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Recent Developments

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ATTORNEY AND CLIENT — Rules Governing The Administration Of Clients' Security Trust Fund Of Maryland. MD. CODE ANN. art. 10, § 43 (Supp. 1965). The notion that the legal profession owes a duty to the public to protect its clients from the intentional misdeeds of their attorneys originated in New Zealand in 1929 and soon thereafter spread to Europe. The American Bar became aware that it might owe such a duty but delayed any action in this area until 1959 when the Vermont Bar Association established the first American clients' security fund. The legal profession quickly took notice of this development as bar associations across the country began to more closely examine and determine the merits of establishing such funds in their own states. Twenty-six states and twenty local bar associations have recognized the advantages of such funds to themselves and to their clientele.[1] After careful consideration, they have concluded that the profession does owe such a duty to the public and that the public should be made to realize that the Bar has a strong enough feeling about its own integrity that it is willing to pay for the "bad eggs" in the legal basket. They have further realized that the establishment of such funds is fundamentally good public relations and that the probable result of such funds is a material upgrading of the public's image of the legal profession as a whole.

The Maryland Bar Association began studying the feasibility of such a plan on a state-wide basis in 1962. Initial findings were reported by committee in January, 1964.[2] One of the conclusions was that the Bar, as a group, does owe a duty to the public to insure that citizens will not be injured by the defalcations of members of the Bar. The committee recommended further that the fund be administered by lawyer trustees, not by a government agency or private corporation, and that all members of the Maryland Bar be required to contribute, not only those in the Maryland Bar Association. A year later, the committee made a final proposal to the Association which was unanimously passed and certified for passage by the General Assembly of Maryland.[3] The Maryland legislature enacted this proposed legislation and it was signed into law in May, 1965.[4] Pursuant to this enactment, rules and regulations for the administration of the fund were drafted by

1. *Time Magazine,* Sept. 16, 1966, p. 69.

2. TRANSACTIONS OF THE MD. STATE BAR ASS'N, vol. 69, 1964, pp. 363–65.

3. TRANSACTIONS OF THE MD. STATE BAR ASS'N, vol. 70, 1965, pp. 339–42. The Committee recommended that the General Assembly authorize establishment of the fund by lawyers and by the Court of Appeals, but that it not direct such establishment. The Committee reasoned that an establishment by rule instead of by statute would be the better method because it would be a voluntary action by the Bar rather than a mandate by the General Assembly. By employing such a method, it was felt that the responsibility for the matter would be placed squarely in the hands of the legal profession (including the judiciary) where it properly belonged.

4. MD. CODE ANN. art. 10, § 43 (Supp. 1965).

the Court of Appeals' Standing Committee on Practice and Procedure and were approved and ordered effective by the Court as of March 28, 1966.[5]

The rules, in setting forth the administrative machinery for collection and distribution of the fund, reiterate the purpose for the establishment of the fund, which is to "maintain the integrity and to protect the good name of the legal profession."[6] The fund is to be administered by trustees who are appointed by the Court of Appeals and who are required to be members of the Maryland Bar in accordance with the recommendation of the Bar Association committee in its January, 1964 report.[7] The powers and duties of the trustees are also provided for.[8] Rule six requires the payment of an annual premium into the fund as a condition precedent to the practice of law in the state.[9] Funds in other states have been financed in quite different manners.[10] The rules expressly provide for the judicial procedure to be followed when lawyers attempt to practice law and fail to make their payment "without valid reason or justification."[11] Rule nine provides that a majority vote is required for a favorable ruling on a claim and further that the trustees have "sole discretion to determine whether a claim merits reimbursement from the trust fund, and if so, the amount of such reimbursement, the time, place, and manner of its payment, the conditions upon which payment shall be made, and the order in which payments shall be made."[12] The Court of Appeals

5. MD. CODE ANN. vol. 9A, Clients' Security Fund Rules of the Court of Appeals of Maryland.

6. Rule 2c provides that: "The purpose of the trust fund shall be to maintain the integrity and protect the good name of the legal profession by reimbursing, to the extent authorized by these rules and deemed proper and reasonable by the trustees, losses caused by defalcations of members of the Bar of the State of Maryland, acting either as attorneys or as fiduciaries (except to the extent to which they are bonded.)"

It should be pointed out that no fund in any state has afforded relief for negligent misdeeds by attorneys, and it would seem certain that the Maryland fund will afford no greater relief since losses caused by "defalcations" only are provided for.

7. Rule 3.

8. Rules 4 and 5.

9. Rule 6 also provides that twenty dollars is the maximum annual amount a lawyer may be required to pay; no lawyer is required to pay for any whole or part of a year during which he is not engaged in the practice of law. A limitation of ten dollars per year is placed on any attorney's required payment during his first five years of practice after passing the bar examination.

10. The Philadelphia Bar Association's fund and many state funds are financed from association dues. The Alaska Bar Association pays the premium on insurance policies which protect mistreated clients.

11. Rule 7.

12. Rule 9c provides that the trustees may consider the following factors, among others, in exercising such discretion:

(1) the amounts available and likely to become available to the trust fund for the payment of claims.
(2) the size and number of the claims which are likely to be presented in the future.
(3) the total amount of losses caused by defalcations of any one attorney or associated groups of attorneys.
(4) the unreimbursed amounts of claims recognized by the trustees in the past as meriting reimbursement, but for which reimbursement has not been made in the total amount of the loss sustained.
(5) the amount of the claimant's loss as compared with the amount of the losses sustained by others who may merit reimbursement from the trust fund.
(6) the degree of hardship the claimant has suffered by the loss.
(7) any negligence of the claimant which may have contributed to the loss.

is granted final authority over the fund by one of the rules which provides that "this Court may amend, modify, or repeal these rules at any time without prior notice, and may provide for the dissolution and winding up of the affairs of the trust."[13]

It should be remembered, however, that the Clients' Security Trust Fund is limited in its application to "losses caused by defalcations of members of the Bar . . . (except to the extent to which they are bonded.)"[14] A commonly accepted definition of "defalcation" is "the misappropriation of trust funds or money held in any fiduciary capacity."[15] If silence is an indication, the incidence of defalcation is rare. Rarer still would be the incidence of unbonded losses. Therefore, claims under the fund will probably be negligible. But despite the fact that the fund will infrequently be of any practical benefit to anyone, it does represent the trend of increasing awareness by the Bar of its public image and responsibility.

ATTORNEYS — Employment By Union To Prosecute Worker's Claims Prohibited As Unauthorized Practice Of Law. *Illinois State Bar Association v. United Mine Workers,* 219 N.E.2d 503 (1966). The State Bar Association brought an action to restrain the United Mine Workers from engaging in the unauthorized practice of law by the employment of attorneys on a full-time salaried basis to litigate tort claims of union members against their employers.[1] The UMW contended it was not engaged in such practice, and even if it were, the UMW claimed such activities were protected under the first and fourteenth amendments to the United States Constitution. The Illinois court rejected the Union's contentions and enjoined further practice finding that such activity amounted to the commercialization of the legal profession and was not in the public interest.[2] The court carefully distinguished this case from the Supreme Court's decisions in *NAACP v. Button*[3] and *Brotherhood of Railroad Trainmen v. Virginia State Bar.*[4] *Button* held that, in the context of NAACP objectives, soliciting litigation is a form of political expression protected by the first and fourteenth amendments. The Illinois court stated that such a decision could not be equated to the present case which involved only individual personal injury litigation. In *Brotherhood of Railroad Trainmen* the Court held that the Union had a right protected by the first and fourteenth amendments to advise members to obtain legal advice from a list of recommended attorneys in connection with

13. Rule 10.
14. Rule 2c.
15. BLACK, LAW DICTIONARY 504 (1951).

1. 219 N.E.2d 503 (1966).
2. 219 N.E.2d at 510.
3. 371 U.S. 415 (1963). A comprehensive history of the *Button* litigation is provided in Birkby & Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts,* 42 TEXAS L. REV. 1018 (1963).
4. 377 U.S. 1 (1964).

litigation of personal injury claims arising out of their employment.[5] Although the Illinois court itself had previously recognized the propriety of assistance similar to that provided by the Brotherhood,[6] it nevertheless felt that holding could not be extended to permit the particular activities of these attorneys for the United Mine Workers.[7]

Arrangements similar to those involved in the instant case have generally been regarded as constituting the unauthorized practice of law.[8] Such activities are said to contravene the traditional standards of professional ethics as found in the state statutes[9] and Canons of Ethics.[10] Decisions prohibiting a corporation from providing legal services for its employees have traditionally been based on two grounds. First, it is said that the practice of law by lay associations will eventually result in the commercialization of the legal profession.[11] Second, such

5. On remand from the Supreme Court, the Chancery Court entered an injunction in 1965 prohibiting the Brotherhood of Railroad Trainmen from soliciting business for attorneys but permitting its recommendation of attorneys. See Text of Decree in 12 U.C.L.A.L. REV. 333-34 (1965). The Union appealed to the Virginia Supreme Court of Appeals, which held that the Supreme Court's mandate against interference with the Union's program did not permit drawing a distinction between solicitation and recommendation. *Brotherhood of Railroad Trainmen* prohibited any restraint on activities which the Court determined to be constitutionally protected; therefore, the Union must be allowed to pursue such activities no matter how they are characterized by the Supreme Court or by Virginia law.

In deciding whether the injunctive provisions of the 1965 decree were consistent with the majority opinion in *Brotherhood of Railroad Trainmen,* the Virginia court recognized its obligation and duty to obey the Supreme Court mandate. However, the court made it quite clear that it was in no way fully in accord with the Supreme Court's reasoning or logic. For this reason the court refused to extend *Brotherhood of Railroad Trainmen* beyond its immediate application to the second chancery decree, and indicated that in future controversies involving unauthorized solicitation it would invoke existing Virginia law prohibiting such activities. See Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 149 S.E.2d 265 (Va. 1965).

6. *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958). In this case the BRT sought a declaratory judgment that the activities of the Union in assisting with the prosecution of its members' personal injury claims under the FELA were not inconsistent with a state law forbidding lay solicitation of legal business. Arguing that it was not motivated by a profit desire, but that it had a commensurate interest with its members in enforcing the FELA statute, the Union claimed that its efforts were necessary to prevent dishonest claims adjustors from taking advantage of uninformed members. The Illinois Court in ruling against the Union prohibited it from fixing attorney's fees, maintaining financial connections with counsel, and distributing legal contract forms to its members; however, the Court did allow the Brotherhood to maintain an investigative staff to advise its members regarding their legal right and to recommend particular attorneys.

7. The particular activities were "employment on a salary basis by a labor union of counsel to represent individual member's claims before the Industrial Commission." 219 N.E.2d at 509.

8. See *In re* O'Neil, 5 F. Supp. 465 (E.D.N.Y. 1933); Hildebrand v. State Bar of California, 36 Cal. 2d 504, 225 P.2d 508 (1950); People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50 (1935); People *ex rel.* Chicago Bar Ass'n v. Motorist Ass'n of Illinois, 354 Ill. 595 (1933).

9. See CAL. BUS. AND PROF. CODE § 6125 (1962); ILL. ANN. STAT. ch. 32, 411-15 (1954); N.Y. STOCK CORP. LAW art. 2, § 7 (1951); N.Y. JUDICIARY LAW art. 15, § 476A (1948); PA. STAT. ANN. tit. 17, § 1608 (1962); VA. CODE ANN. §§ 54-74, 54-78, 54-79 (Supp. 1966).

10. ABA, *Canons of Ethics* 35, 47 (1964).

11. See Divine v. Watauga Hospital, 137 F. Supp. 628 (M.D.N.C. 1956) (unauthorized practice of law by a collection agency); State Bar of Arizona v. Arizona Land Title and Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961) (realtors and land title companies); State Bar Ass'n v. Connecticut Bank and Trust, 145 Conn. 222, 140 A.2d 863 (1958) (bank). See also *In re* Community Action for Legal Services, Inc., 35 U.S.L. WEEK 2270 (App. Div. Nov. 22, 1966) (No. 19) (New York Corporation organized to provide community legal services).

practice would destroy the personal nature of the attorney-client relationship which would be detrimental to the public interest.[12] Although there is no Maryland decision in point, it appears that the Maryland Code would prohibit similar activities.[13]

The refusal of the Illinois court to encroach upon the traditional distinction between the authorized and unauthorized practice of law seems in accord with the inherent limitations of the holding in *Brotherhood of Railroad Trainmen.* That case can easily be interpreted to have sanctioned no such departure from the traditional approach, because it condoned neither a financial connection between the union and its attorneys nor the full-time employment of salaried attorneys to litigate the personal claims of union members. However, the court, in its attempt to distinguish *Button,* seemed less confident and less successful. The *Button* case, said the court, involved the protection of "political expression" in matters of general public interest. If the *Button* case is interpreted broadly, a substantial identity between the two cases seems to exist. At most, it seems that the difference could only be considered a matter of degree and as much seems to be implicitly conceded by the Illinois court when it states:

> We seriously doubt that proscription of this salary arrangement constitutes infringement of constitutionally protected rights of the union members. If it be thought to do so, however, we believe it permissible in view of the interest of the state in controlling standards of professional conduct.[14]

By so conceding the similarity of the cases the court in effect was placing its ultimate reliance on a balancing test without articulating any helpful verbal description of the process of balancing. The court's further statement that its decree would not result in any *"direct suppression* of the member's first amendment right to petition the courts"[15] seems, without more, to be an unhelpful criteria. However, this is not to intimate that the court was wrong in the instant case; rather it seems indicative of the difficulties to be anticipated in dealing with the broad implications of the *Button* case.

12. See NAACP v. Patty, 159 F. Supp. 503 (E.D. Va. 1958); Doughty v. Grills, 37 Tenn. App. 63, 260 S.W.2d 379 (1952).

13. MD. CODE ANN. art. 27, § 14 (Supp. 1965) reads: "It shall be unlawful for any corporation or voluntary association to assume, use, or advertise . . . or by the use of any notice . . . or in any manner whatsoever, the title of lawyer, or attorney, attorney at law, or equivalent terms in any language in any such manner as to convey the impression that either alone or together, with, or by, or through any person, whether a duly and regularly admitted attorney at law or not, it has, owns, constructs or maintains a law office facilities for the practice of law, or for furnishing legal advice, services or counsel. It shall be unlawful further, for any corporation or voluntary association to solicit itself or by, or through its officers, agents or employees, employment in connection with the rendition of legal advice, services or counsel of any kind whatsoever, or to solicit any claim or demand for the purpose of bringing an action thereon, or representing as attorney at law, or for furnishing legal advice, services or counsel to a person sued, or about to be sued in any action or proceeding, or against whom an action or proceeding has been, or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body, or for the purpose of representing in person in the pursuit of any civil remedy." See generally Lewis, *Corporate Capacity to Practice Law — A Study in Legal Hocus Pocus,* 2 MD. L. REV. 342 (1938).

14. 219 N.E.2d at 510.

15. *Ibid.* (Emphasis added.)

BROKERS — Advising Prospective Purchasers Of The Racial Composition Of Different Sections Held Not To Violate New York's "Block-Busting" Rule. *Abel v. Lomenzo,* 267 N.Y.S.2d 265 (App. Div. 1966). Alleging that certain real estate brokers were advising prospective purchasers of the racial composition of various neighborhoods and finding that the brokers were engaging in a practice of selling homes in integrated areas to Negroes only and discouraging white clients from buying in those areas, the Secretary of State of the State of New York suspended the licenses of the brokers. The ground for the suspensions was that the brokers had violated New York's "block-busting" rule[1] and had thereby demonstrated untrustworthiness.[2] Reversing, the Appellate Division held that merely informing prospective purchasers of the racial composition of different sections is not in and of itself a violation of the "block-busting" rule, nor a demonstration of untrustworthiness. The court carefully specified, however, that to be unexceptionable, such information must be accurate and "neither in content nor in purpose seek to encourage racial bias as regards housing."[3] The Secretary's finding that the brokers were attempting to change the racial composition of certain areas was rejected as merely conjectural.

Although the practice of "block-busting" is widely condemned,[4] few states expressly prohibit it.[5] Legislative or administrative prohibition of "block-busting" practices is undertaken either as an attribute of the state's power to license real estate brokers and salesmen or as an exercise of its police power.[6] New York approaches the problem as one for administrative regulation with revocation of the broker's license as the maximum penalty. Maryland has recently taken even a stronger position against "block-busting," making it a misdemeanor, punishable by fine or imprisonment or both, as well as by action of the Real Estate Commission, for any person to knowingly induce or attempt to induce persons to sell or to discourage persons from purchasing real

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1. The so-called "block-busting" rule (Rule 175.17 of the Rules and Regulations promulgated by the Secretary of State to regulate the activities of real estate brokers) seeks to prohibit ". . . the practice of soliciting sales of residential property on grounds of the loss of value of the properties due to a prospective or present entry into the neighborhood of homeowners of a different race or origin." Abel v. Lomenzo, 267 N.Y.S.2d 265, 266 (App. Div. 1966).

2. In New York, a demonstration of untrustworthiness by a broker is grounds for suspending his license. See N.Y. REAL PROPERTY LAW § 441–c(1) (McKinney's 1945).

3. Abel v. Lomenzo, 267 N.Y.S.2d 265, 266 (App. Div. 1966).

4. For a description of "block-busting" tactics, see U.S. COMMISSION ON CIVIL RIGHTS IN NEW YORK, N.Y.; ATLANTA, GA.; AND CHICAGO, ILL., HOUSING HEARING 218–19, 224, 226, 379 (1959); U.S. COMMISSION ON CIVIL RIGHTS, REPORT 516–18 (1959). For a more graphic account, see "Confessions of a Block-Buster," *Saturday Evening Post,* July 14, 1962, pp. 15–19.

5. On the general topic of legislative attempts to curb discrimination by real estate brokers and salesmen, including "block-busting," see U.S. COMMISSION ON CIVIL RIGHTS, REPORT ON HOUSING vol. 4, pp. 122–26 (1961).

6. For an example of an attempt to control "block-busting" by the exercise of a municipality's police power, see BALTO. CITY ORD. no. 432 (1960–61), as amended by BALTO. CITY ORD. no. 754 (1966). The 1966 amendment prohibits the most common "block-busting" tactics by making it a misdemeanor for a broker, salesman or dealer to ". . . solicit properties for purchase or sale by general door to door solicitation, in person, by telephone or mail, or by mass distribution of circulars."

property by appealing to their apprehensions regarding integrated neighborhoods.[7]

To prohibit brokers from imparting a factually accurate and non-inflammatory description of the nature of a given neighborhood regardless of their intent might be constitutionally suspect. On the other hand, if imparting the information with the intent to "block–bust" is made the essence of the violation, as with the Maryland and New York rules, and if the reluctance of the court in the instant case in determining the existence of intent is indicative of the approach to be followed elsewhere, enforcement of such statutes will be extremely difficult. Moreover, since the desired result can be brought about by such subtle manipulation of the apprehensions of buyers and sellers, enforcement appears difficult. It is easy to doubt that legislative proscription will be a successful solution to the problem.[8]

INSURANCE — McCarran Act Bars Action Under Securities Exchange Act For Fraudulent Solicitation Of Proxies. *Securities and Exchange Commission v. National Securities, Inc.*, 252 F. Supp. 623 (D. Ariz. 1966). The defendant stock insurance companies mailed proxy materials proposing to their stockholders a plan for consolidation and reorganization. This plan was approved by the Arizona Director of Insurance. The Securities and Exchange Commission charged that defendants violated section 10(b) of the Securities Exchange Act of 1934[1] and rule 10b-5 promulgated thereunder[2] by mailing solicitations containing positive misrepresentations and omissions of material facts necessary to make the statements therein not misleading. The complaint prayed for injunctive relief to curtail dissemination of the

7. Under LAWS OF MD. ch. 285 (1966), it is a misdemeanor for any person knowingly to induce or attempt to induce a person to sell real property (or to discourage a person from purchasing real property):

> . . . by representations regarding the existing or potential proximity of real property owned, used, or occupied by persons of any particular race, color, religion, or national origin, or to represent that such existing or potential proximity will or may result in: (1) The lowering of property values; (2) A change in the racial, religious, or ethnic character of the block, neighborhood or area in which the property is located; (3) An increase in criminal or antisocial behavior in the area; or (4) A decline in quality of the schools serving the area.

8. "It seems to me . . . this problem ultimately has to be solved by individuals in spite of all the laws that have been made . . ." Statement of Commissioner Theodore M. Hesburgh in U.S. COMMISSION ON CIVIL RIGHTS IN NEW YORK, N.Y.; ATLANTA, GA.; AND CHICAGO, ILL., HOUSING HEARINGS 227 (1959). See U.S. COMMISSION ON CIVIL RIGHTS, REPORT 536 (1959).

1. 48 Stat. 891 (1934), 15 U.S.C. § 78j(b) (1964) recites that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange. . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or on any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

2. "It shall be unlawful . . . (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." 17 C.F.R. 240, 10b–5.

proxies and a decree compelling the defendants to take all necessary measures to restore the various insurance companies and their stockholders to their previous status and economic condition. The court held that since the corporate merger had already been approved by the Arizona Director of Insurance pursuant to Arizona law,[3] to now invalidate that merger would at least "impair," if not "invalidate" or "supersede," laws enacted by the State of Arizona "for the purpose of regulating the business of insurance" in contravention of the applicable provisions of the McCarran-Ferguson Insurance Regulation Act.[4] Therefore the action was dismissed.

In applying the McCarran Act as a bar to the action by the Securities and Exchange Commission, this court has decided contrary to numerous decisions which sought to restrict the purview of the McCarran Act for various policy reasons.[5] The Supreme Court made clear in *Maryland Casualty Co. v. Cushing*[6] that the McCarran Act is not to be interpreted as invalidating every federal law inconsistent with state insurance laws, even in the absence of specific reference to the insurance business in the federal law.[7] The instant case interprets

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3. The law of Arizona requires that any proposed merger of stock insurance companies be submitted to the Director of Insurance for his approval in accordance with the criteria set forth in ARIZ. REV. CODE § 20-731(B) (1956), which reads:

> B. No . . . merger or consolidation shall be effected unless in advance thereof the plan and agreement therefor have been filed with and approved in writing by the director of insurance. The director shall give his approval within a reasonable time after filing unless he finds the plan or agreement:
>
> 1. Is contrary to law.
> 2. Inequitable to the stockholders of any domestic insurer involved.
> 3. Would substantially reduce the security of the service to be rendered to policyholders of the domestic insurer in this State or elsewhere.

4. The McCarran-Ferguson Insurance Regulation Act, 59 Stat. 33 (1945), 15 U.S.C. § 1012 (1964) provides:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . .

Legislative history of the McCarran Act appears in H. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945).

5. See, *e.g.*, Securities and Exchange Commission v. Variable Annuity Life Insurance Co., 359 U.S. 65 (1959) (variable annuity contracts having some aspects of life insurance held to be "securities" which must be registered under federal law); Prudential Insurance Co. v. Securities and Exchange Comm., 326 F.2d 383 (3d Cir. 1964) (Investment Company Act of 1940, 15 U.S.C. § 80a, held applicable to fund resulting from sale of variable annuity contracts by insurance company); Sears Roebuck & Co. v. All States Life Insurance Co., 246 F.2d 161, 172 (5th Cir. 1957), where the court held that nothing in the McCarran Act limits the right of the owner of a trade name or service name to seek redress in a federal court under the Lanham Trademark Act [15 U.S.C. 1051-1127 (1964)] merely because the approval of the name of the infringing insurance company is part of the duties of the state board.

See also Zachman v. Erwin, CCH (1960) FED. SEC. L. REP. 990, 993 (S.D. Tex., Dec. 16, 1960), where a defendant, accused of fraudulently selling insurance company stock, was not allowed to claim exemption from the remedies afforded by the Securities Act because of the McCarran Act. This decision is not necessarily contrary to that of the instant case because in *National Securities*, the court found facts indicating that the application of the Securities Act would invalidate, impair, or supersede laws of Arizona regulating the insurance business, while no such finding could be made in *Zachman*.

6. 347 U.S. 409, 413 (1954).

7. *Accord*, United States v. Meade, 179 F. Supp. 868, 875 (S.D. Ind. 1960).

the McCarran Act as barring an action under section 10(b) of the Securities Exchange Act where the questioned stock transaction has been officially sanctioned pursuant to the state insurance regulations. In *United States v. Sylvanus*,[8] however, the Court of Appeals for the Seventh Circuit held that the criminal mail fraud statute[9] applied even though the scheme to defraud was directed to the sale of insurance policies. The *Sylvanus* court could have ruled that the McCarran Act bars an action under the Mail Fraud Statute where the scheme to defraud occurred in transacting insurance business. Instead it concluded that the indictment did not concern the regulation of insurance business and that Congress did not intend, by the passage of the McCarran Act, to surrender control of the mails. The principal case may be distinguished from *Sylvanus* on the grounds that here civil remedies are sought and the interest to be protected is that of stockholders and not policyholders. Yet these differences should not have prevented the court in *National Securities* from applying the *Sylvanus* rationale by holding the S.E.C. suit not to be a regulation of insurance, but rather an attempt to prevent perpetration of an investment fraud against the insurance company's shareholders in violation of section 10(b).

If state insurance regulations provided adequate protection for stockholders against fraudulent schemes, then it might be feasible to prohibit recourse to federal laws. But, generally, as in both Arizona and Maryland,[10] the state regulation of insurance is designed for the benefit of policyholders rather than for the benefit of stockholders of such companies.[11] Neither the McCarran Act nor its legislative history[12] indicates that the existence of such state regulation was intended to work a denial to stockholders of insurance companies of the protection afforded them by the anti-fraud provisions of section 10(b) of the Exchange Act and rule 10 b-5 promulgated thereunder. *Sylvanus* involved regulation of sales of insurance policies, not stock; yet the federal law was applied. Similarly, the issuance by insurance companies of variable annuity policies whose value depends on common stock values is subject to federal regulation.[13] From either of these holdings it should follow, a fortiori, that the McCarran Act does not bar federal regulation of matters relating to an insurance company's own stock.

SECURED TRANSACTIONS — Buyer In The Ordinary Course Of Business Takes Free Of Security Interest Created By His Seller. *Huettner v. The Savings Bank of Baltimore,* 219 A.2d 559 (1966). Plaintiff Huettner sued defendant bank for the wrongful repossession of an automobile which had previously been purchased by him. The trial court rendered a directed verdict for defendant, from which

8. 192 F.2d 96, 100 (7th Cir. 1951).
9. 18 U.S.C. § 1341 (1964).
10. MD. CODE ANN. art. 48A, § 271 (1957).
11. PATTERSON, ESSENTIALS OF INSURANCE LAW 3 (2d ed. 1957).
12. See Maryland Casualty Co. v. Cushing, 347 U.S. 409, 413 (1954).
13. Cases cited note 5 *supra.*

plaintiff appealed. The automobile was one of several bought by the dealer from Bittorf Motors under a conditional sales contract, which was assigned to defendant and recorded on the conditional sales docket of Baltimore City.[1] Plaintiff purchased the automobile from dealer for $1195 in cash, took possession of the auto, and was reassigned an apparently lien-free certificate of title by dealer. Having received no payment for the automobile in question or for others from dealer, defendant repossessed those automobiles remaining on dealer's lot and as many of those already sold as could be located.[2]

The court held that under the applicable statute[3] plaintiff had constructive notice of the existence of a lien on the automobile despite the bank's failure to have its lien shown on the certificate of title. Article 21, section 66 of the Maryland Code is a notice type of statute requiring only a brief description of the chattel involved. The description is sufficient if it enables the purchaser, with such inquiry as the contract itself suggests, to identify the chattel.[4] The court concluded by restating its previously announced position that, if the bona fide purchaser is to be protected, this protection must be effected by action of the legislature and not by judicial decision.[5]

The General Assembly of Maryland provided this protection on February 1, 1964, with the enactment of the Uniform Commercial Code.[6] Were the principal case to arise now, under section 9-307(1)

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1. The agreement was recorded on a standard printed form normally used for the sale and purchase of one vehicle. A general description of all the automobiles was on the face of the agreement to which was attached, as part of the agreement, a typewritten list of the serial numbers.

2. According to the terms of the agreement dealer was to pay defendant about $900 from the proceeds from the sale of each automobile. Dealer was given possession of the automobiles with their respective certificates of title on which there were no notations of the existence of encumbrances on the title.

3. Every . . . contract for the sale of goods and chattels, . . . wherein the title thereto, or a lien thereon, is reserved until the same be paid in whole or in part . . . shall in respect to such reservation . . . be void as to subsequent purchasers . . . until such . . . contract . . . be recorded . . . in the clerk's office of the Superior Court of Baltimore City, or in the clerk's office of the circuit courts of the various counties . . . where the vendee . . . has its principal place of business in the State of Maryland. . . . Such recording shall be sufficient to give actual or constructive notice to such parties when a memorandum of the paper writing signed by the vendee, setting forth the date thereof, the amount due thereon, when and how payable and a brief description of the goods and chattels therein mentioned shall have been recorded with the clerk aforesaid. . . .

MD. CODE ANN. art. 21, § 66 (1957), *repealed,* MD. CODE ANN. art. 95B, § 10–102 (1964).

4. See Phillips v. J. F. Johnson Lumber Co., 218 Md. 531, 542, 147 A.2d 843, 849 (1959). The court in *Huettner* noted that there were thirty similar automobiles on dealer's lot, which should have suggested such inquiry to plaintiff. As additional bases for its decision, the court noted that the Department of Motor Vehicles is not a recording office and that since indication is made on the face of the certificate that the certificate of title is not a warranty, the absence of notation of a lien on the certificate did not mean that there was no encumbrance on the title. Possession of a certificate of title is a rebuttable indication of ownership only, and in light of the terms of the conditional sales contract, it is obvious that title to the automobile remained in defendant until the money was paid to him. See generally 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 26.9 (1965), for a discussion of motor vehicle certificate acts.

5. See Finance and Guaranty Co. v. Defiance Motor Truck Co., 145 Md. 94, 99, 125 Atl. 585, 586 (1924).

6. Although MD. CODE ANN. art. 95B (Uniform Commercial Code) was in effect when this case was decided, the fact situation developed prior to 1964; the case was therefore governed by MD. CODE ANN. art. 21, § 66 (1957), *repealed,* MD. CODE ANN. art. 95B, § 10–102 (1964).

of the Code, the result would clearly be different: "A buyer in the ordinary course of business other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."[7]

The fact situation of the principal case fits precisely the language of section 9-307(1). Plaintiff is the buyer in the ordinary course of business,[8] and the security interest was created by his seller, the dealer. When Bittorf sold the automobiles to dealer under a conditional sales contract, he entrusted the automobiles to dealer, and "any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business."[9] Clearly, dealer was a merchant dealing in automobiles, and when Bittorf entrusted possession of the automobiles to him, he gave dealer the power to transfer his rights in the automobiles to purchasers. Assignment of the security interest to defendant and defendant's acquiescence in dealer's retention of the automobiles do not alter the situation. Defendant would have to file in order to perfect his security interest.[10] However, under the words of section 9-307(1), from the standpoint of the buyer in the ordinary course of business, perfection of the security interest is immaterial. The buyer takes free of the security interest "*even though* the security interest is perfected and *even though* the buyer knows of its existence."[11] By implication, of course, the buyer who knows nothing of the perfected security interest takes free of that interest.[12]

Section 9-307(1) has not yet been judicially construed in Maryland. In Pennsylvania, however, it has already been decided that a buyer from the inventory of a dealer in the business of selling automobiles takes the automobile free of a security interest created by the

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7. MD. CODE ANN. art. 95B, § 9-307(1) (1964).

8. A " 'buyer in the ordinary course of business' means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in the ordinary course from a person in the business of selling goods of that kind. . . ." MD. CODE ANN. art. 95B, § 1-201(9) (1964). ". . . [A] buyer takes the goods free of security interest even though he knows there is a security interest therein. It is only when in addition thereto he knows that the sale violates some term of the security agreement not waived by the secured party, either in express terms or by conduct, that he takes subject to the security interest." O. M. Scott Credit Corp. v. Apex, Inc., 198 A.2d 673 (R.I. 1964). For a complete discussion, see *What Constitutes a Buyer in the Ordinary Course of Business*, 51 CORNELL L.Q. 598 (1966).

9. MD. CODE ANN. art. 95B, § 2-403(2) (1964). See generally 2 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 2.320201 (1964); 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 26.6 (1965).

10. MD. CODE ANN. art. 95B, § 9-302(1)(d) (1964). The secured party can protect his interest against a buyer in the ordinary course only by taking possession of the collateral or by posting signs or conspicuously marking the goods in order to warn the buyer that restrictions have been placed on the dealer. These methods, however, usually have the disadvantage of placing the dealer in a bad competitive position. 2 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 710 (1964).

11. MD. CODE ANN. art. 95B, § 9-307(1) (1964). (Emphasis added.)

12. This is reflected by the drafters' comments, although it should be noted that these are not controlling: "A buyer who takes free of a perfected security interest of course takes free of an unperfected one." MD. CODE ANN. art. 95B, § 9-307, comment (1) (1964).

dealer.[13] Also, if the dealer creates a security interest in the automobile after it has been sold to a buyer in the ordinary course of business but before a certificate of title has been issued to that buyer, the result is the same.[14] Of course, a buyer takes subject to a perfected security interest when his seller is not "in the business of selling goods of that kind," for he is not then a buyer in the ordinary course of business.[15] It is therefore clear that protection is afforded a buyer under section 9-307(1) only when he purchases from a dealer.

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13. Sterling Acceptance Co. v. Grimes, 194 Pa. Super. 503, 168 A.2d 600 (1961). Although this case was decided prior to the 1959 amendment of § 9-307(1), the result would be unchanged by the statute's present wording.

14. Main Investment Co. v. Gisolfi, 203 Pa. Super. 244, 199 A.2d 535 (1964); Weisel v. McBride, 191 Pa. Super. 411, 156 A.2d 613 (1959). See Howarth v. Universal C.I.T. Credit Corp., 203 F. Supp. 279 (W.D. Pa. 1962), where security interest in used car held to be perfected by following procedure for perfection of security interest in new car even though Department of Motor Vehicles certificate requirements different. See also Associates Discount Corp. v. Old Freeport Bank, 421 Pa. 609, 220 A.2d 621 (1966), where buyer executed a bailment lease security agreement obligating him to pay balance of price to dealer, who assigned agreement to discount corporation. *Held:* buyer took free of bank's security interest even though lien noted on certificate of title, and discount corporation took bailment lease security agreement free of bank's security interest in the agreement as proceeds of the sale.

15. Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc., 205 Pa. Super. 154, 208 A.2d 290 (1965); *cf.* Taylor Motor Rental, Inc. v. Associates Discount Corp., Inc., 196 Pa. Super. 182, 173 A.2d 688 (1961). See generally 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 26.8 (1965). Taking a clean certificate of title would be no help to the buyer. See Note, 25 MD. L. REV. 199, 203 (1964).