

Michigan Law Review

Volume 37 | Issue 8

1939

SECURITIES LEGISLATION - ACT OF 1933 - WITHDRAWAL OF REGISTRATION STATEMENT

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Recommended Citation

Fred C. Newman, *SECURITIES LEGISLATION - ACT OF 1933 - WITHDRAWAL OF REGISTRATION STATEMENT*, 37 MICH. L. REV. 1276 (1939).

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SECURITIES LEGISLATION — ACT OF 1933 — WITHDRAWAL OF REGISTRATION STATEMENT — The right to withdraw a registration statement filed with the Securities and Exchange Commission was involved in a recent case.¹ The plaintiff had filed a registration statement with the Securities and Exchange Commission. The statement became effective. Thereafter, the commission instituted proceedings under the stop order provision.² There had been no sale of shares to which the registration statement related. After the hearings commenced, plaintiff petitioned the commission for permission to withdraw the registration statement. The commission denied the petition. Thereupon plaintiff filed a bill in equity, praying that the commission be required to permit plaintiff to withdraw its registration statement and that further proceedings by the commission against plaintiff be enjoined. The federal district court dismissed the bill on the ground that the order denying withdrawal of the registration statement was interlocutory only and not reviewable by a collateral attack.³ The court of appeals affirmed this decision on the ground that after the registration statement had become effective it would be contrary to the public interest to permit the withdrawal of the registration statement.

Uncertainty enshrouds the right to withdraw a registration statement and the effect of a withdrawal upon the inquisitorial powers of the Securities and Exchange Commission.⁴ The United States Supreme Court has held that the registration statement may be withdrawn prior to its effec-

¹ Resources Corporation International v. Securities & Exchange Comm., (App. D. C. 1939) CCH SECURITIES ACT SERVICE, p. 7691.

² Securities Act of 1933, § 8 (d), 48 Stat. L. 79, 15 U. S. C. (1934), § 77h (d).

³ Resources Corporation International v. Securities & Exchange Comm., (D. C. D. C. 1939) 24 F. Supp. 580. Cf. a prior proceeding, (C. C. A. 7th, 1938) 97 F. (2d) 788.

⁴ See 31 ILL. L. REV. 369 (1936). Rule 960, promulgated by the commission, March 15, 1936, provides among other things: "Any registration statement or any amendment thereto may be withdrawn upon the application of the registrant if the Commission, finding such withdrawal consistent with the public interest and the protection of investors, consents thereto." Substantially the same rule has been in effect since September, 1934. SEC Release No. 47 (Sept. 22, 1934).

tive date.⁵ It is not clear from the Supreme Court opinion whether the result would have been any different if securities had been issued under the registration statement, even though it had not become effective.⁶ Nor can one be certain that the result would have been the same if the commission had made an express finding that it was contrary to the public interest to permit the withdrawal of the registration statement, although the tenor of the opinion strongly suggests that the Court itself made an independent finding as to the interest of the public and found it insufficient to justify the denial of the right to withdraw the registration statement.⁷

The Securities and Exchange Commission⁸ and the lower federal courts⁹ have held that if the registration statement has become effective, it cannot be withdrawn without the consent of the commission, because this would be contrary to the public interest. Where securities have not been issued under the registration statement, it is not clear how the effective date creates a greater public interest. The Court in the instant case predicated the public interest on the possibility of discovering criminal activity in the wilful filing of a false registration statement.¹⁰ But Justice Cardozo made the same argument when he dissented from the majority opinion in the *Jones* case, permitting the withdrawal of a registration statement that had not become effective.¹¹ The criminal act does not depend upon the effectiveness of the registration statement, at least not so far as the language of the statute indicates.¹² The importance of public exposure as a deterrent in the filing of

⁵ *Jones v. Securities & Exchange Comm.*, 298 U. S. 1, 56 S. Ct. 654 (1936).

⁶ *Ibid.*, 298 U. S. at 23. See 31 ILL. L. REV. 369 at 376 (1936).

⁷ *Jones v. Securities & Exchange Comm.*, 298 U. S. 1 at 22, 56 S. Ct. 654 (1936). The opinion of the majority states (298 U. S. at 23): "The possibility of any other interest [than registrant's] in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal."

⁸ In the Matter of Paper Sales Co. of Detroit, Inc., 2 S. E. C. 748 (1937). Cf. In the Matter of National Boston Montana Mines Corp., 1 S. E. C. 639 (1936); In the Matter of Seneca Petroleum Corp., SEC Release No. 1720 (Apr. 19, 1938).

⁹ *Securities & Exchange Comm. v. Hoover*, (D. C. Ill. 1938) 25 F. Supp. 484, noted 37 MICH. L. REV. 963 (1939). Cf. *Securities & Exchange Comm. v. Jones*, (D. C. N. Y. 1935) 12 F. Supp. 210, and *Jones v. Securities & Exchange Comm.*, (C. C. A. 2d, 1935) 79 F. (2d) 617, both overruled in *Jones v. Securities & Exchange Comm.*, 298 U. S. 1, 56 S. Ct. 654 (1936).

¹⁰ Principal case, CCH SECURITIES ACT SERVICE, p. 7691 at 7692.

¹¹ *Jones v. Securities & Exchange Comm.*, 298 U. S. 1 at 30, 56 S. Ct. 654 (1936).

¹² Sec. 24 of the Securities Act of 1933, 15 U. S. C. (1934), § 77X, provides: "Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statement therein not misleading, shall upon conviction be fined not more than \$5,000 or imprisoned not more than five years, or both."

deficient registration statements would seem to be independent of the effectiveness of the registration statement.¹³ The public would be just as interested in preventing the filing of improper registration statements regardless whether the statement becomes effective or not. Nor would it seem that the activities of the commission were inevitably more or less as to its treatment of a particular registration statement depending upon whether the statement had become effective or not.¹⁴ Therefore any argument that the commission, representing the public, had acted on the filing of the statement and had taken steps in connection therewith which should prevent the withdrawal at will by the registrant is applicable whether the registration statement is effective or not. It is equally true that any contention that withdrawal ought to be denied for the reason that the registrant after withdrawing might be able to sell securities about which he had made material misstatements or omissions in transactions exempt under the statute also would apply in both cases.¹⁵ The argument of the Court in the instant case that the interest of the public in the discovery of a crime would be thwarted by permitting the withdrawal of a registration statement assumes that the inquisitorial powers of the commission are limited to stop order proceedings.¹⁶ But the commission is given power to conduct an investigation to discover criminal activity if it has reason to believe that a crime has been committed or is about to be committed.¹⁷

¹³ Justice Cardozo in *Jones v. Securities & Exchange Comm.*, 298 U. S. 1 at 31, 56 S. Ct. 654 (1936), said in dissenting: "More important still, the enforcement of the Act is aided when guilt is exposed to the censure of the world, though the witness in the act of speaking may make punishment impossible."

¹⁴ Sec. 8 (a), Securities Act of 1933, 15 U. S. C. (1934), § 77 h (a), provides: "The effective date of a registration statement shall be the twentieth day after the filing thereof. . . ." The effective date may be extended if amendments to the registration statement are filed, and, of course, under the decision of the Court in *Jones v. Securities & Exchange Comm.*, the effective date may be postponed indefinitely by the commission giving notice of stop order proceedings. The legislative purpose in delaying the effectiveness of a registration statement was to give the commission an opportunity to check its accuracy. For this reason the commission will usually have done most of its work as to any given registration statement prior to its effective date.

¹⁵ Secs. 3 and 4 of the Securities Act of 1933 exempt certain securities and transactions from registration and from the effect of other provisions of the act.

¹⁶ Principal case, *CCH SECURITIES ACT SERVICE*, p. 7691 at 7694.

¹⁷ Sec. 20 (a) of the Securities Act of 1933, 15 U. S. C. (1934), § 77t: "Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts." The following cases arose under § 20 (a) of the act and independent of any stop order proceedings: Con-

And the commission may make such investigations even though the security be exempt from registration.¹⁸

While the difference in public interest in withdrawal between a registration statement that has become effective and one that has not (there being no securities issued thereunder) would appear to be merely technical, it does not follow that the Supreme Court will hold the withdrawal right to be the same in both cases. Formal distinctions have frequently been relied upon to distinguish one case from another and to justify results that differ on facts substantially similar. The decision of the Supreme Court holding that a registration statement could be withdrawn if it had not become effective was apparently founded on some notion of due process or unreasonableness. Notions as to due process and reasonableness change. The reasons which Justice Cardozo advanced for refusing to permit withdrawal even though the statement had not become effective have not lost their force, and have had the approval of writers, while the opinion of the majority has met little favor.¹⁹ So it may be that the Supreme Court will uphold the position of the court of appeals in the principal case, that a registration statement which has become effective cannot be withdrawn without the consent of the commission irrespective whether stock has been issued or not.

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solidated Mines of California v. Securities & Exchange Comm., (C. C. A. 9th, 1938) 97 F. (2d) 704; In re Verser-Clay Co., (C. C. A. 10th, 1938) 98 F. (2d) 859. In both cases a witness was compelled to produce documentary evidence, in response to a commission subpoena. Sec. 8 (e) of the act confers authority on the commission to investigate in connection with stop order proceedings.

¹⁸ "Exemption under Section 3 (a) (11), if in fact available, removes the securities from the operation of all provisions of the Act except those of Section 12 (2) and 17." Opinion of General Counsel of Commission, SEC Release No. 1459 (May 29, 1937). Section 12 (2) provides civil liability for the seller of a security, who materially misleads the purchaser, by prospectus or oral statement, by the use of any instruments of interstate commerce or of the mails. Section 17 (a) makes it unlawful to use any instruments of interstate commerce or the mails to materially mislead another in the sale of a security; section 17 (b) makes it unlawful to use any of the named instrumentalities to publicize any securities without disclosing the amount of consideration, if any, for such publicity. Therefore the commission may conduct an investigation, under section 20a (see note 17, supra) even though a registration statement has never been filed.

¹⁹ See 31 ILL. L. REV. 369 (1936); 23 VA. L. REV. 88 (1936); 84 UNIV. PA. L. REV. 1019 (1936); 34 MICH. L. REV. 1031 (1936); 6 UNIV. CHI. L. REV. 492 (1939).