University of Arkansas at Little Rock Law Review

Volume 11 | Issue 4 Article 8

1988

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Recommended Citation

Stan D. Smith, *Securities—Section 12(1) Seller Liability Limited to Persons Who Pass Title or Solicit Securities Sales for Financial Gain. Pinter v. Dahl, 108 S. Ct. 2063 (1988).*, 11 U. ARK. LITTLE ROCK L. REV. 771 (1989).
Available at: https://lawrepository.ualr.edu/lawreview/vol11/iss4/8

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SECURITIES—SECTION 12(1) SELLER LIABILITY LIMITED TO PERSONS WHO PASS TITLE OR SOLICIT SECURITIES SALES FOR FINANCIAL GAIN. *Pinter v. Dahl*, 108 S. Ct. 2063 (1988).

Billy J. Pinter, a registered securities dealer, sold unregistered securities consisting of fractional undivided interests in oil and gas leases to Maurice Dahl. Dahl touted the venture to other investors, all of whom were either his friends or members of his family, and helped them complete subscription agreements prepared by Pinter. Dahl did not receive a commission from Pinter for soliciting other investors. When the venture failed, Dahl and the other investors sued Pinter in federal district court seeking rescission under section 12(1)[1] of the Securities Act of 1933[2] for the unlawful sale of unregistered securities. Pinter counterclaimed against Dahl arguing, among other things, that Dahl was liable for contribution to Pinter if Pinter was liable to the other plaintiffs.[3]

After a bench trial, the district court granted judgment for the investors. The court rejected Pinter's claim of exemption from registration of the securities as a private offering[4] and because the securities lacked registration, held Pinter liable to the investors under section 12(1).

The United States Court of Appeals for the Fifth Circuit affirmed

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1. Section 12(1) provides in pertinent part:

> Any person who—(1) offers or sells a security in violation of section [5] . . . shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

15 U.S.C. § 77l(1) (1982).

2. 15 U.S.C. §§ 77a-77aa (1982).

3. Pinter v. Dahl, 108 S. Ct. 2063, 2069 n.9 (1988). Pinter also argued that Dahl's claim was barred by the equitable defense of *in pari delicto*. The Supreme Court held that the *in pari delicto* defense is available in a suit for rescission under § 12(1), thereby extending its holding in Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985), and directed the district court on remand to determine whether Pinter proved the elements of the defense. *Pinter*, 108 S. Ct. at 2070-75. This casenote will not discuss the Court's holding on the *in pari delicto* issue, but will confine its analysis to the second issue presented to the Court: whether Dahl could be found to be a "seller" under § 12(1) and therefore arguably liable to make contribution to Pinter.

4. A number of exemptions enable issuers to avoid the registration requirements of the Securities Act of 1933. Section 4(2), 15 U.S.C. § 77d(2) (1982), relieves "transactions by an issuer not involving any public offering" from registration. *See* SEC v. Ralston Purina Co., 346 U.S. 119 (1953).

the decision in favor of the investors and denied Pinter's counterclaim for contribution against Dahl.[5] While no code provision specifically allows a right of contribution, the court assumed that Dahl could be liable for contribution to Pinter if Dahl's activities in soliciting the other investors rendered Dahl a "seller" within the meaning of section 12(1).[6] Citing Fifth Circuit precedent, the court defined "seller" as "one whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place."[7] However, the court refined its substantial factor test to include a requirement that a promoter of unregistered securities must "be motivated by a desire to confer a direct or indirect benefit on someone other than the person he has advised to purchase."[8] The court concluded that although Dahl's activities were a substantial factor in causing the other investors to purchase the securities, he was not a "seller" because there was no evidence that he sought or received a financial benefit for himself or anyone other than the other respondents.[9]

The United States Supreme Court agreed with the Fifth Circuit's requirement that one have an expectation-of-financial-benefit in order to qualify as a "seller" within the meaning of section 12(1). The Court, in a seven-to-one decision, held that a nonowner of securities must not only solicit the purchase but must also be motivated in part by a desire to serve his own financial interests or those of the securities owner. The Court rejected the Fifth Circuit's previous version of the substantial factor test and ruled that a person does not become liable under section 12(1) merely because his actions were a substantial factor in causing the sale of unregistered securities. The Court remanded the case for further factual findings to determine whether Dahl was liable as a statutory "seller" under section 12(1). *Pinter v. Dahl*, 108 S. Ct. 2063 (1988).

Congress enacted the Securities Act of 1933[10] to provide investors with all material information relating to public offerings of securities, to protect investors against fraud, and to promote honesty and fair dealing.[11] Section 12(1) of the Securities Act of 1933 imposes liability on a seller of securities sold in violation of section 5.[12] The

5. Dahl v. Pinter, 787 F.2d 985 (5th Cir. 1986), *vacated*, 108 S. Ct. 2063 (1988).
6. *Id.* at 990 n.8.
7. *Id.* at 990.
8. *Id.* at 990-91.
9. *Id.*
10. 15 U.S.C. §§ 77a-77aa (1982).
11. *See, e.g.*, H.R. REP. NO. 85, 73d Cong., 1st Sess. 1-5 (1933).
12. 15 U.S.C. § 77e (1982) (makes it unlawful to sell or deliver a security in interstate commerce if the security is unregistered).

Act does not delineate who may be regarded as a "statutory seller" for purposes of section 12, and courts have struggled in their efforts to define the term in a uniform manner.[13] The definitions range from a literal construction of the term "seller," requiring strict privity,[14] to various liberal approaches[15] expanding section 12 liability beyond the security titleholder.[16]

Courts that follow the strict privity approach interpret "seller" according to its plain meaning and impose liability only on the immediate seller of the security to the purchaser.[17] However, most of these courts have concluded that brokers acting as agents are in privity with securities purchasers and therefore within the definition of seller. For example, *Cady v. Murphy*[18] holds that strict privity exists between the purchaser and a broker-dealer who sells the securities as an agent as well as between the titleholder of the security and the purchaser.[19]

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13. Pinter v. Dahl, 108 S. Ct. 2063, 2076 (1988).

14. The term "privity" denotes mutual or successive rights of property. *See, e.g.*, Upper Lakes Shipping Ltd. v. Seafarers' Intern. Union of Canada, 40 Ill. App. 2d 392, 189 N.E.2d 753 (1963); Mitchell v. Austin, 266 Ala. 128, 94 So. 2d 391 (1957).

15. *See infra* notes 29-48 and accompanying text (participation, proximate cause, and substantial factor approaches).

16. In addition to the theories based on primary liability as a "seller," some courts have recognized that persons other than a statutory seller can be secondarily liable for violation of § 12. For example, some courts have imposed liability on defendants for aiding and abetting the primary wrongdoer in some manner. *See, e.g.*, Mayer v. Oil Field Sys., 803 F.2d 749 (2d Cir. 1986); Kilmartin v. H.C. Wainwright & Co., 637 F. Supp. 938 (D. Mass. 1986); *In re* Caesars Palace Sec., 360 F. Supp. 366 (S.D.N.Y. 1973). *Caesars Palace* was among the first cases recognizing aiding and abetting liability under § 12. The court concluded that § 12 aiding and abetting liability was consistent with "the broad, remedial nature of the [Securities] Act and [cited] the need to adopt a liberal interpretation of the statute in order to best effectuate the congressional purpose." *Id.* at 382-83. However, the courts have not generally adopted the aiding and abetting principles in § 12 cases, probably because most courts have adopted a definition of "seller" broad enough to encompass persons whose conduct might otherwise fall within the ambit of aiding and abetting liability. Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 FORDHAM URBAN L.J. 877, 943-44 (1987).

A person may be liable under the aiding and abetting approach if: (1) an independent wrong exists; (2) the aider and abetter knew of the wrong's existence; and (3) the aider and abetter renders substantial assistance in effecting the wrong. *See generally* Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification and Contribution*, 120 U. PA. L. REV. 597, 620-46 (1972).

17. *See* Collins v. Signetics Corp., 605 F.2d 110 (3d Cir. 1979); Sanders v. John Nuveen & Co., 619 F.2d 1222 (7th Cir. 1980), *cert. denied*, 450 U.S. 1005 (1981); *see also* O'Hara, *Erosion of the Privity Requirement in Section 12(2) of the Securities Act of 1933: The Expanded Meaning of Seller*, 31 UCLA L. REV. 921, 931 n.30 (1984); Note, *Seller Liability Under Section 12(2) of the Securities Act of 1933: A Proximate Cause-Substantial Factor Approach Limited by a Duty of Inquiry*, 36 VAND. L. REV. 361 (1983).

18. 113 F.2d 988 (1st Cir.), *cert. denied*, 311 U.S. 705 (1940).

19. *Id.* at 990-91.

The court ruled that the broker would be in strict privity even if he acts as agent for both the owner and purchaser.[20] The court stated that the "broader interpretation of section 12(2)[21] is warranted by the definition of 'sell' in section 2(3)[22] and is also supported by comparison with other sections of the statute."[23]

After *Cady* many courts expanded the meaning of seller to include persons other than brokers or persons who pass title. *Wonneman v. Stratford Securities Co.*,[24] introduced the broad concept of "participation." In *Wonneman* the plaintiff purchased unregistered securities from a broker-dealer firm that made the sales as a principal after purchasing the securities. The plaintiff sued the brokerage firm, the issuer of the securities, individual employees of the issuer, and the broker-dealer firm.[25] The court denied a summary judgment motion by two of the individual defendants and stated that in order to avoid section 12(1) liability, defendants "must show that they did not participate in the sale and not merely that they did not actually sell the securities to plaintiff."[26] The same court, on rehearing, limited the scope of the approach by requiring "some degree of privity" between the purchaser and the seller.[27] The court refused to extend section 12 liability to an attorney who was partially involved in the securities

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20. *Id.*

21. *Cady* was brought under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2) (1982) which provides a security purchaser with a rescissory cause of action for misrepresentation. Most courts define "seller" similarly for purposes of § 12(1) and § 12(2). *See, e.g.*, Pharo v. Smith, 621 F.2d 656, 665-68 & nn.6-8 (5th Cir. 1980); *see also* Schillner v. H. Vaughan Clarke & Co., 134 F.2d 875, 878 (2d Cir. 1943) ("Clearly the word ["sell"] has the same meaning in subdivision (2) as in subdivision (1) of section 12"). Thus, decisions under § 12(2) are relevant to the issue of § 12(1) seller liability.

22. Section 2(3) provides in pertinent part:

> Sec. 2. When used in this subchapter, unless the context otherwise requires . . .
>
> (3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell," "offer for sale," or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.

15 U.S.C. § 77b(3) (1982).

23. 113 F.2d at 990. The court added that if the security in question had been one required by law to be registered, the broker-dealer would have been guilty of selling a security in violation of § 5 and would not have come within the private offering exemption provided in § 4(2). *Id.* at 990-91.

24. [1957-61 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,923 (S.D.N.Y. June 26, 1959).

25. *Id.* at 92,963.

26. *Id.*

27. [1957-61 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,034, 93,461 (S.D.N.Y. June 7, 1961).

transaction.[28]

Freed v. Szabo Food Services[29] follows the broad participation approach stated in *Wonneman*. The court held that a plaintiff can maintain a cause of action under section 12(2) despite the lack of strict privity "as long as plaintiffs' alleged purchase was in reliance upon misrepresentation and participation in these misrepresentations by the defendant."[30] The court also noted that strict privity between the seller and the purchaser should no longer be a requirement to find seller liability.[31] As in *Wonneman*, the court did not base its reasoning on section 12's language. Rather, the court relied on the remedial purposes of the securities laws as a reason to construe the statute liberally.[32]

Subsequent to some courts upholding section 12 causes of action against persons who remotely participated in a securities transaction, other courts attempted to articulate a standard to define the outer limits of section 12 liability. *Lennerth v. Mendenhall*[33] utilizes participation as the basis for seller liability, but states that section 12 liability "must lie somewhere between the narrow view, which holds [liable] only the parties to the sale, the too-liberal view which would hold [liable] all who remotely participated in the events leading up to the transaction."[34] The decision crafts a theory grounded in common law tort principles that imposes liability as a "seller" on a nonowner of securities if the plaintiff's injury flows directly and proximately from the particular defendant's conduct.[35] This theory premises section 12 liability on proximate cause.[36] The court looked at the defendants' actions throughout the selling process and imposed section 12(1) liability not only on the company that issued the securities and

28. *Id.*

29. [1961-64 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,317 (N.D. Ill. Jan. 14, 1964).

30. *Id.* at 94,365.

31. *Id.*

32. "The securities laws are remedial and are to be construed liberally in order to achieve the congressional purpose." *See* Freed v. Szabo Food Services, [1961-64 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 94,365. *See also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 200 (1976) (recognizing Congress' "broad remedial goals" in enacting the securities laws and providing civil remedies).

33. 234 F. Supp. 59 (N.D. Ohio 1964).

34. *Id.* at 65.

35. *Id.*

36. A "proximate cause" is that cause which the effect might be expected to follow without the concurrence of any unusual circumstances. *See, e.g.*, Antler v. Cox, 27 Idaho 517, 149 P. 731 (1915). BLACK'S LAW DICTIONARY defines "proximate cause" as "[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." BLACK'S LAW DICTIONARY 1103 (5th ed. 1979).

transferred title, but also on the company's president, vice president, and another employee.[37]

Hill York Corp. v. American International Franchises, Inc.,[38] also adopts the proximate cause rationale. The case rejects the participation concept, which imposes liability on anyone who participates in the sales transaction, as overly broad.[39] The court cites *Lennerth's* proximate cause theory as a rational and workable standard for imposition of liability under section 12.[40] The Fifth Circuit refined its approach two years later in *Lewis v. Walston & Co.*[41] to impose liability on a nontransferor defendant whose activities were a "substantial factor"[42] in causing the plaintiffs to purchase unregistered securities. The Fifth Circuit articulated its substantial factor approach more clearly in *Pharo v. Smith*,[43] stating that the scope of section 12 liability was limited to 1) those in privity with the purchaser and 2) those whose participation in the securities transaction was a substantial factor in causing the transaction to take place.[44]

The substantial factor test became the dominant concept regarding seller liability under section 12. The United States Courts of Appeals for the Fourth,[45] Sixth,[46] Eighth,[47] and Eleventh[48] Circuits have followed the Fifth Circuit's substantial factor approach to determine section 12 liability. The Ninth Circuit adopted its own version of the test, imposing section 12 liability on " 'participants' whose acts are

37. 234 F. Supp. at 65-66.

38. 448 F.2d 680 (5th Cir. 1971). The court held that promoters of a franchising scheme were § 12 sellers.

39. *Id.* at 692.

40. *Id.* at 693.

41. 487 F.2d 617 (5th Cir. 1973).

42. "The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, § 41, at 267 (5th ed. 1984).

43. 621 F.2d 656 (5th Cir. 1980).

44. *Id.* at 667. By refusing in *Dahl* to impose liability on Dahl under the substantial factor test, the Fifth Circuit broke with the import of precedent, adding an expectation-of-financial-benefit refinement to the test.

45. Lawler v. Gilliam, 569 F.2d 1283, 1287 (4th Cir. 1978) (section 12(1) liability extends to "all persons whose actions are a substantial factor in causing a purchaser to buy a security").

46. Davis v. Avco Fin. Serv., 739 F.2d 1057, 1067 (6th Cir. 1984) (imposing § 12(2) liability on "participants in the selling effort whose acts meet the substantial factor test"), *cert. denied*, 470 U.S. 1005 (1985).

47. Stokes v. Lokken, 644 F.2d 779 (8th Cir. 1981).

48. Foster v. Jesup & Lamont Sec. Co., 759 F.2d 838, 843-44 (11th Cir. 1985) (determining the "scope of section 12" by applying Fifth Circuit decisions as "controlling" in this circuit).

'both necessary to and a substantial factor in the sales transaction.' "[49] The strict privity view prevailed in the Third[50] and Seventh[51] Circuits. In the circuits where the interpretation of liability remained an open question, most district courts adopted the substantial factor approach.[52]

The substantial factor test, however, has not been free from criticism. First, the substantial factor test offers very little guidance apart from the words "substantial factor,"[53] and application of the test has not been uniform among the circuits. Second, as with the earlier "participation test" cases, courts adopting the substantial factor approach did not seriously attempt to interpret the language of section 12 or refer to pertinent legislative history. The Fifth Circuit decisions in *Hill York Corp.*[54] and *Lewis*[55] simply embraced the conclusion that the substantial factor test was consistent with the Securities Act's remedial purposes. For the most part, the other circuits and lower courts adopting the approach merely followed Fifth Circuit precedent and failed to engage in any meaningful statutory analysis.[56]

Pinter v. Dahl[57] presented the United States Supreme Court with the question of whether a person must intend to confer a benefit on himself or a third party in order to be deemed a "statutory seller" for the purposes of section 12(1).[58] In determining the scope of section

49. Anderson v. Aurotek, 774 F.2d 927, 930 (9th Cir. 1985) (quoting SEC v. Murphy, 626 F.2d 633, 649-50 (9th Cir. 1980)).

50. Collins v. Signetics Corp., 605 F.2d 110, 113 (3d Cir. 1979) (section 12(2) liability imposed only on the "immediate seller" unless a "special relationship" exists between the plaintiff and a third party defendant).

51. Sanders v. John Nuveen & Co., 619 F.2d 1222, 1226 (7th Cir. 1979) (section 12(2) "explicitly requires privity between plaintiff-purchaser and defendant-seller"), *cert. denied*, 450 U.S. 1005 (1981).

52. See cases cited at Abrams, *supra* note 16, at 891-92 & n.87.

53. *See* Pharo v. Smith, 621 F.2d 656, 667 (5th Cir. 1980).

54. 448 F.2d 680 (5th Cir. 1971).

55. 487 F.2d 617 (5th Cir. 1973).

56. Abrams, *supra* note 16, at 892-94 & nn.89-97.

57. 108 S. Ct. 2063 (1988).

58. *Id.* at 2067. The Court addressed the question whether Dahl was a seller for purposes of § 12(1) on the assumption that if the question was answered affirmatively, Dahl might be liable for contribution as to the remaining investor-respondents' claims against Pinter. The issue of Dahl's liability to Pinter for contribution was independent of the issue regarding whether or not Dahl's actions barred recovery against Pinter pursuant to the *in pari delicto* doctrine. *See supra* note 3; 108 S. Ct. at 2075 n.17. The majority did not determine whether a right of contribution exists under § 12(1). 108 S. Ct. at 2070 n.9. Justice Stevens, arguing that the contribution issue was not properly before the Court, wrote a strong dissent. 108 S. Ct. at 2083 (Stevens, J., dissenting). Justice Stevens also stated that even if a right to contribution exists under § 12(1), it should not be available in an action for rescission to allow "a seller to recover from a third party who did not receive any part of the purchase price." *Id.* at 2086.

12(1) liability, the Court first looked at the language of the statute.[59] The Court noted that section 12(1) defines the class of defendants who may be subject to liability as any person who "offers or sells" unregistered securities.[60] To determine whether section 12(1) liability extends to persons other than the owner of securities who passes title,[61] the Court looked to section 2(3)[62] of the Securities Act and concluded that the inclusion of the phrase "solicitation of an offer to buy" within the definition of "offer" brings an individual who engages in solicitation within the scope of section 12.[63] Thus, the Court concluded that transactions other than traditional sales of securities are within the scope of section 2(3) and that passage of title is not essential for imposition of liability under section 12(1).[64]

After determining the activities which fall within the range of "offer" or "sell" in section 2(3), the Court addressed section 12(1)'s requirement that the plaintiff "purchase" the securities "from" the defendant.[65] The Court rejected the view that this language of section 12(1) imposes a strict privity requirement.[66] While the purchase requirement confines section 12 liability to situations in which a sale has taken place,[67] the purchase requirement does not exclude solicitation from the range of activities that may render a person liable under the section when a sale has been made.[68]

The Court then interpreted the term "purchase," which is not defined by the Securities Act, "as a correlative to both sell and 'offer'," at least to the extent "offer" involves active solicitation.[69] Thus, the Court concluded "that the class of those from whom the buyer 'purchases' extend[s] to persons who solicit him."[70]

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59. *Id.* at 2075.

60. *Id.* at 2076.

61. The Court concluded that on its face, § 12(1) "imposes liability on the owner who passed title, or other interest in the security, to the buyer for value." *Id.* (citing L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1016 (2d ed. 1988)).

62. 15 U.S.C. § 77b(3) (1982).

63. 108 S. Ct. at 2076.

64. The Court relied on its analogous holdings on the question of what is an "offer or sale" under § 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a) (1982)). 108 S. Ct. at 2076. *See* United States v. Naftalin, 441 U.S. 768 (1979); *see also* Rubin v. United States, 449 U.S. 424 (1981).

65. 108 S. Ct. at 2077.

66. *Id.*

67. *Id.* The Court found that the purchase requirement bars recovery under § 12(1) by "a prospective buyer . . . against a person who touts unregistered securities to him if he does not purchase the securit[y]." *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 2078.

The Court agreed with the Fifth Circuit's conclusion that Congress did not intend section 12(1) liability to extend to persons who merely give gratuitous advice to another to make a securities purchase. The Court noted that section 2(3) defines an offer as a "solicitation of an offer to buy . . . for value" and that a person who gives advice gratuitously is not requesting value in exchange for his suggestion.[71] Thus, the Court concluded that the language and purpose of section 12(1) suggest that imposition of seller liability extends only to persons who successfully solicit the purchase, motivated at least in part by a desire to serve the soliciting person's own financial interest or that of the securities owner.[72]

Once the Court extended section 12(1) primary liability to one who solicits securities sales for financial gain, it refused to make any further extension. The Court rejected Pinter's request to validate the substantial factor test used by the Fifth Circuit prior to its expectation-of-financial-benefit refinement of the test in this court case.[73] The Court noted that section 12's failure to impose express liability for mere participation suggests that Congress did not intend to impose liability on persons collateral to the offer of sale.[74] The Court also noted that the substantial factor test divorces the analysis of "seller" from any reference to the statutory language of section 12 or examination of the section in the context of the Securities Act's statutory scheme.[75]

Pinter's sole justification of the substantial factor analysis was that it protects investors and serves the "remedial purposes" of the Securities Act.[76] The Court agreed that it has previously construed securities law provisions flexibly to effectuate their remedial purposes, but noted that it had never conducted its analysis entirely apart from the statutory language.[77] The Court stated that the broad remedial goals of the Securities Act were insufficient justification to support the substantial factor test and that being merely a "substantial factor" was insufficient to render a defendant liable under section 12(1).[78]

The *Pinter* case is significant because the Supreme Court finally

71. *Id.* at 2078-79.
72. *Id.* at 2079.
73. *Id.* at 2079-82.
74. *Id.* at 2080.
75. *Id.*; *see supra* notes 33-49 and accompanying text.
76. 108 S. Ct. at 2081.
77. *Id.* at 2082.
78. *Id.*

addressed the issue of who is a "seller" for purposes of section 12(1).[79] The decision provides guidelines for the courts so that determination of section 12(1) liability will no longer be by judicial implication based solely on the broad remedial purposes of the Securities Act. Moreover, the Court's rejection of the substantial factor approach clearly places accountants, lawyers, and other persons who participate in the transaction, but who are only remotely related to the relevant aspects of the transaction, outside the scope of section 12(1) liability.[80]

"The 'offers or sells' and the 'purchasing such security from him' language that governs § 12(1) also governs § 12(2)."[81] Even though the Court did not decide whether the definition of seller for purposes of section 12(1) also applies to section 12(2), ordinary principles of statutory construction would apparently dictate that the same construction be given to the identical language[82] and most courts apply the same meaning to "seller" in both provisions.[83] Because section 12(2) liability requires fault on the part of the defendant,[84] it is less likely that the Court would apply a more restrictive test.[85]

In an attempt to broaden the class of potential section 12 defendants beyond *Pinter's* relatively narrow reach, plaintiffs will probably seek to use the aiding and abetting approach to bring accountants, lawyers, and other persons whose participation in the securities trans-

79. The Court had consistently denied certiorari in cases dealing with § 12 seller liability. *See, e.g.*, Davis v. Avco Fin. Serv., 739 F.2d 1057 (6th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985); Sanders v. John Nuveen & Co., 619 F.2d 1222 (7th Cir. 1980), *cert. denied*, 450 U.S. 1005 (1981); Cady v. Murphy, 113 F.2d 988 (1st Cir.), *cert. denied*, 311 U.S. 705 (1940).

80. 108 S. Ct. at 2081.

81. *Id.* at 2076 n.20.

82. Schneider, *Section 12 of the Securities Act of 1933: The Privity Requirement in the Contemporary Securities Law Perspective*, 51 TENN. L. REV. 235, 261 (1984). The general rebuttable presumption of formal consistency is that the draftsman "has not changed his meaning unless he has varied his terminology." R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 224 (1975).

83. *See, e.g., Cady*, 113 F.2d at 991 ("the phrase 'any person who sells a security' occurs both in § 12(1) and in § 12(2), and would seem to mean the same thing in both subsections. . . ."); *see also supra* note 21.

84. Section 12(2) provides in pertinent part:

> Any person who . . . (2) offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements . . . not misleading . . . shall be liable to the person purchasing such security from him. . . .

15 U.S.C. § 77l(2) (1982).

85. In *Hill York Corp.*, 448 F.2d 680, the court suggested a broader definition of seller for purposes of § 12(2) but found it unnecessary to expand the definition under the facts of the case.

action are relatively remote within the scope of section 12(1) liability.[86] However, both the statutory language and the legislative history of section 12 fail to address aiding and abetting liability[87] and the courts are divided over whether aiding and abetting liability should apply to section 12.[88]

By limiting the scope of section 12(1) liability, the Court has diminished the protections given to purchasers of securities by the various circuits which have interpreted the statute liberally. However, this limitation does not leave purchasers totally unprotected from persons who are not "sellers" subject to liability under section 12(1). Section 15[89] makes a person who "controls" any person liable under section 12 jointly and severally to the same extent as the controlled person. Additionally, the vast majority of states have enacted blue sky laws[90] which impose liability for aiding and abetting or assisting in securities violations.[91] Thus, investors will probably seek to impose liability on sellers under other methods available to them in situations where plaintiffs previously utilized section 12(1).

Stan D. Smith

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86. The Court did not consider whether aiding and abetting liability is appropriate under § 12(1). 108 S. Ct. at 2079 n.24.

87. Abrams, *supra* note 16, at 944.

88. The Second Circuit approved imposition of aiding and abetting liability in Mayer v. Oil Field Sys., 803 F.2d 749, 756 (2nd Cir. 1986). The Fifth Circuit rejected the approach in Croy v. Campbell, 624 F.2d 709, 713 n.5 (5th Cir. 1980). The Eighth Circuit rejected imposition of aiding and abetting liability in Stokes v. Lokken, 644 F.2d 779, 785 (8th Cir. 1981). *See also supra* note 16.

89. Section 15 of the Securities Act of 1933 provides:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections [11 or 12 of the Act], shall also be liable jointly and severally with and to the same extent as such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

15 U.S.C. § 77o (1982).

90. Blue sky laws are state securities laws which regulate the sales of securities to purchasers within the jurisdiction.

91. Forty-three states and the District of Columbia have passed blue sky laws which create private rights of action that expressly impose primary liability for aiding, aiding and abetting, or assisting in securities violations. *See* Abrams, *supra* note 16, at 945-46 n.423. *See, e.g.*, ARK. CODE ANN. § 23-42-106(c) (1987) ("every employee . . . who materially aids in the sale; and every broker-dealer or agent who materially aids in the sale").