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Ninth Circuit Holds that Social Media Communications Can Satisfy Statutory-Seller Requirement Under Securities Act

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The Court of Appeals for the Ninth Circuit held today that social media and other mass communications concerning securities can constitute solicitations potentially creating statutory-seller liability under § 12(a)(2) of the Securities Act of 1933. The decision in *Pino v. Cardone Capital, LLC* (9th Cir. Dec. 21, 2022) joins a recent Eleventh Circuit ruling in rejecting the need for *direct* communications between an alleged solicitor and a purchaser of securities. This issue has attracted some attention in light of the recent spate of proceedings involving alleged promoters of crypto assets, and it emphasizes the need for caution and disclosure in the promotion of any product or investment that might be considered a security.

Factual Background

The *Pino* case is a class action under the Securities Act alleging violations of § 12(a)(2) arising from statements in real-estate investment offering materials. The securities were sold through crowdfunding techniques, and the defendants made alleged misstatements at conferences, in internet videos, and in social-media postings about expected returns on investment and other performance metrics.

The District Court dismissed the claim, holding that the defendants – a real-estate property manager and its principal – were not "statutory sellers" under § 12(a)(2) because they had not passed ownership of the securities to the plaintiff and had not directly solicited his purchase. The Ninth Circuit reversed and remanded, holding that § 12(a)(2) does not require *direct* solicitation or other privity between the alleged solicitor and the purchaser.

Ninth Circuit's Decision

Section 12(a)(2) imposes liability on persons who "offer or sell" securities "by means of a prospectus or oral communication" containing material misstatements or omissions. A person may be liable as a "statutory seller" if he or she either (*i*) passes title to the securities to the plaintiff or (*ii*) "engages in solicitation," meaning that he or she "solicits the purchase [of the securities], motivated at least in part by a desire to serve his [or her] own financial interests or those of the securities owner."

The plaintiff here did not allege that the defendants had passed title to him, and the defendants clearly had a financial interest in the purchase of the securities. The claim's viability thus turned on whether the defendants' mass communications constituted "solicitations" even though the defendants had not had any *direct* contact with the plaintiff

The Ninth Circuit held that "nothing in § 12 expressly requires that solicitation must be direct or personal to a particular purchaser to trigger liability under the statute." Accordingly, "mass communications directed to multiple potential purchasers at once" can constitute solicitations under § 12(a)(2). The Ninth Circuit agreed with an Eleventh Circuit decision from earlier this year holding that videos posted on the internet can be solicitations under § 12(a)(2).

Implications

The Ninth Circuit's joining with the Eleventh Circuit in rejecting any requirement that a solicitation be directed to or targeted at a particular plaintiff for purposes of § 12(a)(2) heightens liability risks for social-media and other mass communications concerning securities. Unlike Securities Exchange Act claims, Securities Act claims such as those under § 12(a)(2) do not require the plaintiff to prove scienter, reliance, or loss causation. And the potential relief includes rescission if the plaintiff still owns the security.

Allegations about mass solicitations have been in the news lately because of promotional statements about crypto assets. Promoters will need to be particularly careful about their statements in light of the liability risk under § 12(a)(2).

Of course, § 12(a)(2) does not apply if the assets allegedly being promoted are not securities – a hotly contested issue for many types of crypto assets. And even if the assets are securities, § 12(a)(2) liability cannot exist if the alleged promoter's statements were not motivated at least in part by a desire to serve the promoter's own financial interests or those of the securities owner. A promoter who feels positively about the security allegedly being promoted and who is not speaking to promote his or her financial interest in the security should not be subject to liability as a statutory seller.

If the asset at issue is a security, a promoter also must consider § 17(b) of the Securities Act, which the SEC has been enforcing. Section 17(b) prohibits a person from making statements that, "though not purporting to *offer* a security for sale, *describe*" a security without fully disclosing any consideration that the speaker received or will receive, directly or indirectly, from an issuer, underwriter, or dealer. Accordingly, if a promoter receives or expects to receive any consideration for making social media or other statements that "describe" or might be viewed as promoting a security, he or she must disclose the existence and amount of that consideration.

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