

Securities Liability for Transactional Lawyers: The Blues of Oregon's Blue Sky Law

By Dan Keppler

Your real estate client wants to bring in a few “money people” to purchase the property for a new apartment building. Or your small business client needs cash to open another retail location and is getting financing from friends and family.

Ordinary business deals can inadvertently morph into securities transactions whenever somebody puts money into a business, especially if the investors aren't engaged in running the business. And if your client's deal involves the sale of a security, you as the lawyer can incur a significant liability risk if the business fails, even if you competently drafted the deal documents.

The Oregon Securities Law is unique among state “blue sky” securities laws because it imposes liability in favor of the purchaser of a security against “every person who participates or materially aids” in the unlawful sale of a security. ORS 59.115(3). That “person” can include the lawyers who documented the transaction.

Hard to believe? Read *Prince v. Brydon* 307 Or. 146 (1988). The Oregon Supreme Court ruled that a lawyer who prepares documents that supported the unlawful sale of securities may be held liable under the statute where the documents are material to the sale. Disgruntled investors may rely on *Prince* to argue that they can establish a lawyer's liability even

if the lawyer did not know about the facts that made the sale of securities unlawful.

So how can you understand your risk if you don't practice securities law? Here are three questions to consider:

DOES MY CLIENT'S DEAL INVOLVE A SALE OF SECURITIES?

The definition section of the Oregon Securities Law, ORS 59.015 (19), contains a laundry list of things that constitute securities. Not only does this list include classic securities like stocks and bonds, but it also includes promissory notes in many circumstances. See *Lahn v. Vaisport*, 276 Or App 468, 483 (2016).

Most importantly, the definition of security includes a catchall for “investment contracts.” An investment contract has four attributes: (1) an investment of money or money's worth; (2) in a common enterprise; (3) for profit; and (4) to be achieved by the management or control of others. *Computer Concepts, Inc. v. Brandt*, 310 Or 706, 714 (1990).

LLC memberships, partnerships, or real property tenant-in-common interests can all constitute securities if they meet this four-part test. A good rule of thumb is, if your deal involves investors who aren't actively involved in running the business, those passive investors are likely being sold a security.

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CAN MY CLIENT BE POTENTIALLY LIABLE AS THE SELLER OF SECURITIES?

The issuer or seller of securities is liable to the purchaser for any violation of the Oregon Securities Law. Two types of violations are commonly alleged against the seller in securities litigation under the statute:

- (1) The seller failed to comply with the technical requirements of the Oregon Securities Law or implementing regulations. ORS 59.115(1)(a). A common violation is the failure to register the security with state regulators or failure to qualify for an exemption from registration. See ORS 59.055 (requiring securities to be registered or exempt).
- (2) The seller sold the security by means of an untrue statement of material fact or misleading omission. ORS 59.115(1)(b). The damages for seller liability are the entire amount the purchaser invested, plus interest at the nine percent statutory rate, plus court-awarded attorney fees. ORS 59.115(2).

AS THE LAWYER, COULD I BE LIABLE AS A “NONSELLER” OF SECURITIES?

If the seller or issuer of securities (i.e., your business client) is liable for an unlawful sale, then the Oregon Securities Law imposes liability on certain categories of “nonsellers” involved with the sale. Potentially liable nonsellers include managers, officers, directors, and others who controlled the seller (i.e., your client’s management team). But it also includes any person who participated and materially aided in the unlawful sale of securities. ORS 59.115(3).

This could include you as the lawyer who drafted the deal documents or advised the business client — if your work can be said to have materially aided the sale of the securities. And, a disgruntled investor need not prove you knew about the facts that made the sale of securities unlawful. *Prince*, 307 Or at 150. Instead, to escape liability, you bear the burden to prove at trial that you did not know, or in the exercise of reasonable care could not have known, about the facts that made the sale unlawful. See ORS 59.115(3).

So what can you do as a business or transactional lawyer to avoid the risk of securities liability? For

starters, choose your clients and deals carefully. Avoid clients who might take advantage of unsophisticated investors or are unwilling to be transparent about the risky nature of investing in a business. Also, avoid doing the legal work on deals that seem unrealistic or destined to fail.

If you’re not well versed in securities, avoid getting involved in transactions with passive investors. Try to limit the scope of your representation to matters unconnected to the financing portion of the transaction or to the sale of any securities. If you think you have a securities issue, bring in experienced securities counsel.

Unfortunately, there are no safe harbors, no best practices, and no agreed-upon standards of care for mitigating risks under the Oregon Securities Law. But if you understand and identify the risks, you are more likely to avoid them.