

1992

H and B Carriers Capital General Corporation v. Utah Securities Division and the Department of Business Regulation : Petition for Writ of Certiorari

Utah Supreme Court

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BRIEF.

970180

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

In the Matter of the Following
Issuers, their Securities,
Affiliates or Successors,
and/or Entities subsequently
organized by them, including
H & B Carriers, Inc., et al.,
Capital General Corporation,

Petitioners/Appellants

vs.

Utah Securities Division, and the
Department of Business Regulation,

Respondents/Appellees.

PETITION FOR WRIT OF
CERTIORARI

Docket No. 920180
Court of Appeals No. 910196-CA
Priority No. 13.

PETITION FOR WRIT OF CERTIORARI OF FINAL DECISION OF THE
UTAH COURT OF APPEALS

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TABLE OF AUTHORITIES

STATUTES

Note: All statutory references are to the Utah Code Annotated (1953, as amended) as it existed in 1987 and 1988.

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Appellant, by and through counsel, pursuant to Rules 43 and 46, Rules of Appellate Procedure, files this Petition for Writ of Certiorari.

Petitioners present three issues for review:

Although such action of the Division was upheld by the Court of Appeals, not only is there no authorization for such in the provisions of the Utah Uniform Securities Act, but to the contrary the remedy/penalty provisions of the Act are

directed only at punishing violators and not the current security holders who may have purchased from an illegal seller. It is true that the suspension order does not specifically name the many individual security holders, but the effect of suspending all transactional exemptions nevertheless effectively prevents anyone from using them, now or at any time in the future.

2. Does Section 61-1-7, U.C.A. (1953, as amended) which prohibits the sale of securities without registration also prohibit gifts of securities without registration, especially in light of the case of Andrews v. Chase, 49 P.2d 938 (Utah 1935)?

The Court of Appeals has answered "yes" to this question notwithstanding (1) the plain meaning of the words gift and sale, and (2) the case of Andrews v. Chase, a case on all fours with this case as to the specific issue, in which this Court held that the statute prohibiting sales of securities without registration specifically did not prohibit gifts.

3. Was the affirmation by the Court of Appeals of the imposition of sanctions under Rule 11, Utah Rules of Civil Procedure, a significant departure from the usual and accepted course of judicial proceedings in light of Appellant's arguments that the Andrews case is controlling, that there is no authority in the Utah Code for the action taken by the Appellee in issuing and upholding the suspension order, and Appellant's other arguments?

At least three valid reasons, as will be discussed below, show that the Appellant's arguments in the District Court were warranted by existing law and were not interposed for any improper purpose. For the Court of Appeals to rubber stamp the sanctions imposed by the District Court is an improper deviation from the usual and accepted course of judicial proceedings.

STATEMENT OF JURISDICTION

Review is sought of a February 10, 1992 decision rendered by the Utah Court of Appeals. A Petition for Rehearing was filed on February 24, 1992. The Court of Appeals denied the petition on March 9, 1992. The Utah Supreme Court has jurisdiction to review

March 9, 1992. The Utah Supreme Court has jurisdiction to review this matter by a Writ of Certiorari pursuant to Section 78-2-2(5), Utah Code Annotated, (1953, as amended).

CONTROLLING STATUTES

Appellant believes the following statutes and rules to be controlling in this matter. However, due to their length, they will be printed as part of the addendum (All statutory references are to the Utah Code Annotated (1953, as amended)):

Section 61-1-7	Section 61-1-13(15)(c)(ii)
Section 61-1-14(2)	Section 61-1-20
Section 61-1-14(3)	Rule 11, Utah Rules of Civil Procedure

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Appellant requests the issuance of a Writ of Certiorari for the purpose of reviewing the decision of the Utah Court of Appeals upholding the order of the Utah Securities Division suspending all Section 61-1-14(2), U.C.A. transactional exemptions applicable, or which at any time thereafter may become applicable, to trades by the securities holders of H & B Carriers, Inc., its affiliates and successors, and 46 other corporations.

B. COURSE OF PROCEEDINGS

On December 1, 1987 the Utah Securities Division brought a petition pursuant to the Utah Uniform Securities Act, 61-1-14(3), U.C.A. to suspend all Section 61-1-14(2) transactional exemptions applicable, or which at any time thereafter may become applicable, as to the securities of H & B Carriers, Inc. and 46 other Utah corporations because the securities had been gifted to members of the public without prior registration. The agency asserted that such gifts violated the registration provisions of the Utah

An order of suspension was issued on December 1, 1987 with respect to the securities of these companies. Appellant Capital General Corporation as an interested party, being the party who made the gifts of stock, requested that the matter be set for hearing. Hearing was held on January 20, 1988 at which time evidence and testimony was offered and received (R. at 8).

An Administrative Law Judge affirmed the December 1, 1987 suspension order on April 15, 1988. The Executive Director of the Department of Business Regulations approved the affirmation on April 27, 1988. The Securities Advisory Board approved the affirmation on April 26, 1988 (R. at 8-14). Thereafter, Appellant filed a timely petition for review in the Third District Court for Salt Lake County (Petition for Review, R. at 2-5).

Thereafter, but prior to action being taken by the District Court, a related case was decided by the Utah Court of Appeals which affirmed a suspension order in a prior but related case, Capital General Corp. v. Utah Department of Business Regulations, 777 P.2d 494 (Utah Ct. App, 1989), cert denied, 781 P.2d 878 (Utah 1989), (hereinafter referred to as "Amenity", the name of the company whose securities trading exemptions were at issue in that case).

The District Court upheld the Final Order of the Appellee on September 10, 1990 (R. at 101-107). A Motion for New Trial was filed on September 20, 1990 (R. at 113-114) and that motion was denied on November 20, 1990 (R. at 134-136). Notice of Appeal was filed on December 10, 1990 (R. at 156-157). The Utah Court of Appeals affirmed the Securities Advisory Board on February 10, 1992. A Petition for Rehearing was denied on March 9, 1992.

C. STATEMENT OF THE FACTS

Appellant Capital General Corporation, at various times in and prior to 1986, with others, incorporated the 47 corporations at issue. In 1986 Appellant made gifts of the stock of these corporations to various individuals with whom Capital General had been associated. (R. at 8). None of the securities which were given away were registered with the Utah Securities Division, nor was registration sought. Further, no exemptions from registration requirements were sought or issued with respect to the gifting of those securities (R. at 8-9).

Prior to making the gifts of stock, the president of Capital General inquired of the Utah Securities Division as to whether gifts of stock were exempt from registration. He also checked with the Securities Division of the State of Nevada in addition to obtaining various legal opinions. He was always advised that gifts of stock need not be registered since such was required only for sales of stock. (Evidence file, Transcript of 1/20/88 Hearing at 66-76).

Capital General relied on this advice and didn't register the stock but made the intended gifts to many individuals with whom the company had dealt. No consideration was ever received or expected in exchange for the gifts of stock. The gifts were made without any obligation on the part of the recipients (Evidence file, Transcript of 1/20/88 Hearing at 66-76).

The President of Capital General also testified at the initial hearing in January 1988 that he had received "no-action" letters from eleven different states, which indicated that there were no rules against gifting unregistered stock in those states.

(Evidence file, Transcript of 1/20/88 Hearing at 76).

Based upon all of these investigations, Capital General was confident that no registration requirements would be violated in making the gifts. (Evidence file, Transcript of 1/20/88 Hearing at 70-71). However, the Utah Securities Division later took the position that the gifts were sales in violation of Section 61-1-7, U.C.A. and suspended all trading exemptions that were currently applicable or that forever after may become applicable. The order effectively and perpetually stopped all further trading of the stock of these companies, whether or not statutorily defined exemptions were applicable or ever would become applicable.

ARGUMENT

Point One

A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS IGNORED THE CLEAR MEANING OF A STATUTE AND THUS SANCTIONED AN INVALID USE OF A STATUTE

The Court of Appeals upheld the suspension order of the Appellee. In this case, as well as in the Amenity decision, the lower courts appear to have totally misunderstood the difficulty presented by what the Utah Securities Division has done in suspending all transactional exemptions in the securities of the 47 companies. The scope of the suspension order goes far beyond the statutory authority given the Division and clearly is not a proper remedy for a violation of Section 61-1-7, as claimed.

It is critical that the Court understand the regulatory scheme of the Securities Act. Section 7 prohibits sales of securities unless they are registered or exempt from registration. Section 14(2) lists 17 transactional exemptions, that is, 17 specific transactions that are exempt from registration, for example, a

sale that does not involve offering to the public. By examining said 17 exempt transactions (subparagraphs (a) - (q) of Section 61-1-14(2)) it is clear that the legislative intent was to exempt them for the reason that the public did not need the protection afforded by registration in such situations.

Appellee found Appellant to have sold securities to the public without registration or exemption and therefore to have violated Section 7. Although this is contested, let us assume *arguendo* that such was the case, that is, in 1986 Appellant sold unregistered securities in the 47 companies to members of the public in violation of Section 7. Having learned of this violation, the Utah Securities Division suspended all applicable Section 14(2) transactional exemptions, or those which may at any time in the future become applicable, respecting the securities of those companies. The effect of this is that if you happened to be one who purchased the illegally sold stock, the Division's order stops you from ever reselling it to anyone else, even if one or more of the 17 exempted situations apply or later becomes applicable. There is nothing in Section 14 or anywhere in the Securities Act to indicate that the legislature could possibly have intended such a bizarre result. Whether stock was sold illegally in the first instance should have nothing to do with the rights of current stock holders to avail themselves of statutorily granted exemptions, particularly when it is obvious that the types of transactions described in Section 14(2) were carved out as exemptions from registration because registration would serve no useful purpose.

Nevertheless, Appellee claimed authority for its suspension

order in Section 14(3), which section does indeed grant the Division power to "deny" or "revoke" any of said 17 exemptions following notice and a hearing. The crucial questions that emerge are: **Under what circumstances does it have power to do that? What are the criterion?** Obviously the legislature did not intend for the Division to have power to revoke or deny exemptions at its pleasure, without any criteria, or it would not have required notice and a hearing.

The applicable section, Section 61-1-14(3), unfortunately does not list any criteria. As a result one must obtain this information by considering all of the relevant sections of the Act as they interact with each other in the regulation of securities. Since a hearing is required, it is clear that certain findings must be made at the hearing before any power can be invoked. Appellant's position is that in order to "revoke" or "deny" an exemption, that finding must establish a violation of Section 14 by the person seeking the exemption and with respect to the particular exemption sought. Nothing in the statute allows a blanket suspension of all exemptions, those which may become applicable in the future, nor especially prevention of parties who have had nothing to do with any violations from utilizing applicable exemptions.

There are five reasons, from the provisions of the Act, that conclusively establish Appellant's said position:

1. There is nothing in Section 14(3) that states or suggests that it was designed to be as all encompassing and far reaching as to allow a suspension of all exemptions, based on a violation of a different section of the Act (by different parties even!).

2. One might well ask why the drafters of Section 14(3) would set up the hearing requirement and not list the criteria. A reading of the entire Section 14 would suggest that it was most probably because they assumed the reader would naturally understand that the remedy portion of the section, i.e. subparagraph (3), had direct relation to and was dependent upon the substantive portions, i.e., the descriptions of the available exemptions in subparagraphs (1) and (2). In other words, the statutory scheme of the drafters was that if someone is erroneously claiming a particular one of the 17 exemptions, the way to find out is to set up a hearing and deny it if the error is established at the hearing. Nowhere in Section 14 or elsewhere in the Act is there language to imply or suggest anything beyond that.

3. That the remedy of Section 14(3) is limited to Section 14 applications is further established by the wording of Section 7, the section claimed to have been violated by Appellant. Under Section 7, securities can be legally sold only if they are registered or the transaction is exempt, i.e., if the transaction is one of those described in Section 14(2)(a) through (q), mentioned above. The either/or posture of Section 7 makes it clear that the Section 14 exemptions apply only to unregistered stock. Yet the opinion of the Court of Appeals amounts to just the opposite, i.e., the Court has in effect stated that the exemptions of Section 14 that may otherwise be applicable must be suspended because this stock is in the hands of the public in an unregistered condition. Again, it is seen in the specific wording of the 17 exempted types of transactions that the very purpose of

Section 14 and the exemptions is to allow people with unregistered stock, regardless of how they obtained it (but assuming for the sake of argument that they are innocent, as at least 99% of the stockholders in the present matter certainly are), to dispose of it under the circumstances there described. And these circumstances are those in which the legislature has deemed that the benefits of registration are not needed. It appears that the Court of Appeals may be of the opinion that because the several hundred stockholders received their unregistered stock in transactions in which the Appellant violated Section 7, that somehow that has tainted the securities for all time, and that is why it is justifiable to allow the blanket suspension. If so, this is an unsupported supposition inasmuch as no provision anywhere in the Act, states, suggests or implies anything close to such a concept. In fact the specific circumstances described in the 17 described exempted transactions are greatly in conflict with such a concept, i.e., in every exempted circumstance described, the basis for the exemption involves only the issues of protection to the new purchaser and not whether some prior purchaser in the chain had bought it without the benefit of registration or other exemption.¹

¹Section 14(2)(j)(ii) may at first glance appear to be an exception to this since it specifically restricts the application of the (j) exemption if the existing security holders acquired their shares in a transaction in violation of Section 7. Not so, however, because the restriction applies only to a new issue by the issuer and not to resale by the security holders. Nevertheless, this provision is highly significant in the present discussion because it corroborates completely Appellant's position above, to-wit: Since it specifies a particular fact situation that would defeat that particular exemption, it follows that the same fact situation is not the criteria that would defeat the other 17 exemptions. That specific fact situation is also the one found by the Division in the present case, i.e., that securities were

The logic of this is very compelling. After all, what does the fact that John Doe may have been duped into purchasing an unregistered or unexempted security have to do with whether he should be allowed to sell it sometime in the future provided that he complies with the law.

4. It is significant to note that Section 14(3) grants power to "deny" or "revoke" any exemption, but does not grant power to "suspend." Nor does it grant this power with respect to "any and all exemptions," but only with respect to "any exemption." Granted, it can be argued, within the meaning of proper word usage, that if one is given power to act with respect to "any" he can add up all the "anys" so that he can act with respect to "all." However, when all three words in the provision are considered together, it is clear what the legislature had in mind, and it was not a blanket suspension of all. The word "deny" is commonly used in response to a request. "Revoke" is to cancel something that has already been effectuated. It seems that the Division must have realized this when it issued its order and therefore did not use the statutory language of "deny" (because nothing had been requested) or "revoke" (because no one had attempted to use any of the 17 exemptions so that such could be revoked), and instead just went ahead and issued a blanket suspension to be effective forever in the future (which power is

received in a transaction in violation of Section 7. Thus, by the wording of the statute itself, we see that a finding of a Section 7 violation in the distribution of the stock cannot itself be used as the criteria for denying or revoking an exemption. And with that falls the Appellee's whole case, as the finding that the Appellant made the illegal distribution is not relevant to the Section 14 exemptions unless under (j), Appellant were to attempt to make a like distribution to the same shareholders, and in that event, the (j) exemption could legitimately be denied following a hearing.

not authorized in the statutory language). Thus, it is seen why the drafters used "any" instead of "any and all" or "all," as it was contemplated that an individual seeking the benefits of Section 14 exemptions certainly wouldn't attempt to rely on all 17 (because the factual circumstances described in each are too dissimilar) and that a revocation or denial hearing pursuant to 14(3) would necessarily be specific as to the particular exemption claimed.

5. In the paragraphs above, Appellant has given a number of reasons based on the specific applicable statutory language in support of its position. These are all bolstered by the fact that acceptance of Appellant's position does not leave the Division without adequate remedy. Sections 20 and 21 grant authority to the Division to bring about very severe penalties for selling stock without registration or exemption, including such things as rescission, fines, disgorgement of profits, injunctions and criminal penalties. How could it be more clear that this is the way the legislature intended that violations of the Act, such as sales in violation of Section 7, would be punished? Somebody makes an illegal sale - so maybe they'll have to disgorge the profits or have it rescinded, etc. It makes a lot of sense. Sections 20 and 21 start out with words to the effect that these are the remedies the Division has for "a violation of this chapter." The legislature's specifying such in these sections but not in Section 14(3) sends a clear message that such was not intended to apply to 14(3) also.

In the companion case, Amenity, the Court of Appeals appeared to recognize the correctness of Appellant's above argument with

respect to why Section 14(3) doesn't give the necessary authority, but the Court concluded that it was harmless error for the Division to have proceeded under Section 14 instead of Section 20. Appellant would have no problem with the harmless error argument if Section 20 granted authority for the blanket/forever suspension, i.e., Appellant would not seek to take advantage of a mere technicality of the Division inadvertently proceeding under the wrong section. However, the problem is that there is no language in Section 20 to empower the Division to order the blanket/forever suspension either.

The Court of Appeals attempts to justify its ruling that Section 20 provides enabling power by pointing out that Section 20 provides that when someone has violated the Act, the Division is empowered to either issue a show cause order to cease and desist or seek a district court injunction. It is respectfully submitted that this constitutes power to order that the violation stop, and nothing more. It is simple: If a person has violated the Act (e.g., selling unregistered securities to members of the public), then this provision quoted by the Court empowers the Division to enjoin further violations in a court action, or enter its own cease and desist order with respect to such. That's all. It authorizes nothing more. It says nothing about any power to suspend trading of the stock already purchased or received by the stockholders, i.e., the victims of the Section 7 violator's illegal sales. And as alluded to above in the discussions under Section 14, no valid reason exists for such, i.e., the statutory scheme throughout is aimed at stopping or punishing the violator and helping the victim. It is hard to imagine how the legislature

could have more clearly spelled out that Section 20 remedies are aimed solely at the perpetrator and have no affect whatsoever on securities after the illegal seller has sold to the victims. It goes against all logic and accepted rules of English usage to conclude, as did the Court of Appeals, that because the Division has power to order the Section 7 violator to cease making illegal sales, it therefore has power to issue an eternal and all reaching suspension order preventing victims of prior illegal sales (and other stockholders who were not victims) from utilizing Section 14 exemptions with respect to their stock.

Point Two

A WRIT OF CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT A PRIOR DECISION OF THIS COURT, NAMELY ANDREWS V. CHASE, 89 Utah 51, 49 P.2d 938 (1935).

The Court of Appeals upheld the ruling of the Appellee that the Appellant's gifts of stock were in fact sales, and hence were in violation of the registration requirements of Section 61-1-7. Although no one questioned that the transfers of stock without consideration were in fact gifts in the normal sense and usage of the word, the lower court has nevertheless ruled them to be sales on the theory that by making the gifts Appellant put itself in a better position to realize subsequent value from the corporation because of thereafter having a public company. In doing so, it ignored the case of Andrews v. Chase, 49 P.2d 938 (Utah 1935), the holding of which is controlling on this issue.

Andrews involved the exact same question as this case on the gift/sale issue. In that case, as here, stock was gifted to members of the public, and it was claimed that such gifts violated the securities act then in effect. That act was basically

identical to the present act in that it prohibited sales of securities without registration (and also defined sale as a disposition for value). The Supreme Court rejected the claim that the gifts were sales and held there was no violation of the Act even though it was pointed out that the gifted stock in that case was assessable stock which amounted to a direct value to be received from the giftees if they paid their subsequently levied assessments. The Court followed time honored principles of statutory construction and held:

The stock here involved is not one of the kinds of securities which are exempt from the provisions of the Securities Act. Appellant does not contend otherwise. What he does contend is that the Act merely regulates the sale of securities and has no application whatever to securities which are given away. It will be observed that "sale or sell" is defined as every disposition for value. The words "for value" are descriptive of, and constitute a limitation on, the kind of transactions which the Securities Act was intended to regulate. It is a cardinal rule of the construction of a statute that, when possible, effect must be given to all the language the legislature used in the Act. If the legislature had intended the words "sale or sell" should include "gift or give," it would not have limited the former words to such dispositions, or attempted disposals of securities as are made for value... **Had the law making power intended that the Act should apply to gifts or securities, it would have been a simple matter to have so provided.**

49 P.2d at 941 (Emphasis added).

Appellant submits that that language and holding of Andrews have never been overruled. It is still valid and should remain such. It applies directly to and is controlling in this case.

The Court of Appeals' opinion does not respond specifically to Appellant's arguments that Andrews is controlling, but relies on its holding in the companion case, Amenity, (which does attempt to distinguish Andrews and give reasons for not following it) in holding that Appellant's gifts of stock were in reality sales and therefore prohibited by the Act. In attempting to distinguish

Andrews, the Court of Appeals states that its most "compelling" reason for not following it is that it claims that it was overruled by the legislature by the subsequent enactment of Section 61-1-15(c)(ii), stating, "a purported gift of assessable stock is an offer or sale..." Amenity at 497, footnote 3.

Granted, it is obvious that the quoted section was enacted to overrule the result in Andrews should someone again attempt to obtain funds from the public from assessments of assessable stock he had gifted to them. Obviously the legislature didn't want stock to be given away with those kinds of strings attached, i.e., the giftees having to pay the assessments or lose the gift (which is tantamount to a "sale" though not really a sale without the subsequent additional language in the statute).

However, it doesn't follow that the subsequently enacted language was intended to, or in fact did, overrule any other part of Andrews. Rather, this language shows that the holding of the case and the sound basis on which the case was decided - that words in a statute mean what they say, that a gift really isn't a sale without a specific statutory declaration that it is - has been left totally intact inasmuch as the new language was limited only to "purported gifts of assessable stock." Andrews remains fully applicable for all other kinds of gifts. And it should also be pointed out that not only were Capital General's gifts not of assessable stock, but they were real and bona fide gifts and not "purported" ones.

Further, Appellant is concerned with the Court of Appeals' reasoning at the end of its discussion where it attempts to distinguish the facts of Andrews on a present benefit vs. hope of

future benefit theory. The Court claims that the assessable stock situation is only a hope in the future, whereas in the present case, the gifts create an immediate and certain benefit to the giver. In the first place, on the particular point raised the facts are not distinguishable as claimed, that is, in both cases the gifts were made to large numbers of the public thereby creating public companies. There really is no difference between the two cases on this point. Second, the premise is wrong, i.e., the claimed "immediate actual benefit" of a public company is in reality only a potential for benefit, as everyone in the securities business knows, and in fact, the likelihood of payment of assessments from the owners of the assessable shares would probably be a greater likelihood.

And finally, though the cases are not distinguishable on the point mentioned in the Court of Appeals' opinion, they are distinguishable in that the benefit flows directly from the giftees in the Andrews case, whereas the potential benefits in the situation in the present case become reality only upon the further efforts of the givers (infusion of assets, work to make the company viable, etc.). In other words, the only truly distinguishing feature between Andrews and the present case would have the exact opposite affect to what was opined by the Court of Appeals, i.e., the gift in which the giftee has to pay something to retain it (assessable stock) more closely resembles an actual sale rather than the other way around (non assessable stock). But despite the close resemblance in Andrews between a gift of assessable stock and a sale, since the legislature had not required the registration of gifts, the Utah Supreme Court wisely

and judiciously refused to read words into the legislative enactment.

The Court of Appeals erred in going beyond the meaning of the plain words of the statute and by ignoring the holding of Andrews.

For this reason, this Court should grant the petition for a Writ of Certiorari.

POINT THREE

A WRIT OF CERTIORARI SHOULD BE ISSUED BECAUSE BY UPHOLDING THE SANCTIONS OF THE DISTRICT COURT, THE COURT OF APPEALS IGNORED THE STANDARDS REQUIRED BY RULE 11, UTAH RULES OF CIVIL PROCEDURE

The Appellant had at least three good reasons for continuing its appeal from the final order of the Utah Securities Division, despite the outcome of the Amenity decision.

First, the Appellant believed that the District Court and the Court of Appeals erred in concluding that the Andrews decision was no longer valid. It was entirely proper to continue the appeal in light of the argument that Andrews controls in this case. Appellant had and has no other options than to convince this Court to issue a Writ of Certiorari to declare that its decision in Andrews is still valid law.

Second, relative to the issue of the statutory authority of the Appellee to issue the suspension order, in Amenity, the Court of Appeals indicated that even if Appellant is correct in stating that Section 61-1-14(3) does not give the Utah Securities Division authority for the suspension, Section 61-1-20 does. This was the first time anywhere that it was suggested that Section 61-1-20 gave authority to the Appellee to suspend Section 61-1-14(2) transactional exemptions. However, as discussed in Point One above, this is not a correct conclusion. Hence, in this case, at

the District Court level, Appellant had its first opportunity to argue that neither section gives the necessary statutory authority sought. Amenity was decided after this appeal in the District Court was initiated, but before the ruling of the District Court Judge. Appellant's argument was well grounded in fact and warranted by existing law, and at worst was a good faith argument for modification of existing interpretation of the law in light of Amenity.

Finally, Appellant argued that the gifts of stock were good faith gifts and introduced evidence at the January 20, 1988 hearing. The Order of the Appellee in effect concluded, however, that if the magnitude of the gift is significant enough to create a public company by virtue of gifts of unregistered stock, then the gifts per se cannot qualify as a "good faith gifts" regardless of actual good faith and thus are subject to registration. (Record at page 13). However, if this happens, then the clear meaning of the words "good faith gift" in the statute is lost and the question of whether or not a gift of stock was made in good faith takes on a meaning that has nothing to do with what the statute says or what people commonly understand and accept good faith to mean.

Appellant sought to have the District Court review this issue, particularly in light of evidence, to establish Appellant's good faith in making the gifts. For example, before making the gifts of stock, the Appellant's president inquired of the Utah Securities Division as to whether gifts of stock were exempt from registration. He also checked with the Securities Division of the State of Nevada in addition to obtaining various legal opinions.

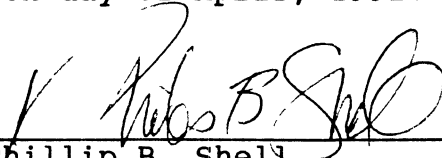
He was consistently advised that gifts of stock need not be registered. He even received "no-action" letters from 11 different states indicating that gifted stock need not be registered. (Evidence file, Transcript of 1/20/88 Hearing at 66-76). Appellant relied on this advice and didn't register the stock but made the intended gifts. The gifts were made without any obligation on the part of the recipients (Evidence file, Transcript of 1/20/88 Hearing at 66-76). Based upon all of this, Appellant was confident that no registration requirements would be violated and that the gifts were good faith gifts (Evidence file, Transcript of 1/20/88 Hearing at 70-71).

Appellant certainly believed that its position was justified factually and that there was a good basis for arguing against the strained interpretation of "good faith gift" as stated by the Utah Securities Division. It had every reason to believe that it met its factual burden of establishing good faith and that the Appellee would be reversed at the District Court level.

Accordingly, there was no basis for the Court of Appeals to uphold the District Court's award of sanctions under Rule 11. This Court should also grant a Writ of Certiorari relative to this issue.

Respectfully submitted this 8th day of April, 1992.

by


Phillip B. Shell
David H. Day
Day & Barney
Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Following
Issuers, their Securities,
Affiliates or Successors,
and/or Entities subsequently
organized by them, including
H & B Carriers, Inc., et al.,
Capital General Corporation,

Petitioners/Appellants

vs.

Utah Securities Division, and the
Department of Business Regulation,:

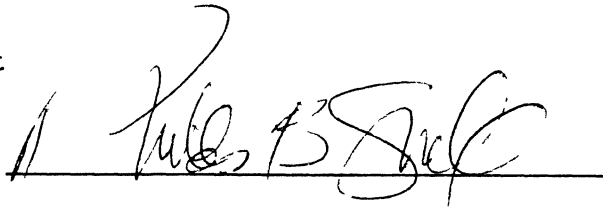
Respondents/Appellees.

:
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: CERTIFICATE OF MAILING
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: Docket No. _____
: Ct of App No. 910196-CA
: Priority No. 13.
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:

CERTIFICATE OF MAILING

I certify that on this 8th day of April, 1992, I caused to
be mailed four true and correct copies of the foregoing Petition
for Writ of Certiorari, postage pre-paid, to the following:

R. Paul Van Dam
David N. Sonnenreich
Fair Business Enforcement Unit
111 State Capitol Building
Salt Lake City, Utah 84114



APPENDIX

1. March 9, 1992 Denial of Petition for Rehearing
2. February 10, 1992 Opinion of the Utah Court of Appeals
3. September 10, 1990 Order of the Third District Court
4. April 27, 1988 Findings of Fact, Conclusions of Law and Order of Utah Securities Division
5. Copies of controlling statutes and rules:
 - A. Section 61-1-7, U.C.A.
 - B. Section 61-1-13(15)(c)(ii), U.C.A.
 - C. Section 61-1-14(2), U.C.A.
 - D. Section 61-1-14(3), U.C.A.
 - E. Section 61-1-20, U.C.A.
 - F. Rule 11, Utah Rules of Civil Procedure

FILED

This opinion is subject to revision before
publication in the Pacific Reporter.

FEB 10 1992

Mary Thomas

IN THE UTAH COURT OF APPEALS

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In the matter of the following)
Issuers, their Securities,)
Affiliates or Successors,)
and/or Entities subsequently)
organized by them, including)
H & B Carriers, Inc., et al.;)
Capital General Corporation,)

Plaintiffs and Appellant,)

v.)

Department of Business)
Regulation, Utah Securities)
Division,)

Defendants and Appellees.)

OPINION
(For Publication)

Case No. 910196-CA

F I L E D
(February 10, 1992)

Third District, Salt Lake County
The Honorable Leonard H. Russon

Attorneys: David H. Day and Phillip B. Shell, Murray, for
Appellant
R. Paul Van Dam and David N. Sonnenreich, Salt Lake
City, for Appellees

Before Judges Garff, Jackson, and Orme.

JACKSON, Judge:

Capital General Corporation (CGC) appeals the trial court's
order which affirmed suspension of all secondary stock trading
exemptions of forty-six corporate entities formed by CGC¹ without
registration pursuant to the Utah Uniform Securities Act, Utah

1. CGC appeared before the Division of Securities to challenge
the summary order as an "interested" party under Utah Code Ann.
§ 61-1-14(3) (1989), and on review as a "person aggrieved by a
final order of the executive director," under Utah Code Ann.
§ 61-1-23 (1989).

Code Ann. § 61-1-1 to -30 (1986), and imposed sanctions under Rule 11 of the Utah Rules of Civil Procedure. We affirm.

ISSUES

CGC's brief acknowledges that our decision in Capital Gen. Corp. v. Department of Business Reg., 777 P.2d 494 (Utah App.), cert. den., 781 P.2d 878 (Utah 1989) (hereinafter Amenity), regarding the stock of Amenity, Inc. controls certain issues. But CGC argues that the following issues require new treatment regarding the stock of forty-six other corporations which it formed:² (1) whether the trial court properly applied the doctrine of collateral estoppel, (2) whether CGC's transfers of stock were not sales but good faith gifts exempt from registration, (3) whether statutory authority exists for the Securities Division to suspend all trading exemptions including those of stock transferees, and (4) whether the trial court abused its discretion in imposing Rule 11 sanctions.

FACTS

The parties present this appeal on undisputed facts. The Securities Advisory Board adopted the following pertinent findings of fact:

8. H&B Carriers, Inc. was incorporated under the laws of the State of Utah on July 1, 1982. That entity was initially known as Y Travel; Jerry W. Peterson and Mr. Yeaman had

2. The forty-six corporate entities were: H&B Carriers, Inc., Florida Growth Industries, Inc., Macaw, Inc., Longhorn Enterprise, Inc., Koala Corporation, Yahwe Corporation, Star Dolphin, Inc., Jackal, Inc., Hyena Capital, Inc., Gopher Inc., Flamingo Capital, Inc., Egret, Inc., Cetacean Industries, Inc., Bonito, Inc., Alpaca, Inc., Zeus Enterprise, Inc., Tamarind, Inc., Saber, Inc., Radar, Inc., Quiescent, Inc., Vanadium, Inc., Upsilon, Inc., Why Not?, Inc., Bestmark, Inc., Missouri Illinois Mining, Inc., Dogmatic, Inc., Mystic Industries, Inc., Highland Manufacturing, Inc., Kowtow, Inc., Noble Industries, Inc., Oryan Capital Corporation, Pegasus Star Enterprise, Inc., Showstoppers, Inc., Hightide, Inc., Grandeur, Inc., Fantastic Industries, Inc., Jugglar, Inc., Xebec Galleon, Inc., Golden Home Health Care Equipment Centers, Inc., Nighthawk Capital, Inc., Resources Exploration Data, Inc., Instrument Development Corporation, Panther Industries, Inc., Owl Enterprises, Inc., Quail, Inc., and GBS Technologies Corporation.

incorporated Y Travel and the registered agent of that entity was Ms. Peterson.

9. Similar to Amenity, Inc., H&B Carriers, Inc. was initially capitalized when Capital General Corporation transferred \$2,000 to it in exchange for authorized common stock. Similar to Amenity, Inc., Capital General Corporation thereafter gifted, to approximately 700 to 1,000 individuals, a unit of 100 shares of the stock it had acquired. Many of the donees were residents of Utah.

10. None of H&B Carriers, Inc. securities were registered with the division at the time those securities were gifted. Further, neither that corporation nor its securities were subject to an exemption from registration requirements pursuant to filing with the division at that time.

11. Sparing detail, the December 1, 1987 Petition sets forth factual allegations substantially similar to those identified above as to the mode of incorporation, the subsequent acquisition and gifting of stock in the forty-five (45) other companies under review. In each case, the essential transaction consisted of the initial transfer of securities for a relatively small amount of money and the gifting of those securities to numerous individuals. In certain instances, the gifted securities were subsequently traded on the secondary market. None of the corporate entities in question or the securities which were gifted were registered with the division and no exemptions from registration requirements were ever issued as to those securities.

Upon petition by the Securities Division, all transactional exemptions applicable to the shares of all forty-six Utah corporations formed by CGC were ordered suspended by the executive director. The order was affirmed by an administrative law judge, the Securities Advisory Board, and the lower court. CGC had transferred the corporate shares without requesting either registration or exemption. CGC asserted that the stock transfers were "gifts" and therefore exempt from regulation.

ANALYSIS

Our analysis will assume arguendo that Amenity does not provide collateral estoppel regarding the issues now presented. Here, the Board determined that CGC's transfers of the shares were sales within the meaning of Utah Code Ann. § 61-1-7 (1986):

[it] is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter or the security or transaction is exempted under § 61-1-14.

In Amenity, we held that transfers of Amenity stock under an identical scheme were sales and not gifts. The pertinent language is the definition of an offer or sale as including a "disposition . . . of a security for value." Utah Code Ann. § 61-1-13(15)(a) (1986). Value is present even though the benefits flow indirectly from the marketplace rather than directly from the transferees. Amenity, 777 P.2d at 497. By distributing shares, CGC transformed H&B Carriers, Inc. and the other forty-five corporations into publicly held corporations ripe for acquisition. Thus, the Board's determination that CGC's "gifting" program constituted sales for value was reasonable and rational.

CGC claims certain testimony regarding "good faith" distinguishes this case from Amenity. "Good faith gifts" are excluded from the definition of "sale" under Utah Code Ann. § 61-1-13(15)(1)(i) (1986). The Board ruled that CGC's transfers were not good faith gifts. CGC does not cite us to the record nor any precedent other than Amenity. Mr. Yeaman, CGC's president, testified regarding his "good faith" efforts not mentioned in Amenity. He testified that he talked to two attorneys and called the Utah Securities Division regarding gifts of stock and was told that the law applied only to sales. On direct examination he said, "we called and asked what the provisions were for making gifts." On cross-examination he stated "as I remember it, it was just a general discussion about making gifts and what states' views generally is [sic] about gifting stock." Because this evidence is so general, vague and uncorroborated, it has little weight or relevance. As in Amenity, the Board found that CGC's main intent, based on what was actually done with the stock, was to circumvent the statutory registration requirements, not to make gifts for the sake of generosity. Further, evidence of economic self-interest in promoting the same corporate stock scheme as a regular practice belies gratuity and innocence. Accordingly, the Board's conclusion that the stock transfers were not good faith gifts was reasonable and rational.

CGC's final challenge to the order is that the Securities Division did not have statutory authority to issue the summary order. The order stated that "pursuant to Utah Code Ann. Section 61-1-14(2), all transactional exemptions that are applicable, or may hereafter become applicable, are suspended." The Board concluded that "the distribution of the securities in question constitutes the unregistered sale of a security violative of Section 61-1-7."

Subsection (1) of 61-1-14 describes the securities which are exempted from sections 61-1-7 (registration before sale) and 61-1-15 (filing of sales literature). Subsection (2) of 61-1-14 describes the transactions which are exempted from the same requirements. Subsection (3) empowers the division by order to "deny or revoke" exemptions with respect to "a specific security, transaction or series of transactions" and sets forth the hearings procedure which was followed in this matter. Thus, because neither registration or exemption were in place, the transactions in these specific securities were unlawful.

Section 61-1-7, registration before sale, provides: "It is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter or the security or transaction is exempted under Section 61-1-14." Since CGC had not registered the stock and could not claim any exemption, the transactions were violative of section 61-1-7. Section 61-1-20 authorizes enforcement action by the Securities Division. "Whenever it appears to the division that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of this chapter or any rule or order under this chapter," it may issue a show cause order to cease and desist or bring a court action for relief. See Utah Code Ann § 61-1-20(1)(a)-(d) (1986). The summary order stated:

The entry of an order is in the public interest because the offer or sale of securities, which have not been registered and are not the subject of an appropriate underlying exemption from registration, deprives investors of the statutory protections afforded by the Utah Uniform Securities Act.

Thus, as in Amenity, the Securities Division had statutory power to act and substantially complied with the statutory procedure. See Amenity, 777 P.2d at 498.

The Securities Division filed a motion for Rule 11 sanctions consisting solely of attorney fees. The trial court entered an award of \$1,395.00. We review the award under an abuse of

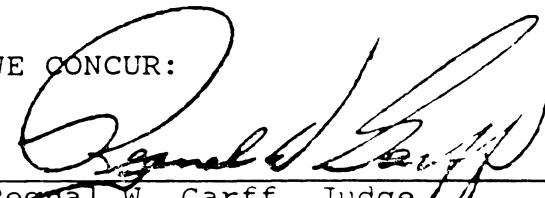
discretion standard. We have reviewed the trial court's action and cannot say that the trial court abused its discretion in making the award. See Taylor v. Estate of Taylor, 770 P.2d 163 (Utah App. 1989).

Accordingly, we affirm on all issues.




Norman H. Jackson, Judge

WE CONCUR: -----



Reginal W. Garff, Judge



Gregory K. Orme, Judge

FILED

MAR 9 1992

Mary T. Noonan

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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In the matter of the following)
Issuers, their Securities,)
Affiliates or Successors,)
and/or Entities subsequently)
organized by them, including)
H & B Carriers, Inc., et al.;)
Capital General Corporation,)

Plaintiffs and Appellant,)

v.)

Department of Business)
Regulation, Utah Securities)
Division,)

Defendants and Appellees.)

ORDER DENYING
PETITION FOR REHEARING

Case No. 910196-CA

THIS MATTER having come before the Court upon appellant's
Petition for Rehearing, filed February 25, 1992,

IT IS HEREBY ORDERED that the appellant's Petition for
Rehearing is denied.

Dated this 9th day of March, 1992.

FOR THE COURT:

Mary T. Noonan

Mary T. Noonan
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of March, 1992, a true and correct copy of the foregoing ORDER DENYING PETITION FOR REHEARING was deposited in the United States mail to each of the parties listed below:

David H. Day
✓ Phillip B. Shell
Day & Barney
Attorneys at Law
45 East Vine Street
Murray, UT 84107

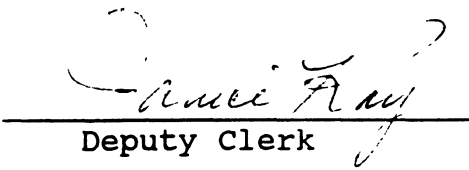
R. Paul Van Dam
State Attorney General
David N. Sonnenreich
Assistant Attorneys General
Tax & Business Regulation Division
115 State Capitol
Salt Lake City, UT 84114

and a true and correct copy of the foregoing ORDER DENYING PETITION FOR REHEARING was hand-delivered to the trial judge of record listed below:

The Honorable Leonard H. Russon.
Utah Court of Appeals Judge
230 South 500 East, Suite 400
Salt Lake City, UT 84102

Dated this 9th day of March, 1992.

By


Deputy Clerk

SEP 10 1990

220 Lindbergh

R. PAUL VAN DAM, #3312
 Attorney General
 MARK J. GRIFFIN, #4329
 Assistant Attorney General
 DAVID N. SONNENREICH, #4917
 Assistant Attorney General
 Fair Business Enforcement Unit
 115 State Capitol
 Salt Lake City, Utah 84114
 Telephone: (801) 538-1331

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
 SALT LAKE COUNTY, STATE OF UTAH

In the matter of the following)	
Issuers, their Securities,)	
Affiliates or Successors,)	
and/or Entities subsequently)	
organized by them, including)	
H & B CARRIERS, INC., et al.)	
CAPITAL GENERAL CORPORATION,)	ORDER
)	
Petitioner,)	
)	
vs.)	Case No. 885900053MI
)	
UTAH SECURITIES DIVISION AND)	
THE DEPARTMENT OF BUSINESS)	Judge LEONARD H. RUSSON
REGULATION,)	
)	
Respondents.)	

The Defendant's Motion to Dismiss and Motion for Rule 11
 Sanctions came on for hearing at 10:00 a.m. on August 13, 1990.
 The petitioner was represented by David H. Day of the law firm of
 Day & Barney, and the defendants were represented by David N.

Sonnenreich of the Utah Attorney General's Office. After reviewing the file and hearing the arguments of counsel, this Court issued a Ruling on August 14, 1990. This Order follows.

ORDER, JUDGMENT AND DECREE

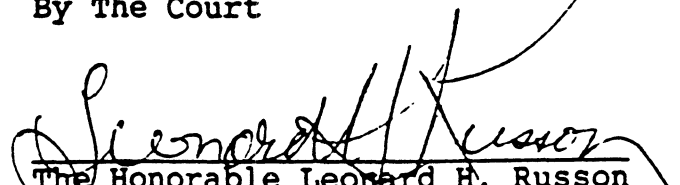
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The petitioner's Petition for Review is hereby dismissed with prejudice, the petitioner's claims therein having been barred by the doctrine of collateral estoppel; and

2. The petitioner, Capital General Corporation, and its counsel, David H. Day and Phillip B. Shell of the law firm of Day and Barney, are hereby sanctioned for violating Rule 11 of the Utah Rules of Civil Procedure, and are hereby ordered, jointly and severally, to pay to the Office of the Attorney General of the State of Utah the sum of \$1395.00, representing reasonable attorneys' fees.

SO ORDERED ^{THH} THIS 10th DAY OF Sept, 1990.

By The Court


The Honorable Leonard H. Russon
District Court Judge

NOTE: THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE OF
UTAH

DATE:

Sept 12 1990


DEPUTY COURT CLERK

BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF BUSINESS REGULATION
OF THE STATE OF UTAH

In the matter of the following issuers, their	:	FINDINGS OF FACT, CONCLUSIONS OF LAW
securities, affiliates or successors, and/or entities	:	AND RECOMMENDED ORDER
subsequently organized by them, including:	:	Case No. SD-87-09-28-01

H & B Carriers, Inc., et. al.

Appearances:

William B. McKean for the Division of Securities

David H. Day for Capital General Corporation

By the Administrative Law Judge:

The instant proceeding was initiated pursuant to the issuance of a Petition, dated December 1, 1987. By Order, also dated December 1, 1987, the division suspended all transactional exemptions applicable, or which may subsequently become applicable, as to the registration of the securities at issue. Capital General Corporation thereafter requested that the matter be set for hearing.

Pursuant to notice duly served by certified mail, this matter came on regularly for hearing on January 20, 1988 before J. Steven Eklund, Administrative Law Judge for the Department of Business Regulation. Thereafter, evidence was offered and received.

The administrative law judge, being fully advised in the premises, now enters the following findings of fact, conclusions of law and recommended order.

FINDINGS OF FACT

1. Capital General Corporation was incorporated under the laws of the State of Utah on March 9, 1971. David R. Yeaman and Jeri Pettersson are the directors of Capital General Corporation and respectively hold the offices of president and vice president. Ms. Pettersson is the registered agent of Capital General Corporation.

2. At various times during 1986, Capital General Corporation incorporated approximately forty-six (46) companies and caused them to go public by distributing their securities through gifts to approximately 700 to 1,000 individuals with whom Capital General Corporation had been associated. The distribution was typically made to

donees derived from a list of approximately 1,500 individuals, of whom 450 were residents of this state.

3. The first company gifted by Capital General Corporation was Elkin Weiss & Co., Inc. Elkin Weiss & Co., Inc. was incorporated under the laws of the State of Utah on January 7, 1986. At the time of incorporation, Elkin Weiss & Co., Inc. was named Amenity, Inc. Julie Harmon, Cynthia Paskett and Ms. Pettersson were the incorporators and directors of Amenity, Inc. Ms. Pettersson was the registered agent for Amenity, Inc.

4. Amenity, Inc. was initially capitalized when Capital General Corporation transferred \$2,000 to it in exchange for one million shares of its authorized common stock, which represented approximately 1% of all outstanding common stock authorized. Thereafter, Capital General Corporation gifted, to approximately 700 to 1,000 individuals, a unit of one hundred (100) shares of the stock it had acquired. None of those securities were registered with the division when they were gifted to such individuals.

5. On June 5, 1986, the division initiated an administrative action to suspend trading of Amenity, Inc. securities because those securities had been gifted and such gifts allegedly violated the registration provisions of the Utah Uniform Securities Act. On July 9, 1986, four million shares of Amenity, Inc. were purchased by Elkin Weiss and Co., Inc. for \$25,000. At that time, Elkin Weiss & Co., Inc. was a California corporation. Thereafter, Amenity, Inc. changed its name to Elkin Weiss and Co., Inc.

6. On September 25, 1986 and January 20, 1987, hearings were conducted in the just-referenced administrative proceeding as to Amenity, Inc. On February 18, 1987, the Securities Advisory Board and the Executive Director of the Department of Business Regulation issued an order suspending the use of all secondary trading exemptions relative to Amenity, Inc. securities on the basis that the public distribution effected by the gifting of those securities was made to evade and circumvent the disclosure required by registration and could not qualify under the "good faith gift" exception contained in Section 61-1-13(15)(d)(i).

7. On April 16, 1987, Amenity, Inc. filed a petition in district court seeking review of the just-described order. Commencing September 11, 1987, Warren Brown Securities Company, Inc., a Utah broker/dealer, Greentree Securities, Inc., a Florida broker/dealer, and Dillon Securities, Inc., a Washington State broker/dealer made markets in Elkin Weiss & Co., Inc. securities and have continued to do so. On September 18, 1987, the order previously entered by the Securities Advisory Board and the Executive Director of the Department of Business Regulation was upheld on review by the district court. That matter is presently pending before the Utah Court of Appeals.

8. Respondent H&B Carriers, Inc. was incorporated under the laws of the State of Utah on July 1, 1982. That entity was initially known as Y Travel. Jerry W. Peterson and Mr. Yeaman had incorporated Y

Travel and the registered agent of that entity was Ms. Pettersson.

9. Similar to Amenity, Inc., H&B Carriers, Inc. was initially capitalized when Capital General Corporation transferred \$2,000 to it in exchange for authorized common stock. Similar to Amenity, Inc., Capital General Corporation thereafter gifted, to approximately 700 to 1,000 individuals, a unit of 100 shares of the stock it had acquired. Many of the donees were residents of Utah.

10. None of H&B Carriers, Inc. securities were registered with the division at the time those securities were gifted. Further, neither that corporation nor its securities were subject to an exemption from registration requirements pursuant to filing with the division at that time.

11. Sparing detail, the December 1, 1987 Petition sets forth factual allegations substantially similar to those identified above as to the mode of incorporation, the subsequent acquisition and gifting of stock in the forty-five (45) other companies under review. In each case, the essential transaction consisted of the initial transfer of securities for a relatively small amount of money and the gifting of those securities to numerous individuals. In certain instances, the gifted securities were subsequently traded on the secondary market. None of the corporate entities in question or the securities which were gifted were registered with the division and no exemptions from registration requirements were ever issued as to those securities.

CONCLUSIONS OF LAW

The division initially asserts that no basis exists to vacate the December 1, 1987 Order as to any of the corporate entities not represented in the instant proceeding. The division concedes that Capital General Corporation is an interested party which has standing to challenge that order, but contends that none of the named companies in the December 1, 1987 Petition have requested a hearing as to the validity of the order. Given the foregoing, the division asserts there is no basis to grant those companies relief from the continued operation of that order.

The division next contends that the December 1, 1987 Order should be summarily affirmed, inasmuch as the facts presented herein are similar to those upon which an order suspending the use of secondary trading exemptions was previously entered in the case of Amentiv, Inc. (Case No. SD-86-11). To reiterate, the division asserts that the gifting of securities constituted the disposition of those securities for value and there is no exemption which exists to otherwise obviate compliance with registration requirements.

Section 61-1-14(3), Utah Code Ann. (1953), as amended, provides:

Upon the entry of a summary order, the division shall promptly notify all interested parties that it has been entered and of the reasons therefor and that within 15 business days of the receipt of a written request, the matter will be set down for hearing If a hearing is requested or ordered, upon approval by the executive director and a majority of the Securities

interested parties, may affirm, modify, or vacate the order (Emphasis added).

Inasmuch as Capital General Corporation is either the sole owner or holds majority control of the various companies under review, that affiliation renders Capital General Corporation as an interested party for purposes of this proceeding. It necessarily follows that Capital General Corporation may challenge the validity of the summary order which was issued and, if that order were to be vacated, the order would be of no further force and effect as to any of the companies in question.

Capital General Corporation urges that the sale of a security refers to a purchase consisting of an exchange of a security for money and necessarily excludes the gifting of a security where no such monetary exchange occurs. Alternatively, Capital General Corporation asserts that a good faith gift was made in each instance and, thus, any such transaction was excluded from compliance with registration requirements. Specifically, Capital General Corporation contends that it made inquiry of the division whether the gifting of unregistered securities was permissible. Thus, Capital General Corporation asserts that it has desired to comply with the law at all times. Finally, Capital General Corporation urges that the protections afforded by registration through the Utah Uniform Securities Act relate only to those individuals who have parted with money and, significantly, there is no evidence that any individuals have been damaged by reason of the unregistered status of the securities at issue.

Section 61-1-7 provides :

It is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter or the security or transaction is exempted under Section 61-1-14.

Section 61-1-13(15)(a) defines "sale" or "sell" to include:

. . . every contract for sale of, contract to sell, or disposition of, a security or interest in a security for value.

"Offer" and "offer to sell" are defined in Section 61-1-13(15)(b) to include:

. . . every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

Section 61-1-13(15)(d)(i) further provides that the above-defined terms do not include a "good faith" gift.

In Technomedical Labs, Inc. v. Utah Securities Division, 744 P.2d 320 (Utah App. 1987), the Utah Court of Appeals stated as follows:

The purposes of securities acts in general are to prevent fraud and to encourage disclosure of information through registration, thereby protecting investors from the sale of fraudulent and worthless speculative securities. Id at 322.

The Court further quoted the following language from Payable Accounting Corp. v. McKinley, Utah, 667 P.2d 15

(1983), to wit:

Securities laws are remedial in nature and should be broadly and liberally construed to give effect to the legislative purpose. *Id.* at 17-18.

There are two pivotal issues in the instant case. The first is whether the gifting of stock represents the disposition of a security for value within the meaning of the above-quoted statutes. It is instructive that, in Technomedical Labs Inc. v. Utah Securities Division, *supra*, the Court noted two cases in which the issue addressed was whether the distribution of a subsidiary's unregistered shares as a dividend to the parent company's shareholders constituted a "sale" requiring registration under the Federal Securities Act of 1933. In its review of Securities and Exchange Commission v. Datronics Engineers, Inc., 490 F.2d 250 (4th Cir. 1973) and Securities and Exchange Commission v. Harwyn Industries Corp., 326 F.Supp. 943 (S.D.N.Y. 1971), the Court summarized the rationale of those cases as follows:

Whether a "sale" has occurred depended upon whether the distribution was "for value". Both courts held value would be gained by the creation of a public market . . . Such value includes: (1) an enhanced ability to borrow; (2) an enhanced ability to raise equity; (3) the availability of a method of valuing assets; (4) an enhanced liquidity of assets; and (5) the prestige associated with publicly held companies. *Id.* at 324.

The Court further noted the Department's conclusion that the term "value", as defined in the above-cited cases, was substantially synonymous with the term "benefit" which was the language under review in Technomedical Labs Inc. v. Utah Securities Division, *supra*. Significantly, the Court concluded that the Department's interpretation of the Act and its rulings "fall within the bounds of reasonableness and rationality." *Id.* at 325.

What constitutes "value", as identified by the decisions quoted herein, parallels the meaning of "value" set forth in Sections 61-1-13(15)(a) and (b). As was true in Amenity, Inc., the transactions under review in the instant case involved the creation and/or maintenance of good will and the resulting beneficial exposure of Capital General Corporation's business in various areas. Such represents the value envisioned by the just-cited statutes. Importantly, the gifting of securities in each of the transactions under review facilitated the creation of a public market for those securities. As Mr. Yeaman stated in an October 2, 1987 letter issued by Capital General Corporation to the donees of the gifted securities:

During 1986, you received shares of stock from Capital General as gifts for your past association and loyalty to us. It was our intention to use these gifts as a way of benefitting you economically and at the same time helping private individuals, corporations, etc. to "go public" and increase and enhance the value of the gifts.

Clearly, the gifting of those securities constituted a disposition for value and the sale of a security, as defined in Section 61-1-13(15)(a).

The only remaining issue is whether the disposition of the securities represented a "good faith gift" exempted from compliance with the registration requirements set forth in Section 61-1-7 by reason of the applicability of Section 61-1-13(15)(d)(i). As was true in Amenity, Inc., the division again asserts that the transfer of the securities from Capital General Corporation to the donees constitutes a subterfuge designed to avoid registration requirements mandated by statute and/or rule, the implication being that the transfer was not one made in "good faith". In Amenity, Inc., it was noted that there was no exemption or exception which had been demonstrated to exist relative to the distribution of securities in that case and that no registration of those securities had been sought or granted.

Concededly, the term "good faith gift" is not defined by statute. However, Capital General Corporation's assertion that "good faith" exists because inquiries were made in legal and regulatory circles as to whether securities could be gifted without being registered is misplaced. The question of intent, relative to whether a "good faith gift" exists, is one which necessarily involves examination of not only whether the issuer subjectively desires to comply with registration requirements, but whether the absence of compliance and the operative results of the distribution are such as to effectively obtain the benefits of a public market in securities absent the protection which registration would offer to prospective investors of the gifted securities.

Without doubt, the donees of the gifted securities do not constitute that class of potential investors who may be in need of information which would be available if the securities were registered. Having invested nothing when they were given the securities, the donees are simply conduits through whom the unregistered securities could be subsequently purchased by third parties. As Mr. Yeaman noted in his October 2, 1987 letter, most of the donees of the gifted securities "have made at least some significant paper profits by our program."


However, it is the creation of a secondary trading market for those securities which then prompts the requirement that information be made available through registration for review by those prospective investors who may contemplate the purchase of securities which could be potentially worthless. Further, the fact that those who have purchased the unregistered securities have not yet suffered financial loss should not operate to compel the division to blithely await that possibility. The salutary purposes served by diligent enforcement of securities laws and the protection made available to the investing public through registration compels the conclusion that the mere potential for damage is a sufficient basis upon which to prevent the trading of unregistered securities.

In summary, the nature of the transactions under review establishes that the "good faith gift" provision set forth in Section 61-1-13(15)(d)(i) does not apply in the instant case. Thus, the distribution of the securities in question constitutes the unregistered sale of a security violative of Section 61-1-7.

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED that the December 1, 1987 Order is affirmed.


Dated this 15th day of April, 1988.


J. Steven Eklund
Administrative Law Judge

BY THE EXECUTIVE DIRECTOR:

The foregoing Findings of Fact, Conclusions of Law and Recommended Order is hereby accepted, confirmed, and approved by the Executive Director of the Department of Business Regulation.

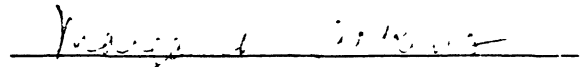



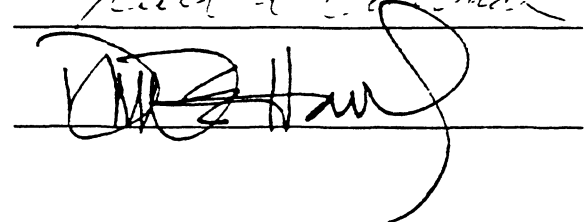
Dated this 27 day of April, 1988.


William E. Dunn, Executive Director

BY THE SECURITIES ADVISORY BOARD:

The foregoing Findings of Fact, Conclusions of Law and Recommended Order is hereby accepted, confirmed, and approved by the Utah Securities Advisory Board.

Dated this 28 day of April, 1988.

COLLATERAL REFERENCES

Am. Jur. 2d. — 69 Am. Jur. 2d Securities Regulation — State §§ 19 to 24.

C.J.S. — 53 C.J.S. Licenses §§ 74, 77; 79 C.J.S. Supp. Securities Regulation §§ 223 to 226.

A.L.R. — Churning: stockbroker's liability for allegedly "churning" or engaging customer's account in excessive activity, 32 A.L.R.3d 635.

Law practice: what activities of stock or security broker constitute unauthorized practice of law, 34 A.L.R.3d 1305.

Mistake: effect, as between stockbroker and customer, of broker's mistaken sale of stock or other security other than that intended by customer, 48 A.L.R.3d 513.

Key Numbers. — Licenses ⇨ 18½ (38), 38; Securities Regulation ⇨ 270, 274, 277.

✓ 61-1-7. Registration before sale.

It is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter or the security or transaction is exempted under § 61-1-14.

History: C. 1953, 61-1-7, enacted by L. 1963, ch. 145, § 1; L. 1979, ch. 218, § 2; 1983, ch. 284, § 10.

Amendment Notes. — The 1983 amend-

ment deleted "or to offer to purchase in connection with a takeover" after "sell"; and substituted "chapter" for "act."

NOTES TO DECISIONS

Purpose of corporation.

Motives and purposes set forth in bylaws but not found in the articles of incorporation could not be considered in determining the question

of registration of securities. State ex rel. Sec. Comm'n v. Lake Hills, 14 Utah 2d 14, 376 P.2d 540 (1962)(decided under former law.)

COLLATERAL REFERENCES

Utah Law Review. — The Utah Take-Over Offer Disclosure Act: Constitutional and Practical Considerations, 1979 Utah L. Rev. 583.

Utah Legislative Survey — 1979, 1980 Utah L. Rev. 155.

Am. Jur. 2d. — 69 Am. Jur. 2d Securities Regulation — State § 25 et seq.

C.J.S. — 53 C.J.S. Licenses §§ 75, 76; 79 C.J.S. Supp. Securities Regulation § 195.

A.L.R. — Corporate officer or agent: what

amounts to participation by corporate officer or agent in illegal issuance of security in order to impose liability upon him under state securities regulations, 44 A.L.R.3d 588.

Attorney's preparation of legal document incident to sale of securities as rendering him liable under state securities regulation statutes, 62 A.L.R.3d 252.

Key Numbers. — Licenses ⇨ 18½ (35); Securities Regulation ⇨ 247.

61-1-8. Registration by notification.

(1) The following securities may be registered by notification, whether or not they are also eligible for registration by co-ordination under § 61-1-9:

(a) any security whose issuer and any predecessors have been in continuous operation for at least five years if there has been no default during the current fiscal year or within the three preceding fiscal years in the payment of principal, interest, or dividends on any security of the issuer, or any predecessor, with a fixed maturity or a fixed interest or dividend provision, and the issuer and any predecessors during the past three fiscal years have had average net earnings, determined in accordance with generally accepted accounting practices, (i) which are applica-

under the provisions of the trust or other agreement or instrument under which the security is issued.

(d) With respect to an equipment trust certificate, a conditional sales contract, or similar securities serving the same purpose, "issuer" means the person by whom the equipment or property is to be used.

(e) With respect to interests in partnerships, general or limited, "issuer" means the partnership itself and not the general partner or partners.

(f) With respect to certificates of interest or participation in oil, gas, or mining titles or leases or in payment out of production under the titles or leases, "issuer" means the owner of the title or lease or right of production, whether whole or fractional, who creates fractional interests therein for the purpose of sale.

(12) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

(13) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a joint venture, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

(14) "Promoter" means any person who, acting alone or in concert with one or more persons, takes initiative in founding or organizing the business or enterprise of a person.

(15)(a) "Sale" or "sell" includes every contract for sale of, contract to sell, or disposition of, a security or interest in a security for value.

(b) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

(c) The following are examples of the definitions in subsections (a) and (b):

(i) Any security given or delivered with or as a bonus on account of any purchase of a security or any other thing, is part of the subject of the purchase, and has been offered and sold for value.

(ii) A purported gift of assessable stock is an offer or sale as is each assessment levied on the stock.

(iii) An offer or sale of a security that is convertible into, or entitles its holder to acquire or subscribe to another security of the same or another issuer is an offer or sale of that security; and also an offer of the other security, whether the right to convert or acquire is exercisable immediately or in the future.

(iv) Any conversion or exchange of one security for another shall constitute an offer or sale of the security received in a conversion or exchange, and the offer to buy or the purchase of the security converted or exchanged.

(v) Securities distributed as a dividend wherein the person receiving the dividend surrenders the right, or the alternative right, to receive a cash or property dividend is an offer or sale.

(vi) A dividend of a security of another issuer is an offer or sale.

(vii) The issuance of a security under a merger, consolidation, reorganization, recapitalization, reclassification, or acquisition of assets shall constitute the offer or sale of the security issued as well as the offer to buy or the purchase of any sec-

DO NOT INCLUDE.

(i) A good faith gift;

(ii) A transfer by death;

(iii) A transfer by termination of a trust or of a beneficial interest in a trust;

(iv) A security dividend not within clauses (c)(v) or (vi);

(v) A securities split or reverse split; or

(vi) Any act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash.

(16) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility Holding Company Act of 1935," and "Investment Company Act of 1940" mean the federal statutes of those names as amended before or after the effective date of this chapter.

(17) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; burial certificate or burial contract; voting-trust certificate; certificate of deposit for a security; certificate of interest of participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money in a lump sum or periodically for life or some other specified period.

(18) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico.

1983

61-1-14. Exemptions.

(1) The following securities are exempted from Sections 61-1-7 and 61-1-15:

(a) any security, including a revenue obligation, issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing, or any certificate of deposit for any of the foregoing;

(b) any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporate or other instrumentality of one or more of the foregoing, or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;

(c) any security issued by and representing an interest in or a debt of, or guaranteed by, any bank organized under the laws of the United States, or any bank, savings institution, or trust company supervised under the laws of any state;

(d) any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association, or any building and loan or similar association organized under the

loan association, or similar association organized and supervised under the laws of this state;

(f) any security issued or guaranteed by any railroad, other common carrier, public utility, or holding company which is subject to the jurisdiction of the interstate commerce commission; a registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that act; regulated in respect of its rates or in its issuance by a governmental authority of the United States, any state, Canada, or any Canadian province;

(g) any security listed on the National Association of Securities Dealers Automated Quotation System, the New York Stock Exchange, the American Stock Exchange, or on any other stock exchange or medium approved by the division, provided that the division may at any time suspend or revoke this exemption for any particular stock exchange, medium, security, or securities under Subsection 61-1-14(3); any other security of the same issuer which is of senior or substantially equal rank to any security so listed and approved by the division; any security called for by subscription rights or warrants so listed or approved; or any warrant or right to purchase or subscribe to any of the foregoing;

(h) any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association; and any security issued by a corporation organized under Chapter 1, Title 3 and any security issued by a corporation to which the provisions of such chapter are made applicable by compliance with the requirements of Section 3-1-21;

(i) any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months of the date of issuance, exclusive of days of grace, or any renewal, guarantee, or guarantee of renewal of the paper which is likewise limited;

(j) any investment contract issued in connection with an employees' stock purchase, savings, pension, profit-sharing, or similar benefit plan;

~~(k) any security as to which the division by rule or order finds that registration is not necessary or appropriate for the protection of investors.~~

(2) The following transactions are exempted from Sections 61-1-7 and 61-1-15:

(a) any isolated transaction, whether effected through a broker-dealer or not;

(b) any nonissuer transaction in an outstanding security if: (i) it is listed in a recognized securities manual such as Moody's and Standard & Poor's securities manuals where the listing contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within 18 months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations; or (ii) the security has a fixed security or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years in the payment of

(c) any nonissuer transaction effected by or through a registered broker-dealer pursuant to an unsolicited order or offer to buy;

(d) any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

(e) any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;

(f) any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(g) any transaction executed by a bona fide pledgee without any purpose of evading this chapter;

(h) any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity;

(i) any offer or sale of a preorganization certificate or subscription if: (i) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber; (ii) the number of subscribers acquiring any legal or beneficial interest therein does not exceed ten; and (iii) there is no general advertising or solicitation in connection with the offer or sale;

(j)(i) any transaction pursuant to an offer by an issuer of its securities to its existing securities holders, if no commission or other remuneration, other than a standby commission is paid or given directly or indirectly for soliciting any security holders in this state, if the transaction constitutes: (A) the conversion of convertible securities; (B) the exercise of nontransferrable rights or warrants; (C) the exercise of transferrable rights or warrants if the rights or warrants are exercisable not more than 90 days after their issuance; or (D) the purchase of securities under a preemptive right;

(ii) the exemption created by Subsection (2)(i)(i) is not available for an offer or sale of securities to existing securities holders who have acquired their securities from the issuer in a transaction in violation of Section 61-1-7;

(k) any offer, but not a sale, of a security for which registration statements have been filed under both this chapter and the Securities Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending;

(l) a distribution of securities as a dividend if the person distributing the dividend is the issuer of the securities distributed;

(m) any nonissuer transaction effected by or through a registered broker-dealer where the broker-dealer or issuer files with the division, and the broker-dealer maintains in his records, and makes reasonably available upon request to any person expressing an interest in a proposed transaction in the security with the broker-dealer information prescribed by the division under its rules;

Utah Condominium Ownership Act, whether or not to be sold by installment contract, if the provisions of the Utah Condominium Ownership Act, or if the units are located in another state, the condominium act of that state, the Utah Uniform Land and Timeshare Sales Practices Act, and the Utah Uniform Consumer Credit Code are complied with;

(p) any transaction or series of transactions involving a merger, consolidation, reorganization, recapitalization, reclassification, or sale of assets, if the consideration for which, in whole or in part, is the issuance of securities of a person or persons, and if:

(i) the transaction or series of transactions is incident to a vote of the securities holders of each person involved or by written consent or resolution of some or all of the securities holders of each person involved;

(ii) the vote, consent, or resolution is given under a provision in: (A) the applicable corporate statute or other controlling statute; (B) the controlling articles of incorporation, trust indenture, deed of trust, or partnership agreement; or (C) the controlling agreement among securities holders;

(iii)(A) one person involved in the transaction is required to file proxy or informational materials under Section 14(a) or (c) of the Securities Exchange Act of 1934 or Section 20 of the Investment Company Act of 1940 and has so filed; (B) one person involved in the transaction is an insurance company which is exempt from filing under Section 12(g)(2)(G) of the Securities Exchange Act of 1934, and has filed proxy or informational materials with the appropriate regulatory agency or official of its domiciliary state; or (C) all persons involved in the transaction are exempt from filing under Section 12(g)(1) of the Securities Exchange Act of 1934, and file with the division such proxy or informational material as the division requires by rule;

(iv) the proxy or informational material is filed with the division and distributed to all securities holders entitled to vote in the transaction or series of transactions at least ten business days prior to any necessary vote by the securities holders or action on any necessary consent or resolution; and

(v) the division does not, by order, deny or revoke the exemption within ten business days after filing of the proxy or informational materials;

(q) any transaction as to which the division, by rule or order, finds that registration is not necessary or appropriate for the protection of investors.

(3) Upon approval by the executive director and a majority of the Securities Advisory Board, the executive director may by order deny or revoke any exemption specified in Subsection (1)(h) or (1)(j) or in Subsection (2) with respect to: (a) a specific security, transaction, or series of transactions; or (b) any person or issuer, any affiliate or successor to a person or issuer, or any entity subsequently organized by or on behalf of a person or issuer generally. No such order may be entered without appropriate prior notice to all interested parties, opportunity for hearing, and written findings of fact and conclusions of law, except that the division may by order summarily deny or revoke any of the specified exemptions pending final determination of any proceeding under this subsection. Upon the entry of a summary order, the division shall promptly notify

or division, the order will remain in effect until it is modified or vacated by the executive director. If a hearing is requested or ordered, upon approval by the executive director and a majority of the Securities Advisory Board the executive director, after notice of and opportunity for hearing to all interested persons, may affirm, modify, or vacate the order or extend it until final determination. The executive director may not extend any summary order for more than ten business days. No order under this subsection may operate retroactively. No person may be considered to have violated Section 61-1-7 or 61-1-15 by reason of any offer or sale effected after the entry of an order under this subsection if he sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the order. 1987

61-1-14.5. Burden of proving exemption.

In any proceeding under this chapter, civil, criminal, administrative, or judicial, the burden of proving an exemption under section 61-1-14 or an exception from a definition under section 61-1-13 is upon the person claiming the exemption or exception. 1983

61-1-15. Filing of sales literature.

The division may by rule or order require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, unless the security or transaction is exempted by section 61-1-14. 1983

61-1-16. False statements unlawful.

It is unlawful for any person to make or cause to be made, in any document filed with the division or in any proceeding under this chapter, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect. 1983

61-1-17. No finding by division on merits -

Contrary representation unlawful.

(1) Neither the fact that an application for registration or a registration statement has been filed nor the fact that a person or security is effectively registered constitutes a finding by the division that any document filed under this chapter is true, complete, and not misleading. Neither any such fact nor the fact that an exemption or exception is available for a security or a transaction means that the division has passed in any way upon the merits or qualifications of, or recommended or given approval to, any person, security, or transaction.

(2) It is unlawful to make, or cause to be made, to any prospective purchaser, customer, or client any representation inconsistent with subsection (1). 1983

61-1-18. Division of securities established -

Director - Appointment - Functions.

(1) There is established within the department of business regulation a division of securities. The division shall be under the direction and control of a director, appointed by the executive director with the governor's approval. The director shall be responsible for the administration and enforcement of this chapter. The director shall hold office at the pleasure of the governor.

(2) The director, with the approval of the executive director, may employ such staff as necessary to

61-1-20. Enforcement action authorized — Bond not required.

Whenever it appears to the division that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of this chapter or any rule or order under this chapter, it may take the following action:

- (1) (a) issue an order directing the person to appear before the division and show cause why an order should not be issued directing the person to cease and desist from engaging in the act or practice, or doing any act in furtherance of the activity;
(b) the order to show cause shall state the reasons for the order and the date of the hearing;
(c) the division shall promptly serve a copy of the order to show cause upon each person named in the order; and
(d) the division shall hold a hearing on the order to show cause no sooner than ten business days after the order is issued. After a hearing, the division may issue an order to cease and desist from engaging in any act or practice constituting a violation of this chapter or any rule or order under this chapter. The order shall be accompanied by written findings of fact and conclusions of law. If any person named in the order to show cause fails to appear at the hearing, then an order to cease and desist may be issued against that person.
- (2) bring an action in the appropriate district court of this state or the appropriate court of another state to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order under this chapter. Upon a proper showing the court may:
 - (a) issue a permanent or temporary, prohibitory or mandatory injunction;
 - (b) issue a restraining order or writ of mandamus;
 - (c) enter a declaratory judgment;
 - (d) appoint a receiver or conservator for the defendant or the defendant's assets;
 - (e) order disgorgement;
 - (f) order rescission;
 - (g) impose a fine of not more than \$500 for each violation of the act; and
 - (h) enter any other relief the court considers just. The court may not require the division to post a bond.

History: C. 1953, 61-1-20, enacted by L. 1963, ch. 145, § 1; L. 1983, ch. 284, § 29; 1986, ch. 107, § 1.

Amendment Notes. — The 1986 amendment added Subsections (1)(a) through (1)(d); redesignated part of the former introductory language as present Subsection (2); redesignated former Subsections (1) through (6) as present Subsections (2)(a) through (2)(f); added Subsection (2)(g); redesignated former Subsection (7) and the final sentence as present Subsection (2)(h); and made minor stylistic changes.