

3-1-1990

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Recommended Citation

Allen Kent Davis, *Pinter v. Dahl: The Supreme Court's Attempt to Redefine The "Statutory Sellor" Under Section 12 of the Securities Act of 1933*, 4 BYU J. Pub. L. 97 (1990).

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Pinter v. Dahl: The Supreme Court's Attempt to Redefine The "Statutory Seller" Under Section 12 of the Securities Act of 1933

Section 12¹ of the Securities Act of 1933² provides that "[a]ny person who offers or sells a security [in violation of Section 5 or Section 12(2)] shall be liable to the person purchasing such security from him . . ."³ The defendant class, or the class of persons potentially liable under this section (commonly known as the "statutory seller") is not defined in the Act. As a result, courts have struggled to determine whether more indirect sales participants—such as lawyers, accountants, and unpaid promoters—can be held liable as statutory sellers under Section 12. Over the last few decades, the circuit courts have developed three different tests to determine this very question.

In the 1988 case of *Pinter v. Dahl*,⁴ the Supreme Court rejected all three of the circuit court approaches and developed its own test. This paper focuses on the meaning and potential impact of the Supreme Court's new statutory seller test. Section I of this casenote traces the common-law roots of the statutory seller concept and outlines its evolution toward today's more expanded interpretation. Section II discusses the holding of the 1988 Supreme Court ruling in *Pinter v. Dahl* and the new definition of a statutory seller. Section III evaluates the Court's holding and determines that lower courts may struggle with implementation of the new statutory seller definition with its new motives-based test. Finally, this casenote concludes that a better definition of the defendant class exists that would produce more equitable results in Section 12 cases.

I. INTRODUCTION TO THE STATUTORY SELLER CASES

A. *Common-Law Roots*

Section 12 grants a private cause of action to the purchaser of a security against "any person who . . . offers or sells a security" in viola-

1. The Securities Act of 1933 § 12, 15 U.S.C. § 77l (1982) (hereinafter referred to as Section 12).

2. The Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982) (hereinafter referred to as the 1933 Act).

3. 15 U.S.C. § 77l (1982).

4. 108 S. Ct. 2063 (1988).

tion of section 5 or section 12(2). Section 5⁵ requires the filing of a registration statement and Section 12(2)⁶ is an anti-fraud provision.

The Section 12 cause of action was essentially adapted from the common-law right of rescission of contract.⁷ At common law, the privity requirement means that only the immediate seller is liable to his purchaser when rescission is granted. Like the common-law action for rescission of contract, Section 12 expresses a privity requirement,⁸ primarily in the words stating that the seller "shall be liable to the *person purchasing such security from him.*"⁹ This language indicates that the drafters of Section 12 contemplated liability for only the immediate seller. In addition, the restitution damages granted for violation of Section 12 parallel¹⁰ the damages awarded in a common-law action for

5. 15 U.S.C. § 77e (1982) states

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

6. 15 U.S.C. § 77l (1982) states

Any person who—

(1) offers or sells a security in violation of Section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), 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, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, 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.

7. 3 L. LOSS, *SECURITIES REGULATION* 1700 (2d ed. 1961). ("Section 12(2) can perhaps best be analyzed and evaluated by comparing it with common law or equitable rescission, from which it was adapted.")

8. This rescissory nature would limit the liability only to the immediate seller. See *Collins v. Signetics Corp.*, 605 F.2d 110, 113-14 (3d Cir. 1979); *Beck v. Cantor, Fitzgerald & Co.*, 621 F. Supp. 1547, 1560-61 (N.D. Ill. 1985); *Wolf v. Frank*, 477 F.2d 467, 478 (5th Cir. 1973), cert. denied, 414 U.S. 975 (1973); *Surowitz v. Hilton Hotels Corp.*, 342 F.2d 596, 603 (7th Cir. 1965), rev'd on other grounds, 383 U.S. 363 (1966); *Abrams, The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 *FORDHAM URB. L.J.* 877 (1987).

9. 15 U.S.C. § 77l (1982) (emphasis added).

10. Unlike the common-law action for rescission, Section 12 has a fall-back provision that allows for "damages if [the purchaser] no longer owns the security." 15 U.S.C. § 77l (1982). See, L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 1010-1011 (common law rescission al-

rescission of contract.¹¹ Hence, any analysis of the Section 12 statutory seller definition must include an underlying supposition of privity.

B. *Toward a Broader Definition*

The 1933 Act's failure to effectively define the class of persons potentially liable under Section 12 forced courts to construct their own definition of a statutory seller. Under the language of the statute a transferor is expressly liable as a seller, but the language, as interpreted by some lower courts, made it unclear as to whether any other participants in the transaction could be held liable as a seller.

In 1939, one U.S. district court held a broker liable under Section 12, applying simple common-law agency principles.¹² The agent was placed in the shoes of the principal and held responsible as a statutory seller. This approach was widely accepted and it is now a well-established rule that a broker or other selling agent, acting for a principal, can be considered a seller under Section 12.¹³

C. *Three Different Tests*

Most courts did not stop at the broker level. Many courts continued to expand the statutory seller definition to include many other participants in the securities transaction.¹⁴ Three different lines of authority were created that expanded the statutory seller definition. Each line of cases established a different test to determine the requisite relationship of collateral participants to the transaction necessary to impose primary liability status under Section 12. The tests are called: (1) the participation test, (2) the proximate cause test, and (3) the participant position test.

The three tests, created to determine the definition of a statutory seller, were established in the 1960's. In most of the cases, lower courts cited the Supreme Court's application of the 1933 Act, claiming that it should be broadly construed "to effectuate its remedial purposes."¹⁵ The language of the statute was almost completely ignored and only the

lows for no recovery when the plaintiff has disposed of the contract property).

11. L. Loss, at 1010-1011 (1983) ("In rescission there is no problem of computing damages. Either the P can restore the defendant to the *status quo ante* or he has no action of rescission at all")

12. *Murphy v. Cady*, 30 F. Supp. 466 (D. Me. 1939), *aff'd*, 113 F.2d 988 (1st Cir.), *cert. denied*, 311 U.S. 705 (1940).

13. *Pinter*, 108 S. Ct. at 2078.

14. In the Third Circuit, however, strict privity was required absent control. *Collins v. Signetics Corp.*, 605 F.2d 110, 113 (3rd Cir. 1979). Also see cases cited in note 8, *supra*.

15. *Sec. Exch. Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963). See generally, L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 1-54, 1007-56 (1983).

protection of the potential investor was considered.

1. *The participation test*

One line of cases adopted a test that measures a third party's participation in the events leading up to the sale.¹⁶ This participation test is the broadest of the three tests, allowing primary liability under Section 12 for all who participate in the sale.¹⁷ The second circuit is the only circuit court that has applied this test. In *Katz v. Amos Treat & Co.*,¹⁸ the court held that a strict reading of the privity requirement in the statutory seller definition was contrary to the "remedial purpose of the statute."¹⁹ Any solicitation,²⁰ even without compensation, would bring a participant into the action and possibly within liability of the statute: "[I]t was thus clear error for the court to have dismissed the complaint against [the participants to the transaction] all of whom . . . pressed [the purchaser] to buy . . . stock."²¹

2. *The proximate cause test*

The fifth circuit rejected the participation test as being overly broad and created its own test,²² borrowing the doctrine of proximate cause from common-law tort theory. Under the proximate cause test, anyone who participated in the transaction could be considered a statutory seller, but only if that participation was determined to be a *substantial factor* in causing the transaction to take place.²³ As contrasted with the participation test, the proximate cause test limits potential Section 12 liability to only those who participate in some substantial way.

The fifth circuit, in *Hill York Corp. v. American International Franchises, Inc.*,²⁴ described the test in the following terms: "[T]he line

16. 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, 948-58 (1984).

17. *Wonneman v. Stratford Securities Co.*, Fed. Sec. L. Rep. (CCH) ¶ 90,923 (S.D.N.Y. 1959); *Wonneman v. Stratford Securities Co.*, Fed. Sec. L. Rep. (CCH) ¶ 91,034 (S.D.N.Y. 1961).

18. 411 F.2d 1046 (2d Cir. 1969).

19. *Id.* at 1052.

20. Compare notes 42-56 and accompanying text as to the similarities of the new solicitation test established by *Pinter v. Dahl*.

21. *Katz*, 411 F.2d at 1053 (emphasis added).

22. *Hill York Corp. v. Am. Int'l Franchises, Inc.*, 448 F.2d 680 (5th Cir. 1971). The Fifth Circuit test seems to have been accepted by several other circuits. See *Davis v. Avco Financial Services, Inc.*, 739 F.2d 1057 (6th Cir. 1984); *Admiralty Fund v. Jones*, 677 F.2d 1289, (9th Cir. 1982); *Stokes v. Lokken*, 644 F.2d 779, (8th Cir. 1981); *Lawler v. Gilliam*, 569 F.2d 1283 (4th Cir. 1978); *Ayers v. Wofinbarger*, 491 F.2d 8 (5th Cir. 1974).

23. *Hill York Corp. v. Am. Int'l Franchises, Inc.*, 448 F.2d 680 (5th Cir. 1971). O'Hara, *supra* note 16, at 958-74.

24. 448 F.2d at 693 (citing *Lennereth v. Mendenhall*, 234 F. Supp. 59, 65 (N.D. Ohio

of demarcation must be drawn in terms of cause and effect: To borrow a phrase from the law of negligence, did the injury to the plaintiff flow directly and proximately from the actions of this particular defendant?"²⁶ The proximate cause test is a participation test limited by common law tort principles of causation.

3. *The participant position test*

The eighth circuit developed its own definition for statutory seller.²⁶ Under the participant position test, primary liability as a seller depends on the position of the participant at the time of the transaction. If the participant was in a position to ensure full disclosure of the material facts, then that participant is a seller under Section 12.²⁷

In *Wasson v. SEC*,²⁸ the eighth circuit focused on the goal of full disclosure that the Supreme Court declared in *Ernst & Ernst v. Hochfelder*.²⁹ Because it is the "crucial step in the Act's disclosure scheme,"³⁰ the point of sale is where the court should ask "whether the defendant was uniquely positioned to ask relevant questions, acquire material information, or disclose his findings."³¹

D. *Back to the Language of the Statute*

The tests expand the statutory seller definition beyond the express language of the statute, using elements from various areas of common law. While each test is supported by equitable and logical arguments, as well as by judicial opinion, all three disregard the strict privity requirement established in the express language of the statute.³²

Early in the 1980's, the Supreme Court's attitude toward the securities laws changed. Instead of concentrating on the Act's broad remedial purpose, the Court placed renewed emphasis on the language of the securities acts and more narrowly construed the language of those

1964) ("The hunter who seduces the prey and leads it to the trap he has set is no less guilty than the hunter whose hand springs the snare.").

25. 448 F.2d at 693.

26. See, O'Hara, *supra* note 16, at 974-79. See, e.g., *Jeffries & Co. v. United Missouri Bank*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,257, at 96,140 (W.D. Mo. May 24, 1983); *Lingenfelter v. Title Ins. Co. of Minnesota*, 442 F. Supp. 981, 992-93 (D. Neb. 1977).

27. *Wasson v. Sec. Exch. Comm'n*, 558 F.2d 879, 886 (8th Cir. 1977). This approach has apparently been followed in only a few cases outside the Eighth Circuit.

28. 558 F.2d 879, 886 (1977).

29. 425 U.S. 185, 195 (1976) (The Supreme Court focused on the goal of full disclosure and the Act's "broad remedial purpose.").

30. *Wasson*, 558 F.2d at 886.

31. *Id.*

32. See *supra* notes 5-11 and accompanying text.

statutes.³³ As the transformation of the rules of interpretation began to take place, lower courts followed the Supreme Court's lead in searching the language of the statutes for guidance rather than relying merely on the remedial purposes of the Acts. Commentators also began attacking the case law for its abuse of the strict language of the statutes.³⁴ Finally in 1988, the Supreme Court gave the lower courts further guidance for construing Section 12 liability when it decided *Pinter v. Dahl*.³⁵

II. *Pinter v. Dahl*

A. *Factual Background*³⁶

Pinter is an oil and gas producer and a registered security dealer. Dahl is a real estate broker and investor who was a veteran of two unsuccessful oil and gas ventures. Dahl advanced money to Pinter to acquire oil and gas leases, while retaining the right of first refusal to drill. The leases were to be held, however, in the name of Pinter's Black Gold Oil Company. Pinter acquired the leases and worked closely with Dahl. After investing in the properties, Dahl told his friends, family and business associates about the venture. Because of Dahl's involvement, others decided to invest. Dahl assisted his fellow investors in completing the subscription agreement form prepared by Pinter, but never received any commissions.³⁷

Upon failure of the venture, those who had invested brought suit against Pinter for rescission of the investment contract under Section 12(1) of the Securities Act.³⁸ In a counterclaim Pinter alleged, *inter alia*, that Dahl should be liable for contribution because Dahl had agreed to raise the funds and Pinter was merely an "operating agent."³⁹ Pinter also claimed the defense of *in pari delicto* against Dahl. The District Court considered these defenses⁴⁰ and then, in deciding whether Dahl was liable for contribution, considered whether Dahl was himself a "seller" of the oil and gas interests within the

33. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

34. See generally, Kaminsky, *An Analysis of Securities Litigation Under Section 12(2) and How It Compares with Rule 10b-5*, 13 HOUS. L. REV. 231 (1976); O'Hara, *supra* note 16; Abrams, *supra* note 8.

35. 108 S. Ct. 2063 (1988).

36. *Id.* at 2067-70.

37. *Id.* at 2067-68.

38. *Id.* at 2068.

39. *Id.* at 2068-69.

40. This case note will not deal with the first part of the holding which considered the *in pari delicto* defense. The Court held that there is a defense of *in pari delicto* in the case of Section 12 even though scienter is not involved. However, the Court remanded this case for further facts as to who was responsible for failure to register the securities. *Id.* at 2075.

meaning of Section 12(1). The lower court declined to impose liability on Dahl because the court found no evidence that Dahl sought or received any financial benefit in return for “mere gregariousness.”⁴¹

B. *Analysis and Holding*

The Supreme Court⁴² began its analysis of what constitutes a seller for the purposes of Section 12(1) by examining the language of the statute.⁴³ The Court noted that the buyer-seller relationship contemplated by Section 12, which is “not unlike traditional contractual privity,”⁴⁴ would, at the very least, impose liability on the owner who passes title.

The Court then looked to the statutory definitions and found that the definition of the word *offer*⁴⁵ included the term “solicitation of an offer to buy . . . a security . . . for value.”⁴⁶ The Court noted that under this definition:

[T]he range of persons potentially liable under §12(1) is not limited to persons who pass title. The inclusion of the phrase “solicitation of an offer to buy” within the definition of “offer” brings an individual who engages in *solicitation*, an activity not inherently confined to the actual owner, within the scope of § 12.⁴⁷

The Court concluded that this definitional inclusion of the term *solicitation* expands the meaning of the words *offers* and *sells* to include more persons than simply the transferor of title.⁴⁸

41. *Pinter*, at 2070.

42. Justice Blackmun delivered the opinion of the court, in which Chief Justice Rehnquist and Justices Brennan, White, Marshall, O'Connor, and Scalia joined. Justice Kennedy took no part in the consideration or decision of the case. Justice Stevens dissented on other grounds, stating [T]he discussion of the §12(a) term “seller” in the context of a contribution suit is both advisory, because no such suit was brought in this case, and misleading, because it assumes that the class of persons who sell securities to purchasers (*i.e.*, §12(1) “sellers”) is coextensive with the class of potential defendants in claims for contribution, not brought directly under §12(1), asserted by §12(1) sellers.

Pinter, 108 S. Ct. at 2083.

43. *Id.* at 2075 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976)).

44. *Pinter*, 108 S. Ct. at 2075-76.

45. 15 U.S.C. § 77b states;

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 (1982) (emphasis added).

46. *Pinter*, 108 S. Ct. at 2076; 15 U.S.C. § 77b(3) (1982).

47. *Pinter*, 108 S. Ct. at 2076 (emphasis added).

48. *Id.*

In considering which other sales participants might be statutory sellers, the Court first recognized the long-established precedent that a seller/agent is liable under the Act.⁴⁹ The Court then explained the 1954 Amendment to the 1933 Act and its effect on Section 12: "As enacted in 1933, §12(1) imposed liability on '[a]ny person who *sells* a security'"⁵⁰ In the 1954 Amendments, the phrase was changed to "[a]ny person who offers or sells a security" The change in wording was made because the original definition of *sell*, in the definition section of the Act,⁵¹ was split into two separate definitions of *sell* and *offer*.⁵²

Since "sells" and "purchases" have obvious correlative meanings, Congress' express definition of "sells" in the original Securities Act to include solicitation suggests that the class of those from whom the buyer "purchases" extended to persons who *solicit* him. The 1954 amendment to § 12(1) was intended to preserve existing law. . . . Hence, there is no reason to think Congress intended to narrow the meaning of "purchased from" when it amended the statute to include "solicitation" in the statutory definition of "offer" alone.⁵³

The Court then determined that the test must be (1) whether there was actually a buyer-seller relationship in terms of common-law privity or (2) whether there was another party who participated in the transaction in a way that would be considered solicitation, which seemed to include some financial gain component.⁵⁴

The Court recognized that liability extends only to a person "who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner."⁵⁵ Hence, the court imposed an undefined motivation factor on the solicitation test. The Court expanded very little on this point, but the opinion seemed to indicate that the motive of the soliciting participant is a material factual question left to the fact-finder to decide when defining a statutory seller.⁵⁶

49. *Id.* at 2077. See *supra* notes 12-13 and accompanying text.

50. *Pinter*, at 2077 (emphasis added).

51. 15 U.S.C. § 77b (1982). This is the definition section of the 1933 Act.

52. The statute does not define the word *purchase*, but the word "should be interpreted in a manner complementary to *sale* which is defined in § 2(3). . . ." *Sec. Exch. Comm'n v. Guild Films Co.*, 279 F.2d 485, 489 (2d Cir.), *cert. denied sub nom.*; *Santa Monica Bank v. SEC*, 364 U.S. 819 (1960).

53. *Pinter*, 108 S. Ct. at 2077-78 (emphasis added) (citing H.R. REP. NO. 1542, 83d Cong., 2d Sess., 26 (1954); S. REP. NO. 1036, 83d Cong., 2d Sess., 18 (1954)).

54. *Id.* at 2078.

55. *Id.* at 2079.

56. *Id.* at 2082. Even though the District Court made a specific finding that "Dahl *solicited* each of the other plaintiffs," the Court stated

The Court then considered the other statutory seller tests that had been established by the lower courts⁵⁷ and quickly rejected all three of the circuit courts' statutory seller tests because they were not faithful to the language of the statute.⁵⁸ Lastly, the Court remanded the case for the lower court's determination of whether Dahl had solicited each of the other plaintiffs in connection with the offer, purchase, and receipt of their oil and gas interests for his own benefit.⁵⁹

III. ANALYSIS OF THE *Pinter* Decision

A. *The New Solicitation Test*

The new solicitation test is not significantly different from the earlier tests established by the lower courts. In *Pinter*, the definition of a statutory seller has been expanded beyond the buyer-seller relationship contemplated in the statute. The privity requirement has again been abandoned, but this time in favor of a solicitation test.

The Court failed to define the term *solicit*, stating only that the solicitor must benefit in some pecuniary way. Consequently, the lower courts will struggle with this new word, and, as they did with the word *seller*, try to create some manageable test to determine whether a person is a *solicitor*. The door is again open to the interpretational abuse of the statutory seller cases of the past. The artful pleader will merely allege solicitation instead of participation, proximate cause or position.

B. *Interpreting Securities Statutes*

Courts generally use a four-step approach when interpreting a statute and this process is applied in the securities field as well. A court first looks at the explicit language of the statute to determine its bounds.⁶⁰ The second step involves consideration of the legislative history of the statute.⁶¹ The court finds further clarification by considering

It is not clear, however, that Dahl had the kind of interest in the sales that make him liable as a statutory seller. . . . The Court of Appeals apparently concluded that Dahl was motivated entirely by a gratuitous desire to share an attractive investment opportunity with his friends and associates. . . . This conclusion, in our view, was premature."

Id. at 2082-83. (the District Court made no such findings.)

57. See *supra* notes 15-31 and accompanying text.

58. *Pinter*, 108 S. Ct. at 2079-82.

59. *Id.* at 2082-83. See *Dahl v. Pinter*, 857 F.2d 262 (5th Cir. 1988) (The Court of Appeals for the Fifth Circuit remanded the case to the district court for findings consistent with the Supreme Court's holding as described above).

60. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *Aaron v. Sec. Exch. Comm'n*, 446 U.S. 680 (1980).

61. *Ernst & Ernst*, 425 U.S. at 201.

the particular statute in light of the whole regulatory scheme.⁶² Finally, if the first three steps lead to two equally plausible interpretations of the same statute, then the court looks at the policies and purposes underlying that statute.⁶³

1. *The explicit language of section 12(1)*

"The starting point in every case involving construction of a statute is the language itself."⁶⁴ In *Aaron v. SEC*,⁶⁵ the Supreme Court even sought guidance from Webster's New International Dictionary as a tool for understanding words that had not been specifically defined by the statute.⁶⁶

While it is true that Congress enacted the securities statutes with a broad remedial purpose, they did not intend to provide a "broad federal remedy for all fraud."⁶⁷ The allegedly unlawful conduct must be prohibited by the language of a particular statute.

The express language of Section 12(1) states, "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*"⁶⁸ While the term *offer* in the first clause may contemplate an offer without relation to a sale, the latter clause, "purchasing such security from him," expressly restricts the case to a purchase and the remedy of rescission permits recovery only from the actual seller.⁶⁹ However, in *Pinter*, the Court looked at the word *offer*, found the word *solicitation* in its definition, and stopped there. The Court failed to consider the important phrase of "purchasing such security from him,"⁷⁰ which expressly limits the defendant class to the seller or transferor.

62. See, *Sec. Exch. Comm'n v. National Sec., Inc.*, 393 U.S. 453, 466 (1969).

63. See, *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 694-95 n.7 (1985).

64. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring); See, *Fed. Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349, 350 (1941).

65. 446 U.S. 680 (1980).

66. *Id.* at 696 n.13.

67. *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982) (citations omitted).

68. 15 U.S.C. § 77l (1982) (emphasis added).

69. Courts generally agree that a sale is required in order to maintain a Section 12 cause of action. See, e.g., *Bosse v. Crowell Collier & MacMillan*, 565 F.2d 602 (9th Cir. 1977); *Thomas v. Roblin Indus., Inc.*, 520 F.2d 1393 (3d Cir. 1975); *Lewis v. Walston & Co.*, 487 F.2d 617 (5th Cir. 1973); *Greater Iowa Corp. v. McLendon*, 378 F.2d 783 (8th Cir. 1967); *Surowitz v. Hilton Hotels Corp.*, 342 F.2d 596 (7th Cir. 1965), *rev'd on other grounds*, 383 U.S. 363 (1966); *Monetary Management Group of St. Louis, Inc. v. Kidder, Peabody & Co.*, 604 F.Supp. 764 (E.D. Mo. 1985); *Nick v. Shearson/Am. Express, Inc.*, 612 F. Supp. 15 (D. Minn. 1984); *Am. Nursing Care of Toledo, Inc. v. Leisure*, 609 F. Supp. 419 (N.D. Ohio 1984); *Glusband v. Fittin Cunningham Lauzon, Inc.*, 582 F. Supp. 145 (S.D.N.Y. 1984).

70. 15 U.S.C. § (1982). The Court merely interpreted the second phrase as requiring a purchase, rather than requiring privity. *Pinter*, at 2077.

The 1933 Act does not define the word *purchase*, but there is an obvious relationship between *purchase* and the words *sell* and *sold*.⁷¹ The same relationship, however, does not exist between the words *purchase* and *offer*. The Supreme Court, in *Blue Chips Stamps v. Manor Drug Stores*,⁷² distinguished a completed sale from prior activities that may lead to a sale.⁷³ Thus it seems that the inclusion of the word *offer* in Section 12 is at odds with the qualification of "person purchasing such security from him."⁷⁴

The use of the word *offer* in Section 12 poses a curious question: How can the word *offer* apply if the second phrase limits this action to only those who purchase, and rescission is the remedy?

Perhaps Congress intended the definition of *seller* to be expanded as it has been, and that is why the word *offer* was added to Section 12 in the 1954 Amendments after the word *offer* was eliminated from the definition of *sell*. That is apparently what the Supreme Court concluded in *Pinter*.⁷⁵ Unfortunately, the legislative history is limited on this section and does not address this issue.⁷⁶

The better explanation of the inclusion of the word *offer* is that when the 1954 Amendments eliminated the word *offer* from the definition of *sell*, Congress merely added the words *offers or*, on a wholesale basis, wherever the word *sells* previously appeared. Even the *Pinter* Court recognizes that "[t]he 1954 amendment to §12(1) was intended to preserve existing law, including the liability provisions of the Act."⁷⁷ If this explanation holds true, the interpretation of the Supreme Court, expanding the seller definition, is erroneous.⁷⁸ In fact, the only purpose

71. Sec. Exch. Comm'n v. Guild Films Co., 279 F.2d 485, 489 (2d. Cir. 1960). See also 1 L. LOSS, *supra* note 7, at 548.

72. 421 U.S. 723 (1975).

73. *Id.* at 725, 731, 734.

74. 15 U.S.C. § 771 (1982).

75. 108 S. Ct. at 2077-78.

76. See *supra* notes 83-86 and accompanying text.

77. *Pinter*, 108 S. Ct. at 2078. See H. R. REP. NO. 1542, 83d Cong., 2d Sess. 26 (1954); S. REP. NO. 1036, 83d Cong., 2d Sess., 18 (1954).

78. *But see*, 3 L. LOSS *supra* note 6, at 1703-04. Loss argues that there is some reason to view Section 12(1) and 12(2) differently, and he suggests a purpose for the addition of the words *offers or*, but seems to limit that purpose to the context of Section 12(2)

Yet it does not seem necessary to follow here the categorical §12(1) approach which grounds liability on an illegal offer followed by a legal sale. In §12(1) there is no alternative to that reading except to disregard both the addition of the words "offers or" in 1954 and the general realization that there is often no other effective sanction for "beating the gun." But it is possible in §12(2) to give meaning to both phrases—"offers or" and "by means of"—by grounding liability on the use of a misleading prospectus or other document which was corrected before the sale

of the inclusion of the word *offer* was to "preserve existing law."⁷⁹

The word *solicitation* is contained in the Section 2(3) definition of the word *offer* and the word *offer* is in Section 12. Notwithstanding, there is a justification for not interpreting the Section 2(3) definition in the way that the Supreme Court did in *Pinter*. The definitions in Section 2(3) of the 1933 Act are prefaced with the qualification "unless the context otherwise requires."⁸⁰ While the term *offer* does include the word *solicitation*, perhaps this is an instance where the context expressly requires otherwise.⁸¹ The context of Section 12 liability requires privity between buyer and seller, and the word *offer*, including the use of the word *solicitation*, infringes on this requirement. The scope of Section 12 liability is limited to only those situations of actual privity,⁸² and any construction of the definitions that expands the scope of Section 12 would be a case in which the context does otherwise require.

2. *The legislative history of Section 12*

To aid in the task of interpreting the express language of the statute, courts look to the relevant legislative history.⁸³ By reviewing the history of the congressional process, the courts can better interpret the purposes of the acts of Congress.⁸⁴ Although difficult, determining legislative intent is the task of the judiciary.⁸⁵

In this case, the applicable legislative history is silent on the issue of the statutory seller problem. The legislative history of the Securities Act of 1933 contains only two excerpts concerning Section 12, and neither tends to support one reading of the statute more than another.⁸⁶

79. *Pinter*, 108 S. Ct. at 2078.

80. 15 U.S.C. § 77b (1982).

81. *Id.* See also, O'Hara, *supra* note 16, at 941.

82. See *supra* notes 5-11 and accompanying text.

83. See, e.g., *Ernst & Ernst*, 425 U.S. at 201.

84. See *supra* notes 60-63 and accompanying text.

85. See *Abrams*, *supra* note 8, at 921. See also *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977) (where the language of the statute is sufficiently clear in context, the language controls and there is no need to search the legislative history).

86. See, O'Hara, *supra* note 16, at 992, n. 387

The House Committee Report discusses civil liability under § 12(2) in only two instances. At first blush the initial reference might appear to support a concept of participant liability. However, on closer reading it becomes clear that this language is attributable to the fact that the Report was discussing § 11 and § 12 in the conjunctive under the general heading of "Civil Liabilities," and that the references to participant liability refer only to actions under § 11.

H.R. Rep. No. 85, 73d Cong., 1st Sess., 9 (1933) states

Sections 11 and 12 create and define the civil liabilities imposed by the act and the machinery for their enforcement which renders them practically valuable. Fundamen-

It is well accepted, however, that Section 12 was adapted from common law rescission.⁸⁷ That proposition lends great support to a narrow reading of the statute, in which privity would be a prerequisite to the imposition of liability.

3. *The federal regulatory scheme*

The third step of statutory interpretation is the consideration of the entire regulatory scheme of which the statute is a part.⁸⁸ "[T]he interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen"⁸⁹ This is especially relevant when the statute is incorporated within an elaborate statutory scheme such as the securities laws.

The legislative history of the 1933 and 1934 Acts is sparse, at best. In viewing the statutory language of Section 12, a portion of the legislative intent can be surmised simply by viewing the individual statute as a part of the whole act.⁹⁰ The construction of the securities acts is viewed in whole, because in the absence of contrary intent, the legislature is presumed to have intended that an act be interpreted as a unified whole.⁹¹

In *Pinter*, the Court extended liability to a solicitor, using a statutory reading of the definitions, and included as part of its analysis an

tally, these sections entitle the buyer of securities sold upon a registration statement including an untrue statement or omission of material fact, to sue for recovery of his purchase price, or for damages not exceeding such price, those who have participated in such distribution either knowing of such untrue statement or omission or having failed to take due care in discovering it. The duty of care to discover varies in its demands upon participants in security distribution with the importance of their place in the scheme of distribution and with the degree of protection which the public has a right to expect

The Committee emphasizes that these liabilities attach only when there has been an untrue statement of a material fact or an omission to state a material fact in the registration statement or the prospectus—the basic information by which the public is solicited. All who sell securities with such a flaw, who cannot prove that they did not know—or who in the exercise of due care could not have known—of such misstatement or omission, are liable under [S]ections 11 and 12.

It becomes apparent from the language that the participant liability spoken of is tied only to Section 11 and not to Section 12.

87. See *supra* notes 5-11 and accompanying text.

88. *Ernst & Ernst*, 425 U.S. at 206; *Sec. Exch. Comm'n v. Nat'l Sec. Inc.*, 393 U.S. 453, 466 (1969).

89. *Sec. Exch. Comm'n v. Nat'l Sec.*, 393 U.S. at 466.

90. See, *Sec. Exch. Comm'n v. Sloan*, 436 U.S. 103, 112-14 (1978); *Ernst & Ernst*, 425 U.S. at 206-11.

91. *Abrams*, *supra* note 8, at 903 n.143, (citing 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 46.05, 46.06, 47.01 (C. Sands 4th ed. 1984)).

equity argument: “[I]t is fair to say that the buyer ‘purchased’ the security from [the solicitor] and to align [the solicitor] with the owner in a rescission action.”⁹² In light of the statutory scheme established by the 1933 and 1934 Acts, the equity spoken of here is superfluous. Those soliciting participants are held liable under other statutes⁹³ and to include them as sellers in this case is not necessary in order to establish liability.

Section 106 of the 1934 Act⁹⁴ is most susceptible to dilution because of the liberal reading of Section 12. In a footnote,⁹⁵ the *Pinter* Court expressly denied the application of its decision to Section 12(2), even though “[m]ost courts and commentators have not defined the defendant class differently for purposes of the two provisions.”⁹⁶ The language of Section 12(2) is identical to the language of Section 12(1) in

92. *Pinter*, 108 S. Ct. at 2079.

93. Other statutes establish liability for participants. *See, e.g.*, Section 10b of the 1934 Act, 15 U.S.C. § 78j(b)(1982) (extending liability to “any person”); Section 9, 15 U.S.C. § 78i (1982) (extending liability to “any person” acting with any of a number of stated purposes); Section 11, 15 U.S.C. § 77k (1982) (extending liability to the issuer and every other person who signed the registration statement, the issuer’s principal officers and its directors or partners, persons named with their consent in the registration statement as being or about to become directors or partners, persons named with their consent as experts, and every underwriter); Section 17, 15 U.S.C. § 77q(a) (1982) (extending liability to “any person” who violates the statute). *See also* the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 (1982) (extending liability to persons who, for compensation, engage in the business of advising others, either directly, through publications or writing, concerning the value of securities or advising investment in, or purchasing or selling of securities).

94. 15 U.S.C. § 78j(b) (1982) (hereinafter referred to as Section 10(b)). Section 10(b) provides

It shall be unlawful for any person, directly or indirectly . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The SEC then promulgated Rule 10b-5, in 1942, that is codified at 17 C.F.R. § 240.10b-5 (1987) which states

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or,

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. Section 240.10b-5.

95. *Pinter*, 108 S. Ct. at 2076 n.20.

96. *Id.*

its definition of the defendant class.⁹⁷ Moreover, the only distinction between the two sections is that Section 12(1) deals with violations of section 5 registration statements while Section 12(2) is an anti-fraud provision.

According to the holding in *Ernst & Ernst v. Hochfelder*,⁹⁸ the first step to interpreting the securities acts is to look to the language of the statute. The second step would be to look at the legislative history to determine intent.⁹⁹ The language of Sections 12(1) and 12(2) is identical, and even contained in the same subsection. There is no justification for the Supreme Court to interpret these two subsections differently, especially in light of the identical legislative history of the two subsections. In either case, the liability granting clause is the same and, if the language of the statute is given the same interpretation, it would pose some interesting problems for the Court.

Section 12(2) is an anti-fraud provision which uses language similar to that of Rule 10b-5.¹⁰⁰ Under Rule 10b-5, the plaintiff is required to prove reliance¹⁰¹ as well as (and perhaps more importantly) scienter.¹⁰² However, Rule 10b-5 does not limit the defendant class and that is the purpose of the requirement of reliance and scienter. This burden of proving reliance and scienter is significant¹⁰³ and many plaintiffs' lawyers try to use Section 12(2) to avoid such a burden.¹⁰⁴ Under Section 12(2), the plaintiff has a cause of action that is basically one of strict liability. There is no burden of showing reliance¹⁰⁵ or scienter.¹⁰⁶ Section 12(2) imposes liability on a seller for negligence without reliance, a much lesser burden than Rule 10b-5.¹⁰⁷

If the Court's interpretation of the language of Section 12 is applied to Section 12(2) (which is proper because the language is the same), then the cause of action under Rule 10b-5 will be greatly diluted. Plaintiffs will bring, and win, causes of action for mere negli-

97. 15 U.S.C. § 77l (1982) ("Any person who—(1) offers or sells a security . . . shall be liable to the person purchasing such security from him . . .").

98. 425 U.S. at 197 (1976).

99. *Id.* at 201.

100. Compare notes 6 and 94 *supra* and accompanying text.

101. See 3 A. BROMBERG & L. LOWENFELS, *SECURITIES FRAUD AND COMMODITIES FRAUD* § 8.6(1) (1983). *But see*, *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152-53 (1972).

102. *Ernst & Ernst*, 425 U.S. at 193-94.

103. 3 L. LOSS, *supra* note 7, at 1763-97.

104. Kaminsky, *supra* note 34, at 231.

105. *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1034 (2d Cir. 1980); *Alton Box Bd. Co. v. Goldman, Sachs & Co.*, 560 F.2d 916, 923 (8th Cir. 1977).

106. *Franklin Sav. Bank of N.Y. v. Levy*, 551 F.2d 521, 526-29 (2d Cir. 1977).

107. For a complete comparison between Section 12(2) and Rule 10b(5) see 3 A. BROMBERG & L. LOWENFELS, *supra* note 101, at § 8.4-8.6 (1983); 3 L. LOSS, *supra* note 7, at 1702-04.

gence without reliance against those that Rule 10b-5 was designed to encompass. The additional hurdle of privity would be absent and the new solicitation test, if applied to Section 12(2), could dramatically dilute the cause of action under Rule 10b-5.¹⁰⁸

4. *Policy considerations*

When a court has examined a statute's language, its legislative history, and the regulatory scheme, it has exhausted its interpretive powers, even in the case of a remedial statute.¹⁰⁹ However, the Supreme Court has stated that "it is proper for a court to consider . . . policy considerations in construing terms in [statutory construction of Securities Acts]."¹¹⁰

The *Pinter* Court stated, as one policy consideration, that its decision "furthers the purposes of the Securities Act—to promote full and fair disclosure of information to the public in the sales of securities."¹¹¹ The solicitation stage may be the most critical to the flow of information and perhaps the stage at which the investor is most likely to be injured.¹¹² Also, brokers and other solicitors are in perhaps the best position to control the flow of information.¹¹³

These policy considerations, however, do not give the Court reason to "infer that Congress intended solicitation to fall under the mantle of § 12(1)."¹¹⁴ Policy considerations are generally used in securities cases only in the event of two equally credible interpretations of the statute. When the language of the statute, the legislative intent and the statutory construction are ambiguous and permit two equally plausible interpretations, then policy considerations can swing the balance one way or the other.¹¹⁵ In a Section 12 case, the language of the statute and its history are absolute and these policy arguments cannot alter that conclusiveness. Policy considerations are not an issue in a Section 12 case.

108. A comparison of Section 11 with Section 12 provides a similar result in that Section 11 is also greatly diluted by the expanded seller definition of Section 12.

109. *Blue Chip Stamps*, 421 U.S. at 727-36.

110. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 694-95 n.7 (1985).

111. *Pinter*, 108 S. Ct. at 2078.

112. *Id.*

113. *Id.*

114. *Id.*

115. See, *Abrams*, *supra* note 8, at 911-22. See also *Blue Chips Stamps*, 421 U.S. at 727-37 n.8 (the majority refused to accept Justice Blackmun's policy arguments in the face of the language of the statute).

C. *Agency Theory May Be the Explanation*

Courts and commentators agree that the transferor of title is considered a seller under Section 12.¹¹⁶ They also agree, for the most part, that an agent may be considered a *seller* under certain agency principals.¹¹⁷ The *Pinter* Court seems to stretch this exception beyond agency to solicitation. This casenote has argued that the solicitation test is an improper tool for determining whether a party to a security transaction is a seller.

Perhaps the new solicitation test established by the Court is meant to extend liability only in the event of a *de facto* principal/agent relationship. The Court's test even suggests that commissions, or other monetary gain, are an element of the solicitation test.¹¹⁸ As justification for its solicitation test, the Court stated that "[t]here is authority at common law . . . for granting a plaintiff rescission against a defendant who was not a party to the contract in question, in particular, against the *agent* of the vendor."¹¹⁹

It seems that the only real justification for the test is a principal/agent relationship under common-law principals of agency. However, if that is the objective of the Supreme Court, then such a mandate should be explicitly stated. By using a new test that has yet to be interpreted by lower courts, the Supreme Court has left the issue open to the lower courts to expand liability, rather than limiting the lower courts with the established doctrine of agency.¹²⁰ However, if the principal/agent theory is adopted by the lower courts, the commentators and the court will be in agreement on the question of liability under Section 12.

IV. CONCLUSION

The *Pinter* Court was faced with a doctrine of law that was full of conflicts in the lower federal courts, and replete with overly-expansive tests. The Court reconciled the lower courts with an initial approach of using the language of the statute, which was absolutely correct. The application of statutory construction, however, was misused. The Court failed to consider the entire statute and applied a definition that per-

116. See *supra* notes 5-11 and accompanying text.

117. See *generally*, 3 L. LOSS, *supra* note 7, at 1715; W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* § 130(B) (1964).

118. See *supra* note 56.

119. *Pinter*, 108 S. Ct. at 2079 n.23 (emphasis added).

120. To date, most cases applying *Pinter* can be reconciled using an agency theory. See, e.g., *Schlinke v. Seafirst Corp.*, 866 F.2d 935 (7th Cir. 1989); *Capri v. Murphy*, 856 F.2d 473 (2nd Cir. 1988); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988); *Laven v. Flanagan*, 695 F.Supp. 800 (D. NJ 1988) (interpreting *Pinter* test as agency only with little emphasis on solicitation); *In re Prof'l Fin. Management, Ltd.*, 692 F.Supp. 1057 (D. Minn. 1988).

haps was unfounded and unnecessary. An application of simple agency theory would have yielded an appropriate result without opening the doors to lower court interpretation. Now, the resulting interpretation of this new test by the lower courts, with their propensity to expand liability as demonstrated in past cases, may lead to even more confusion and conflict. The *Pinter* decision may also lead to increased dilution of the other sections within the 1933 and the 1934 Act, especially Rule 10b-5. If the Court wanted to establish a simple agency theory in this case, it should have been explicit with such a mandate so that the Court could better predict the administration of the rule in the lower courts.

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