

## A HISTORICAL INTRODUCTION TO ARIZONA'S SECURITIES LAWS

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## I. INTRODUCTION

This Article provides an introductory history of Arizona's securities laws. It covers the period from the 1909 Antibucketing Act through 1996, when the last major amendments to the current securities act were enacted. A history of Arizona's securities laws has not previously been published. The start made here is useful in several ways.

First, the history of Arizona's securities laws is part of the history of Arizona's economic development in the twentieth century. Arizona's economic history, particularly during the twentieth century, has been little studied.<sup>1</sup> The history that follows fills a small part of the missing scholarship. Second, the facts, people, and events that produced Arizona's securities laws are interesting in their own right and create context for the laws. Third, it prompts others to undertake research that will expand what is begun here. Finally, the historical background to Arizona's securities statutes provides insight on the meaning of today's laws.<sup>2</sup>

Why did the legislature enact new statutes? Were the changes the result of lobbying by particular interest groups? Were they prompted by a crime or fraud that exposed a weakness in existing laws? Were the later statutes intended to narrow or expand liability? Framing questions like these is possible

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<sup>1</sup> See Gerald D. Nash, *Reshaping Arizona's Economy: A Century of Change*, in ARIZONA AT SEVENTY-FIVE: THE NEXT TWENTY-FIVE YEARS 123, 146 (Beth Luey & Noel J. Stowe eds., 1987) ("Nor has the history of government economic policies in Arizona been written—at the local, urban, state, or federal level. What is the record of state policies toward business, agriculture, or labor? We do not have histories of state agencies affecting economic development—whether corporate regulation, insurance and banking regulation, licensing of the professions, or even water policies").

<sup>2</sup> The importance of understanding a statute's history is illustrated by Justice Hurwitz's interpretation of Arizona's judgment-renewal statutes in *Fid. Nat'l Fin. Inc. v. Friedman*, 238 P.3d 118 (Ariz. 2010). To interpret today's statutes, he began by describing the pre-statutory, common-law background. *See id.* at 119-20. After that, he examined the first territorial statute on judgment renewal and continued his analysis by outlining the amendments leading to the current statutes. *See id.* at 120. With this background, he concluded that an "action," as used in the statute, did not have its ordinary meaning. *See id.* at 121. Rather, an "action" under the statute is a particular type of common-law action on a judgment. *Id.*; *see also* *Carrow Co. v. Lusby*, 804 P.2d 747, 749-51 (Ariz. 1990) (examining the historical development of Arizona's fencing-out statute).

only if the historical background is understood. And the ability to answer historical questions like these facilitates the statutory interpretation on which securities cases turn.<sup>3</sup>

Today we think of securities law as an established legal field. But it was not always so. The foundation of securities law is statutory law. It was not until the three years spanning 1911 to 1913—when the first group of blue-sky laws were enacted—that a legislative foundation for securities law emerged. After that, law reviews, regulatory conferences, professional associations, law-school classes, and eventually treatises devoted to securities law emerged. In this way, securities law arose as a distinct legal field.

The discussion that follows provides a chronological history of Arizona's securities laws. Part II begins by describing the dearth of nineteenth-century securities law. It explains how that changed at the start of the new century and how securities law as a field emerged from the change. Part III discusses the proceedings at the 1910 Constitutional Convention that led to the creation of the Arizona Corporation Commission and to the Commission's constitutional power to regulate publicly sold securities. Part IV discusses the four securities acts enacted between 1909 and 1921. The most important of these was the 1912 Investment-Company Act, which empowered the newly formed Corporation Commission to establish a licensing and registration scheme to regulate companies publicly selling stock. A major gap in the 1912 Act, as well as other securities statutes enacted in 1917 and 1921, was the absence of civil-liability provisions. To fill this gap, Arizona's courts, between 1912 and 1951, implied civil remedies and used statutes requiring surety bonds to provide civil remedies. Part V describes the events and legislation leading to the 1949 formation of the Corporation Commission's Securities Division. It also describes how the leadership provided by the state's first Securities Director led to a new securities act in 1951—an act that despite many amendments, continues to represent the core of Arizona's securities laws. Part VI concludes the history with an explanation of the highly negotiated 1996 amendments to the 1951 Act. The 1996 amendments were by far the most significant amendments in the 1951 Act's history. They introduced new statutes like those on loss causation, proportionate fault, and civil liability for controlling persons. Finally, Part VII places Arizona's securities laws in context by describing the dual system of concurrent state and federal regulation that exists. It explains the broad powers that states retain to supplement and even disregard federal securities law. The result is contrasting Arizona and federal approaches, especially regarding civil liability. Since 2000, Arizona's courts have refused to be bound by federal

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<sup>3</sup> See *Fid. Nat'l Fin. Inc.*, 238 P.3d at 121 (“Legislative intent often can be discovered by examining the development of a particular statute.” (quoting *Carrow Co.*, 804 P.2d at 749)).

decisions—including those of the U.S. Supreme Court—that do not adequately protect investors.

## II. SECURITIES LAW EMERGES AS A LEGAL FIELD: 1911-1951

Securities law, as a field of law, did not exist in the nineteenth century.<sup>4</sup> Cases involving securities were of course litigated but were usually decided under contract, fraud, or tort theories.<sup>5</sup> Scattered state statutes regulating aspects of securities transactions were enacted<sup>6</sup> and the majority of the nineteenth century's state constitutions had provisions that in some way regulated securities sales.<sup>7</sup> But securities law was not taught in law schools. Treatises on securities law did not exist. Securities regulators had yet to appear.<sup>8</sup> No one thought about securities law as a distinct field of law.

It was not until the early twentieth century—when a spate of blue-sky statutes beginning with a 1911 securities act in Kansas were enacted—that people began to think of securities law as a legal field.<sup>9</sup> The enactment of state securities laws spread rapidly and prompted the formation of a national association of

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<sup>4</sup> See WALTER WERNER & STEVEN T. SMITH, *WALL STREET* 145 (1991) (“The notion of government action to protect investors as a class appears to have been foreign to the thinking of the time.”); David Saul Levin, *Regulating the Securities Industry: The Evolution of a Government Policy* 10 (1969) (unpublished Ph.D. dissertation, Columbia University) (on file with U.S. Naval Acad. Library) (“Neither bulls nor bears were subject to governmental or [New York Stock] Exchange regulation during the 19th century.”).

<sup>5</sup> See, e.g., *Steinfeld v. Nielsen*, 139 P. 879, 887-88 (Ariz. 1913) (discussing and collecting nineteenth-century cases regarding the liability of corporate officers and directors for using inside information to buy stock); *Salt River Canal Co. v. Hickey*, 36 P. 171, 172-73 (Ariz. 1894) (holding that a plaintiff who paid for stock that a corporation refused to issue properly sued for the stock's value); *Philes v. Hickies*, 18 P. 595 (Ariz. 1888) (affirming an order imposing a trust and ordering specific performance regarding the transfer of stock that plaintiffs were promised in return for transferring their mining rights under an agreement to form a corporation and issue stock to plaintiffs).

<sup>6</sup> 1 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *SECURITIES REGULATION* 55-56 (5th ed. 2014) (discussing the early statutes).

<sup>7</sup> Gerald D. Nash, *Government and Business: A Case Study of State Regulation of Corporate Securities, 1850-1933*, 38 *BUS. HIST. REV.* 144, 149 (1964) (“Of the new constitutions framed between 1860 and 1900, twenty-two contained special provisions placing restrictions on corporate stock transactions.”); see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 390 (3d ed. 2005) (“No constitutional convention met, between 1860 and 1900, without considering the problem of the corporation.”).

<sup>8</sup> See FRIEDMAN, *supra* note 7, at 391 (describing the market for corporate securities in the second half of the nineteenth century as “totally unregulated; no SEC kept it honest, and the level of morality among promoters was painfully low”).

<sup>9</sup> See *infra* notes 112-16 and accompanying text (discussing blue-sky laws enacted between 1911 and 1913).

investment bankers<sup>10</sup> and state securities administrators.<sup>11</sup> By 1929, state securities law had developed to the point that the National Conference of Commissioners on Uniform State Laws had prepared a Uniform Sale of Securities Sales Act (the 1929 Act).<sup>12</sup> The 1929 Act was followed by federal securities laws in 1933 and 1934.<sup>13</sup> With the appearance of concurrent federal laws, securities law as a field of state and federal statutory law was clearly established and recognized.<sup>14</sup>

But until 1948, no one attempted to organize the securities laws and present the issues they raised in a systematic way.<sup>15</sup> The first book that can fairly be described as a treatise was a scholarly effort by a nonlawyer on the SEC's staff.<sup>16</sup> It was followed three years later by a treatise by Harvard's Louis Loss. Loss's treatise grew out of study materials and commentary that he prepared

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<sup>10</sup> See MICHAEL E. PARRISH, *SECURITIES REGULATION AND THE NEW DEAL* 7-12, 21-36 (1970) (discussing the Investment Banker's Association that was organized in 1912); VINCENT P. CAROSSO, *INVESTMENT BANKING IN AMERICA: A HISTORY* 165-73 (1970) (same).

<sup>11</sup> In 1918, the National Association of Securities Administrators elected a president and conducted its first annual meeting. Key speeches and summaries of the proceedings were published each year afterward. The Association is known today as the North American Securities Administrators Association (NASAA). See *NASAA History*, N. AM. SEC. ADMIN. ASS'N, <http://www.nasaa.org/about-us/nasaa-history/> (last visited May 8, 2014). Although NASAA dates the organization's formation to 1919, its first annual meeting was held in 1918 in Chicago. *Id.*

<sup>12</sup> See UNIFORM SALE OF SECURITIES ACT (1929); Legislation, *Uniform Sale of Securities Act*, 30 COLUM. L. REV. 1184, 1189 (1930) [hereinafter Legislation, *1929 Act*].

<sup>13</sup> See Securities Act of 1933, Ch. 38 Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-77aa (2006) (amended 2012)); Securities Exchange Act of 1934, Ch. 404, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78nn (2006) (amended 2012)).

<sup>14</sup> For a sample of the academic writing that the new laws inspired, see A. A. Berle, Jr., *High Finance: Master or Servant*, 23 YALE REV. 20 (1933); William O. Douglas & George E. Bates, *Some Effects of the Securities Act Upon Investment Banking*, 1 U. CHI. L. REV. 283 (1933); Russell A. Smith, *State "Blue-Sky" Laws and the Federal Securities Acts*, 34 MICH. L. REV. 1135 (1936); Note, *The Liability of Directors and Officers for Misrepresentation in the Sale of Securities*, 34 COLUM. L. REV. 1090 (1934) [hereinafter Note, *Liability of Directors and Officers*].

<sup>15</sup> See generally EDWARD T. MCCORMICK, *UNDERSTANDING THE SECURITIES ACT AND THE S.E.C.* (1948); Edward R. Hayes, *State "Blue Sky" and Federal Securities Laws*, 11 VAND. L. REV. 659, 659 n.1 (1958) (noting that the first casebook to devote significant space to securities regulation was ADOLF A. BERLE & WILLIAM C. WARREN, *CASES AND MATERIALS ON THE LAW OF BUSINESS ORGANIZATION: CORPORATIONS* 731-860 (1948)); cf. A.A. Berle Jr., *Liability for Stock Market Manipulation*, 31 COLUM. L. REV. 264, 264 (1931) ("That body of law which may fairly be said to regulate the security markets has never been systematized or collected.").

<sup>16</sup> See MCCORMICK, *supra* note 15 (McCormick, a CPA and economist with a Ph.D., was a senior member of the SEC's staff. His 300-page treatise focused on the Securities Act of 1933. It included a short history in Part I of the English securities laws and the state securities laws that had preceded the Securities Act of 1933. Part II followed with a comprehensive discussion of the provisions of the 1933 Act, and Part III summarized the positions taken by the SEC in enforcement proceedings. McCormick's treatise did not discuss the 1934 Securities and Exchange Act or judicial decisions on civil liability under the 1933 or 1934 Acts).

and refined in teaching a seminar called "SEC Aspects of Corporate Finance."<sup>17</sup> When finished in 1951, the treatise was published as one volume entitled *Securities Regulation*.<sup>18</sup>

Afterward, Loss and a research assistant undertook a comprehensive study of what were then separate securities statutes in forty-seven states.<sup>19</sup> The results of that study were published in 1958 as *Blue Sky Law*.<sup>20</sup> The book remains a valuable research source that has for the most part been incorporated and updated in later editions of Loss's *Securities Regulation*.<sup>21</sup>

The treatise is now in its fourth edition. With Loss's death in 1997, Professor Joel Seligman, with assistance from others, continues to keep the ten-volume treatise current with annual revisions and a cumulative supplement. Today a multitude of treatises on securities law exist.<sup>22</sup> But Loss's treatise remains, for most purposes, the most authoritative.<sup>23</sup>

### III. FORMATION OF THE CORPORATION COMMISSION: 1910

In 1910, Arizona elected delegates to frame a constitution to submit to Congress as a condition of statehood. The delegates completed the constitution in late 1910 and it went into effect in 1912 when President Taft signed a proclamation creating the State of Arizona.<sup>24</sup>

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<sup>17</sup> Loss taught the seminar at the Yale Law School for five years and then at George Washington Law School before joining the Harvard Law School faculty. See LOUIS LOSS, ANECDOTES OF A SECURITIES LAWYER 48-51 (1995) (discussing how the book evolved from a collection of mimeographed materials that Loss used in teaching a seminar on the SEC); Eugene V. Rostow, *Louis Loss' Securities Regulation*, 62 YALE L.J. 675 (1953) (book review).

<sup>18</sup> LOUIS LOSS, *SECURITIES REGULATION* (1951).

<sup>19</sup> LOUIS LOSS & EDWARD M. COWETT, *BLUE SKY LAW VI* (1958).

<sup>20</sup> *Id.*

<sup>21</sup> See 1 LOSS, SELIGMAN & PAREDES, *supra* note 6, at 55-68 (discussing the history of state securities regulation); 9 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *SECURITIES REGULATION* 160-209 (4th ed. 2013) (discussing civil liability under state securities statutes).

<sup>22</sup> See, e.g., THOMAS LEE HAZEN, *TREATISE ON THE LAW OF SECURITIES REGULATION* (6th ed. 2009) (Professor Hazen's seven-volume work).

<sup>23</sup> Securities law has evolved to the extent that some aspects of the field are too nuanced to be definitively covered in a treatise like Loss's work. Broker-dealer law is an example of a subject more definitively covered in other treatises. See NORMAN S. POSER & JAMES A. FANTO, *BROKER-DEALER LAW AND REGULATION* (4th ed. Supp. 2014) (two volumes annually updated).

<sup>24</sup> The history of the events leading to statehood is recounted in John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L. J. 1, 7-27 (1988), and Mark E. Pry, *Arizona and the Politics of Statehood, 1889-1912* (May 1995) (unpublished Ph.D. dissertation, Arizona State University) (on file with the Hayden Library, Arizona State University); see also Gordon Morris Bakken, *The Arizona Constitutional Convention of 1910*, 1978 ARIZ. ST. L.J. 1, 1.

In the decades leading up to and following statehood, Arizona's mineral resources represented its wealth.<sup>25</sup> In 1910, the state operated with an economy centered on mining activities.<sup>26</sup> Mining, in turn, was dominated by large copper companies and railroads that facilitated the mining industry.<sup>27</sup> The railroad and mining companies were able to control the territorial legislature without much effort.<sup>28</sup> At times, they simply bribed public officials to obtain their goals.<sup>29</sup> Newspapers commonly described the territorial legislature as subservient to the railroads and other large corporations.<sup>30</sup>

This view of corporations was held by most of the state constitution's framers, including George W.P. Hunt, who was elected president of the convention.<sup>31</sup> Hunt had lived in the mining environment of Globe and briefly worked as a miner.<sup>32</sup> Later, when he served in the territorial legislature, corporate interests frequently blocked his legislative efforts.<sup>33</sup> He saw the prospect of a new constitution as an opportunity for reform that was impossible in the territorial legislature.<sup>34</sup>

As the convention neared, Hunt and the progressive wing of the Democrats formed an alliance with the party's labor wing, which had threatened to form a

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<sup>25</sup> DAVID R. BERMAN, *REFORMERS, CORPORATIONS, AND THE ELECTORATE: AN ANALYSIS OF ARIZONA'S AGE OF REFORM* 6 (1992) [hereinafter BERMAN, REFORMERS].

<sup>26</sup> *Id.* at xi.

<sup>27</sup> See DAVID R. BERMAN, *POLITICS, LABOR, AND THE WAR ON BIG BUSINESS: THE PATH OF REFORM IN ARIZONA, 1890-1920*, at 19-20, 24-25 (2012) [hereinafter BERMAN, POLITICS]; see also THOMAS E. SHERIDAN, *ARIZONA: A HISTORY* 169-71 (rev. ed. 2012) (describing the railroads and copper companies in territorial Arizona and the relationships between them).

<sup>28</sup> See BERMAN, POLITICS, *supra* note 27, at 25; SHERIDAN, *supra* note 27, at 180.

<sup>29</sup> BERMAN, POLITICS, *supra* note 27, at 11, 25, 28; SHERIDAN, *supra* note 27, at 180.

<sup>30</sup> BERMAN, REFORMERS, *supra* note 25, at 65.

<sup>31</sup> See JOHN D. LESHY, *THE ARIZONA STATE CONSTITUTION* 341, 356 (2nd ed. 2013) [hereinafter LESHY, ARIZONA CONSTITUTION]. On Hunt's views of the mining and railroad corporations, see BERMAN, POLITICS, *supra* note 27, at 7-12; JOHN S. GOFF, *GEORGE W.P. HUNT AND HIS ARIZONA* 7, 9, 21-22, 26-27, 30, 37 (1973); JAY J. WAGONER, *ARIZONA TERRITORY 1863-1912: A POLITICAL HISTORY* 483 (1970) (explaining that during the 1911 election for governor, "Hunt flailed the corporations, which he said had controlled territorial politics to the detriment of the people. He called for the election of men to the Corporation Commission who would not bow to the 'big interests,' or 'coyotes' and 'skunks' as he was calling them by the end of the campaign").

<sup>32</sup> BERMAN, POLITICS, *supra* note 27, at 8; GOFF, *supra* note 31, at 10-12 (describing Hunt's work in Globe as a waiter, mineworker, grocery clerk, and eventually a manager and then president of Globe's leading general store).

<sup>33</sup> BERMAN, REFORMERS, *supra* note 25, at 29, 74; Peter Clark McFarland, *The Galahad of Arizona: Governor Hunt*, *COLLIER'S*, Aug. 15, 1916, at 21, 22 (explaining that during Hunt's years in the territorial legislature, "He found he could beat the corporations in a contest before the voters, but that the corporations could tie him hand and foot in committee room and legislative chambers.").

<sup>34</sup> BERMAN, REFORMERS, *supra* note 25, at 74.

separate party.<sup>35</sup> Corporate leaders and conservative political interests attempted to head off the alliance.<sup>36</sup> But the Hunt-labor alliance of Democrats held.<sup>37</sup> In the end, forty-one of the fifty-two elected delegates were Democrats,<sup>38</sup> and only a handful leaned toward the conservative side.<sup>39</sup> As the convention proceeded, Hunt's progressive alliance dominated it.<sup>40</sup>

The progressive delegates had great confidence in government through elected regulatory boards and administrators.<sup>41</sup> The delegates wanted an elected government free from the corporate influence that dominated the territorial legislature.<sup>42</sup> In addition to direct democracy through measures like the initiative and referendum that give rise to the propositions on today's ballots,<sup>43</sup>

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<sup>35</sup> SHERIDAN, *supra* note 27, at 182; *see also* EARL POMEROY, *THE AMERICAN FAR WEST IN THE TWENTIETH CENTURY* 308 (2008) (describing Hunt and California's Hiram W. Johnson as the "[t]wo progressive governors who made the most of issues of corporate power and who most successfully enlisted support from labor against it").

<sup>36</sup> BERMAN, *POLITICS*, *supra* note 27, at 116.

<sup>37</sup> *See id.* at 115-16, 120.

<sup>38</sup> *Id.* at 120.

<sup>39</sup> *Id.*; *see also* GOFF, *supra* note 31, at 38-39 (describing the progressive majority). The one Democrat who was not a progressive was Everett E. Ellinwood, a corporate attorney. *See infra* note 63 (discussing Ellinwood).

<sup>40</sup> *See* BERMAN, *POLITICS*, *supra* note 27, at 121, 125-31; SHERIDAN, *supra* note 27, at 183-84; *see also* GOFF, *supra* note 31, at 43 ("[T]here were few things put into the Arizona constitution which did not have the support of George W.P. Hunt."). For a discussion of western politics that covers the progressive era, *see* POMEROY, *supra* note 35, at 300-38. More generally, *see* GLENDA E. GILMORE, *WHO WERE THE PROGRESSIVES?* (2002) (collecting a selection of readings that focuses on progressivism in nonwestern cities).

<sup>41</sup> The delegates habitually opted to make government positions elected rather than appointed. The state auditor, state treasurer, superintendent of public instruction, corporation commissioners, mine inspector, and even the clerk of the court became elected officials under the constitution. *See* Leshy, *supra* note 24, at 60; *see also* GOFF, *supra* note 31, at 42 ("The Arizona founding fathers of 1910 asserted their belief in the value and desirability of government by administration and commission, and only late in his career did Hunt finally come out in opposition to the system.").

<sup>42</sup> *See* BERMAN, *REFORMERS*, *supra* note 25, at 153 (arguing that Hunt and other reformers sought to reduce corporate control of politics by making elective as many government positions as possible); *see also* BERMAN, *POLITICS*, *supra* note 27, at 125-26, 128-29 (describing the offices made elective); James H. Fowler, II, *Constitutions and Conditions Contrasted: Arizona and New Mexico, 1910*, 13 J. W. 51, 54 (1974) ("Labor believed the initiative and the referendum would permanently break the hold the [rail and mining] corporations had held over territorial legislatures.").

<sup>43</sup> *See* Paul F. Eckstein, *The Debate Over Direct Democracy at the Arizona Constitutional Convention*, ARIZ. ATT'Y, Feb. 2012, at 32; Paul Bender, *The Arizona Supreme Court & the Arizona Constitution: The First Hundred Years*, ARIZ. ATT'Y, July/Aug. 2012, at 40, 41-44 (tracing the history of the Arizona Supreme Court's decisions interpreting the initiative and the referendum and concluding that the Court thwarted the expansive direct democracy that the Constitution's framers envisioned).

the delegates favored corporate regulation through a corporation commission with elected commissioners.<sup>44</sup>

The original proposal for a corporation commission vested it with broad regulatory power over all corporations.<sup>45</sup> But the delegates were sharply divided on whether a regulatory commission should be given power over private businesses.<sup>46</sup> As one opponent of the commission proposal described it, “the business of a private corporation is not a matter of public concern.”<sup>47</sup> The delegates eventually voted to limit the commission’s most sweeping powers to two categories of corporations: public-service corporations operating as common carriers or providing utilities<sup>48</sup> and corporations whose stock was issued for public sale.<sup>49</sup>

Stock fraud had been a problem for years.<sup>50</sup> It became an issue during the debates.<sup>51</sup> Fraudulent practices in selling securities by what the delegates called wildcat corporations,<sup>52</sup> especially those selling mining stock, were frequently mentioned.<sup>53</sup> During the convention, a front-page story in the Arizona

<sup>44</sup> Leshy, *supra* note 24, at 88.

<sup>45</sup> LESHY, ARIZONA CONSTITUTION, *supra* note 31, at 357.

<sup>46</sup> Pry, *supra* note 24, at 270-71 (describing the debate over the corporation-commission proposal and the convention’s refusal to empower the commission to regulate private corporations other than those selling stock).

<sup>47</sup> THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 614 (John S. Goff ed. 1991) [hereinafter 1910 CONVENTION RECORDS]. Another delegate opposing regulation of private businesses argued that the commission’s investigatory powers should not extend to “small mining companies in the hills, struggling for existence, or to an industrial corporation struggling for existence. If this office is in the hands of hostile individuals, they can put that corporation out of business.” *Id.* at 719.

<sup>48</sup> LESHY, ARIZONA CONSTITUTION, *supra* note 31, at 357.

<sup>49</sup> *Id.* at 364.

<sup>50</sup> Thirty years earlier, Arizona voters approved a constitution in an unsuccessful statehood drive. See Mark E. Pry, *Statehood Politics and Territorial Development: The Arizona Constitution of 1891*, 35 J. ARIZ. HIST. 397, 397 (1994). The Delegates’ Address introducing the constitution to Arizona voters mentioned provisions that the delegates expected would be used to control stock fraud. See CONST. CONVENTION, CONSTITUTION FOR THE STATE OF ARIZONA AND ADDRESS TO THE PEOPLE OF THE TERRITORY 4 (Oct. 2, 1891) (stating that “provisions have been made for the destruction of all wild cat schemes, and the wiping out of all dormant and sham corporations claiming special and exclusive privileges”).

<sup>51</sup> See *infra* notes 61-71 and accompanying text (discussing the debate on a provision to allow the corporation commission to regulate companies selling stock to the public).

<sup>52</sup> *Wildcat corporation* as an expression dates from the mid-nineteenth century. See 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 3685 (rev. ed. 1993). The words connote a risky, financially unsound, or illicit company. See *id.*; See also WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2925 (2d ed. 1934) (defining the adjective *wildcat* as, “Not sound or safe; unreliable; irresponsible;—applied esp. to unsound business houses, enterprises, or methods; as, a *wildcat* bank, mine, scheme; . . .”).

<sup>53</sup> See, e.g., 1910 CONVENTION RECORDS, *supra* note 47, at 611, 972 (delegate remarks referring to deceptive practices by wildcat corporations). See generally Gilbert E. Brach, Note, *The*

Republican described federal indictments for mail fraud of men involved in two alleged stock swindles.<sup>54</sup> In one case, the government alleged that a New York based company sold \$40 million to \$50 million in mining and oil stock worth little or nothing.<sup>55</sup> In the other, the director of an Arizona corporation was charged with participating in a scheme to sell at least \$1 million in stock by misrepresenting his company's finances.<sup>56</sup>

The delegates were also undoubtedly familiar with fraud in the bucket shops that spread through Arizona and most of the country during the late nineteenth century.<sup>57</sup> The bucket shops allowed people to bet on the rise and fall of copper, gold, silver, and publicly traded stocks.<sup>58</sup> The rigged quotes and other frauds perpetrated by the bucket shops were notorious.<sup>59</sup> Hunt had successfully sponsored a bill the year before to outlaw bucket shops.<sup>60</sup>

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*Blue Sky Law*, 3 MARQ. L. REV. 142, 142-43 (1919) (describing wildcat companies selling stock in fraudulent oil or mining ventures).

<sup>54</sup> *Notorious Burr Bros. Caught in the Net*, ARIZ. REPUBLICAN, NOV. 22, 1910, at 1.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* During the trial that followed, the U.S. Attorney described the company's product as a phony wireless telephone. In his opening statement, the prosecutor outlined the way deceptive demonstrations of the telephone's wireless operation were made at public exhibitions:

Outlining the methods of the defendants Mr. Stephenson [the prosecutor] asserted that their most profitable advertising was to open stands in public places for the exhibition of the Collins instruments, and he alleged that the demonstrators were warned to make the conversations short, as if a wireless telephone was used for any length of time the transmitter would become hot and burn off. Even with these limitations, counsel asserted, the precaution was taken of using a ground wire, unknown to those who were examining the invention.

*Say Wireless Had a Wire*, N.Y. TIMES, NOV. 16, 1912, at 24.

<sup>57</sup> See *infra* Part IV.A.1. (discussing bucket shops); see also BLACK'S LAW DICTIONARY 221 (9th ed. 2009) (defining a bucket shop as, "An establishment that is nominally engaged in stock-exchange transactions or some similar business, but in fact engages in registering bets or wagers, usu. for small amounts, on the rise or fall of the prices of stocks and commodities.").

<sup>58</sup> See *infra* Part IV.A.1. (discussing bucket shops).

<sup>59</sup> See *infra* Part IV.A.1. (discussing bucket shops).

<sup>60</sup> See *Bucket Shops in Arizona*, ARIZ. DEMOCRAT, FEB. 2, 1909, at 3.

Led by Hunt,<sup>61</sup> Michael Cunniff,<sup>62</sup> Everett E. Ellinwood,<sup>63</sup> and Seaborn Crutchfield,<sup>64</sup> the corporation-commission proposal was amended to grant broad authority to the commission to regulate corporations that sell stock to public investors. The amendment gave the commission the right to require periodic reports and information from these public corporations as well as the right to inspect, investigate, and subpoena their records.<sup>65</sup> Opponents of this investigatory power expressed concern that the commission “would go around

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<sup>61</sup> Hunt (1859-1934) spoke little during the convention’s debates. Leshy, *supra* note 24, at 38. Although an avid reader, he had no more than an eighth-grade education and was a poor public speaker. *Id.* at 37-38. He did not express views on securities fraud at the convention. But his action afterward in calling for a blue-sky act to regulate wildcat companies showed his support for laws aimed at preventing securities fraud. See *infra* notes 111-12 and accompanying text. Earlier, in 1909, he had sponsored territorial legislation to ban bucket-shop trading in securities and commodities. See *infra* notes 77-79 and accompanying text. On Hunt generally, see GOFF, *supra* note 31; McFarland, *supra* note 33.

<sup>62</sup> Cunniff (1875-1914) obtained his undergraduate and master’s degrees from Harvard. He taught English afterward and then worked as an editor and manager of a progressive magazine before moving to Arizona. In Arizona, he went into the mining business with his brother. He chaired the Convention’s Committee on Style, Revision, and Compilation and became the constitution’s principal draftsman. As illustrated by the quote in note 67 below, he was an articulate and eloquent spokesman throughout the debates. He was elected to the first state senate and became its president before suffering an early death from pneumonia at 39. See Leshy, *supra* note 24, at 35-36 (providing a short profile of Cunniff).

<sup>63</sup> Ellinwood (1862-1943) was an attorney who graduated from the University of Michigan law school. He moved to Flagstaff in the late 1890s and became the territory’s U.S. attorney in 1893. Later, he became associated with mining interests, especially the Phelps Dodge Corporation, for whom he was an attorney. For more information on Ellinwood, see BERMAN, POLITICS, *supra* note 27, at 115-16, 121-25 (describing aspects of Ellinwood’s career); GOFF, *supra* note 31, at 274 (providing a short profile of Ellinwood); SHERIDAN, *supra* note 27, at 193 (describing Ellinwood’s successful defense of Phelps Dodge’s president, Walter Douglas, after Douglas was indicted on federal conspiracy and kidnapping charges involving a 1917 labor dispute); *infra* note 69 (discussing Ellinwood). Although a Democrat, he was not a progressive. He refused to sign the constitution. See Leshy, *supra* note 24, at 56. He believed the constitution’s provisions on the initiative, referendum, and recall of judges would prevent statehood approval. See *id.* at 105 & n.667. In explaining his “no” vote, Ellinwood stated:

I believe gentlemen, that the recall of the judiciary means the utter destruction of the independence of the judicial system and of the courts. I believe that when you write that into the constitution you are inviting disapproval at Washington.

1910 CONVENTION RECORDS, *supra* note 47, at 1009.

<sup>64</sup> Crutchfield (1837-1927) was a former Confederate soldier and Methodist minister from Kentucky. His public prayers often enlivened the proceedings. He moved to Safford in the early 1900s and started a church. He was the convention’s official chaplain and later was the chaplain in the first state senate and for seven years afterward in the Arizona house. See GOFF, *supra* note 31, at 273 (providing a short profile of Crutchfield).

<sup>65</sup> See 1910 CONVENTION RECORDS, *supra* note 47, at 971-75 (describing the motion by Crutchfield, as amended by Ellinwood, to amend Article XV, § 4, to apply to any corporation publicly offering stock for sale).

sticking its nose into the affairs of clothing store corporations, and grocery corporations . . . .”<sup>66</sup> The counterview, expressed most forcefully by Cunniff,<sup>67</sup> Crutchfield,<sup>68</sup> and Ellinwood,<sup>69</sup> was that Arizona’s reputation had been tar-

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<sup>66</sup> *Id.* at 719.

<sup>67</sup> In a speech followed by applause, Cunniff denounced wildcat companies and the tarnished national reputation that they had created for Arizona:

Arizona has been held up before this nation by Collier’s Weekly and other publications, because of the permission that it grants to wildcat companies to come here and fleece the public by selling their stock, . . . and I beg to say that the Democratic party of Arizona is on record as urging and forwarding any proposition that was a sound and wise one, that would succeed in removing this blot from the name of Arizona . . . . This proposition will be one of the most valuable and important to put into the constitution, not only for the people of Arizona, but for the good faith and reputation of Arizona all over the country.

*Id.* at 972.

<sup>68</sup> Crutchfield argued that regulation of companies selling stock was essential to protect the public from fraud:

It seems to me it is the protection of the public, a guarantee also of the corporations themselves, and on the whole will tend to render stable the business of our state and territory, and guarantee to good and bona fide corporations a stability that they could not have otherwise, and allow the Corporation Commission to put out of business any wildcat corporations that propose to gather in the money of unsuspecting investors, or put them under such regulation that good corporations will not be disgraced by the actions of other corporations that are merely combinations for the purpose of getting all the easy money they can.

*Id.* at 971.

<sup>69</sup> Ellinwood, an attorney for Phelps Dodge, argued that corporations selling stock needed to open their affairs to public scrutiny:

This provision absolutely exhibits to the gaze of the public the affairs of corporations which are floating their stock to be sold to the public . . . . It has been my purpose to exhibit to the gaze of the public [the] entire affairs [of corporations publicly selling stock] so that the public may know what is going on, when its stock is offered for sale.

*Id.* at 975. Earlier in the convention, Ellinwood unsuccessfully sponsored a proposal to make shareholders personally liable for corporation debts. Leshy, *supra* note 24, at 90. These unusual positions for a corporate attorney, coupled with Ellinwood’s refusal to sign the constitution, caused speculation that Ellinwood’s true intent was to derail the constitution. *See id.* at 56, 90; Pry, *supra* note 24, at 249-50 (mentioning Ellinwood and citing newspapers contending that some of the Democrats seeking delegate slots were well-known corporate attorneys whose rail and mining clients opposed the constitution); Calvin N. Brice, *The Constitutional Convention of Arizona 78* (1953) (unpublished M.A.Ed. thesis, Arizona State College) (on file with Hayden Library, Arizona State University) (“There is considerable doubt whether Ellinwood was a progressive liberal, or as the Phoenix papers call him, a ‘stone age reactionary’ who would ‘settle all differences between labor and capital with battle axes’ and drive small investors from Arizona.”).

nished and the public left unprotected from stock fraud that needed to be controlled.<sup>70</sup> In a close vote, the amendment passed 25-22.<sup>71</sup>

Its passage made possible the administratively enforced blue-sky legislation that was enacted two years later. A hallmark of blue-sky laws like those enacted in Kansas in 1911 and in Arizona in 1912<sup>72</sup> was their use of administrative agencies to enforce securities compliance.<sup>73</sup> In Arizona's 1912 Act,<sup>74</sup> that agency was the corporation commission, and in Kansas's 1911 Act,<sup>75</sup> it was the state's banking department.

#### IV. THE EARLY STATUTES: 1909-1921

##### A. *The 1909 Antibucketing Act*

###### 1. In General

Bucket shops<sup>76</sup> and fraudulent mining ventures were intertwined in Arizona history. Bucket shops facilitated mining swindles by allowing wagers on future prices of copper, gold, silver, and the stock issued by these mining companies. As described in a 1909 Arizona newspaper, the gambling on future prices that bucket shops made possible "creates fictitious values, destroys confidence in the integrity of our territory and makes the territory *particeps criminis* in mining frauds or gambling schemes."<sup>77</sup> To outlaw the bucket shops, George W.P. Hunt introduced the 1909 antibucketing law,<sup>78</sup> which became Arizona's first securities legislation.<sup>79</sup>

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<sup>70</sup> 1910 CONVENTION RECORDS, *supra* note 47, at 611, 721-22, 971-75 (Remarks of delegates expressing concern about corporate fraud, wildcat companies, worthless stock, Arizona being a laughing stock, and of stories in *Collier's Weekly* and other publications about Arizona allowing wildcat companies to fleece the public by selling their stock.).

<sup>71</sup> *Id.* at 975.

<sup>72</sup> See *infra* Part IV.B.1. (discussing Arizona's 1912 Act and related blue-sky laws).

<sup>73</sup> See Nash, *supra* note 7, at 151 (explaining how the blue-sky statutes used administrative agencies like the attorney-general's office, the secretary of state, and most often, corporation commissioners, to compel compliance with the laws).

<sup>74</sup> Act of May 18, 1912, ch. 69, 1912 Ariz. Sess. Laws 338.

<sup>75</sup> Act of Mar. 10, 1911, ch. 133, 1911 Kan. Sess. Laws 210.

<sup>76</sup> The term *bucket shop* arose in the 1870s. ANN FABIAN, *CARD SHARPS, DREAM BOOKS, & BUCKET SHOPS: GAMBLING IN 19TH-CENTURY AMERICA* 189 (1990). It was used to describe brokerage firms or shops that had no connection to the stock or commodities exchanges but allowed customers to enter purchase or sale orders that were settled on the basis of price changes. *Id.* These trades were made without any intent to actually purchase, sell, or deliver the stock or commodity. *Id.* Fabian also describes an alternative use of *bucket shop* to refer to "the resorts of smalltime grain traders who operated in alleys around the [Chicago] Board of Trade and dealt in lots as small as a thousand bushels."). *Id.* at 189.

<sup>77</sup> *Bucket Shops in Arizona*, *supra* note 60.

<sup>78</sup> *Id.*

<sup>79</sup> See Act of Mar. 11, 1909, ch. 37, 1909 Ariz. Sess. Laws 115.

In the 1890s, similar legislation had been widely enacted in other states.<sup>80</sup> Hunt's anti-gambling sentiments most likely prompted the Arizona legislation.<sup>81</sup> The antibucketing laws, with few changes, remain on the books.<sup>82</sup>

Bucket shops arose in the 1870s.<sup>83</sup> They allowed people to bet on stock or commodity prices rather than actually purchasing the stock or commodity.<sup>84</sup> The bucket shops attracted a socially lower class of customers.<sup>85</sup> The shops made it easy to place orders, and the action was quicker than in true brokerage firms.<sup>86</sup> The shops were "open longer hours, took fewer holidays, and welcomed those with little money."<sup>87</sup> Over time, many bucket shops were designed with the furnishings, ticker quotes, and the formalities of true brokerage firms.<sup>88</sup> The firms purported to provide investment information and to mimic the operations of firms that actually bought and sold securities.<sup>89</sup> Fraud was prevalent.<sup>90</sup> Some investors were duped into believing that the stocks they picked were actually bought.<sup>91</sup> They did not realize that the bucket shop did not execute an order when it received the customer's money.<sup>92</sup> Instead, the bucket shop was betting that the leverage created by the customer's margin would work against the customer so that a small price movement would trigger

<sup>80</sup> FABIAN, *supra* note 76, at 197.

<sup>81</sup> See BERMAN, *POLITICS*, *supra* note 27, at 98 (describing a 1907 Hunt-sponsored bill that banned public gambling); LESHY, *ARIZONA CONSTITUTION*, *supra* note 31, at 10 (noting Hunt's support for controls on saloons and prohibiting gambling). For further discussion of Hunt, see *supra* notes 31-40, 61 and accompanying text.

<sup>82</sup> See ARIZ. REV. STAT. ANN. §§ 44-1651 to 1660 (2013).

<sup>83</sup> See David Hochfelder, "Where the Common People Could Speculate": *The Ticker, Bucket Shops, and the Origins of Popular Participation in Financial Markets, 1880-1920*, 93 J. AM. HIST. 335, 340-41 (2006).

<sup>84</sup> See *supra* note 76.

<sup>85</sup> See FABIAN, *supra* note 76, at 189, 191; Hochfelder, *supra* note 83, at 342 ("The earliest bucket shops seem to have catered to those who were already predisposed to speculate but could not do so through brokers because of limited means, sex discrimination, or other reasons—customers, as one newspaper put it, 'no broker would care to have.'" (citation omitted)).

<sup>86</sup> FABIAN, *supra* note 76, at 191.

<sup>87</sup> *Id.*

<sup>88</sup> Hochfelder, *supra* note 83, at 342-43.

<sup>89</sup> *Id.*; see also Kaiser v. Butchart, 274 N.W. 680, 681 (Minn. 1937) (describing a bucket shop that associated with two legitimate brokerage firms to obtain ticket-price quotations and to use the legitimate firms' credibility as a facade for its bucketing).

<sup>90</sup> For a vivid account of the fraudulent practices, see Merrill A. Teague, *Bucket-Shop Sharks*, EVERYBODY'S MAG., June 1906, at 723; Merrill A. Teague, *Bucket-Shop Sharks: II*, EVERYBODY'S MAG., July 1906, at 33; Merrill A. Teague, *Bucket-Shop Sharks: III*, EVERYBODY'S MAG., Aug. 1906, at 245.

<sup>91</sup> Hochfelder, *supra* note 83, at 357; see also Haight v. Haight & Freese Co., 98 N.Y.S. 471, 474 (N.Y. App. Div. 1906) (describing a case in which "there was never a real purchase or sale of stock by the defendant [brokerage firm] on account of the plaintiff, and all these credits and debits based upon an actual purchase or sale of stock were purely fictitious").

<sup>92</sup> See sources cited *supra* note 90.

margin calls that allowed the firm to liquidate the customer's position.<sup>93</sup> In other instances, the bucket shops rigged the time at which the customer's order was placed to catch a price favorable to the shop.<sup>94</sup> When necessary, the bucket-shops entered wash sales to drive down prices, which allowed the shop to liquidate the undermargined account created by the price drop that the wash sales produced.<sup>95</sup>

## 2. Criminal Provisions

The 1909 Act banned trading on the future prices of stocks, bonds, and various commodities.<sup>96</sup> The commodities were those associated with Arizona's economy and were listed as "copper, gold, silver, lead, cotton, grain, or meat."<sup>97</sup> The Act made it illegal to conduct business through a bucket shop or to knowingly lease space to a bucket shop.<sup>98</sup> Those making bucket trades and those who accepted the orders were subject to criminal penalties.<sup>99</sup> Telephone and telegraph companies, whose facilities were generally needed for quotes and placing orders, were exempt from penalties if they were engaged "exclusively" in the business of a common carrier and received no special compensation for their services.<sup>100</sup> A telegraph or telephone company that knowingly allowed a transmission wire or instrument to be used in a bucket shop was subject to criminal penalties.<sup>101</sup>

## 3. Civil Remedies

In addition to criminal penalties, private suits for injunctive relief were authorized.<sup>102</sup> Any citizen was entitled to "sue in his own name" for an injunction without showing that he was personally injured.<sup>103</sup> The territory was also entitled to sue for injunctive relief.<sup>104</sup>

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<sup>93</sup> Hochfelder, *supra* note 83, at 344.

<sup>94</sup> See FABIAN, *supra* note 76, at 192 ("Some bucket shoppers simply manipulated the prices they posted and robbed their customers."); Teague, *Bucket-Shop Sharks: III*, *supra* note 90, at 250-52 (describing the manner in which prices were matched to ensure customer losses).

<sup>95</sup> Hochfelder, *supra* note 83, at 344.

<sup>96</sup> See Act of Mar. 11, 1909, §§ 1-2, ch. 37, 1909 Ariz. Sess. Laws 115.

<sup>97</sup> *Id.* § 2.

<sup>98</sup> *Id.* §§ 3-4.

<sup>99</sup> See *id.* §§ 3, 5-6.

<sup>100</sup> *Id.* § 6.

<sup>101</sup> *Id.* § 7.

<sup>102</sup> See *id.* §§ 11-12.

<sup>103</sup> *Id.* § 12.

<sup>104</sup> *Id.*

## B. *The 1912 Investment-Company Act*

### 1. In General

In its first legislative session after statehood, the 1912 legislature enacted a new corporate code<sup>105</sup> and the state's first securities-registration act.<sup>106</sup> Both acts were to be administered by the Corporation Commission.<sup>107</sup>

The platform needed for the new securities act was enacted at the 1910 constitutional convention. As discussed above,<sup>108</sup> Article XV of the constitution provided for a Corporation Commission and empowered it to require corporate reports and to investigate, inspect, and subpoena the records of corporations that sold stock publicly.<sup>109</sup> A year later, Kansas enacted the first of what would become a new form of administratively enforced securities registration.<sup>110</sup> Although Arizona's convention delegates could not have foreseen it, the Kansas law was tailor-made to implement Article XV's constitutional power to regulate publicly sold stock.

In his first message to the 1912 legislature, Hunt urged the Arizona legislature to enact securities laws to stop wildcat promoters and others from selling worthless stock.<sup>111</sup> After the Act passed unanimously, Hunt publicized it as one of his administration's main accomplishments.<sup>112</sup>

The new securities act was part of a spate of specialized state statutes known colloquially as blue-sky laws<sup>113</sup> that were enacted between 1911 and

<sup>105</sup> See Act of May 16, 1912, ch. 49, 1912 Ariz. Sess. Laws 216.

<sup>106</sup> See Act of May 18, 1912, ch. 69, 1912 Ariz. Sess. Laws 338.

<sup>107</sup> See generally Nash, *supra* note 7, at 151 (explaining how the blue-sky statutes used administrative agencies like the attorney-general's office, the secretary of state, and most often, corporation commissioners, to compel compliance with the laws).

<sup>108</sup> See *supra* notes 61-65 and accompanying text.

<sup>109</sup> LESHY, ARIZONA CONSTITUTION, *supra* note 31, at 357, 364.

<sup>110</sup> See *infra* notes 113-17 and accompanying text (discussing the Kansas act).

<sup>111</sup> GEORGE W.P. HUNT, MESSAGE OF GEO. W. P. HUNT 25-26 (Mar. 18, 1912) (proposing a new securities act that would regulate investment companies that publicly sell stock and stating, "I am convinced that advanced steps should be taken to stop wild-cattling, and I recommend that the Corporation Commission be clothed with further powers to that end").

<sup>112</sup> See PARTIAL RECORD OF FIRST STATE ADMINISTRATION 2 (1914) (pamphlet prepared by Hunt administration).

<sup>113</sup> Historically "blue sky" has been used as a figurative expression connoting a speculative investment as worthless as buying a piece of sky. See Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 359 n.59 (1991). More recently, the origins of the expression have been traced to the Kansas banker, J.N. Dolley, who is credited with obtaining passage of the 1911 Kansas Securities Act. See Rick A. Fleming, *100 Years of Securities Law: Examining a Foundation Laid in the Kansas Blue Sky*, 50 WASHBURN L.J. 583, 584-86 (2011) (discussing Dolley and the origin of the blue-sky language). Dolley wrote a 1935 article in which he said he came up with the blue-sky expression after a member of the Kansas legislature asked him what to call the law. See *id.* at 585-86 (quoting Dolley's article). Dolley claims to have suggested "blue sky law" on the basis of his experience with purported rainmakers who promised

1913.<sup>114</sup> The first of these was the Kansas act passed in 1911.<sup>115</sup> The second was the blue-sky law that Hunt proposed a year later.<sup>116</sup> Arizona's act was copied almost verbatim from the Kansas act.<sup>117</sup>

The Arizona Supreme Court, in a 1925 decision, described the legislation's purpose as public protection—"preventing the public from being imposed upon by questionable and unsound financial schemes of fortune dreamers and dishonest promoters, and to reach all get-rich-quick schemes offering to the general public their stocks and securities, under whatever name they may choose to act."<sup>118</sup> The paternalistic goals described in this quote are emblematic of judi-

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rain but delivered only blue sky. *Id.* at 586 (quoting Dolley's article and concluding that as originally used by Dolley, blue-sky "refers to an investment opportunity in which the promoter promises rain but delivers blue sky").

<sup>114</sup> See Lee J. Perrin, *The "Blue Sky Laws."*, 10 BENCH & B. NEW SERIES 483, 483-86 (1916) (summarizing the twenty-three blue-sky laws enacted between 1911 and 1913).

<sup>115</sup> Act of Mar. 10, 1911, ch. 133, 1911 Kan. Sess. Laws 210. See generally Fleming, *supra* note 113, at 586-609 (discussing the history of the Kansas act). Rhode Island enacted a blue-sky law in 1910. See Act of Apr. 22, 1910, ch. 557, 1910 R.I. Acts & Resolves 61. The legislation did not attract attention in other states. There is no record that it was enforced in Rhode Island. See Edward F. Willett, *The Securities Act of 1933: An Analysis of Its Background, Administration, and Effects* 47 (Mar. 1939) (unpublished Ph.D. dissertation, Princeton University) (on file with Princeton University). The legislation was repealed in 1922 when Rhode Island enacted a new securities act. *Id.* at 48.

<sup>116</sup> See Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 232 (2003) (listing Arizona as the second state to pass a blue-sky law).

<sup>117</sup> See generally C.A. Dykstra, Note, *Blue Sky Legislation*, 7 AM. POL. SCI. REV. 230, 231 (1913) ("The wide publicity given to the Kansas law resulted in agitation for some such legislation in most of our States. Two of them, Connecticut and Arizona, passed such laws at the last session of their legislatures."); Amy Deen Westbrook, *Blue Skies for 100 Years: Introduction to the Special Issue on Corporate and Blue Sky Law*, 50 WASHBURN L. J. xxv, xxx (2011) ("The [Kansas act] attracted overwhelming interest, and a number of other states, as well as several foreign countries, wrote and asked for copies." (footnote omitted)).

<sup>118</sup> *Reilly v. Clyne*, 234 P. 35, 38 (Ariz. 1925); see also *Commercial Life Ins. Co. v. Wright*, 166 P.2d 943, 946-48 (Ariz. 1946) (discussing the enactment of the 1912 Investment-Company Act and the later 1921 Securities-Dealer Act).

cial interpretations of blue-sky legislation.<sup>119</sup> Similar statements in other Arizona cases<sup>120</sup> and blue-sky decisions from other states are pervasive.<sup>121</sup>

As envisioned by Arizona's 1910 constitution,<sup>122</sup> the 1912 Act gave the Corporation Commission general supervision and control over all investment companies (i.e., corporations selling stock to the public) including the right to inspect and investigate the company's records.<sup>123</sup> The new legislation required all companies selling securities in Arizona, regardless of where they were incorporated, to obtain a permit from the Corporation Commission and to file periodic financial reports.<sup>124</sup> To obtain a permit, an investment company was required to file with the Commission a detailed business plan and itemized information showing its financial condition.<sup>125</sup> The Commission was authorized to deny a permit to a company if it concluded that the company's business plan was unfair, unjust, inequitable, or oppressive,<sup>126</sup> or that the company was

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<sup>119</sup> See *Martin v. Orvis Bros. & Co.*, 323 N.E.2d 73, 78-79 (Ill. App. Ct. 1974) ("The [Illinois Securities] Act is paternalistic in character and should be liberally construed to better protect the public not just from fraud or dishonesty, but also from the incompetence, ignorance and irresponsibility of persons engaging in the business of disposing of securities to the public."); *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n*, 977 P.2d 826, 833 (Ariz. Ct. App. 1998) ("The securities laws are designed to protect less-than-prudent investors from giving their money to irresponsible or unscrupulous businessmen."); see also *LOSS & COWETT*, *supra* note 19, at 9, 17 (referencing the paternalistic approach of the blue-sky laws); see also *id.* at 21 ("The justification for the blue sky laws must rest upon the degree of protection which they afford to the investing public.").

<sup>120</sup> See, e.g., *R & L Ltd. Invs., Inc. v. Cabot Inv. Props., LLC*, 729 F. Supp. 2d 1110, 1114 (D. Ariz. 2010) (stating that Arizona's Securities Act establishes "substantive safeguards that Arizona's legislators have crafted to protect its investing citizenry"); *State v. Baumann*, 610 P.2d 38, 45 (Ariz. 1980) ("Regulation of transactions in securities, commonly known as 'blue sky laws,' are designed to protect the public from fraud and deceit arising in those transactions."); *Butler v. Am. Asphalt & Contracting Co.*, 540 P.2d 757, 760 (Ariz. Ct. App. 1975) ("The purpose of the Securities Act of 1933, from which the Arizona Act governing the sale of securities, A.R.S. § 44-1801 et seq., was derived, is to safeguard the investing public from fraudulent devices and tricks in the sale of securities by requiring publication of certain information concerning securities before they are offered for sale." (internal citation omitted)).

<sup>121</sup> See, e.g., *Smith v. Fid. & Deposit Co. of Baltimore, Md.*, 132 S.E. 792, 793 (N.C. 1926) ("It is a matter of common knowledge that millions of dollars were lost in this state through these organizers, promoters, and their agents—men and women made homeless by investing in worthless stocks and bonds, savings of a lifetime in many cases swept away. . . . The intent of the statute, under the police power of the state, was to protect the people of the state from this kind of fraud and imposition."); see also 69A AM. JUR. 2D *Securities Regulation—State* § 1, at 676-77 & nn.6-10 (2d ed. 2008) (collecting cases).

<sup>122</sup> See *supra* notes 61-71 and accompanying text (describing the debate on the provision to allow the Corporation Commission to regulate companies selling stock to the public).

<sup>123</sup> Act of May 18, 1912, ch. 69, §§ 9-10, 1912 Ariz. Sess. Laws 338, 343-44.

<sup>124</sup> *Id.* §§ 1-2, 5 & 8.

<sup>125</sup> *Id.* § 2.

<sup>126</sup> *Id.* § 5.

insolvent and “does not promise a fair return” on the company’s securities.<sup>127</sup> On similar grounds, the Commission was authorized to apply for a receiver or other equitable relief if a company became financially impaired or began conducting business in an unsafe or inequitable manner.<sup>128</sup> Selling securities without compliance with statutory requirements was a misdemeanor.<sup>129</sup> Knowingly falsifying a company’s records or financial filings with the intention of deceiving the Commission was a felony.<sup>130</sup>

## 2. Judicially Created Remedies

The 1912 Act did not include civil-liability provisions. This was typical of the first series of blue-sky laws.<sup>131</sup> But civil remedies soon emerged.

The earliest forms of statutory liability were through statutes that required surety bonds.<sup>132</sup> For instance, Section 4 of Mississippi’s 1916 Securities Act required an investment company to post a bond payable to the state.<sup>133</sup> The bond was to provide security that the statements in the company’s permit application were true and that the company and those promoting its stock would comply with the act’s provisions.<sup>134</sup> Section 6 of the Mississippi Act provided that anyone “induced to purchase” the corporation’s stock by a material misrepresentation could bring suit on the bond for the money invested with interest.<sup>135</sup> The statute was interpreted to allow a suit against the corporate issuer with or without joining the surety as a party.<sup>136</sup>

But it was not until 1919 that legislation providing for express civil remedies began to emerge.<sup>137</sup> At the end of 1920, only three states—Georgia, Illi-

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* § 11.

<sup>129</sup> *Id.* § 13.

<sup>130</sup> *Id.* § 12.

<sup>131</sup> See Clarence D. Laylin, *The Ohio “Blue Sky” Cases*, 15 MICH. L. REV. 369, 370 (1917) (describing the blue-sky laws that existed as of 1917 as being based on inspection and licensure schemes that screened stocks and bonds to protect the public); Perrin, *supra* note 114, at 483-86 (summarizing the twenty-three blue-sky laws enacted between 1911 and 1913).

<sup>132</sup> See generally 9 LOSS, SELIGMAN & PAREDES, *supra* note 21, at 191-95 (discussing surety bonds under state-securities statutes).

<sup>133</sup> Act of Apr. 3, 1916, ch. 97, § 4, 1916 Miss. Laws 90-91. In 1917, Arizona enacted a similar bonding requirement for securities brokers. See *infra* notes 151-54 and accompanying text (discussing the 1917 Act’s bonding requirement).

<sup>134</sup> Act of Apr. 3, 1916, ch. 97, § 4, 1916 Miss. Laws 87, 90-91.

<sup>135</sup> *Id.* § 6.

<sup>136</sup> *Irving v. Bankers’ Mortg. Co.*, 151 So. 740, 743 (Miss. 1934); see also 9 LOSS, SELIGMAN & PAREDES, *supra* note 21, at 193 & nn.78-79 (citing blue-sky cases allowing investor suits on surety bonds).

<sup>137</sup> See, e.g., Act of Oct. 3, 1919, ch. 17, § 24, 1919 Utah Laws Spec. Sess. 28, 35 (providing that “every person . . . participating directly or indirectly in the sale of any security in violation of the terms of this [A]ct . . . shall be liable to the purchaser in a civil action instituted in any court of

nois, and Utah—had civil liability statutes.<sup>138</sup> Legislation in other states sometimes made sales that violated the securities laws voidable without defining a remedy,<sup>139</sup> or more commonly, simply provided criminal penalties for violations.<sup>140</sup>

From these criminal penalties, civil remedies were judicially implied.<sup>141</sup> The Arizona courts allowed purchasers to rescind sales made in violation of statutory requirements and to refuse payment on illegal stock subscriptions.<sup>142</sup> Arizona decisions also recognized the right to sue for damages when a sale violated the 1912 Act's criminal provisions.<sup>143</sup>

The courts created remedies as a matter of course without discussing whether, as is the practice today, it was appropriate to imply a private cause of action.<sup>144</sup> During the years between 1912 and 1950, the principle that a criminal violation of a blue-sky law deserved a remedy was an easy one for courts in

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competent jurisdiction for the amount of the purchase price paid and all damages the purchaser may sustain").

<sup>138</sup> Compare *id.*, with Current Legislation, *Blue Sky Laws*, 24 COLUM. L. REV. 79, 82-83 (1924) (discussing express civil remedies under the 1919 Illinois and 1920 Georgia securities laws).

<sup>139</sup> See, e.g., Act of July 26, 1920, ch. 26, § 20, 1920 Ind. Acts 83, 95 ("Every sale or contract of sale made or executed in violation of any provisions of this act shall be voidable.").

<sup>140</sup> See Current Legislation, *supra* note 138, at 82-83 (discussing the approaches taken by the states as of 1924).

<sup>141</sup> See Legislation, *1929 Act*, *supra* note 12, at 1195 n.38 (citing examples).

<sup>142</sup> See, e.g., *United Bank & Trust Co. v. Joyner*, 11 P.2d 829, 832-33 (Ariz. 1932) (holding that subscription for stock offered in violation of the blue-sky statutes was illegal and therefore unenforceable); *Reilly v. Clyne*, 234 P. 35, 39 (Ariz. 1925) (affirming a judgment that refused to enforce a subscription for illegally issued stock; allowing the investor to recover damages for the money invested; and stating, "A person may rescind his contract to subscribe for or purchase such stock and recover back what he has paid for it, upon a tender back or surrender of the certificate, and of any dividends which he has received; or he may set up the illegality of the stock as a defense to an action by the corporation on his subscription" (quoting an early version of WILLIAM MEADE FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS*)); Dale C. LaPorte, Note, *Voidability Provisions Under State Blue Sky Laws*, 17 W. RES. L. REV. 1148, 1162-63 (1966) (describing the Arizona Supreme Court's decision in *United Bank* as representing the majority view under which a contract for the sale of securities that violates a statute's blue-sky law is unenforceable in an action against the investor).

<sup>143</sup> See *Fid. Bldg. & Loan Ass'n v. Cox*, 84 P.2d 70, 73 (Ariz. 1938) (holding that money paid for stock sold in violation of the blue-sky laws could be recovered); *Durham v. Firestone Tire & Rubber Co. of Cal.*, 55 P.2d 648, 653-54 (Ariz. 1936) (holding that stock purchaser was entitled to sue for damages equal to the value of the assets transferred to pay for stock sold in violation of the blue-sky-statute).

<sup>144</sup> Compare cases cited *supra* notes 142-43 (implying remedies as a matter of course), with *Sellinger v. Freeway Mobile Home Sales, Inc.*, 521 P.2d 1119, 1122 (Ariz. 1974) (interpreting the Consumer Fraud Act's criminal provisions and concluding that they inferentially create a private right of action).

Arizona and most states.<sup>145</sup> The remedy that was created could be more complicated. It required a common-law analysis, which lacked clear-cut rules like those in modern remedies' statutes.<sup>146</sup> When the opinion's analysis becomes complicated, it is usually because of issues concerning the remedy or the measure of damages rather than whether a remedy should exist.<sup>147</sup>

### C. *The 1917 Securities-Broker and Antibucketing Act*

#### 1. Licensing and Bonding Requirements

In 1917, the legislature supplemented the 1912 Investment-Company Act with new legislation regulating brokers who buy or sell publicly traded securities.<sup>148</sup> Agents selling on behalf of an investment company were already required to register with the Corporation Commission.<sup>149</sup> "Broker" was defined as "every person who buys or sells or contracts to buy or sell, as agent for or representative of or for or on account of another, any security or commodity on or through any exchange or board of trade or other public mar-

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<sup>145</sup> See, e.g., *Fid. Bldg.*, 84 P.2d at 73 (holding that money paid for stock sold in violation of the blue-sky laws could be recovered); *Durham*, 55 P.2d at 653-54 (similar); *Reilly*, 234 P. at 39-40 (affirming a judgment that (a) refused to enforce a subscription for illegally issued stock and (b) allowed the investor to recover damages for the money invested); *Daniels v. Craiglow*, 292 P. 771, 772-73 (Kan. 1930) (holding that plaintiff could recover damages from corporate officers who participated in violation of blue-sky law even though officers received none of the plaintiff's money); *Thompson v. Cain*, 198 N.W. 249, 250-51 (Mich. 1924) (interpreting criminal securities statute to permit plaintiff to recover damages from officers who participated in the unlawful stock sale); 9 LOSS, SELIGMAN & PAREDES, *supra* note 21, at 164 ("Some of the best known of the early blue-sky cases were decisions to the effect that sales made in violation of the statutes were 'void' or 'voidable,' without benefit of statutory declaration to that effect.").

<sup>146</sup> See, e.g., *Durham*, 55 P.2d at 653-54 (discussing the calculation of damages); Note, *The Liability of Directors and Officers*, *supra* note 14, at 1100 (discussing rescission remedies).

<sup>147</sup> See sources cited *supra* notes 145-46. The early blue-sky decisions also recognized a right to join responsible officers and directors in an action for either damages or rescission against the issuer or seller. See, e.g., *Thompson*, 198 N.W. at 250-51 (reversing directed verdict for defendant and holding that if he actively aided and assisted two agents for the issuer in selling stock in violation of criminal provisions of Michigan's blue-sky statute, he was liable to the plaintiff for the money invested); *Edward v. Ioor*, 172 N.W. 620, 623 (Mich. 1919) (reversing judgment for defendants who, while acting in concert, violated the criminal provisions of Michigan's blue-sky statute and holding that the plaintiff was entitled to rescind and recover the value of stock he exchanged for the stock that was illegally sold); see also Note, *Liability of Directors and Officers*, *supra* note 14, at 1100 (discussing cases in which officers and directors were sued with the selling corporation).

<sup>148</sup> Act of Mar. 8, 1917, ch. 30, 1917 Ariz. Sess. Laws 31.

<sup>149</sup> See Act of May 18, 1912, ch. 69, §7, 1912 Ariz. Sess. Laws 338 ("Any investment company may appoint one or more agents, but no such agent shall do any business for said investment company in this State until he shall first register with the Corporation Commission . . .").

ket.”<sup>150</sup> Brokers were required to obtain a license and post a \$5000 bond.<sup>151</sup> The State Bank Examiner was empowered to inspect the broker’s records and to suspend the broker’s license if the broker became insolvent or was doing business in violation of the Act.<sup>152</sup>

The bond was to be “conditioned upon the faithful compliance with the provisions of law [the 1917 Act] by said applicant, and [to] provide that upon failure to so comply, the applicant shall be liable to any and all persons who may suffer loss by reason thereof.”<sup>153</sup> Any violation of the Act was covered by the bonding requirements.<sup>154</sup> Similar bonding requirements in other states were interpreted to allow investors to sue for statutory violations with or without joining the bond’s surety.<sup>155</sup>

## 2. Antibucketing Provisions

Criminal penalties were provided for bucketing.<sup>156</sup> These antibucketing provisions dealing specifically with securities brokers were an extension of the earlier laws enacted in 1909.<sup>157</sup>

### D. *The 1921 Securities-Dealer Act*

In 1921, the legislature again supplemented the Investment-Company Act by enacting a Securities-Dealer Act.<sup>158</sup> The 1921 Act completed Arizona’s securities legislation for the next twenty-eight years. It was not until after World War II that the legislature again took up securities legislation.<sup>159</sup>

## 1. Licensing Requirements

The 1921 Act expanded the licensing scheme under the 1912 and 1917 Acts. The 1912 Act required an investment company’s agents to register with the Corporation Commission,<sup>160</sup> but the Act omitted standards for obtaining a

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<sup>150</sup> Act of Mar. 8, 1917, ch. 30, § 1, 1917 Ariz. Sess. Laws 31.

<sup>151</sup> *Id.* § 3(2).

<sup>152</sup> *Id.* § 8.

<sup>153</sup> *Id.* § 3(2).

<sup>154</sup> *See id.*; *see also* Nat’l Sur. Co. v. Dorsey, 23 P.2d 111, 112 (Ariz. 1933) (interpreting the bonding requirement and holding that the statute’s reference to compliance with “provisions of law” meant provisions of the 1917 Act regulating brokers, not to all laws generally).

<sup>155</sup> *See supra* notes 132-36 and accompanying text (discussing civil liability under statutory bonds).

<sup>156</sup> Act of Mar. 8, 1917, ch. 30, § 10, 1917 Ariz. Sess. Laws 31.

<sup>157</sup> *See supra* Part IV.A. (discussing the 1909 Antibucketing Act).

<sup>158</sup> Act of Feb. 26, 1921, ch. 33, 1921 Ariz. Sess. Laws 38.

<sup>159</sup> *See infra* Part V.

<sup>160</sup> *See* Act of May 18, 1912, ch. 69, § 7, 1912 Ariz. Sess. Laws 338.

permit.<sup>161</sup> The 1917 Act applied only to brokers selling commodities or securities in public markets.<sup>162</sup> The 1921 Act supplemented the existing licensing laws through a statutory scheme designed specifically to regulate the dealers and agents who sold nonpublic investment-company securities.

The 1921 Act did this through new laws setting administratively enforced licensing standards for dealers and the agents who worked under them. All dealers selling an investment company's securities were required to apply by written application to the Corporation Commission for a permit.<sup>163</sup> The permit was to be issued only if the Commission was satisfied, on the basis of the application's information and the Commission's investigation, that (1) the investment company was solvent and its plan of business was "fair, just and equitable to investors"; and (2) nothing in the dealer's sales methods would "work fraud" upon investors.<sup>164</sup> A separate application and permit was required for each issuer that a dealer wished to represent.<sup>165</sup> A dealer who obtained the required permit could appoint agents to sell the issuer's securities.<sup>166</sup> But an agent was not entitled to offer or sell securities until the agent obtained a license from the Corporation Commission.<sup>167</sup> The dealer permit and agent license had to be renewed annually and were revocable by the Commission for cause.<sup>168</sup>

## 2. Criminal and Antifraud Provisions

Offering or selling an investment company's securities without the required permit or license was a misdemeanor,<sup>169</sup> and knowingly providing false information to the Commission to obtain a dealer permit or agent's license was a felony.<sup>170</sup>

Perhaps of more significance, the 1921 Act included Arizona's first general antifraud statute. Earlier fraud statutes had targeted only bucketing.<sup>171</sup> Section 14 of the 1921 Act was broader. It made it a felony to knowingly or willfully

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<sup>161</sup> See *id.*

<sup>162</sup> See Act of Mar. 8, 1917, ch. 30, § 1, 1917 Ariz. Sess. Laws 31 defining *broker* as "every person who buys or sells or contracts to buy or sell, as agent for or representative of or for or on account of another, any security or commodity on or through any exchange or board of trade or other public market").

<sup>163</sup> Act of Feb. 26, 1921, ch. 33, § 3, 1921 Ariz. Sess. Laws 38.

<sup>164</sup> See *id.* § 4.

<sup>165</sup> See *id.* § 3.

<sup>166</sup> See *id.* § 7.

<sup>167</sup> See *id.*

<sup>168</sup> See *id.* §§ 6-8.

<sup>169</sup> See *id.* § 15.

<sup>170</sup> See *id.* § 14.

<sup>171</sup> See *supra* Parts IV.A.2. and IV.B.2. (discussing the criminal provisions on bucketing in the 1909 and 1917 Acts).

make “any false statements or representations . . . to any person for the purpose of influencing such person to purchase, either for himself or for others, the securities of any issuer . . .”<sup>172</sup> Although no reported cases under Section 14 exist, the courts implied civil remedies for violations of other provisions of the state’s securities laws.<sup>173</sup>

## V. DRAFTING A MODERN SECURITIES ACT: 1949-51

### A. *Historical Background to the 1951 Securities Act*

The securities laws that comprised the 1909, 1912, 1917, and 1921 securities acts were inadequate in many ways. This was especially true of the 1912 Investment-Company Act, which represented the centerpiece of Arizona’s securities statutes. It was crudely drawn legislation that was hurriedly copied almost verbatim from the blue-sky act enacted in Kansas the year before.<sup>174</sup> Prosecutors found the 1912 Act’s criminal provisions too weak to use.<sup>175</sup> It did not provide civil remedies.<sup>176</sup> Additionally, the complicated and uncertain registration process discouraged legitimate companies from attempting registration.<sup>177</sup>

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<sup>172</sup> Act of Feb. 26, 1921, ch. 33, § 14, 1921 Ariz. Sess. Laws 38.

<sup>173</sup> See cases cited *supra* notes 142-43.

<sup>174</sup> See generally PARRISH, *supra* note 10, at 6 (describing the 1911 Kansas Act as defensive and negative in purpose); Robert R. Reed, “Blue Sky” Laws, 88 ANNALS AM. ACAD. POL. & SOC. SCI. 177, 179 (1920) (describing the Kansas act and similar acts as “hopelessly crude and unworkable”).

<sup>175</sup> See Richard G. Himelrick, *Turning 60: Bud Jacobson, Earl Hastings, and Arizona’s 1951 Securities Act*, ARIZ. ATT’Y, Dec. 2011, at 22, 22 [hereinafter Himelrick, *Turning 60*]; see also JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 44-46 (3d ed. 2003) (discussing the early blue-sky laws’ inability to prevent fraud).

<sup>176</sup> See *supra* Part IV.B.2. (discussing the need to imply civil remedies because express-liability provisions did not exist).

<sup>177</sup> See CAROSSO, *supra* note 10, at 171-73, 181-90 (describing lobbying by the Investment Bankers Association, which viewed statutes of the Kansas type (on which Arizona’s laws were modeled) as so extreme that reputable investment companies were virtually prevented from doing business in states with such statutes); Reed, *supra* note 174, at 184 (explaining that it was neither necessary nor worth the burden for large investment firms to include small states with cumbersome registration requirements in their new securities offerings). Even as the blue-sky statutes were modernized by amendments and new acts, they often imposed significant burdens for issuers attempting multi-state offerings. See, e.g., *Blue-Sky Red Tape*, FORTUNE, July 22, 1957, at 122 (providing a state-by-state account of the impractical and sometimes impossible registration requirements that one company encountered).

*B. World War II and the Transformation of Arizona's Economy*

Two events in the late 1940s led to a movement toward new Arizona securities legislation.

The first was the explosion of Arizona's economy after World War II. Before World War II, Arizona played a small role in the nation's economy. Its primary businesses centered on cattle, cotton, tourism, and mining copper needed for manufacturing by eastern states.<sup>178</sup> World War II and the cold war that followed transformed Arizona's economy.<sup>179</sup> With the stimulus of the government's unprecedented defense and research spending, Arizona's population increased by 50% between 1940 and 1950,<sup>180</sup> and companies like Motorola, Hughes Aircraft, General Electric, U.S. Steel, and Goodyear Aircraft moved into the state.<sup>181</sup> Manufacturing and service industries developed that did not exist before the war.<sup>182</sup> With the economy booming, business, legal, and government leaders committed to building the state emerged.<sup>183</sup> These business-minded leaders formed committees to plan for postwar growth and

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<sup>178</sup> See SHERIDAN, *supra* note 27, at 130; Tom McKnight, *Manufacturing in Arizona*, in 8 UNIVERSITY OF CALIFORNIA PUBLICATIONS IN GEOGRAPHY 289-90 (J. E. Spencer et al. eds., 1962) (discussing the post-war growth in manufacturing); see also GERALD D. NASH, *THE AMERICAN WEST TRANSFORMED: THE IMPACT OF THE SECOND WORLD WAR* 14 (1985) [hereinafter NASH, *THE AMERICAN WEST TRANSFORMED*] ("On the eve of [WWII], . . . the American West was still very much an underdeveloped region, a colony dependent on the older East for much of its economic well-being, for its population growth, and for its cultural sustenance.").

<sup>179</sup> See LARRY SCHWEIKART, *A HISTORY OF ARIZONA BANKING* 115-31 (1982) (discussing the state's economic growth in the post-war particularly as to the state's banks and the services they provided); ELIZABETH TANDY SHERMER, *SUNBELT CAPITALISM: PHOENIX AND THE TRANSFORMATION OF AMERICAN POLITICS* 227-29 (2013) (describing Phoenix's industrial growth in the 1950s); Richard A. Harvill, *The Economy of Arizona*, 6 ARIZ. BUS. & ECON. REV. 1, 2 (1957) (recapping the 10 years after World War II and noting that Arizona annually ranked first among the states in its rate of increase in total income, bank deposits, and the value of manufacturing, farm, and mineral output).

<sup>180</sup> SHERIDAN, *supra* note 27, at 289 (explaining that the state's population increased by 50% between 1940 and 1950 and Phoenix's population increased by 63% in the same period (from about 65,000 to 107,000)).

<sup>181</sup> *Id.* at 279-80; *Phoenix Looks Good; U.S. Steel Moves in With Plant Purchase*, PHOENIX ACTION, Mar. 1949, at 5 (describing U.S. Steel Corporation's acquisition of a Phoenix plant).

<sup>182</sup> SHERIDAN, *supra* note 27, at 286-89 (describing the growth in manufacturing); GERALD D. NASH, *WORLD WAR II & THE WEST: RESHAPING THE ECONOMY* 218 (1990) (explaining that after the war, the service sector of the western states' economies increasingly "became more important as tourism, education, health care industries, and financial institutions blossomed").

<sup>183</sup> See SHERIDAN, *supra* note 27, at 281-83; SHERMER, *supra* note 179, at 132-41.

recommend legislative changes.<sup>184</sup> Committees to study Arizona's government and the state's securities laws were among these.<sup>185</sup>

### C. *Formation of the Special Securities Committee*

The second catalyst for new securities legislation was a series of stock swindles in the late 1940s that the Corporation Commission was incapable of controlling. One of these securities schemes, involving a disbarred attorney<sup>186</sup> and career criminal named Constantino Riccardi,<sup>187</sup> accelerated the drive for new securities laws.

During 1948, a group of Arizona investors that Riccardi had defrauded in a mining swindle pressured the Corporation Commission to investigate.<sup>188</sup> By then, Riccardi had at least a dozen arrests and had served prison time in California and New York.<sup>189</sup> When the Commission's investigation began, Riccardi was in New Jersey under arrest on new fraud charges involving a divorced princess and former wife of the Kresge store-chain owner, to whom he had proposed despite being married.<sup>190</sup> The Commission's investigation was front-page news that focused attention on the weaknesses in Arizona's securities laws and revealed that the Commission lacked the funds to hire the

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<sup>184</sup> See SHERIDAN, *supra* note 27, at 274-78; see also NASH, THE AMERICAN WEST TRANSFORMED, *supra* note 178, at 203 ("Almost every western state established special committees whose prime task it was to develop plans for postwar growth."). In Arizona, the committees included a Special Legislative Committee on State Operations to study the state's legal structure. Hastings obtained the Legislative Committee's support for a new securities act. See *Tighter Securities Tax [sic] Law Wins Interim Favor*, ARIZ. REPUBLIC, Dec. 20, 1949, at 12; SEC. DIV., ARIZ. CORP. COMM'N, CONDENSED ANNUAL REPORT: 38TH FISCAL YEAR (Sept. 1, 1950) (listing the Special Legislative Committee as among those supporting new securities legislation).

<sup>185</sup> See *Legislation for Securities Expert Drawn*, PHX. GAZETTE, Jan. 8, 1949, at 11.

<sup>186</sup> Riccardi was disbarred in California and then obtained a license in Nevada. His Nevada license was revoked after the Nevada State Bar discovered that he had concealed his California disbarment. See *State Bar v. Riccardi*, 294 P. 537, 537 (Nev. 1931).

<sup>187</sup> *'Wealthy Rancher' Held in Mine Fraud*, N.Y. TIMES, Mar. 17, 1947, at 1 (describing a pending New York indictment involving an alleged stock swindle and reporting that Riccardi had ten previous arrests and two convictions); *Stock Promoter Wanted in East is 'Quite a Man'*, L.A. TIMES, Mar. 19, 1947, at 2 (describing Riccardi's criminal history and extravagant lifestyle).

<sup>188</sup> See Herb Nelson, *Receivership Sought for Company*, PHX. GAZETTE, Sept. 16, 1948, at 1.

<sup>189</sup> See sources cited *supra* note 187-88.

<sup>190</sup> *Arizona to Inquire Into Mining Concern*, N.Y. TIMES, June 13, 1948, at F3 (reporting that when the ACC's investigation began, Riccardi was being tried in New Jersey on charges of defrauding Princess Farid-es-Sultaneh); *Princess Charges \$99,500 Swindle*, N.Y. TIMES, May 1, 1947, at 26 (describing the Princess's marriages to a Persian prince and Mr. Kresge, Riccardi's proposal to her, and his alleged scheme to defraud her); see also Lynn Golder, Letter to the Editor, ARIZ. ATT'Y, Feb. 2012, at 8 (describing the princess's marriages and divorces).

personnel to screen securities dealers and stock offerings like Riccardi's scam.<sup>191</sup>

In response, Edward "Bud" Jacobson, who was then a young assistant attorney general, and later a long-time Snell & Wilmer partner, solicited business leaders to participate in a conference to study solutions. Jacobson sent invitations to commercial bankers, securities brokers, the Arizona Chamber of Commerce, and the Better Business Bureau.<sup>192</sup> This led to the formation of a special committee that drafted new legislation to create a Securities Division within the Corporation Commission.<sup>193</sup> In addition to Jacobson and Phoenix attorneys Yale McFate and Joseph F. Walton, the committee included four securities professionals and four businessmen whose experience spanned the mining, oil, real estate, and banking industries.<sup>194</sup>

#### *D. Formation of the Arizona Securities Division: 1949*

The proposed legislation provided for a Securities Division with experienced staff to cure the lack of investigative resources that had prevented the Corporation Commission from investigating the legitimacy of new securities offerings.<sup>195</sup> To do the work, the legislation budgeted for a director and assistant director of securities as well as supporting staff.<sup>196</sup> Before that, securities enforcement had been handled by an Investment and Securities Department whose only staff was a part-time stenographer.<sup>197</sup>

After the legislation passed in early 1949, Jacobson was passionate about the new Securities Division and the need to stop securities fraud. A memo

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<sup>191</sup> *Board Finds Firm Funds Mishandled*, ARIZ. REPUBLIC, Sept. 17, 1948, at 1; Dan M. Madden, *Woman to Testify on Riccardi Deals*, PHX. GAZETTE, July 10, 1948, at 1; Nelson, *supra* note 188.

<sup>192</sup> *State Moves to Wipe Out Stock Frauds*, PHX. GAZETTE, Dec. 13, 1948, at 13.

<sup>193</sup> *Legislation for Securities Expert Drawn*, *supra* note 185.

<sup>194</sup> The four securities professionals were Paul D. Beck, Benton M. Lee, Eugene F. Tompane, and Joseph C. Quinn. The other four members were Charles H. Dunning, a mining engineer, who in 1944-51 was director of the State Department of Mineral Resources; Richard C. King, the chairman of a newly formed oil-exploration company drilling in Arizona; Eugene S. Lee, a banker who headed the Valley National Bank's investment division and was a member of the bank's board of directors; and Charles W. Mickle, the president of Phoenix Title & Trust Co.

<sup>195</sup> *Statehouse Journal: General Government*, MESSENGER, Dec. 18, 1948, at 1.

<sup>196</sup> See Act of Feb. 26, 1949, ch. 14, 1949 Ariz. Sess. Laws 15. When the 1951 Securities Act was enacted, new statutes were included that transitioned the Securities Division's administrator into the new Director of Securities Division created by the 1951 Act. Section 23 of the 1951 Act provided that the Commission would appoint a director of securities to administer the Commission's Securities Division. Securities Act of Arizona, ch. 18, § 23, 1951 Ariz. Sess. Laws 46, 78. The director provided for was to succeed the director previously created under the 1949 legislation. See *id.* § 25(E).

<sup>197</sup> *Legislation for Securities Expert Drawn*, *supra* note 185.

from the SEC's San Francisco office described him as a "fire ball."<sup>198</sup> Jacobson wanted a strong Securities Director. He and the Securities Committee supported Earl Hastings for the position.<sup>199</sup>

Hastings was appointed in July 1949.<sup>200</sup> His qualifications were sound but unremarkable. He had no legal experience. He had studied business and engineering in college.<sup>201</sup> Afterward, he worked in managerial and consulting positions for a variety of companies, many in the mining industry, where he became certified as a mining and metallurgical engineer.<sup>202</sup> His familiarity with Arizona's mining industry probably helped his appointment. Mining was an important part of Arizona's economy and a frequent source of securities frauds like Riccardi's mining scheme.<sup>203</sup>

### E. *Legislative Origins of the 1951 Act*

#### 1. The Decision to Draft a New Securities Act

Once appointed Director of the Securities Division, Hastings, with Jacobson's assistance, quickly expanded the securities committee's work into drafting an entirely new securities act.<sup>204</sup> The task was a challenging one. The existing laws needed to be entirely scrapped.<sup>205</sup> An obvious model for a new act did not exist. In broad terms, the states could be grouped according to whether their securities laws provided for one or more of the following:

- (1) Registration or qualification of securities;
- (2) Registration of dealers and salespersons who sell securities;
- (3) Fraud prevention through criminal penalties or civil remedies.<sup>206</sup>

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<sup>198</sup> See Memorandum from Howard A. Judy, Reg'l Adm'r of SEC, at 4 (Nov. 14, 1949) (on file with the author).

<sup>199</sup> *Id.*

<sup>200</sup> Herb Nelson, *Securities Post Given E. F. Hastings*, PHX. GAZETTE, July 13, 1949.

<sup>201</sup> Himelrick, *Turning 60*, *supra* note 175, at 24.

<sup>202</sup> *Id.*

<sup>203</sup> Hastings served as Director of the Securities Division for seven years, until 1956, when he left the Division to accept an appointment as an SEC commissioner. He continued with the SEC until 1961, when he fell ill and suffered an early death at age 53. *Id.* at 24-28.

<sup>204</sup> See Memorandum from Howard A. Judy, *supra* note 198, at 1.

<sup>205</sup> See Letter from Earl F. Hastings, Director of Sec. Div., to Charles R. Burr, Assistant Reg'l Adm'r of SEC (Sept. 26, 1949) (on file with the author).

<sup>206</sup> See LOSS & COWETT, *supra* note 19, at 19-39 (describing the three approaches).

No two states had the same provisions.<sup>207</sup> Regulatory philosophies varied greatly.<sup>208</sup> And bewildering variation existed in the language used by the states to cover the same subject.<sup>209</sup>

## 2. The SEC's Influence

Hastings wanted to start with a draft bill to show the Special Securities Committee what he and Jacobson had in mind. His first step was to contact the SEC to get the federal agency's views on how best to draft a new act. He told the SEC that Arizona's existing laws "were inadequate in every way." What was needed, he said, was a "stiff law" to protect the public and help legitimate promoters.<sup>210</sup>

Correspondence between the SEC and Hastings shows that the SEC had not developed a position on how state securities legislation should be written.<sup>211</sup> The SEC was willing to provide comments. But with one exception, the SEC's markup and comments were minor.

The exception concerned civil remedies. The preliminary draft of Hastings's bill, like other state securities laws, provided civil remedies only for securities purchasers. The SEC recommended that the proposed act's civil-liability provisions protect both securities sellers and purchasers. In this way, the SEC noted, the civil-liability provisions would track the act's antifraud statute, which made it a crime to defraud either a seller or a purchaser. The drafters accepted these recommendations and revised the civil-remedies section to provide remedies for sellers and purchasers. As a result, Arizona became the first state to provide civil remedies for securities sellers.<sup>212</sup>

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<sup>207</sup> *Id.* at 18.

<sup>208</sup> See *id.* at 19-20; Edward M. Cowett, *Problems in Jurisdiction of State Securities Laws*, 1961 U. ILL. L. F. 300, 301 (1961) (explaining that the 1956 Uniform Securities Act was designed to create flexibility that would allow the states to enact all or part of the Act according to the state's regulatory philosophy).

<sup>209</sup> See LOSS & COWETT, *supra* note 19, at 18-19.

<sup>210</sup> Letter from Earl F. Hastings, Dir. of Sec. Div., to Milton P. Kroll, Assistant Gen. Counsel to SEC (Nov. 19, 1949) (on file with the author).

<sup>211</sup> See, e.g., Letter from Edward T. McCormick, Assistant Dir. of Div. of Corp. Fin., to Earl F. Hastings, Dir. of Sec. Div. (Oct. 19, 1949) (on file with the author) (providing a general overview of state securities laws; mentioning sources on state securities laws that were available; suggesting that Hastings might want to consult with the General Counsel of the Investment Bankers' Association; and concluding that "it would be inappropriate to suggest any particular type of statute.").

<sup>212</sup> See LOSS & COWETT, *supra* note 19, at 135 (stating that Arizona "is unique in making certain purchases rescindable . . . . Elsewhere it is well recognized that the civil liability created by the blue sky laws is a one-way street running in favor of the buyer.").

### 3. The Investment Bankers Association's Influence

The preliminary draft that Hastings presented to the SEC largely tracked model legislation prepared by the Investment Bankers Association (IBA) the year before. The IBA, whose members in 1949 included most of the country's principal underwriting firms, advocated simplified state securities laws written to deter fraud and streamline registration. It opposed Kansas-style registration laws like those in Arizona's 1912 Investment-Company Act. It considered laws of that type poorly drafted and unworkable.<sup>213</sup> As an alternative, the IBA drafted its own model securities laws. These model laws allowed a state to adopt "one or more of the three basic types of regulation (antifraud provisions, registration of dealers and salesmen, or registration of securities)."<sup>214</sup> The model laws became available in 1948.<sup>215</sup>

These IBA-drafted laws were the only model securities legislation that existed when Hastings and Jacobson decided to prepare a new securities act. A uniform state act did not exist; the last uniform state securities law had been withdrawn in 1944 as obsolete,<sup>216</sup> and a replacement act was not finished until 1956.<sup>217</sup> In the interim, the IBA promoted its model legislation,<sup>218</sup> which Arizona and four other states used as templates for new securities acts.<sup>219</sup>

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<sup>213</sup> See Reed, *supra* note 174, at 179. Mr. Reed was the IBA's chief counsel for many years.

<sup>214</sup> INV. BANKERS ASS'N OF AM., HIGHLIGHTS FROM THE FIRST FIFTY YEARS, 1912-1962, at 27 (1962). Although the IBA apparently prepared a stand-alone act that imposed penalties for securities fraud, the two acts that were widely promoted were qualification-type and notification-type acts with fraud and broker-dealer provisions in both. See Louis Loss & Edward M. Cowett, *An Interim Report on the Harvard Law School Study of State Securities Regulation*, 10 BUS. LAW. 15, 17 (1955) [hereinafter Loss & Cowett, *An Interim Report*]. The primary difference between the two acts was in the registration requirements for securities. Under the notification act, nonexempt securities could be sold by filing with the state's securities commission a notice of intent to sell with a statutorily prescribed prospectus. See Gordon L. Calvert, Address on Blue Sky Problems and I.B.A. Model Blue Sky Laws at the Forty-First Annual Convention of National Association of Securities Administrators 123, 127 (Sept. 5, 1952) (on file with author). Under the qualification act, all securities (unless covered by an exemption) had to be registered by qualification before they could be sold in the state. *Id.* The IBA's qualification act was patterned generally after the 1929 Uniform Sale of Securities Act. *Id.* at 128. Under the qualification act, the securities commissioner had discretion to withhold approval for sales. *Id.*

<sup>215</sup> INV. BANKERS ASS'N OF AMERICA, *supra* note 214, at 27. The model acts do not seem to have been published. Instead, they were available upon request as handouts. See Charles H. Vrtis, Address on Blue Sky Problems and I.B.A. Model Blue Sky Laws at the Forty-First Annual Convention of National Association of Securities Administrators 99, 103 (Sept. 5, 1952) (on file with author) (describing the IBA's model acts and stating that copies are available to those interested).

<sup>216</sup> I LOSS, SELIGMAN & PAREDES, *supra* note 6, at 69.

<sup>217</sup> See *id.* at 71-74.

<sup>218</sup> See Loss & Cowett, *An Interim Report*, *supra* note 214, at 16-17.

<sup>219</sup> The four other states were North Dakota (1951), Georgia (1953), Tennessee (1955), and New Mexico (1955).

But Hastings did not blindly accept the IBA's views. As he told the SEC, he wanted a "stiff law" that gave him discretion to regulate securities offerings. To that end, section 8 of the preliminary draft allowed the Corporation Commission to evaluate the merits of proposed offerings and deny registration if an offering was "unfair or inequitable." This type of merit review was opposed by the IBA, but it was retained in the Securities Committee's final draft and became a defining feature of the 1951 Act's regulatory provisions.<sup>220</sup>

#### 4. The Final Drafting Process

By the end of 1949, a preliminary draft of the bill was finished. After that, Hastings presented the bill for study and comment by the Securities Committee and other interested parties.

Reports on the bill's drafting were sent to the Corporation Commission during what Hastings summarized as "days of discussion, unlimited contribution of time by the Special Securities Advisory Committee and legal counsel of firms and individuals interested in the effects of such legislation."<sup>221</sup> The resulting new ideas can be fully appreciated only by carefully comparing the preliminary draft with the final bill.<sup>222</sup>

A notable example is the participate-or-induce standard for civil liability in A.R.S. § 44-2003(A).<sup>223</sup> This provision did not exist in the preliminary draft. It was developed during the study-and-comment process. It extends civil liability beyond sellers to all persons who make, participate in, or induce an unlawful sale.<sup>224</sup> It is a unique statute that has neither a federal nor a state

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<sup>220</sup> See John M. Welch, *Arizona's 1989 Securities Legislation: A Step in the Right Direction*, ARIZ. ATT'Y, Nov. 1989, at 29 (discussing merit review); see also 1 LOSS, SELIGMAN & PAREDES, *supra* note 6, at 216-25 (discussing arguments for and against merit regulation); *id.* at 226 (explaining that since 1996, federal law has preempted merit regulation of securities traded on the New York and American stock exchanges and the Nasdaq National Market System list); see also *infra* notes 250-55 and accompanying text (discussing federal preemption).

<sup>221</sup> SEC. DIV., ARIZ. CORP. COMM'N, CONDENSED ANNUAL REPORT: 38TH FISCAL YEAR 4-5 (Sept. 1, 1950).

<sup>222</sup> Copies of the 1949 draft and the 1951 session laws are available through the author's webpage at [www.tblaw.com](http://www.tblaw.com).

<sup>223</sup> ARIZ. REV. STAT. § 44-2003(A) (2013) (providing that "Subject to the provisions of this section, an action brought under section 44-2001, 44-2002, or 44-2032 may be brought against any person, including any dealer, salesman or agent, who made, participated in, or induced the unlawful sale or purchase, and such persons shall be jointly and severally liable to the person who is entitled to maintain such action. No person shall be deemed to have participated in any sale or purchase solely by reason of having acted in the ordinary course of that person's professional capacity in connection with that sale or purchase.").

<sup>224</sup> See *Grand v. Nacchio*, 236 P.3d 398, 401-02 (Ariz. 2010) (discussing section 44-2003(A) and related statutes).

counterpart.<sup>225</sup> Its meaning and application are debated even today and are among the most litigated issues in civil litigation.<sup>226</sup>

### 5. Passage of the 1951 Act

Hastings garnered wide support for the new act. In addition to the business and securities-industry representatives on the Securities Committee, the bill's supporters included the Arizona State Bar, the Arizona Bankers Association, the Arizona Small Mine Operators Association, the state's new Legislative Committee on State Operations, and the Investment Bankers Association.

In a March 1950 letter, Hastings urged the governor to introduce the proposed legislation in a special session. He was unsuccessful that year but was able to introduce the bill in 1951. The bill passed with only one "no" vote and was approved by the governor on March 6, 1951.

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<sup>225</sup> See LOSS & COWETT, *supra* note 19, at 136 (discussing the early participant-liability statutes). Although it is unique to Arizona, the statute does have historical antecedents. The participant-liability provision can be traced to a line of similar state statutes. The inducement-liability prong of section 44-2003(A) is not typical of state securities laws, but it has a statutory antecedent in Arizona's 1921 Securities-Dealer Act. The 1921 Act included a criminal statute that made it a crime for any person to make a fraudulent statement for the purpose of "influencing" another person to purchase an issuer's securities. See *supra* notes 171-73 and accompanying text (discussing this provision). At the time, criminal statutes under blue-sky laws were routinely interpreted in Arizona and other states to imply civil remedies. See *supra* notes 141-47 and accompanying text (discussing the cases).

<sup>226</sup> See, e.g., *Facciola v. Greenberg Traurig, LLP*, 781 F. Supp. 2d 913, 921 (D. Ariz. 2011) (interpreting section 44-2003(A) and holding that complaint adequately alleged that the officers and managers of two issuers participated or induced the securities sales); *Facciola v. Greenberg Traurig, LLP*, No. CV-10-1025-PHX-FJM, 2011 WL 2268950, at \*4-8 (D. Ariz. June 9, 2011) (interpreting section 44-2003(A) and holding that complaint: (a) adequately alleged one law firm's participation or inducement; (b) failed to adequately allege another law firm's participation or inducement; and (c) failed to adequately allege that bankrupt company's auditors participated in or induced securities sales); *Allstate Life Ins. Co. v. Robert W. Baird & Co., Inc.*, 756 F. Supp. 2d 1113, 1157-58 (D. Ariz. 2010) (interpreting section 44-2003(A) and holding that complaint adequately alleged that two law firms that prepared the issuer's offering documents participated in the securities sales); *Grand*, 236 P.3d at 403 (holding that allegations regarding members of bankrupt company's management adequately alleged inducement but not participation); *Standard Chartered, PLC v. Price Waterhouse*, 945 P.2d 317, 330-34 (Ariz. Ct. App. 1996) (holding in a case involving a purchase of one bank by another that the selling bank's auditors did not participate in or induce an unlawful sale of securities); see also Richard G. Himelrick, *The Importance of Statutory Text: From Scierter to Nonstatutory Defenses under Arizona Securities Law*, 41 ARIZ. ST. L.J. 49, 68-77 (2009) [hereinafter Himelrick, *Statutory Text*] (discussing the case law under A.R.S. § 44-2003(A) (2013)).

## VI. THE 1996 AMENDMENTS

The most significant amendments in the history of the 1951 Securities Act are those enacted in 1996.<sup>227</sup> The amendments were the result of a highly negotiated bill in which the Arizona Securities Division and the Arizona Attorney General played major roles.<sup>228</sup> The bill that led to the amendments was drafted and lobbied for by a group of businesses and corporate attorneys that called itself the "Coalition for Fairness in Securities Litigation."<sup>229</sup> Proponents of the bill claimed that it was intended to track amendments to the federal securities law, which Congress enacted as the Private Securities Litigation Reform Act of 1995.<sup>230</sup> But the Securities Division and others challenged that claim.<sup>231</sup> The bill went through multiple drafts and substantial changes. In the final version, many of the federal provisions were modified and the bill was expanded to include new civil-liability provisions.<sup>232</sup>

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<sup>227</sup> Richard M. Weinroth et al., *Reformation of the Arizona Securities Act: A Brief Summary*, ARIZ. ATT'Y, Sept. 1996, at 25.

<sup>228</sup> See Paul Schneider, *State Officials Win Changes to Securities Proposal*, ARIZ. BUS. GAZETTE, Feb. 29, 1996, at 10.

<sup>229</sup> See generally *Minutes of Comm. on Banking and Ins.*, S. 42nd Leg., 2d Reg. Sess., at 8-9 (Ariz. Feb. 7, 1996) (remarks of Jeffrey Sanquist, Esq. and Richard Lieberman, Esq. on behalf of the Coalition for Fairness in Securities Litigation) (on file with the author).

<sup>230</sup> See *id.*; Chad Bush, *Democrats Wince as Senate Passes Securities Bill*, ARIZ. CAPITOL TIMES, Mar. 8, 1996, at 23 (reporting remarks by Arizona senator John Kaites, who described the bill as mirroring federal legislation that was enacted to preclude strike suits in federal court). Regarding the federal legislation, see 10 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 249-97 (4th ed. 2013) (discussing the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.)).

<sup>231</sup> See, e.g., *Minutes of Comm. on Banking and Ins.*, *supra* note 229, at 10-11 (remarks of Richard Weinroth, general counsel for the Arizona Securities Division).

<sup>232</sup> See Weinroth et al., *supra* note 227, at 26-27 (discussing the new liability provisions and differences under Rule 10b-5 and A.R.S. § 44-1991(A) in state of mind, loss causation, and secondary liability); Schneider, *supra* note 228 (reporting on changes in the original bill).

As passed, the 1996 amendments<sup>233</sup> created new requirements for loss causation,<sup>234</sup> joint-and-several liability,<sup>235</sup> pleading,<sup>236</sup> and other matters.<sup>237</sup> Also included were new statutes based upon the civil-liability provisions of section 20(a) of the 1934 Act<sup>238</sup> and sections 11, 12(a)(2), and 15 of the 1933 Act.<sup>239</sup>

Section 44-1997 (the counterpart of section 11 of the 1933 Act) imposes liability on the issuer and other listed persons for securities sold under a registration statement that is materially misleading or defective.<sup>240</sup> Section 44-1998 (the counterpart of section 12(a)(2) of the 1934 Act) imposes liability for damages or rescission on anyone who sells any security, whether registered or exempt, by means of a misleading statement.<sup>241</sup> Subject to certain state-of-mind defenses, section 44-1999 (the counterpart of section 15 of the 1933 Act and section 20(a) of the 1934 Act) creates liability for persons who control persons who are liable under sections 44-1991, 44-1992, 44-1997, and 44-1998.<sup>242</sup>

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<sup>233</sup> Sales of Securities-Litigation-Fraud, Unlawful Activity, Etc. Amendments, 1996 Ariz. Legis. Serv. Ch. 197 (West). See generally HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES AND FEDERAL CORPORATE LAW, 3C SEC. & FED. CORP. LAW § 16:192 (2d ed. updated by West to Dec. 2010) (discussing the 1996 amendments); Weinroth et al., *supra* note 227, at 25 (same).

<sup>234</sup> See ARIZ. REV. STAT. §§ 44-1991(A)(2) & 44-2082(E) (2013); Grand v. Nacchio, 147 P.3d 763, 773-75 (App. 2006) (discussing loss-causation issues).

<sup>235</sup> See ARIZ. REV. STAT. § 44-2003(B)-(P) (2013); Himelrick, *Statutory Text*, *supra* note 226, at 67-68 (discussing the statutes on proportionate fault and joint-and-several liability).

<sup>236</sup> See ARIZ. REV. STAT. § 44-2082(A)-(B) (2013); Weinroth et al., *supra* note 227, at 27 (discussing the amendments on pleading).

<sup>237</sup> See, e.g., ARIZ. REV. STAT. § 44-2081 (2013) (class-action requirements); Weinroth et al., *supra* note 227, at 27 (discussing the class-action amendments).

<sup>238</sup> 15 U.S.C. § 78t(a) (Supp. IV 2010).

<sup>239</sup> *Id.* §§ 77k, 77l, 77o (2006 & Supp. IV 2010); Weinroth et al., *supra* note 227, at 26 (discussing the new civil-liability statutes).

<sup>240</sup> ARIZ. REV. STAT. § 44-1997(A) (2013). See generally *In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628 (S.D.N.Y. 2004) (providing an extended discussion of underwriter liability under §§ 11 and 12(a)(2) of the 1933 Act); Marc I. Steinberg & Brent A. Kirby, *The Assault on Section 11 of the Securities Act: A Study in Judicial Activism*, 63 RUTGERS L. REV. 1 (2010).

<sup>241</sup> ARIZ. REV. STAT. § 44-1998(A) (2013); see *Allstate Life Ins. Co. v. Robert W. Baird & Co., Inc.*, 756 F. Supp. 2d 1113, 1160-61 (D. Ariz. 2010) (construing A.R.S. § 44-1998 (2013)).

<sup>242</sup> ARIZ. REV. STAT. § 44-1999 (2013); see also *E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 79 P.3d 86, 96-101 (Ariz. Ct. App. 2003) (discussing control liability under A.R.S. § 44-1999 (2013)); Richard G. Himelrick, *Arizona Securities Fraud Liability: Charting a Non-Federal Path*, 32 ARIZ. ST. L.J. 203, 226-28 (2000) [hereinafter Himelrick, *Securities Fraud Liability*] (discussing control liability).

## VII. THE RELATIONSHIP BETWEEN FEDERAL AND ARIZONA SECURITIES LAW

### A. A Dual Regime

Securities law consists of a dual regime in which both state and federal securities laws operate. The blue-sky legislation that began in 1911 came first.<sup>243</sup> Twenty years later, Congress enacted the first federal securities legislation—the Securities Act of 1933<sup>244</sup> and the Securities Exchange Act of 1934.<sup>245</sup> Congress could have preempted state securities legislation.<sup>246</sup> But with every state but Nevada having enacted securities legislation,<sup>247</sup> preemption was not a serious option.<sup>248</sup> Instead, the federal securities laws were drafted to preserve state jurisdiction.<sup>249</sup> As a result, for over sixty years, federal and state securities laws co-existed without preemption.<sup>250</sup>

But the dual system was criticized as burdening capital formation, and calls for preemption of the blue-sky laws were made.<sup>251</sup> In 1996 and 1998, Congress responded by enacting laws that preempt in part and limit the right to sue under state securities laws.<sup>252</sup> With some exceptions, these laws prohibit the

<sup>243</sup> See *Aaron v. SEC*, 446 U.S. 680, 711 (1980) (Blackman, J., concurring in part, dissenting in part) (“The problem of securities fraud was by no means new in 1933, and many States had attempted to deal with it by enactment of their own ‘blue-sky’ statutes. When Congress turned to the problem, it explicitly drew from their experience.”); Robert A. Prentice, *Stoneridge, Securities Fraud Litigation, and the Supreme Court*, 45 AM. BUS. L.J. 611, 631-33 (2008) (discussing the relevance of the pre-1933 blue-sky laws to secondary liability under Rule 10b-5).

<sup>244</sup> See Securities Act of 1933, ch. 38, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (2006) (amended 2012)).

<sup>245</sup> Securities Exchange Act of 1934, ch. 404, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78nn (2006) (amended 2012)).

<sup>246</sup> See Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 25-28 (1998) (discussing the reasons that the 1933 and 1934 Congresses did not preempt the blue-sky laws).

<sup>247</sup> See 1 LOSS, SELIGMAN & PAREDES, *supra* note 6, at 65 (noting that by 1933 every state but Nevada had securities laws in place).

<sup>248</sup> See *id.* at 89 (“The state blue sky laws had become so much a part of the scheme of things that their displacement after over 50 years of dual regulation, when Congress did not see fit to get rid of them in the first ‘hundred days’ of 1933, seemed hardly more likely than the repeal of the income tax.”) (emphasis in the original).

<sup>249</sup> See *id.* at 481-90 (discussing Congress’s decision to provide for concurrent jurisdiction).

<sup>250</sup> See Daniel J. Morrissey, *The Road Not Taken: Rethinking Securities Regulation and the Case for Federal Merit Review*, 44 U. RICH. L. REV. 647, 682 (2010).

<sup>251</sup> See, e.g., Rutheford B. Campbell, Jr., *An Open Attack on the Nonsense of Blue Sky Regulation*, 10 J. CORP. L. 553 (1985).

<sup>252</sup> See National Securities Markets Improvements Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C.) (“NSMIA”); Securities Litigation Uniform Securities Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.) (“SLUSA”).

states from requiring registration of nationally traded securities and ban the use of state securities laws in class actions involving nationally traded securities.<sup>253</sup>

In other respects, Congress left in place the dual system of federal and state securities law. For example, Congress preserved the right of state regulators to bring enforcement actions for violating the states' antifraud statutes.<sup>254</sup> Similarly, private suits by individuals for common-law or statutory securities violations under state law are still permitted.<sup>255</sup> Additionally, class actions based on state securities law remain permissible when the securities are not nationally traded or otherwise within the definition of what Congress has defined as "covered securities."<sup>256</sup> Therefore, as a whole, state securities laws continue to regulate a large sphere of investment activity.

Within this unpreempted sphere, many states, including Arizona, have departed from federal law and adopted a broader, more investor-protective approach to securities regulation.<sup>257</sup> This departure continues the long history

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<sup>253</sup> See 1 LOSS, SELIGMAN & PAREDES, *supra* note 6, at 149-59 (discussing partial preemption of state securities laws under NSMIA); 9 LOSS, SELIGMAN & PAREDES, *supra* note 21, at 209-26 (discussing the elimination of most securities class actions based on state law under SLUSA); Painter, *supra* note 246 (discussing the history leading to NSMIA and SLUSA and the economic and political arguments for preempting state securities laws).

<sup>254</sup> See 15 U.S.C. § 77r(c)(1) (2006) (amended 2012); see also, Evan J. Leitch, Note, *The Antifraud Savings Clause of the National Securities Markets Improvement Act of 1996*, 94 IOWA L. REV. 1769 (2009).

<sup>255</sup> See, e.g., *Zuri-Invest AG v. Natwest Fin. Inc.*, 177 F. Supp. 2d 189, 194-97 (S.D.N.Y. 2001) (rejecting argument that NSMIA preempted investors' common-law claims for securities fraud); see also A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 110 (2011) [hereinafter Pritchard, *Roberts Court*] (explaining that while SLUSA precludes most state-law securities class actions, it does not preempt the substantive law of state securities fraud or prohibit individual actions under state securities law). Although private actions for securities fraud are not preempted, NSMIA does preempt state-law claims for violations of state-registration provisions regarding nationally traded securities. NSMIA also preempts private offerings that qualify for exemption under Rule 506 of Securities & Exchange Commission Regulation D. See Robert N. Rapp & Fritz E. Berckmueller, *Testing the Limits of NSMIA Preemption: State Authority to Determine the Validity of Covered Securities and to Regulate Disclosure*, 63 BUS. LAW. 809 (2008) (discussing the inclusion of Rule 506 offerings in NSMIA's definition of covered securities and explaining that the issuer's actual compliance with Rule 506 (rather than just asserted compliance) must be proved to obtain the benefit of preemption).

<sup>256</sup> See Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349 (2011) (discussing the areas in which state-securities class actions are still allowed).

<sup>257</sup> See Marc I. Steinberg, *Enhanced "Blue Sky" Enforcement: A Path to Help Solve Our Public School Funding Dilemma*, 50 WASHBURN L.J. 563, 571 (2011) (noting the opportunity for more investor protection under state law and describing congressional changes in the securities laws that began in 1995); Jennifer J. Johnson, *Secondary Liability for Securities Fraud: Gatekeepers in State Court*, 36 DEL. J. CORP. L. 463, 480 (2011) ("The imposition of express liability for secondary actors under state blue sky laws is much more expansive than the federal scheme."); Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation*, 93 MICH. L. REV. 649, 678 (1995) ("Today, the most signif-

of affirmative investor protection that has prevailed under state securities laws.<sup>258</sup>

### *B. Arizona's Uniquely Non-Federal Securities Laws*

Since the 1970s, the United States Supreme Court has increasingly adopted a restrictive interpretation of civil liability under Rule 10b-5's antifraud provisions.<sup>259</sup> Under the Court's jurisprudence, strict-statutory interpretation and judicially identified policy considerations are used to cabin Rule 10b-5 liability.<sup>260</sup> Because it uses its own view of policy to limit Rule 10b-5, the Court has candidly acknowledged its disagreement with the SEC's "broad view of § 10(b) or Rule 10b-5" and has "expressed skepticism over the degree to which

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icant augmentative aspect of the state blue sky laws may well be in providing broader private relief in many instances than do the federal securities laws.").

<sup>258</sup> See *supra* notes 118-21 and accompanying text (discussing the historic emphasis on investor protection in cases interpreting state-securities laws).

<sup>259</sup> See Pritchard, *Roberts Court*, *supra* note 255, at 130-38, 143-45 (arguing that the Roberts Court opposes any expansion of civil liability under Rule 10b-5); A.C. Pritchard, *Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws*, 52 DUKE L.J. 841, 856-63 (2003) [hereinafter Pritchard, *Justice Powell and the Counterrevolution*] (discussing Justice Powell's success in persuading his colleagues on the Court to adopt narrow interpretations that curbed the SEC's powers and the plaintiffs' bar); E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1581-82, 1586-87, 1592-96 (2004) (describing the restrictive interpretations that occurred between 1973 and 1987); cf. Marc I. Steinberg, *The Ramifications of Recent U.S. Supreme Court Decisions on Federal and State Securities Regulation*, 70 NOTRE DAME L. REV. 489, 491-97 (1995) (discussing the lack of a consistent theory of statutory construction in the Court's decisions between 1975 and 1995 with some decisions advancing a strict statutory approach and others adopting a more remedial approach).

<sup>260</sup> See, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-64, 165 (2008) (stating that "the § 10(b) private right should not be extended beyond its present boundaries" and noting that the "practical consequences" of an expanded interpretation might allow plaintiffs to "extort settlements" that might raise the costs of domestic business and deter overseas firms from doing business in the United States); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 175, 188-90 (1994) (noting that the text of § 10(b) provides no support for aiding-and-abetting liability and reasoning that the uncertainty created by such expanded liability might cause the cost of professional services by accountants and others to increase and might deter these professionals from representing newer or smaller companies); Douglas E. Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 FORDHAM URB. L.J. 877, 911-17 (1987) (discussing the use of policy considerations to decide federal securities cases that began with the 1975 decision in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975)); Pritchard, *Justice Powell and the Counterrevolution*, *supra* note 259, at 865 ("[Justice] Powell considered the judge-made remedy under Rule 10b-5 to be a species of federal common law, and thus appropriate for judges to consider policy in defining its limits.").

the SEC[’s]” interpretations and policy analysis should receive deference.<sup>261</sup> The Court commonly states that Rule 10b-5 should be narrowly interpreted and uses its perception of policy to reach the appropriate interpretation.<sup>262</sup> These policy-driven decisions have become so idiosyncratic that they have been distinguished as “applying uniquely to federal securities law claims.”<sup>263</sup>

Arizona courts have not followed the Supreme Court’s approach to civil liability. Arizona courts have interpreted the state’s securities statutes as remedial legislation that is intended to broadly protect the public.<sup>264</sup> Since 2001, the Arizona Court of Appeals has expressed the view that it “will not defer to

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<sup>261</sup> *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 n.8 (2011); *see also Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2887-88 (2010) (limiting the extraterritorial reach of § 10(b) and refusing to defer to the SEC’s interpretation).

<sup>262</sup> *See, e.g., Janus*, 131 S. Ct. at 2302-03& n.8 (rejecting the SEC’s interpretation of primary liability and stating that Rule 10b-5 should be narrowly interpreted); *Stoneridge Inv. Partners*, 552 U.S. at 166-67 (stating that implied liability under Rule 10b-5 must be given “narrow dimensions” and holding that because plaintiffs could not prove reliance, defendants were not liable for participating in a deceptive accounting scheme); *cf. Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1104-06 (1991) (reasoning that implied liability for misleading proxy solicitations under the 1934 Act may be narrowed for policy reasons and noting the “threats of speculative claims and procedural intractability” as grounds for imposing strict causation requirements).

<sup>263</sup> *See In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244, 262 (S.D.N.Y. 2011) (distinguishing the Supreme Court’s *Janus* decision as “unique[ ] to federal securities law claims” (*see generally supra* notes 260-61 and accompanying text) and holding that: “Limitations imposed on [the Rule 10b-5] cause of action because it is an implied right of action under a federal statute should not be used to limit the common law” of fraud); *see also Red River Res., Inc. v. Mariner Sys., Inc.*, No. CV 11-02589-PHX-FJM, 2012 WL 2507517, at \*10 (D. Ariz. June 29, 2012) (distinguishing *Janus* and stating: “While *Janus* limited liability under Rule 10b-5 to those with ultimate authority over a statement, Arizona has not defined ‘make’ in § 44-1991(A)(2) in the same way”).

<sup>264</sup> *See Grand v. Nacchio*, 236 P.3d 398, 401 (Ariz. 2010) (“The legislature intended the ASA [Arizona Securities Act] ‘as a remedial measure’ for the ‘protection of the public’ and therefore specified that the act be ‘liberally construed.’” (quoting the statement of legislative intent that directs the court to liberally construe the securities statutes to protect the public)); *State v. Baumann*, 610 P.2d 38, 45-46 (Ariz. 1980) (explaining the protective purpose of securities-registration requirements); *E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm’n*, 79 P.3d 86, 97 (Ariz. Ct. App. 2003) (declining to follow certain cases in the Ninth Circuit that the court characterized as too restrictive to adequately guard the public); *Siporin v. Carrington*, 23 P.3d 92, 99 (Ariz. Ct. App. 2001) (refusing to follow federal decision because its “rationale does not serve the prophylactic and remedial purposes of the Arizona Securities Act”); *Wash. Nat’l Corp. v. Thomas*, 570 P.2d 1268, 1277 (Ariz. Ct. App. 1977) (holding regarding remedies under the securities laws that “[r]emedial statutes are to be liberally construed”); *Bullard v. Garvin*, 401 P.2d 417, 419 (Ariz. Ct. App. 1965) (stating that the securities statutes are to be “liberally construed in favor of the persons whom they are designed to protect”); *see also R & L Ltd. Invs., Inc. v. Cabot Inv. Props., LLC*, 729 F. Supp. 2d 1110, 1114 (D. Ariz. 2010) (interpreting Arizona law and holding that contractual choice-of-law provision that would have precluded application of Arizona securities law was invalid as contrary to the “substantive safeguards that Arizona’s legislators have crafted to protect its investing citizenry.”); *Chrysler Capital Corp. v. Century Power Corp.*, 800 F. Supp. 1189, 1195 (S.D.N.Y. 1992) (explaining that § 44-1991 is “remedial in nature” and “like any tort recovery statute, it merely provides a post-hoc remedy for persons aggrieved by allegedly unlawful con-

federal case law when, by doing so, [it] would be taking a position inconsistent with the policies embraced by our own legislature.”<sup>265</sup> An opinion issued the year before made the point that even decisions of the United States Supreme Court may be disregarded on issues of Arizona-securities law.<sup>266</sup> The Arizona Court of Appeals has also stated that it gives “great deference” to the administrative views of the Corporation Commission<sup>267</sup>—a much different approach than the United States Supreme Court’s hostility towards the SEC’s interpretations of Rule 10b-5.<sup>268</sup>

In 2013, an Arizona Supreme Court decision expressed a preference for following “settled federal securities law unless there is a good reason to depart from that authority.”<sup>269</sup> In spite of that preference, there often exists a good reason for a different interpretation. A settled federal interpretation frequently does not exist.<sup>270</sup> In other instances, differences between the Arizona and federal statutes compel different interpretations.<sup>271</sup> In still other instances, the federal courts have adopted narrow interpretations that are inconsistent with the liberal, investor-protective interpretation mandated by the Arizona legisla-

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duct”); Himelrick, *Securities Fraud Liability*, *supra* note 242, at 208-10 (discussing Arizona’s remedial interpretations).

<sup>265</sup> *Siporin*, 23 P.3d at 98.

<sup>266</sup> *Carrington v. Ariz. Corp. Comm’n*, 18 P.3d 97, 99 (Ariz. Ct. App. 2000); *see also* *Sell v. Gama*, 295 P.3d 421, 425 (2013) (electing to follow a U.S. Supreme Court decision on aiding and abetting but noting that the decision was not binding precedent).

<sup>267</sup> *E. Vanguard Forex*, 79 P.3d at 97.

<sup>268</sup> *See supra* note 261 and accompanying text.

<sup>269</sup> *Sell*, 295 P.3d at 425.

<sup>270</sup> *See, e.g.*, 8 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *SECURITIES REGULATION* 150-62 & n.544 (4th ed. 2012) (discussing the circuits’ different standards for recklessness under Rule 10b-5); 9 LOSS, SELIGMAN & PAREDES, *supra* note 21, at 572-76 & n.13 (discussing differences among the circuits on whether culpable participation in a securities violation is required for control liability under § 20(a) of the 1934 Securities Exchange Act); Lewis D. Lowenfels & Alan R. Bromberg, *Compensatory Damages in Rule 10b-5 Actions: Pragmatic Justice or Chaos?*, 30 SETON HALL L. REV. 1083, 1084 (2000) (concluding that “there is no clear rule guiding the measure of damages under Rule 10b-5 . . .”).

<sup>271</sup> *See, e.g.*, *In re Allstate Life Ins. Co. Litig.*, No. CV-09-8162-PCT-GMS, 2012 WL 1900560, at \*5 n.3 (D. Ariz. May 24, 2012) (explaining that “unlike the federal Securities Exchange Act, the Arizona State Securities Act appears to create liability for one’s participation in creating a misleading statement even where one is not the ‘maker’ of the statement.” (citing § 44-2003(A) (dictum)); *Grand v. Nacchio*, 236 P.3d 398, 401 (Ariz. 2010) (explaining that the federal counterpart of § 44-1991(A) does not contain express remedies, whereas § 44-2001(A) of the Arizona Act provides express damage and rescission remedies for § 44-1991(A) violations); *Standard Chartered, PLC v. Price Waterhouse*, 945 P.2d 317, 329 (Ariz. Ct. App. 1996) (refusing to consider federal case law because a federal counterpart to § 44-2003(A)’s participate-or-induce standard does not exist); Himelrick, *Statutory Text*, *supra* note 226, at 51-54, 63-65 (discussing differences in statutory text under Arizona and federal securities law that require different interpretations on scienter and reliance).

ture.<sup>272</sup> For all these reasons—unsettled case law, differences in statutory language, and narrow interpretations that reduce investor protection—federal decisions should be approached with caution when interpreting Arizona’s securities statutes.

### VIII. CONCLUSION

The history of Arizona’s securities laws coincides with the overall development of securities law as a legal field. In the nineteenth century, securities law as a legal field did not exist. That changed as states enacted a cascade of securities laws during the two decades preceding the 1933 and 1934 federal securities laws. As states and Congress enacted securities legislation, a legal movement occurred in which securities law was increasingly studied and recognized as an important subject of economic regulation. Arizona’s decision in 1951 to scrap its formative securities laws and enact an entirely new securities act was part of that movement.

Since 1996, state securities law has been partially displaced by Congress’s decision to selectively preempt state securities law. But a dual regime of state and federal securities law continues to exist. Antifraud laws are prominent examples of concurrent state and federal regulation. Except for class actions involving nationally traded securities, the states remain free to enact their own laws on civil liability for securities misconduct.<sup>273</sup>

In this unpreempted area, Arizona has staked its independence. In a line of cases that began in 2000, Arizona’s appellate courts have rejected restrictive federal securities law decisions and announced that in interpreting Arizona’s securities statutes, even the United States Supreme Court’s decisions are not binding. As a result, Arizona and federal interpretations of civil liability and remedies have departed. Arizona, like most states, has continued its historic tradition of affirmative investor protection. On the other hand, civil liability under the federal securities laws has narrowed—so much so that federal decisions are likely to be based on policies inconsistent with the legislative goals, language, and history of Arizona’s securities statutes.

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<sup>272</sup> Compare *Grand v. Nacchio*, 147 P.3d 763, 776-77 (Ariz. Ct. App. 2006) (refusing to follow federal precedent, citing the legislature’s intent that the Securities Act’s remedies be liberally construed, and adopting a rule of substitute tender for statutory tender under A.R.S. § 44-2001(A)), *E. Vanguard Forex*, 79 P.3d at 97, 98-99 (refusing to follow federal precedent that was “too restrictive to guard the public interest” (internal quotation mark omitted)), and *Siporin v. Carrington*, 23 P.3d 92, 99 (Ariz. Ct. App. 2001) (refusing to follow federal decision because its “rationale does not serve the prophylactic and remedial purposes of the Arizona Securities Act”), with the federal cases cited *supra* notes 260-62.

<sup>273</sup> See *supra* note 255 (NSMIA precludes suits under state law for securities-registration violations).