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SECURITIES LAW

It does not cause surprise upon reviewing the area of securities law to discover that most actions in this area commenced this past term in the Second Circuit, involved alleged violations of either Section 10(b)[1] of the Securities Exhange Act of 1934 or Rule 10b-5[2] promulgated thereunder or both.[3]

POSTING SECURITY AND PROCEEDING WITH ADDITIONAL ACTIONS

Several decisions of practical importance were reached on the same day by the Court of Appeals for the Second Circuit. The first involved two actions with similar facts and circumstances, *Klein v. Adams & Peck* and *Klein v. Wood, Walker & Co.*[4] In both of these actions the plaintiff alleged that the defendants, as stockbrokers and stock exchange specialists for the stock of Superior Oil Company of California, bought and sold shares of Superior at allegedly fictitious prices, brought about by fraudulently manipulating the market for the stock.[5] The defendants moved for dismissal of the complaint on the ground that the actions were not commenced in good faith, or, in the alternative, for summary judgment. The defendants also moved for orders pursuant to section 9(e)[6] of the Securities Exchange Act of 1934 and section 11(e)[7] of the Securities Act of 1933 requiring the plaintiff to post security for costs and reasonable counsel fees.

At the same time this action was pending before the district court, the plaintiff had commenced several other actions against these defen-

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1 15 U.S.C. § 78j (b) (1970).

2 17 C.F.R. § 240.10b-5 (1970).

3 *See, e.g.*, Green v. Wolf Corp., 406 F.2d 291, 295 (2d Cir. 1968), where Circuit Judge Kaufman stated that none of the other federal securities antifraud provisions has become as "far-reaching" as Rule 10 b-5.

4 436 F.2d 337 (2d Cir. 1971). These two actions were joined, and a single opinion was rendered due to the common nature of their pleadings.

5 The plaintiff charged that these activities violated sections 9 and 10 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i, 78j (1964). Section 9, entitled "Manipulation of Security Prices," makes it unlawful to effect a series of transactions creating actual or apparent active trading or raising or depressing the price for the purpose of inducing the purchase or sale of securities. *See, e.g.*, Wright v. S. E. C., 112 F.2d 89 (2d Cir. 1940). Section 10, entitled "Manipulative and Deceptive Devices," renders unlawful, fraud and deception in connection with the purchase or sale of registered and unregistered securities. See, *e.g.*, Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951), *aff'd*, 235 F.2d 369 (3d Cir. 1956). For criticism of this decision, see Comment, 54 MICH. L. REV. 971 (1956).

6 15 U.S.C. § 78i(e) (1964) provides:

> In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs . . . against either party litigant. . . .

7 15 U.S.C. § 77k(e) (1970) provides:

> In any suit under this . . . section . . . the court may, in its discretion, require an undertaking for the payment of the costs of such suit. . . .

dants in the New York State Supreme Court and in the federal district court. In his state court action, the plaintiff alleged common-law fraud; while in the other district court actions, the plaintiff had alleged a cause of action similar to these now on appeal, although they referred to different transactions.[8]

The district court did not dismiss the actions, but it stayed plaintiff from further litigating these cases until he filed a $5,000 bond as security. The court also enjoined the plaintiff from prosecuting her other actions in the district court.[9]

Upon appeal, the circuit court held that the requirement of providing security is not a final decision from which an appeal may be taken.[10] Thus, the court followed the rule enunciated in *Donlon Industries, Inc. v. Forte*[11] where the Court of Appeals for the Second Circuit held that if the issue concerns the abuse of the court's discretion in ruling upon the posting of security, "the likelihood of reversal is too negligible to justify the delay and expense . . . and the consequent burden on hard pressed appellate courts."[12] The court also noticed that in this case, the security required was not so prohibitive as to effectively impede the swift flow of efficient litigation.[13]

As to the district court's injunction against the plaintiff's proceeding with his other district court cases, a different result was reached. The court held that the order creating an injunction was a final decision, and hence appealable.[14] The court then dispensed with the injunction by stating that the denial of an individual's right to seek redress in a court of law is an extreme remedy and should not be granted except in the most dire circumstances.[15] The mere fact that the fertility of the plaintiff's claims have generated a plethora of litigation is not a sufficient basis for deeming all of his actions groundless. In short, the mere number of the plaintiff's actions does not necessarily dilute the

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8 *Id.*

9 *Id.*

10 However, the reverse is not true. *See, e.g.*, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47 (1949), where the Supreme Court held that orders denying motions for security can be appealed when the issue regards the power of the court to grant the requested relief.

11 402 F.2d 935 (2d Cir. 1968).

12 *Id.* at 937: *see also* Bancroft Navigation Co. v. Chadade Steamship Co., 349 F.2d 527, 529 (2d Cir. 1965).

13 436 F.2d at 339.

14 *Id.* The court disregarded appellees' contention that since no enjoined action was the subject of the appeal and since appellant appeared to be proceeding with his actions, an appeal would only lie when the injunctions issued below were sought to be enforced. The court properly held that the appellant need not first be in contempt by violating the injunction prior to seeking relief.

15 *Id.*

substance of his claims.[16] On these grounds, the court vacated the injunction granted below.[17]

STATUTE OF LIMITATIONS — 10(b) ACTION

Another significant decision reached by the Court of Appeals was *Klein v. Auchincloss, Parker & Redpath*.[18] In this action based on alleged violations of sections 9, 9(e), and 10(b)[19] of the Securities Exchange Act of 1934, the district court granted summary judgment against the plaintiff on the ground that his action was barred by the applicable statute of limitations.[20] The circuit court of appeals reversed.

The plaintiff maintained that he had employed Auchincloss, Parker & Redpath to sell twenty shares of Superior Oil of California stock at the prevailing market price on the New York Stock Exchange. Two days later, on November 27, 1959, the defendant confirmed sale of the shares at $1280 per share. The plaintiff later complained that the price was merely the artificial result of price manipulation by the defendants in violation of sections 9 and 10(b) of the 1934 Act.[21]

Suit was commenced on November 24, 1969, almost 10 years after the alleged fraudulent activities. On this ground and relying on the built-in statute of limitations of section 9(e),[22] the district court dismissed the action.

In reversing the district court's determination and remanding the action of the district court for determination of the merits of the plaintiff's case, the court stated that the applicable statute of limitations is contained in two sections of the N.Y. Civil Practice Law and Rules.[23]

The court was in agreement with the district court that the plaintiff's section 9 claim was properly dismissed. However, since section 10(b) contains no built-in statute of limitations, it was error to apply the three-year period of section 9. Rather, the federal court must turn

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16 *Id.*

17 In so vacating, they suggested that the district court assign all of plaintiff's cases to a single judge who could decide the order of the proceedings so as to expedite their disposition. *Id.*

18 436 F.2d 339 (2d Cir. 1971).

19 15 U.S.C. §§ 78i, 78i(e), 78j(b) (1970).

20 15 U.S.C. § 78i(e) (1970) provides:

> No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

21 The plaintiff further alleged that the defendant claimed that the sale was to a disinterested third party at the prevailing market price when in fact, according to the plaintiff, the shares were transferred to agents of the defendant, and that the prevailing market price was more than $1280 per share. 436 F.2d at 340.

22 *Supra* note 20.

23 N.Y. CIV. PRAC. §§ 203(f) & 213(g) (McKinney 1972).