.S.2d 867 (Sup. Ct. New York County 1964).

⁷⁵ 23 App. Div. 2d 331, 332, 260 N.Y.S.2d 482, 484 (1st Dep't 1965) (dissenting opinion).

Atkin v. Hill, Darlington & Grimm,⁷⁶ a non-value case, graphically demonstrates the kind of questions raised in evaluating pink-sheet quotations as evidence. There the issue was whether the defendant brokerage firm met its burden of proving that the securities sold to plaintiffs had been "offered to the public in this state"⁷⁷ more than one year prior to the sales to plaintiffs. The trial court found for the brokerage firm, relying on evidence of a few purchases of the securities together with pink-sheet quotations more than one year before the sales to plaintiffs:

For the "pink sheets" are what are regularly relied on by professional traders—dealers, brokers and others—to ascertain what the "market" is in unlisted securities. They are not the recording of actual sales, such as we find reported day-by-day by the New York Stock Exchange and repeated in some daily newspapers of large circulation. But within trading circles they serve the same purpose. Published daily by the National Quotation Bureau, they are used in buying and selling circles in 'over the counter' securities.⁷⁸

The court then noted that the sheets in evidence showed that there had been at least four quotations respecting the securities by three separate securities firms, and it concluded that this was "sufficient to indicate activity, and to show 'offerings.'"⁷⁹

The trial court's decision was affirmed by the appellate division on other grounds,⁸⁰ two judges dissenting. The dissenters took issue with the weight given by the trial court to the pink-sheet quotations, saying:

Clearly . . . the statutory criterion of an offering "to the public in this state" is not satisfied by a showing of sales of insignificant amounts of the stock to a few individuals in the State or the publishing of a few over-the-counter quotations of bid or offering prices for the stock, without evidence of any trading therein.

. . . Except as specified in the one quotation, there was no indication of what quantities of the stock were available for purchase or sale. Furthermore, there is no evidence whatever of any trading in or sale of the stock on the over-the-counter market.

There was no proof . . . of the then availability to the public in the State of any substantial quantity of the stock. In its cumulative effect, the proof here amounted to no more than a showing that, in 1957, the particular stock was available to individuals in the State in very limited or uncertain quantities. . . . Under the circumstances, the defendants failed to sustain the burden of establishing that the stock had been "offered to the public in this state" at least a year prior to the sales to plaintiffs.⁸¹

⁷⁶ See text accompanying notes 44-47 for a discussion of the facts in *Atkin*.

⁷⁷ N.Y. Ins. Law § 51(6). The quoted language provides an exception to section 51(1) of the Insurance Law, which makes it unlawful to sell or propose to sell to the public securities of an insurer not authorized to do business in New York without a license.

⁷⁸ *Atkin v. Hill, Darlington & Grimm*, 44 Misc. 2d 863, 866-67, 254 N.Y.S.2d 867, 871 (Sup. Ct. New York County 1964).

⁷⁹ *Id.* at 868, 254 N.Y.S.2d at 873.

⁸⁰ *Atkin v. Hill, Darlington & Grimm*, 23 App. Div. 2d 331, 260 N.Y.S.2d 482 (1st Dep't 1965).

⁸¹ *Id.* at 333-34, 260 N.Y.S.2d at 485-86 (dissenting opinion).

An appeal is pending in *Atkin*,⁸² and further guidelines as to the weight to be given pink-sheet quotations may be furnished by the Court of Appeals.

Turning to valuation cases, *Fistel v. Christman*⁸³ was an action by a stockholder against a corporate director brought under Section 16(b) of the Securities Exchange Act of 1934⁸⁴ to recover alleged insider's profits on his sale of the corporation's stock which he originally acquired in exchange for stock traded in the over-the-counter market. The federal district court accorded little weight to pink-sheet quotations introduced in evidence on the question of the value of the over-the-counter market stock and, relying on expert testimony offered by the defendant, dismissed plaintiff's complaint on the merits. The court said:

The bid and offer quotations on the over-the-counter market, as shown by the records of the National Quotation Bureau, did not reflect actual transactions but at best were in the nature of 'feelers', and even these were extremely few in number. Under the circumstances, the quotations published by the National Quotation Bureau, while permitted to remain in the record, are of limited probative value. The fact is there was no active trading market in the stock and such sales as took place were on a negotiated basis. Accordingly, both sides relied in the main upon expert witnesses.⁸⁵

In *Pandolfo v. United States*,⁸⁶ the value of stock was also a material issue, since the defendant was indicted and tried for purchasing the stock at a much lower figure than that which he charged a company and at which it was placed on the books of the company as an asset. The court refused to accord great weight to isolated quotations, saying:

It may be conceded, as a general proposition, that a mere quotation of offers to buy or sell is not a proper criterion of value unless it is also shown that a sale results therefrom, or unless the quotation results in a sale in the regular course of business It may be conceded that the isolated quotations of bids by brokers to buy or sell the stock of the insurance companies involved here are entirely too uncertain, shadowy, and speculative, to form any sound foundation for the determination of value.⁸⁷

In *People v. S. W. Straus & Co.*,⁸⁸ a civil action by a customer of an underwriting firm claiming fraud in the sale of bonds, the bonds in question were not regularly traded on the over-the-counter market. The court refused to attach weight to nominal bid and asked prices:

[T]here has been no adequate proof of the market value of these bonds at the time of the receivership. The nominal bid and asked prices are not sufficient upon which to predicate a finding of any real market values. . . .

⁸² Argued November 22, 1966.

⁸³ 135 F. Supp. 830 (S.D.N.Y. 1955).

⁸⁴ 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1964).

⁸⁵ *Fistel v. Christman*, 135 F. Supp. 830, 831 (S.D.N.Y. 1955).

⁸⁶ 128 F.2d 917 (10th Cir. 1942).

⁸⁷ *Pandolfo v. United States*, 128 F.2d 917, 921 (10th Cir. 1942).

⁸⁸ 156 Misc. 642, 282 N.Y. Supp. 972 (Sup. Ct. Kings County 1935).

Here, the quotation reports were received in evidence [as required by Section 375-a of the Civil Practice Act⁸⁹]. Their probative value, however, is nil.⁹⁰

In each of the three preceding cases, the decision seems correct. Despite the language employed, they should not necessarily be construed as authority that quotations in all instances are entitled to no weight merely because they do not evidence actual transactions.⁹¹ An understanding of the sheets makes it clear that the quotations themselves may very well furnish proof of value where there are sufficient quotations for a sufficient period of time by reputable firms of standing reflecting a market of depth and permanence. The fact that quotations are not proof of actual sales becomes extremely significant where the quotations are sporadic and random. In such cases, because of the unreliability of isolated quotations, a court would be remiss in according them much weight.

*Matter of Silverman*⁹² was an appraisal proceeding by minority stockholders dissenting from a corporate reorganization. Despite the fact that the appellate division found "a fairly active over-the-counter market for the common stock" being appraised,⁹³ it declined to accept the method of valuation adopted by special term of taking an arithmetical average of "bid" quotations of the common stock on the over-the-counter market for a period of two years prior to the time of the vote. It refused to accept the pink-sheet quotations as being conclusive on the question of value, looking to investment value and net asset value as further aids in the valuation process:

[I]n the circumstances of this case market price of the stock so far as it is possible to ascertain it, should not be the sole criterion of value. The shares of common stock of Hoe were not listed on any exchange. They were bought and sold on the over-the-counter market. . . . [O]ver-the-counter transactions are not recorded nor subject to any regulation or control. Though there was a fairly active over-the-counter market for the common stock of Hoe, it is difficult to determine the prices . . . at which stock was sold. The only records available are the "bid" prices for the stock. A wide spread exists between "bid" and "asked" prices. Indeed, some testimony showed that it was at times as great as a full point in this stock.⁹⁴

⁸⁹ Section 375-a is quoted in the text preceding note 48 supra.

⁹⁰ *People v. S.W. Straus & Co.*, 156 Misc. 642, 650, 282 N.Y. Supp. 972, 980-81 (Sup. Ct. Kings County 1935). In a later proceeding involving the same defendant, the referee again gave little weight to quotations, because these quotations were not evidence of actual sales: "These were not records or reports of actual sales, but of quotations of bid and asked prices, gathered among brokers solely for information purposes. Alone, they do not prove market value." *People v. S.W. Straus & Co.*, 158 Misc. 186, 219, 285 N.Y. Supp. 648, 681 (Sup. Ct. Kings County 1935), aff'd, 248 App. Div. 785, 289 N.Y. Supp. 209 (2d Dep't 1936).

⁹¹ See *Rice v. Eisner*, 16 F.2d 358, 361 (2d Cir. 1926).

⁹² 115 N.Y.S.2d 97 (Sup. Ct. New York County 1952), aff'd with modification, 282 App. Div. 252, 122 N.Y.S.2d 312 (1st Dep't 1953).

⁹³ *Matter of Silverman*, 282 App. Div. 252, 258, 122 N.Y.S.2d 312, 317 (1st Dep't 1953).

⁹⁴ Id. at 258, 122 N.Y.S.2d at 317.

When the valuation of a large block of securities is in issue the market quotations in the sheets have to be considered with particular care. The sheets frequently reflect quotations for small quantities of securities. If a security is thinly traded and if the public "float" is small, the quotations in all likelihood would not be a proper reflection of the value of a large or control block. This would provide another instance in which a court, like the court in *Silverman*, should look to other indicia and criteria for determining value.

Disciplinary Proceedings

It seems to be settled law before the Securities and Exchange Commission that quotations in the sheets are sufficient evidence of prevailing market prices to establish prima facie the market price for a given stock; the respondent broker-dealer is then required to shoulder the burden of going forward with rebuttal evidence.⁹⁵ It is submitted that this invocation and application of a flat rule of thumb by the Securities and Exchange Commission is subject to question. Disciplinary proceedings brought by a regulatory agency against a broker-dealer may involve the imposition of severe economic sanctions.⁹⁶ Accordingly, quotations in the sheets should be used with circumspection and with due regard to their unreliability in many instances.⁹⁷

To be sure, pink-sheet quotations may rise to the level of a prima facie showing of market price if there are quotations in depth by firms of standing which are consistent over a sufficient period of time. In *Merritt, Vickers, Inc. v. SEC*,⁹⁸ the Securities and Exchange Commission sustained the expulsion by the NASD of the respondent broker-dealer. The expulsion was prompted, among other things, by a finding that the broker-dealer had violated the Association's mark-up policy. On review

⁹⁵ For example, in *Charles Hughes & Co.*, 13 S.E.C. 676, 678-79 (1943), the Commission said:

[Pink sheets] are some indication of the prevailing market price. And the prices quoted in the sheets find support in evidence where, as here, it appears that in the overwhelming majority of transactions the prices paid by respondent itself fall within the range shown currently in the sheets. We think that the evidence of the quotations and the prices paid concurrently by respondent itself are a sufficient indication of prevailing market price in the absence of evidence to the contrary, and that respondent had the burden of introducing any rebuttal evidence.

See *Merritt, Vickers, Inc. v. SEC*, 353 F.2d 293 (2d Cir. 1965); *Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943); *Cortlandt Investing Corp.*, Securities Exch. Release No. 7682, Aug. 24, 1965.

⁹⁶ The discussion in this article does not embrace criminal prosecutions in which pink sheets may be material. Persons might, for example, be charged with manipulating market prices of securities through the insertion of fictitious quotations into the sheets. See Securities Act of 1933, § 17a, 48 Stat. 84, as amended, 68 Stat. 686 (1954) 15 U.S.C. § 77q (1964); Securities Exchange Act of 1934 §§ 10(b), 15(c), as amended, 52 Stat. 1025 (1938), 15 U.S.C. §§ 78j, 78o(c) (1964); N.Y. Penal Law §§ 951-53. In criminal cases, of course, the prosecution's burden of proof is different.

⁹⁷ See text accompanying notes 22-29 supra.

⁹⁸ 353 F.2d 293 (2d Cir. 1965).

of the commission's order, the court of appeals affirmed, holding pink-sheet quotations sufficient to have established a prima facie case:

[Petitioners] urge at the outset that it was improper to rely on the ask quotations in the sheets in computing mark-ups. . . . This court is in agreement with the SEC that, although the quotations in the sheets are not firm offers for a fixed number of securities, and final prices are subject to change, they constitute sufficient proof of prevailing market prices "in the absence of evidence to the contrary." . . . Thus, quotations in the sheets are treated as prima facie evidence of current market prices and the burden is on the broker-dealer to come forward with evidence of special circumstances to justify excessive mark-ups.⁹⁹

On the other hand, if, for example, pink sheets for a given day reveal that the asked price of a particular stock was 4, and the contention is that at 3:00 p.m. there was an unlawful sale to a retail customer at $4\frac{3}{4}$, it would be unfair to say that a prima facie case had been made if only one or two small or suspect houses were inserting quotations with respect to that stock, or if the following day's pink sheets indicated a significant increase in the bid and asked prices of the security.

The consequence of permitting a regulatory agency easily to establish a prima facie case is to require the respondent brokerage houses in every instance to procure live testimony or documentary evidence that may be difficult or costly to obtain. This may well be unfair. If the object of a disciplinary proceeding is to deprive a person of a broker-dealer registration and consequently the right to pursue his livelihood, the public interest would not be hampered and due regard for individual rights would be served by insisting that the regulatory agency, in cases where the meaning and effect of quotations is not sufficiently clear, produce first-hand testimony concerning prevailing markets. Regulatory agencies have the facilities and funds to do so. The unfairness of a flat rule of thumb for *all* cases becomes manifest when it is considered that random quotations may be illusory, misleading, and fictitious,¹⁰⁰ and that slight fluctuation in a low priced security could easily transform a lawful retail sale into one which contravenes mark-up policy.

Again, it is submitted that regulatory agencies must assess the sheet quotations as evidence of market prices with a full awareness and understanding of the significance of quotations. In close cases the balance should fall on the side of the respondent and it should be incumbent upon the regulatory agency to come forward with first-hand testimony as to market prices.

⁹⁹ *Merritt, Vickers, Inc. v. SEC*, 353 F.2d 293, 296-97 (2d Cir. 1965). [Citations omitted.]

¹⁰⁰ See text accompanying notes 21-29 *supra*.

CONCLUSION

Without question, the pink, yellow, green and white sheet quotations play a useful and important role in the day-to-day operations of the over-the-counter markets. They contain valuable documentary evidence of market quotations of broker-dealers in all parts of the country concerning a large number of securities which are not traded on any organized exchange. The sheets are usually admissible as evidence of market price or value of securities despite the exclusionary hearsay rule. The real problem is not the admissibility of the sheet quotations, but the weight to be accorded them once they are admitted. They must be evaluated with great care and with full understanding of their business use and meaning. Properly understood, their "shadowy" grays should disappear and they should function with utility and increasing frequency in the courtroom and before regulatory agencies as well as in the market place.