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THE APPLICABILITY OF LOCAL SECURITIES ACTS TO MULTI-STATE SECURITIES TRANSACTIONS*

*Jack E. McClard***

I. Introduction

A plaintiff in securities fraud litigation usually has a whole arsenal of legal theories to pursue.[1] If the securities transaction touched several states, in addition to federal remedies, the plaintiff may have remedies available under two or more state securities acts. In multi-state transactions, lawyers naturally assume that the court must select among state remedies by applying conflict of laws principles. That natural inclination is generally unnecessary.

If the state securities acts invoked have adopted the territoriality provisions of the Uniform Securities Act (Uniform Act),[2] counsel and the court will realize that more than one state's act may apply. If any of the state statutes involved do not include the statutory territoriality provisions, counsel and the court may yield to the temptation to follow conflict of laws guidelines.

In determining whether a state's blue sky statute applies to a securities transaction, the threshold question should be whether there is a sufficient nexus between the transaction and the state whose law is invoked.[3] If a sufficient nexus exists, then the remedies afforded by that act should be available to the plaintiff. The application of one state's securities act should not preempt the application of the securities act of another state with a sufficient nexus to the same transaction. The plaintiff, of course, cannot ac-

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1. These generally include violations of section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j (1982) and S.E.C. Rule 10b-5, promulgated thereunder; sections 12(1), 12(2), 17(a) of the Securities Act of 1933, 15 U.S.C. §§ 77*l*(1), 77*l*(2), 77q (1982); the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968 (1982); state securities acts; and the common law relating to fraud and fiduciary duties.

2. Uniform Securities Act § 414, 7B U.L.A. 509, 673 (1985); *see infra* note 19.

3. *See, e.g.*, Lintz v. Carey Manor Ltd., 613 F. Supp. 543, 548-51 (W.D. Va. 1985), *appeal filed*, No. 85-1896 (4th Cir. July 31, 1985); *see also* text accompanying notes 59-73.

cumulate his remedies, but he should be permitted to choose among them. His remedy should not be determined by choice of law rules. Conflict of laws analysis should be reserved for the case in which an act mandated by one state with a sufficient nexus is prohibited by another.[4]

II. BACKGROUND

Fraudulent and otherwise illegal securities have always been an unfortunate element in the securities marketplace. Long before enactment of the federal securities laws, the states sought to regulate questionable securities transactions through their blue sky laws.[5] State regulation of intrastate securities transactions is relatively simple, but interstate transactions involve the complexities of competing state jurisdictions.

Purveyors of questionable securities find some degree of protection in dealing in the interstate market. One who issues and sells his securities entirely within the territorial jurisdiction of a single state can have little doubt that he is subject to the regulation of the laws of that state. However, one whose transactions occur partially within the territory of one state and partially within the territory of other states can argue that he is not subject to simultaneous regulation by all those jurisdictions. Moreover, by carefully studying the regulatory scheme of each jurisdiction, he could conceivably allocate the various elements of his operation in a manner to evade, or at least minimize, regulation by all states. Thus, questionable securities transactions gravitate toward the multi-state marketplace.

Most state blue sky laws provide for an award of reasonable attorneys' fees to a prevailing plaintiff.[6] For that reason, most plain-

4. *See* J. LONG, 1985 BLUE SKY LAW HANDBOOK § 3.02, at 3-5, 3-6 (1985).

5. Long, *State Securities Regulation—An Overview*, 32 OKLA. L. REV. 541, 542 (1979), *reprinted in* 12 SEC. L. REV. 745, 746 (1980).

6. ALA. CODE § 8-6-19(2) (1975); ALASKA STAT. § 45.55.220(a) (1962); ARIZ. REV. STAT. ANN. § 44-2001 (1967); ARK. STAT. ANN. § 67-1256(a) (Repl. Vol. 1980); COLO. REV. STAT. § 11-51-125 (Cum. Supp. 1985); CONN. GEN. STAT. ANN. § 36-498(a) (West Cum. Supp. 1985); DEL. CODE ANN. tit. 6, § 7323(a) (1975); D.C. CODE ANN. § 2-2613 (1981); FLA. STAT. ANN. § 517.211(G) (West Supp. 1985); GA. CODE § 10-55-14(a) (1981); GUAM CIV. CODE § 45410 (1983); HAWAII REV. STAT. § 485-20(a) (Repl. Vol. 1968); IDAHO CODE § 30-1446(1) (1949); ILL. REV. STAT. ch. 121½, § 137.13 (Smith & Hurd Cum. Supp. 1985); IND. CODE ANN. § 23-2-1-19(a) (Burns Repl. Vol. 1984); IOWA CODE ANN. §§ 502.501(1)(d), 502.502(1) (West Cum. Supp. 1985); KAN. STAT. ANN. § 17-1268(a) (Cum. Supp. 1984); KY. REV. STAT. ANN. § 292.480(1) (Baldwin 1985); LA. REV. STAT. ANN. § 51:714 (West Supp. 1985); ME. REV. STAT.

tiffs in securities fraud litigation include claims under one or more blue sky laws. When the securities transaction in issue involves two or more states, as most do, it becomes necessary to determine which local securities acts apply.

Practitioners and courts dealing with a transaction that touches two or more coequal jurisdictions instinctively turn to that area of the law known as conflict of laws. Anyone who has ventured far into this field of law knows it to be a murky world where esoteric concepts are debated in foreign tongues.[7] While it is undoubtedly necessary to step into this world to analyze many transactions, it is seldom, if ever, necessary to do so in determining rights and remedies under the state blue sky laws.

Application of conflict of laws rules presupposes that two or more coequal jurisdictions have a competing exclusive interest in regulating one or more elements of the transaction and that the court considering the case must make a "choice of law," as that phrase is understood in the context of conflicts of laws.[8] Overlapping regulatory interests do not require a choice of law unless one state's regulation necessarily excludes regulation by the other.[9]

States enacting blue sky laws have two distinct public interests to protect. First, they are interested in protecting their citizens from being victimized by fraudulent securities transactions, re-

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ANN. tit. x, § 10605 (Supp. 1985); MD. CORPS. & ASS'NS CODE ANN. § 11-703(b) (Supp. 1985); MASS. ANN. LAWS ch. 110A, § 410 (Michie/Law. Co-op. 1985); MICH. COMP. LAWS ANN. § 451.810(a)(2) (West 1967); MINN. STAT. ANN. § 80A.23(1) (West Cum. Supp. 1985); MISS. CODE ANN. § 75-71-717 (Cum. Supp. 1972); MO. ANN. STAT. § 409.411(a) (Vernon Cum. Supp. 1986); MONT. CODE ANN. § 30-10-307 (1985); NEB. REV. STAT. § 8-1118(1) (1983); NEV. REV. STAT. § 90.200(1) (1979); N.H. REV. STAT. ANN. § 421-B:25 (Repl. Vol. 1983); N.M. STAT. ANN. § 58-13-42 (Repl. Vol. 1984); N.C. GEN. STAT. § 78A-56(a) (1985); N.D. CENT. CODE § 10-04-17 (1985); OKLA. STAT. tit. 71, § 408(a) (Cum. Supp. 1985); OR. REV. STAT. § 59.115(2) (1983); P.R. LAWS ANN. tit. 10, § 890 (1976); S.C. CODE ANN. § 35-1-1490(2) (Law. Co-Op. 1976); S.D. CODIFIED LAWS ANN. § 47-31-133 (1976); TENN. CODE ANN. § 48-2-122(2)(f) (1984); TEX. CORPS. & ASS'NS CODE ANN. § 581-33 (Vernon 1964); UTAH CODE ANN. § 61-1-22(1)(b) (Supp. 1985); VT. STAT. ANN. tit. 9, § 4225 (Repl. Vol 1984); VA. CODE ANN. § 13.1-522(a) (Repl. Vol. 1985); WASH. REV. CODE § 21.20.430(1)(2) (Cum. Supp. 1986); W. VA. CODE § 32-4-410(a) (Repl. Vol. 1982); WIS. STAT. ANN. § 551.59 (West 1985); WYO. STAT. § 17-4-122 (1977).

7. "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or a lawyer, is quite lost when engulfed and entangled in it." Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

8. Conflict of laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1969).

9. *See* J. LONG, *supra* note 4, § 3.02, at 3-7.

gardless of the origin of the securities.[10] In other words, the state is interested in protecting its consumers. Second, those states are interested in ensuring that their territories are not used as bases of operations for purveyors of fraudulent securities, regardless of where they may be marketed.[11] If this were permitted, investors in other states would become distrustful of securities issued from the enacting state. This second interest is directed at protecting legitimate issuers in the state.[12] The states' efforts to advance these interests will always overlap when securities transactions cross state lines. The states' interests can be protected without preventing other states from protecting their own interests.

The application of more than one state's securities act to a securities transaction, though not discussed in reported decisions until very recently,[13] is not a novel concept. Three decades ago, Professor Loss surveyed the reported authorities on applying a state blue sky law in a securities transaction touching two or more states.[14] He found that the decisions defied generalization,[15] partly

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10. *See, e.g.*, Stevens v. Wrigley Pharmaceutical Co., 9 N.J. Misc. 505, 154 A. 403 (Ch. 1931); *accord* Shappley v. State, 520 S.W.2d 766, 772 (Tex. Crim. App. 1975); Op. Att'y Gen. (Ariz.), [1954-61 Transfer Binder] BLUE SKY L. REP. (CCH) ¶ 70,325 (Aug. 24, 1956); Long, *The Conflict of Laws Provisions of the Uniform Securities Act, or When Does a Transaction "Take Place in this State?" Part I*, 31 OKLA. L. REV. 781, 784 (1978), *reprinted in* 11 Sec. L. Rev. 687, 690 (1979), *updated and reprinted in* J. LONG, *supra* note 4, § 3.02, at 3-4.

11. *See, e.g.*, Newsom v. Diamond Oil Producers, Inc., [1982-84 Transfer Binder] BLUE SKY L. REP. (CCH) ¶ 71,869 (D. Okla. 1983); Upton v. Trinidad Petroleum Corp., 468 F. Supp. 330, 335 (N.D. Ala. 1979), *aff'd*, 652 F.2d 424 (5th Cir. 1981); Neils v. Black & Co. v. Nova-Tech, Inc., [1971-78 Transfer Binder] BLUE SKY L. REP. (CCH) ¶ 71,017 (D. Or. 1972); Stevens v. Abbott, Proctor & Paine, 288 F. Supp. 836 (E.D. Va. 1968); *Stevens*, 9 N.J. Misc. 505, 154 A. 403; Enntex Oil & Gas Co. v. State, 560 S.W.2d 494, 497 (Tex. Civ. App. 1977), *appeal dismissed*, 439 U.S. 961 (1978); Rio Grande Oil Co. v. State, 539 S.W.2d 917 (Tex. Civ. App. 1976); Long, *supra* note 5.

12. These two state interests are not unique to the securities marketplace. In a case involving state regulation of packaging of perishable foods, the Supreme Court noted:

> We are not, then, dealing here with "state legislation in the field of safety where the propriety of local regulation has long been recognized," or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State. These are surely legitimate state interests.

Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970); *accord* Brown v. Market Dev., Inc., 41 Ohio Misc. 57, 322 N.E.2d 367 (C.P. Hamilton County 1974).

13. Lintz v. Carey Manor Ltd., 613 F. Supp. 543 (W.D. Va. 1985), *appeal filed*, No. 85-1896 (4th Cir. July 31, 1985).

14. Loss, *The Conflict of Laws and the Blue Sky Laws*, 71 HARV. L. REV. 209 (1957), *reprinted in* 1 L. LOSS, SECURITIES REGULATION 67 (2d ed. 1961) (authorities cited in original are substantially limited in this reprint).

15. *Id.* at 216.

because they were not really concerned with conflict of laws problems.

> [I]n the blue sky cases the buyer typically alleges the violation of a particular statute, which often happens to be the forum's, and the question is not whether that statute applies in the face of some other governing law but simply whether it applies at all as a matter of statutory construction.[16]

He also found nothing illogical about applying the laws of more than one state to any given multi-state securities transaction.[17]

Professor Loss found the application of conflict of laws concepts unsatisfactory, and he concluded that codification was the reasonable way to bring uniformity to the problem.

> One cannot ponder over the blue sky conflict-of-laws cases without concluding that they represent a pushing and pulling of traditional but unsuitable choice-of-law concepts which were developed for private contract and tort actions. When a whole area of "public" law owes its very existence to legislation, it is not merely anomalous that so important a segment of the area is left to the chance application of conflict-of-laws concepts developed by the common law in quite different contexts; it would be amazing if the result were a reasonably satisfactory geographical allocation of the statutes. Yet it remains true with only a few qualifications that the one solution to the multifarious and vexatious problems of the conflict of laws which no blue sky state has thus far adopted is the codification route.[18]

Professor Loss drafted the Uniform Act, including its territoriality provisions in section 414.[19] The approach of that section is to

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16. *Id.* at 219.
17. *Id.* at 225 n.50.
18. *Id.* at 248.
19. The territoriality provisions are subsections (a) through (f):

(a) Sections 101, 201(a), 301, 405, and 410 apply to persons who sell or offer to sell when (1) an offer to sell is made in this state, or (2) an offer to buy is made and accepted in this state.

(b) Sections 101, 201(a), and 405 apply to persons who buy or offer to buy when (1) an offer to buy is made in this state, or (2) an offer to sell is made and accepted in this state [Subsection (b), as amended by the Conference, August 23, 1958].

(c) For the purpose of this section, an offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer (1) originates from this state or (2) is directed by the offeror to this state and received at the place define when the statute of a particular state applies to any given securities transaction, without regard to whether the statute of some other state might also apply.[20] In other words, there is no presumption of exclusivity in the application of a blue sky law. The morass of conflict of laws rules is largely, and perhaps fully, avoided.

The interpretation and applicability of subsections 414(a) through (e) of the Uniform Act in multi-state transactions have been extensively analyzed by Professor Joseph Long.[21] His work and the official code comments offer guidance for those seeking to determine the applicability of a blue sky statute that contains the territoriality provisions of the Uniform Act.

Thirty-nine jurisdictions have adopted the Uniform Act,[22]

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to which it is directed (or at any post office in this state in the case of a mailed offer).

(d) For the purpose of this section, an offer to buy or to sell is accepted in this state when acceptance (1) is communicated to the offeror in this state and (2) has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed (or at any post office in this state in the case of a mailed acceptance).

(e) An offer to sell or to buy is not made in this state when (1) the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than two-thirds of its circulation outside this state during the past twelve months, or (2) a radio or television program originating outside this state is received in this state.

(f) Sections 102 and 201(c), as well as section 405 so far as investment advisers are concerned, apply when any act instrumental in effecting prohibited conduct is done in this state, whether or not either party is then present in this state.

UNIFORM SECURITIES ACT § 414, 7B U.L.A. 509, 675 (1985).

20. *Id.* official code comments 2-3. The comments read as follows:

2. Section 414(c) provides, in substance, that an offer which originates in State S and is directed to State B is made in both states. Hence the statute of State B applies under § 414(c)(2) in the hypothetical case.

3. By the same token, the statute of State S also applies to the offer under § 414(c)(1), on the theory that State S should not be used as a base of operations for defrauding persons in other states. It is thus quite possible for more than one statute to apply to a given transaction.

Id.

21. J. LONG, *supra* note 4, at ch. 3; *see also* Long, *supra* note 10, at 781.

22. Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Guam, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Puerto Rico, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. 1 BLUE SKY L. REP. (CCH) ¶ 5500 (1985).

though many have modified various provisions. Seventeen of those jurisdictions have adopted the territoriality provisions verbatim,[23] and nine more have adopted those provisions with relatively minor modifications.[24] One state has apparently decided to regulate only securities sold within its borders and has adopted the territoriality provisions after so limiting them.[25] Of the jurisdictions that have not adopted the Uniform Act, two have drafted and adopted their own territoriality provisions, which are similar to section 414.[26] That leaves twenty-four United States jurisdictions with no detailed statutory definition of the territorial application of their blue sky statutes.[27]

Practitioners and courts concerned with the applicability of those statutes should not turn too quickly to conflict of laws rules to make that determination. In a recent decision, a federal court in Virginia rejected the conflict of laws approach and simply determined whether there was a sufficient nexus to apply the blue sky statute invoked by the plaintiffs.[28]

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23. Alaska (ALASKA STAT. § 45.55.260 (1962)); Connecticut (CONN. GEN. STAT. REV. § 36-502 (West 1981)); District of Columbia (D.C. CODE ANN. § 2-2615 (1962)); Guam (GUAM GOV'T CODE § 45414 (1983)); Kentucky (KY. REV. STAT. ANN. § 292.313 (Baldwin 1981)); Maryland (MD. CORPS. & ASS'NS CODE ANN. § 11-801 (Repl. Vol. 1985)); Massachusetts (MASS. ANN. LAWS ch. 110A, § 414 (Michie/Law. Co-op. 1985)); Michigan (MICH. COMP. LAWS § 459.814 (Cum. Supp. 1985)); Mississippi (MISS. CODE ANN. § 75-71-119 (Cum. Supp. 1985)); New Hampshire (N.H. REV. STAT. ANN. § 421-B:30 (Repl. Vol. 1983)); New Jersey (N.J. STAT. ANN. § 49:3-51 (West 1970)); North Carolina (N.C. GEN. STAT. § 78A-63 (1985)); Oklahoma (OKLA. STAT. ANN. tit. 71, § 413 (West 1985)); Puerto Rico (P.R. LAWS ANN. tit. 10, § 894 (1976)); South Carolina (S.C. CODE ANN. § 35-1-180 (Law. Co-Op. 1976)); West Virginia (W. VA. CODE § 32-4-414 (Repl. Vol. 1982)); Wyoming (WYO. STAT. § 17-4-126 (1977)).

24. Arkansas (ARK. STAT. ANN. § 67-1260 (Cum. Supp. 1985)); Iowa (IOWA CODE § 502.610 (Cum. Supp. 1985)); Minnesota (MINN. STAT. § 80A.27 (Cum. Supp. 1985)); Missouri (MO. ANN. STAT. § 409.415 (Vernon 1979)); Montana (MONT. CODE ANN. § 1 (1985)); Nevada (NEV. REV. STAT. § 90.186 (1979)); Oregon (OR. REV. STAT. §§ 59.335, 59.345 (1983)); Pennsylvania (PA. STAT. ANN. tit. 70, § 1-702 (Purdon Cum. Supp. 1985)); Wisconsin (WIS. STAT. ANN. § 551.60 (West 1985)).

25. Utah deleted that portion of § 414(c) that defines an offer to sell or buy made in the state to include an offer that "originates from this state." The Utah definition is limited to offers "directed by the offeror to this state and received at the place to which it is directed, or at any post office in this state in the case of a mailed offer." UTAH CODE ANN. § 61-1-26(3) (Supp. 1985).

26. California (CAL. CORP. CODE § 25008 (West 1977)) and Maine (ME. REV. STAT. ANN. tit. 32, § 10707 (Supp. 1985)).

27. Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Nebraska, New Mexico, New York, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, and Washington.

28. Lintz v. Carey Manor Ltd., 613 F. Supp. 543 (W.D. Va. 1985), *appeal filed*, No. 85-1896 (4th Cir. July 31, 1985).

III. *Lintz v. Carey Manor Ltd.*

The court in *Lintz v. Carey Manor Ltd.*[29] was required to determine the applicability of the Virginia Securities Act (Virginia Act)[30] to multi-state securities transactions. The Virginia Act is modeled after an early draft of the Uniform Act that did not contain section 414.[31] The Virginia Act has no explicit territorial limitation.[32]

The court determined the applicability of the Virginia Act in the context of securities transactions emanating from Virginia and touching several other states.[33] Although the issue was couched by defendants as a conflict of laws issue, the court expressly rejected that approach and determined that the only question was whether a sufficient nexus existed between the securities transactions and Virginia to invoke the Virginia Act.[34] The court found the Virginia Act applicable, but it could have found other state blue sky laws applicable as well.[35]

A. *The Factual Setting in* Lintz

Lintz involved a series of lawsuits[36] arising out of a complex scheme organized by Joseph Griggs, III, a Roanoke, Virginia archi-

29. 613 F. Supp. 543 (W.D. Va. 1985), *appeal filed*, No. 85-1896 (4th Cir. July 31, 1985).

30. VA. CODE ANN. §§ 13.1-501 to -527.3 (Repl. Vol. 1985).

31. Loss, *supra* note 14, at 253; *accord* Riely, *The Virginia Securities Act: A Blue Sky Primer*, 45 VA. L. REV. 303, 306 (1959).

32. Loss, *supra* note 14, at 253.

33. *Lintz*, 613 F. Supp. at 543.

34. *Id.*

35. Plaintiffs had alleged violations of the New Jersey Securities Act, the Florida Securities Act, and the Pennsylvania Securities Act of 1972, as well as the Virginia Securities Act. *Id.* at 546. Before the issue was decided, plaintiffs had advised the court that, if the Virginia Securities Act applied, they would abandon their claims under the other state securities acts to obviate the need to interpret those acts. *Id.* at 551. Thus, in the end, no blue sky law other than Virginia's applied, but that was only because of the election of the plaintiffs and not because of any conflict of laws ruling.

36. At the time the opinion was issued there were eighteen lawsuits pending in the United States District Court for the Western District of Virginia. *Id.* at 546. Other suits had been filed in other courts against some of the same defendants. Getz v. Mark Partners 1980-A, No. 82-1947 CA 26 (Fla. Cir. Ct. filed Feb. 2, 1982); Shore v. River Towers, Ltd., No. 82-1945 CA 26 (Fla. Cir. Ct. filed Feb. 2, 1982); Jacowitz v. Mark Partners 1980-A, No. 82-1946 CA 26 (Fla. Cir. Ct. filed Feb. 2, 1982); Lessin v. Mark Partners 1980-A, No. 82-20801 (26) (Fla. Cir. Ct. filed Oct. 26, 1982); Gorelik v. Strom, No. 84 C 10999 (N.D. Ill. filed Dec. 28, 1984).

The court's ruling applied to the four cases in the Western District of Virginia that were ready for trial. Lintz v. Carey Manor Ltd., Nos. 83-0079-R, 83-0993-R (W.D. Va. filed Feb.

tect. With professional assistance from W.F. Mason, Jr., a Roanoke lawyer, and Faine, Harrell, Larmer & Co. (the Accountants),[37] a Roanoke accounting firm, Griggs organized and operated a series of interrelated partnerships and corporations involved in his securities offerings.[38] The Griggs organization offered and sold limited partnership units in apartment projects to be financed with mortgages insured by the United States Department of Housing and Urban Development (HUD).[39]

The limited partnership units were offered to investors via a lengthy private placement memorandum (PPM).[40] Each PPM identified the Accountants as the accounting firm retained by the partnership, represented that the Accountants had reviewed the financial projections contained therein, and stated that the Accountants would prepare all audited statements for the partnership as well as all construction cost certifications for HUD.[41] Mason was identified as general counsel to each partnership,[42] and his opinion letter was contained in each PPM.

Although issued from Virginia, the securities were sold almost exclusively outside of Virginia to residents of other states.[43] All plaintiffs were solicited outside the state and made their investment decisions outside the state.[44]

15, 1983); Shafman v. Mark Partners 1980-A, Nos. 83-0080-R, 83-0991-R (W.D. Va. filed Feb. 15, 1983); Brin v. Timberidge, Nos. 83-0081-R, 83-0980-R (W.D. Va. filed Feb. 15, 1983); Monticello v. Gulf Partners, Nos. 83-0082-R, 83-0996-R (W.D. Va. filed Feb. 15, 1983).

37. In the latter stages of the operation of the Griggs organization, the accounting firm changed its name to Faine, Larmer & Co. and then to Larmer, Young & Co. The accounting firm principals who were directly involved in the work done for the Griggs organization were W.T. Faine and Graham C. Larmer. *Lintz*, 613 F. Supp. at 545. Hereinafter, "the Accountants" will be utilized generically to refer to this accounting firm, under any of its names, as well as any professional in the firm.

38. *Id.* at 550-51.

39. *Id.* at 544.

40. *Id.* Hereinafter each private placement memorandum will be referred to as a "PPM," sometimes preceded by the name of the specific partnership.

41. *Id.* at 545.

42. Mark Partners 1980-A PPM at 28 ("Cruey and Mason" identified as general counsel); Gulf Partners PPM at 24 ("Cruey and Mason" identified as general counsel); Timberidge Assoc. PPM at 28 ("Cruey and Mason" identified as general counsel); Carey Manor Ltd. and Colonial Management Ltd. PPM at 26 (W.F. Mason, Jr., identified as general counsel). Mr. Mason testified that, while he and B.K. Cruey in some ways functioned as partners, they never formed a partnership. Defendant's Deposition at 5-6, Lintz v. Carey Manor Ltd., 613 F. Supp. 543 (W.D. Va. 1985), *appeal filed*, No. 85-1896 (4th Cir. July 31, 1985) (deposition of Mr. Mason).

43. *Lintz*, 613 F. Supp. at 544-45.

44. An investor interested in purchasing units in the retail limited partnerships was re-

When enough subscriptions were received, the limited partnership syndication was closed through a formal closing ceremony conducted in Roanoke, Virginia. Each closing ceremony was presided over by Mason and attended by Griggs, his partner Larry J. Forth, and a representative of the Accountants.[45]

As of January, 1983, construction had not begun on any of the projects, several project sites had not been acquired, and all applications for HUD insurance had expired.[46] Certain plaintiffs had demanded rescission pursuant to their partnership agreements and PPMs, but their demands had been ignored.[47]

Eighteen separate securities fraud suits were filed in the United States District Court for the Western District of Virginia between March, 1983, and February, 1985.[48] Because of various problems

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quired to complete a purchaser questionnaire, a subscription agreement, and a series of annual notes. *Id.* at 544; Mark Partners 1980-A PPM at 11; Gulf Partners PPM at 9; Timberidge Assoc. PPM at 11-12; Carey Manor Ltd. and Colonial Management Ltd. PPM at 11. All investors completed these documents in their states of residence, i.e., outside Virginia. These documents, together with a check representing the initial payment for the partnership unit, were forwarded to the general partner in Roanoke, Virginia. The general partner was a corporation wholly owned and controlled by Griggs and his partner, Larry J. Forth.

By the subscription agreement, each investor agreed that the subscription

> is and shall be irrevocable, but his obligations hereunder will terminate if this subscription is not accepted by the General Partner. The undersigned understands that the General Partner will notify him whether this subscription has been accepted (subject to the sale of all the units prior to the expiration of the Offering Period) or rejected by the expiration of the Offering Period . . . . If rejected, the amount of the payment tendered by him will be returned to him forthwith without interest or reduction. If accepted, the amount of the payment tendered by him will be applied in accordance with the description set forth in the Private Placement Memorandum . . . relating to the Partnership . . . .

Mark Partners PPM at 191; *accord* Gulf Partners PPM at 151; Timberidge Assoc. PPM at 171; Carey Manor Ltd. and Colonial Management Ltd. PPM at 229.

45. Each ceremony was memorialized in closing minutes. Mark Partners 1980-A closing minutes; Gulf Partners closing minutes; Timberidge Assoc. closing minutes; Carey Manor Ltd. and Colonial Management Ltd. closing minutes. In each closing ceremony, Mason recited that he had all relevant documentation; he requested oral assurances from the other participants that the documentation was valid and in order; and he requested oral assurances from each participant that all material facts had been properly disclosed to all investors. Mark Partners 1980-A closing minutes; Gulf Partners closing minutes; Timberidge Assoc. closing minutes; Carey Manor Ltd. and Colonial Management Ltd. closing minutes. At the end of each ceremony, Mason declared the partnership formally closed, and the investors' funds were disbursed from escrow. Mark Partners 1980-A closing minutes; Gulf Partners closing minutes; Timberidge Assoc. closing minutes; Carey Manor Ltd. and Colonial Management Ltd. closing minutes.

46. *Lintz*, 613 F. Supp. at 545.

47. *Id.*

48. The eighteen actions pending at the time of the court's opinion were Brin v. Timberidge Assoc. Ltd., Nos. 83-0081-R, 83-0980-R (W.D. Va. filed Feb. 15, 1983); Shafman v.

involving other defendants, plaintiffs were actively pursuing only their claims against Mason and the Accountants.[49]

The plaintiffs were not residents of Virginia; all were outside of Virginia when they decided to invest and when they signed the subscription documents. Each sought recovery, *inter alia*, under the Virginia Act,[50] as well as the securities act of his state of residence.[51] The blue sky claims offered each plaintiff his principal opportunity for an award of attorneys' fees against the defendants.[52]

The Virginia Act proscribes certain improper offers and sales of securities[53] and imposes liability on certain persons involved in the proscribed transactions. It provides that the victim shall recover the consideration paid plus six percent interest, costs, and reasonable attorneys' fees.[54] The civil liability and remedies provisions impose liability on persons who sell securities in violation of the Vir-

Mark Partners 1980-A, Nos. 83-0080-R, 83-0991-R (W.D. Va. filed Feb. 15, 1983); Lintz v. Carey Manor Ltd., Nos. 83-0079-R, 83-0993-R (W.D. Va. filed Feb. 15, 1983); Monticello v. Gulf Partners Ltd., Nos. 83-0082-R, 83-0996-R (W.D. Va. filed Feb. 15, 1983); Rosenberg v. Mark Real Estate Fund Ltd. III, No. 83-1015-R (W.D. Va. filed Nov. 29, 1983); Clutter v. Villa Del Sol Partners, No. 83-0992-R (W.D. Va. filed Nov. 28, 1983); Fishman v. Sugartree Ltd., No. 83-1017-R (W.D. Va. filed Nov. 30, 1983); Bell v. River Towers Ltd., No. 83-0990-R (W.D. Va. filed Nov. 28, 1983); Cole v. Fleetwood-A Ltd. Partnership, No. 85-0055-R (W.D. Va. filed Jan. 11, 1985); McGregor v. Oakdale Square Ltd., No. 85-0057-R (W.D. Va. filed Jan. 11, 1985); Weber v. Old Forest Ltd., No. 85-0103-R (W.D. Va. filed Jan. 21, 1985); Suesz v. Sea Pines, Ltd., No. 85-0053-R (W.D. Va. filed Jan. 11, 1985); Suesz v. Orchard View, No. 85-0054-R (W.D. Va. filed Jan. 11, 1985); Cole v. Piedmont Manor Ltd., No. 85-0052-R (W.D. Va. filed Jan. 11, 1985); Cole v. Augusta Heights, Ltd., No. 85-0051-R (W.D. Va. filed Jan. 11, 1985); Heberling v. Highland Oaks Ltd., No. 85-0050-R (W.D. Va. filed Jan. 11, 1985); Heberling v. Summer View, Ltd., No. 85-0056-R (W.D. Va. filed Jan. 11, 1985); Morton v. Chatham House, Ltd., No. 85-0136-R (W.D. Va. filed Feb. 4, 1985). Since the opinion, one more action has been filed: McTague v. Twin Lakes Ltd., No. 85-0579-R (W.D. Va. filed July 5, 1985). Each lawsuit arises out of a different partnership.

49. *Lintz*, 613 F. Supp. at 546. Claims against Griggs were severed after he filed for bankruptcy and default judgments were entered against the other corporate defendants. *Id.*

50. VA. CODE ANN. §§ 13.1-501 to -527.3 (Repl. Vol. 1985).

51. *Lintz*, 613 F. Supp. at 547 (plaintiffs filed claims under New Jersey and Florida blue sky laws).

52. *Id.* at 546. Plaintiffs had also alleged violations of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982), which provides for an award of a reasonable attorney's fee to a prevailing plaintiff. *Id.* § 1964(c). However, plaintiffs had voluntarily dismissed the RICO counts before the court's ruling. *Lintz*, 613 F. Supp. at 546 n.4.

53. Plaintiffs alleged two separate violations: offers and sales of unregistered, non-exempt securities in violation of VA. CODE ANN. §§ 13.1-507 to -522(a)(1), and sales of securities by means of untrue statements of material facts or omissions to state material facts in violation of VA. CODE ANN. § 13.1-522(a)(2). *Lintz*, 613 F. Supp. at 547.

54. VA. CODE ANN. § 13.1-522(a) (Repl. Vol. 1985).

ginia Act and on persons who aid them in such sales or who control them.[55]

Perceiving the Virginia Act as the only real threat for an attorneys' fee award, Mason and the Accountants moved for partial summary judgment dismissing the claims under that Act.[56] They assumed that the court was faced with a conflict of laws issue and argued the following: (1) that, under the conflict of laws rules prevailing in the forum, *lex loci delicti*[57] governs; (2) that, under *lex loci delicti*, the place of the wrong is where the investors resided and suffered their losses (*i.e.*, outside Virginia); and (3) that, therefore, the Virginia Act could not apply.[58]

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55. The secondary liability provision of the act, as published in the Virginia Code 1978 replacement volume by the Michie Company, contained a publishing omission which was subsequently corrected in the 1985 replacement volume. As originally published by Michie's, it read:

> Every person who materially participates or aids in a sale made by any person liable under subsection (a), who directly or indirectly controls any person so liable, shall also be liable jointly and severally with and to the same extent as the person so liable, unless the person who so participates, aids or controls sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There shall be contribution as in cases of contract among the several persons so liable.

VA. CODE ANN. § 13.1-522(b) (Repl. Vol. 1978). This language suggested that, to establish secondary liability, a plaintiff had to establish both material participation or aid in the primary violation and control over the primary violator. This would have combined the elements of two distinct concepts of secondary liability—aiding and abetting plus controlling person—and virtually eliminated liability for all but the principal violator.

The secondary liability section, as enacted by the Virginia General Assembly and corrected in the 1985 version of the Code, kept the two concepts of secondary liability distinct:

> Every person who materially participates or aids in a sale made by any person liable under subsection (a), *or* who directly or indirectly controls any person so liable, shall also be liable jointly and severally with and to the same extent as the person so liable, unless the person who so participates, aids or controls sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There shall be contribution as in cases of contract among the several persons so liable.

VA. CODE ANN. § 13.1-522(b) (Repl. Vol. 1985) (emphasis added); 1956 Va. Acts 428 (emphasis added).

56. *Lintz*, 613 F. Supp. at 544, 546.

57. *Lex loci delicti* refers to the law of the place where the crime or wrong took place. BLACK'S LAW DICTIONARY 820 (5th ed. 1979). Virginia follows this traditional rule and has rejected the most significant contacts test. *See, e.g.*, McMillan v. McMillan, 219 Va. 1127, 253 S.E.2d 662 (1979).

58. *Lintz*, 613 F. Supp. at 547. Arguing that the securities act of the state of residence of each plaintiff governed exclusively, Mason and the Accountants went on to argue that, under those acts, there could be no attorneys' fee awards against them for various reasons. *Id.* at 547-48. Those issues were not decided, since the court ruled that the Virginia Act

B. *The Holding in* Lintz

The trial court determined that it was not faced with a conflict of laws issue and that the only issue was whether there was a sufficient nexus with Virginia to invoke the Virginia Act,[59] without regard for whether the securities act of some other jurisdiction might also apply. The court found the Virginia Act applicable.[60]

After reviewing the briefs of the parties and conducting supplemental research, the court was unable to find persuasive authority discussing whether traditional conflict of laws rules should apply in a multi-state securities transaction.[61] Thus, the court addressed an issue of first impression.[62]

The court held that determining the applicability of any state's blue sky law to a multi-state securities transaction does not require a conflict of laws analysis.[63] Any analysis on that basis is premised upon "an unduly narrow view of the authority of the state to regulate securities transactions which have a nexus to the state."[64] The court held that the sole basis for determining whether a particular state's blue sky law can be invoked is whether there is a sufficient nexus between the transaction and the state.[65] The court found such a nexus between the transactions in issue and Virginia.[66]

> If the allegations in the Complaints are true, then the Defendants, operating from Roanoke, Virginia, sold securities to non-residents without registering them and through fraud or misrepresentation. Such actions are unlawful and if made with an intent to defraud could be prosecuted as a class 4 felony. It cannot be disputed that Virginia has a legitimate interest in applying its securities laws to operations conducted within the state, even if aimed at non-residents. And if the General Assembly chooses to regulate these trans-

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could apply, and plaintiffs elected to pursue their remedies under that statute. *Id.* at 551.

59. Lintz v. Carey Manor Ltd., 613 F. Supp. 543, 551 (W.D. Va. 1985), *appeal filed*, No. 85-1896 (4th Cir. July 31, 1985).

60. *Id.* at 551. The same effective result could have been achieved under a conflict of laws analysis applying either *lex loci delicti* or *lex loci contractus*. The sale of the securities was structured as a solicitation of an offer from the investors that was accepted by the general partner in Virginia. Thus, the contract was made in Virginia, and the last event necessary to make defendants liable also occurred in Virginia.

61. *Id.* at 548.

62. *Id.* at 550.

63. *Id.*

64. *Id.*

65. *Id.* at 550-51.

66. *Id.* at 551.

> actions through the imposition of statutory civil liability in addition to criminal liability, it is free to do so.[67]

The court held that establishment of such a nexus with one state in no way precludes invoking the blue sky law of some other state that may also have a proper nexus.[68]

> The same analysis can be applied to the Blue Sky laws of New Jersey, Florida or any other state. If upon application of the facts a transaction is found to be covered by the statutory scheme developed by those states, then the penalties imposed by those statutes can be applied. I see no reason why a conflicts of law problem develops if one Blue Sky law provides fewer remedies, lacks an attorneys' fee provision, has a shorter statute of limitations or has a more limited scope than the law of another state. Just as the same act can violate both federal and state law simultaneously, or a state statute as well as state common law, so too can it violate several Blue Sky laws simultaneously. There is nothing inconsistent in trying a securities case on multiple theories, and determining liability under each statute that is applicable, so long as the plaintiff is prevented from multiple recoveries.[69]

The nexus justifying application of the Virginia Act was that the securities were issued from Virginia, by Virginia residents, with assistance from professionals operating in Virginia under professional licenses granted by Virginia.[70] Virginia's interest in the transactions was to prevent its territory from being used as a base for selling fraudulent securities.[71]

The nexus with plaintiffs' home states justifying application of those states' blue sky laws was that the securities were offered within their territories to their citizens by brokers operating in their territories under licenses granted by those states.[72] Those states' interest in the transactions was to protect their citizens from the sale of fraudulent securities.[73]

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67. *Id.* (citations omitted).
68. *Id.*
69. *Id.*
70. *Id.* at 550-51.
71. *Id.*; *see also* Traveler's Health Ass'n v. Commonwealth, 188 Va. 877, 885, 51 S.E.2d 236, 265 (1949), *aff'd*, 339 U.S. 643 (1950).
72. *Lintz*, 613 F. Supp. at 551.
73. *Id.*

IV. Evaluation of the *Lintz* Decision

The district court's decision is correct if satisfactory answers to three questions can be obtained: (1) Does the Commonwealth of Virginia have the power to regulate as broadly as the court ruled its statute reaches? (2) Does the Virginia Act reach as broadly as the court construed it to reach? (3) Applying the court's broad construction to any multi-state securities transaction will necessarily result in overlapping jurisdiction between the blue sky laws of the various states involved. Does that overlapping jurisdiction require application of conflict of laws rules and require the court to effect a "choice of laws"?

A. *The Power of States to Regulate Securities Transactions that Occur only Partially Within Their Territories*

There appears to be little question that Virginia has the inherent power to regulate the activities of the defendants. All of the defendants were residents of Virginia at all relevant times. Their actions for which plaintiffs sought redress all occurred in Virginia. Mason and the Accountants were professionals practicing under licenses granted by Virginia.[74]

Likewise this type of regulation does not offend the commerce clause of the United States Constitution.[75] The Virginia statute only requires registration of certain persons[76] and securities[77] and prohibits fraud in connection with the sale of securities.[78] It also imposes criminal[79] and civil[80] liability upon those who violate the Act. The effects on interstate commerce are incidental, and the burden on interstate commerce is no greater than that of any legit-

74. Attorneys are licensed and regulated pursuant to VA. CODE ANN. §§ 54-42 to -83.1:4 (Repl. Vol. 1985). Certified public accountants are licensed and regulated pursuant to VA. CODE ANN. §§ 54-84 to -102 (Repl. Vol. 1985).

75. U.S. CONST. art. I, § 8, cl. 3.

76. Persons transacting business in Virginia as broker-dealers, investment advisors, or agents, except for exempt transactions, must register. VA. CODE ANN. § 13.1-504(a) (Repl. Vol. 1985).

77. Except for exempt securities or transactions, securities must be registered to be offered or sold. *Id.* § 13.1-507.

78. Fraudulent devices, schemes, or artifices; untrue statements of material facts and omissions of material facts; and transactions, practices, or courses of business which operate or would operate as a fraud on the purchaser in connection with a securities transaction are prohibited. *Id.* §§ 13.1-502, -522(a)(2).

79. *Id.* § 13.1-520.

80. *Id.* § 13.1-522.

imate regulatory statute. Therefore, the Virginia Act does not discriminate against interstate commerce, and it does not operate to disrupt the required uniformity.[81]

The commerce clause of the United States Constitution does not disable states from regulating securities transactions within their boundaries.[82] A state statute affecting interstate commerce will be upheld if it regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are incidental unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.[83] The Virginia Act, as construed by the district court, meets the constitutional standard.

Likewise, state regulation of securities does not offend the due process requirement of the United States Constitution. So long as the regulating state has a "significant contact or aggregation of contacts" with the transaction to which its regulatory law is applied, due process requirements are satisfied.[84] Issuing securities from the state is a significant contact sufficient to satisfy due process requirements. As noted previously, a state has a legitimate interest in preventing its territory from being used as a springboard for fraudulent activities.[85] The same result would obtain if the situation were reversed—i.e., if the Virginia Act were applied to non-Virginia professionals assisting in the issuance of securities issued outside its territories and sold within the territory of Virginia. Due process does not preclude application of more than one state's law to a given transaction.[86] A sale of securities within the state's boundaries is also a significant contact for due process purposes. Here, the state's interest in protecting its citizens from purchasing fraudulent securities would satisfy due process requirements. These interests satisfy due process requirements to permit application of the law of the state from which securities issue as well as

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81. *See* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 448 (1960) (criminal provisions of the smoke abatement code of Detroit held constitutional as applied to ships while docked at Detroit although the vessels operated in interstate commerce).

82. Hall v. Geiger-Jones Co., 242 U.S. 539 (1917).

83. Pike v. Bruce Church, 397 U.S. 137, 142 (1970); *Huron Portland*, 362 U.S. at 443.

84. Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965, 2980 (1985); *accord* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (plurality opinion); *see also id.* at 334 (Powell, J., dissenting).

85. In a different context, the Supreme Court has stated that such an interest is a legitimate state interest. *See Pike*, 397 U.S. 137 (1970); *see also supra* note 12.

86. *Phillips*, 105 S. Ct. at 2981; *Allstate*, 449 U.S. at 307.

the law of the state in which they are offered or sold.

Virginia's blue sky law is unusual because it has no explicit territorial limitation. Of course, Virginia does not have the power to regulate a transaction that takes place entirely beyond its boundaries.[87] It is only when some part of the transaction takes place within the territory of the state that the state acquires the power to regulate it.[88] Absent an explicit territorial limitation, the state's blue sky law must be limited to the maximum jurisdictional reach of the state, i.e., to transactions that take place at least in part within the state.[89] This was the nexus that was necessary to the court's ruling in *Lintz*.[90]

B. *The Breadth of the Virginia Act*

State blue sky statutes are remedial,[91] not penal. Therefore, they are to be construed broadly, not narrowly. Absent an explicit territorial limitation, a blue sky statute should be construed to apply as broadly as the state's power to regulate securities. A state is empowered to regulate securities that are issued from within its territory, regardless of where they may be marketed. Likewise, it is empowered to regulate securities marketed within its territory, regardless of their origin. Finally, a state is empowered to impose civil liability upon those who violate its regulatory scheme as well

87. *Lintz*, 613 F. Supp. at 549-50; J. LONG, *supra* note 4, § 3.02, at 3-5 to 3-6.

88. *Lintz*, 613 F. Supp. at 550.

89. *Accord* Loss, *supra* note 14, at 242 (without an explicit limitation, a state statute will be implicitly limited to transactions "in this state").

90. If the state could find a theoretical basis for jurisdiction to regulate transactions that have no nexus with the state, exercising that power would offend the interstate commerce clause of the United States Constitution. *Hall*, 242 U.S. at 557.

> The provisions of the law, it will be observed, apply to dispositions of securities *within* the state and while information of those issued in other States and foreign countries is required to be filed (§§ 6373-9), they are only affected by the requirement of a license of one who deals in them *within* the State. Upon their transportation into the state there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the State. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally.

Id. at 557-58 (emphasis in original).

91. Pollok v. Commonwealth, 217 Va. 411, 413, 229 S.E.2d 858, 859 (1976).

as those who assist others in violating it.

Section 414 of the Uniform Act is simply an intricate effort to define the transactions to which the Act applies. While a state may define the application of its own blue sky statute more narrowly than does the Uniform Act,[92] it should not be assumed that a failure to adopt the territoriality provision of the Uniform Act means that the state's blue sky statute is intended to apply more narrowly than it could.

The Uniform Act defines a broad territorial application and contemplates overlapping applications among states.[93] But the Uniform Act did not increase the inherent power of the states to regulate. The purpose of the Uniform Act was simply to make the various local securities regulation schemes uniform.[94] Section 414 of the Uniform Act is available only because the states already had the power to regulate in that manner, i.e., the power to regulate securities that emanate from within their boundaries and are sold elsewhere, as well as the power to regulate securities that emanate from elsewhere and are sold within their boundaries.[95] Absent a legislative directive to regulate on a narrower basis, it must be presumed that each blue sky statute reaches to its outer limits.

The blue sky laws of states that have not adopted section 414 have been applied as broadly. Texas has adopted neither the Uniform Act nor its territoriality provision. The only explicit territorial limitation of the Texas blue sky statute is the occasional limitation that the Act applies to certain activities "within this state" or "in this state."[96] Yet, the Texas blue sky statute has been held applicable both to securities emanating from outside the state but

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92. *Accord id.* at 413, 229 S.E.2d at 860.

93. *See supra* notes 19, 20.

94. At the request of the National Conference of Commissioners on Uniform State Laws, the Uniform Securities Act was drafted by Professor Louis Loss of the Harvard Law School, with the aid of Mr. Edward M. Cowett. BLUE SKY L. REP. (CCH) ¶ 5500 (1985). The primary purpose of uniform state laws is to provide, to the extent possible, uniform laws on the subject involved that would be common among all states adopting them. *See* 73 AM. JUR. 2d *Statutes* § 32 (1974).

95. "It is settled beyond controversy . . . that the regulation of the promotion and sale of securities is a proper exercise of the police power of the states." Traveler's Health Ass'n v. Commonwealth, 188 Va. 877, 885, 51 S.E.2d 263, 265 (1949), *aff'd*, 339 U.S. 643 (1950).

96. For example, TEX. CORPS. & ASS'NS CODE ANN. § 581-4(E) (Vernon Cum. Supp. 1986) which defines "sell" to include the posting "within this state" of certain offering material; *id.* § 581-12, which requires registration of persons who offer to sell or sell securities "in this state"; *id.* § 581-32, which empowers the Securities Commissioner and the Attorney General to seek an injunction against and restitution for certain acts "within this state."

sold within its borders[97] and to securities emanating from Texas and sold outside of Texas.[98] Similarly, Florida has not adopted the Uniform Act, and the only territorial limitation found in the Florida blue sky statute is similar to that of the Texas Act.[99] The Florida statute has also been applied to securities emanating from Florida but sold entirely outside the state.[100]

Virginia has imposed no explicit territorial limitation on its securities regulatory scheme. Therefore, the *Lintz* court was correct in construing the Virginia Act broadly. So long as there is a reasonable nexus between the transaction and the state whose blue sky law is invoked, the act should apply.[101]

C. *Conflict of Laws Analysis Unnecessary*

More than one state's blue sky law may have a reasonable nexus to a securities transaction, but that should not in itself cause a problem. Professor Loss, the preeminent authority on blue sky statutes, finds nothing illogical about overlapping blue sky regulations in a multi-state securities transaction.[102]

> When an offer is mailed from State *X* into State *Y*, or when a transaction has contacts with more than one state in some other way, it is quite possible that the same conduct will violate the statutes of both (or all) of the states.[103]
>
> Then again, the cases often turn not on any choice of law in the orthodox conflict-of-laws sense but on the peculiar wording of a particular blue sky statute. That is to say, the buyer typically alleges the violation of a particular statute, which often happens to be the forum's and the question is not whether that statute applies in the face of some other governing law but simply whether it applies at all as a matter of statutory construction. To a large if not a major extent, in other words, the problems here are treated not as conflict-of-laws problems at all, except in the broadest sense of the term

97. Shappley v. State, 520 S.W.2d 766 (Tex. Crim. App. 1975).

98. Enntex Oil & Gas Co. v. State, 560 S.W.2d 494 (Tex. Civ. App.), *appeal dismissed*, 483 U.S. 961 (1978); Rio Grande Oil Co. v. State, 539 S.W.2d 917 (Tex. Civ. App. 1976).

99. *See, e.g.*, FLA. STAT. § 517.07 (1985) (requires registration of securities sold or offered for sale "within this state"); *id.* § 517.12(1) (requires registration by persons who sell securities "in or from offices in this state").

100. State v. Hayes, 305 So. 2d 819 (Fla. Dist. Ct. App. 1975).

101. *See supra* text accompanying notes 59-73.

102. *See supra* text accompanying notes 14-21.

103. 1 L. LOSS, SECURITIES REGULATION 73 (2d ed. 1961).

"conflict of laws" as subsuming all cases having contacts with more than one state.[104]

Each state, in devising its securities regulatory scheme, balances its interest in protecting its consumers against its interest in preventing its territory from being used as a springboard for fraudulent activities. That two different states strike the balance in two different ways should not lead to the conclusion that one must "choose" between the laws of the two in determining the rights and remedies attaching to a securities transaction that involves both states. Two inconsistent regulatory systems do not necessarily require a "choice of law." The following hypotheticals are instructive:

(1) A security is issued[105] from state *X* and purchased in state *Y*. This particular type of security transaction is prohibited[106] by state *X* but not by state *Y*. State *Y*'s failure to proscribe this transaction should not be interpreted as official approbation for the transaction. State *Y*'s silence should not be utilized to hinder enforcement of the prohibition enacted by state *X*.[107] An investor in state *Y* who purchased the security should be permitted to invoke the remedy afforded by the state from which the securities were illegally issued.

(2) A security is issued from state *X* and purchased in state *Y*. This particular security transaction is illegal in state *Y* but is not illegal in state *X*. Again, the failure of state *X* to outlaw this particular transaction should not be viewed as a statement of approval. State *Y*'s determination to outlaw this transaction should not be frustrated through a conflict of laws analysis. The victimized investor in state *Y* should be afforded the remedy granted by state *Y* despite the fact that the issuer operated out of state *X*.

(3) A security is issued from state *X* and sold in state *Y*. This particular security transaction is prohibited by both states. Both ex-

104. *Id.* at 69.

105. Most blue sky statutes' prohibitions apply only to certain sales, offers to sell, and solicitations of offers to buy. The issuance of securities is, of course, the essential first step in offering or selling the securities. The term "issue" is used in these hypotheticals to indicate the source of the securities.

106. "Prohibited" and "illegal" are used broadly to encompass fraudulent securities, unregistered non-exempt securities, and securities sold by unregistered brokers.

107. The Virginia Act affords a private right of action for a defrauded purchaser of securities, but not for a defrauded seller of securities. VA. CODE ANN. § 13.1-522 (Repl. Vol. 1985). Few advocates would argue that the failure to prohibit fraud in connection with a purchase of securities constitutes a legislative license for such activities.

plicitly provide for a private civil right of action, and both articulate the specific remedy available. Under the laws of state *X*, the victim is permitted to recover his investment plus eight percent simple interest. Under the laws of state *Y*, the victim is permitted to recover his investment plus six percent simple interest plus costs including reasonable attorneys' fees. Both states have declared this security transaction illegal, and both have done so in a remedial statute. Both depend heavily upon private civil actions by victims to enforce these policies. Why should the court wend its way through the maze of conflict of laws to adjudicate which of two remedies is available to the victim? The issuer has violated the laws of two separate jurisdictions. Either law is equally applicable, and the victim should be permitted to choose his remedy.

(4) A security is issued from state *X* and purchased in state *Y*. This security transaction is illegal under the laws of both state *X* and state *Y*. The remedies afforded are identical; but state *X* allows recovery only against the issuer, while state *Y* allows recovery against the issuer as well as aiders and abettors of the issuer and persons who control the issuer. Again, the pronounced policy of both states has been violated. The failure of state *X* to prescribe secondary liability should not be read as a license to assist an issuer in violating the law.

These hypotheticals demonstrate that mere inconsistency between two or more state securities acts does not mandate conflict of laws analysis or require the court to make a "choice of law."

It is conceivable that an inconsistency could render it impossible for a seller of securities in a multi-state transaction to comply with the acts of all states involved. For example:

> A security is issued from state *X* and purchased in state *Y*. State *X* has determined that all available financial information, including hypothetical forecasts, must be disclosed. State *Y* has determined that financial forecasts are inherently misleading and that it would be fraudulent to disclose them in connection with a sale of securities. If there are financial forecasts relating to the security, it is impossible to comply with the laws of both state *X* and state *Y*.

In such a situation, it may be necessary to resort to conflict of laws rules.[108] Those rules should be reserved for situations in which an act mandated by one applicable statute is prohibited by another.

108. The seller could avoid the dilemma by not selling in state *Y*.

The likelihood of that kind of inconsistency is extremely remote, given the substantial similarities among the various blue sky statutes. It has not yet appeared among the reported blue sky opinions.

V. Conclusion

There is a too-natural tendency among lawyers to assume that a transaction that occurs in more than one jurisdiction will necessarily require a "choice of law," as that phrase is used in the conflict of laws world. That tendency should be resisted when analyzing multi-state securities transactions. The regulatory scheme of each state involved should be analyzed separately. If there is a sufficient nexus between the state and the transaction, then that state's statute applies unless the transaction is excluded by or exempt from the statute. Whether that statute applies does not preclude the application of the regulatory scheme of any other state with an appropriate nexus to the same transaction. Conflict of laws analysis should be reserved for those rare cases in which an act required by one applicable statute is prohibited by another.