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Anti-fraud Provisions of the Securities Act; ERISA; Pension Plans; Section 17(a) Private Right of Action; Daniel v. International Brotherhood of Teamsters

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FEDERAL SECURITIES LAWS

Anti-fraud Provisions of the Securities Acts • ERISA • Pension Plans • Section 17(a) Private Right of Action

Daniel v. International Brotherhood of Teamsters,
561 F.2d 1223 (7th Cir. 1977).

In Daniel v. International Brotherhood of Teamsters, the Seventh Circuit Court of Appeals held that the federal securities laws apply to disclosure of information regarding employee pension and profit sharing plans. In an era when disclosure of information has become mandatory and commonplace, it is not surprising that relevant information on pension plans should be disclosed to employees. The important aspect of this case is that disclosure was required under the anti-fraud provisions of the federal securities laws rather than under the provisions of the Employee Retirement Income Security Act (ERISA). Questions concerning the Securities and Exchange Commission's jurisdiction over employee pension and profit sharing plans represent an unsettled area of the law. The Seventh Circuit decided in Daniel that the scope of the Commission's jurisdiction does include these plans.

Suit was originally brought in the United States District Court for the Northern District of Illinois against Local 705 of the International Brotherhood of Teamsters by John Daniel. Daniel, a retiree, alleged that a denial of his pension benefits due to a break in the continuity of service constituted a violation of the anti-fraud provisions, section 17(a) of the Securities Act of 1933 and section 10(b) of the Securities Exchange Act of 1934. Plain-
tiff sued for modification of the continuity of service requirement which if broken, forever barred eligibility under the plan. He brought suit on behalf of himself and of all members of affiliate locals of the Teamsters similarly situated.

For more than 22 years plaintiff Daniel was employed as a truck driver for employers under defendant Local 705's labor agreements. Plaintiff's only break in service during this working period was an involuntary four month lay off during an economic decline in 1961. Commencing in 1955, a pension plan had been made available to eligible union members upon completion of twenty years of service, with contributions made solely by the employer on behalf of the employee. Plaintiff contended that Teamsters Local 705 had represented to him that eligibility for its pension fund could be achieved at age 60 with 20 years of service. However, upon his retirement, Daniel learned that the eligibility requirement was one of continuous and uninterrupted service by the employees covered by the labor agreements. Therefore, all employer contributions made to Daniel's account and any accumulated funds therefrom were forfeited, and Daniel consequently received no pension. Plaintiff alleged that his decision to take and keep employment was materially influenced by the representations made by Local 705 officials. Those representations did not include the information made, in the light of the circumstances under which they were made, not misleading, or

3. to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

8 15 U.S.C. § 78j(b) (1970), which reads:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10(b)-5 reads:

it shall be unlawful for any person, directly, or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange—

1. to employ any device, scheme, or artifice to defraud,
2. to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under they were made, not misleading or
3. to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.


9 Many pension plans have continuity requirements, but involuntary breaks in service are usually remediable upon satisfaction of certain requirements. Local 705's continuity requirement was modified for a break in service occurring after 1970. 561 F.2d at 1226 n.1.

10 Id. at 1225.
that continuous, uninterrupted service was a requirement to receive pension payments.

The district court, in a memorandum opinion, held that to the extent employee pension plans constitute a sale of securities, the anti-fraud provisions of the federal securities acts are by their own terms applicable to such plans. In this case, plaintiff’s acquisition of an interest in the Local 705 pension fund constituted such a sale of a security. The court subsequently entered an order denying defendant’s motion to reconsider, but certified their application for interlocutory appeal. Seven amicus curiae briefs were filed upon appeal.

The United States Court of Appeals, Seventh Circuit, affirmed the lower court’s decision upholding the application of sections 17(a) and 10(b) of the federal securities acts to the noncontributory pension plan. The court agreed that plaintiff’s interest in the plan was a security which had been acquired through a sale. The court further stated that there had been no preemption by ERISA and that there existed a private right of action available to the plaintiff under the securities acts for violations of substantive terms thereunder.

The decision in Daniel is significant for several reasons. First, it indicates the recognition by the Securities and Exchange Commission (SEC) through its amicus curiae brief that noncontributory pension plans should no longer be viewed as gifts even in regard to the registration requirements of the federal securities law. Second, since ERISA requires disclosure of only the plan provisions and not of all material facts prior to the investment decision as required by the federal securities laws, the operation of the anti-fraud provisions are not preempted by the passage of ERISA. Third, the Daniel court emphasized that there is a distinction between the registration provisions and the anti-fraud provisions of the federal securities laws. The court was careful to indicate that its decision was based upon the anti-fraud and not the registration provisions of the federal securities laws. Query whether the distinction is as clear as the court indicated, since the net effect of both provisions is disclosure. By applying the anti-fraud provisions, the court achieved the goal of the registration provisions, namely disclosure, but avoided direct application of the registration provisions to pension funds.

12 Id. at 553.
13 Four amicus curiae briefs urged affirmance—one of which was filed by the Securities and Exchange Commission.
14 561 F.2d at 1250-51.
15 Id. at 1250.
The court of appeals began its analysis by considering the defendant’s major argument that the securities laws were not applicable to the pension plan. The defendant contended that the plaintiff’s interest was not a security and had not been acquired in a sale. Lower courts have held that employer pension plans do not constitute securities and therefore jurisdiction under the federal securities laws does not exist. The Daniel court, however, reached the opposite conclusion.

The analysis applied by the court of appeals followed that outlined by the United States Supreme Court in securities cases decided during its October, 1976 term. The court first examined the statutory language of the federal securities acts, both of which defined a security as “any note, stock . . . or investment contract . . .” The important issue then became whether or not plaintiff’s interest met the requirements of an investment contract so as to be subject to the federal securities laws. An investment contract has been expressly defined in S.E.C. v. Howey Co. as “a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of a promoter or third person . . .”

There were several elements within this definition which the court was required to analyze in order to justify its finding that the plaintiff’s interest in the involuntary pension plan herein was an investment contract. The defendants argued that the person benefiting from the transaction was not the same person making the contribution. The court determined that the benefits provided under such pension plans were a form of compensation to the employee. By such a classification, the employer and employee were considered together to satisfy the Howey requirement that the beneficiary be the investor. It appears questionable whether that analysis satisfies the Howey requirement that “a person invests his money.” The court relied on language in United Housing Foundation, Inc. v. Forman which modified

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19 328 U.S. 293 (1946). Lower federal courts had also followed such a definition in Penfield v. S.E.C., 143 F.2d 746, 750 (9th Cir. 1944); Atherton v. United States, 128 F.2d 463 (9th Cir. 1942); S.E.C. v. Universal Serv. Ass’n, 106 F.2d 232, 237 (7th Cir. 1939).
20 328 U.S. at 298-99.
21 See Inland Steel Co. v. N.L.R.B., 170 F.2d 247, 251 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949). See also Employing Plasterers’ Ass’n v. Journeymen Plasterers’ Protective and Benevolent Soc’y of Chicago, Local 5, 279 F.2d 92, 99 (7th Cir. 1960).
22 328 U.S. 298-99 (emphasis added).
Howey and focused instead on "[w]here money is invested." The above analysis is sound; however, the court emphasized the relationship between the employer and the employee rather than develop a direct link between the employee and the pension fund. Neither Forman nor Daniel addresses the issue of who must make the contribution and stresses only the other elements of the Howey rule.

The second element of an investment contract, the requirement of an "investment of money" has been liberally construed so that the requirement is met when the investor commits his assets to the enterprise, subjecting himself to potential financial loss. Here, working under the assumption of receiving future pension benefits could result in a financial loss to plaintiff in that without such a pension plan, plaintiff arguably could have earned more in wages.

An additional hurdle to be overcome in order to reach a finding of an investment contract was the requirement of an expectation of profits. In a series of cases, the Supreme Court has construed the term "profits." For example, in Tcherepnin v. Knight profits were held to exist where participation in earnings resulted from the use of the investor's funds. In United Housing Foundation, Inc. v. Forman, the Supreme Court applied Howey language and stated that in cases where the federal securities laws apply, the investor must be "attracted solely by the prospect of a return on his investment." In Forman, the interest in an apartment co-op failed to satisfy the profit requirement of an investment contract since the investor was motivated by a desire to use or consume the item, i.e., the desire to acquire a place to live and not solely to acquire financial gain. In Howey, on the other hand, where defendants offered to investors an opportunity to contribute money and to share in the profits of a citrus enterprise, as opposed to merely obtaining a fee simple interest in land, the Supreme Court found that there was an "expectation of profits" and therefore applied the federal securities laws.

Lastly, the interpretation of the phrase of the Howey rule, "solely from

24 Id. at 852.
25 Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976).
28 421 U.S. at 852.
29 Id.
30 Id. at 853.
31 328 U.S. at 299.
the efforts of a promoter or third person . . . ," has been expanded. In *S.E.C. v. Glenn W. Turner Enterprises Inc.*, the court stated that the inquiry is whether the efforts made by others are the undeniably significant ones, and nominal efforts by the investor will not defeat the requirement of "solely." Cases in which courts have used a literal construction of the word "solely" have been criticized since those courts emphasize the definitional aspect and fail "to consider the more fundamental question" whether the statutory policy of affording broad protection to investors should be applied.

Thus, the employee's contribution to the enterprise in *Daniel*, i.e., his continued service to the employer, did not foreclose security status. Further, the fact that the gain was based upon "pooled" contributions also had no effect on the profit nature of the gain. Relying upon these prior cases, the court in *Daniel* found that since the expected income to the employee would exceed the employer's contributions, the resultant gain would be deemed a profit. This promise of profit provided the motivation to invest even though the investment was indirect since the employees contributed labor in return for the employer's payment.

The issue presented in *Daniel* has been considered in only a limited number of courts. In *Robinson v. United Mine Workers*, decided in the District Court for the District of Columbia prior to the appellate court decision in *Daniel*, the court held that a health care plan did not constitute a security. Plaintiffs, widows and dependents of deceased coal miners,

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32 Id.
34 474 F.2d at 482.
35 See, e.g., Gallion v. Alabama, 282 Ala. 679, 213 So. 2d 841 (1968).
37 See also Jones v. International Investors Inc. East, 429 F. Supp. 119, 123 (N.D. Ga. 1976). The following cases found the gain to be a "profit" and thus the investors' interest to be a "security": *S.E.C. v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65 (1959) (where the gain was derived from the investments of new annuitants); *S.E.C. v. Koscot Interplanetary*, Inc., 497 F.2d 473 (5th Cir. 1974) (where the gain was based upon the investments of other investors); Collins v. Rukin, 342 F. Supp. 1282 (D. Mass. 1972) (where the gain was contingent upon the investor having enough money to exercise his stock option).
38 561 F.2d at 1234.
39 In *S.E.C. v. Addison*, 194 F. Supp. 709, 722 (N.D. Tex. 1961), the "giving of personal notes . . . participation in profit sharing agreements and investment contracts whether as a gift out of gratitude or in consideration . . . of labor rendered constitute[d] securities because either way it amounts to a disposition of a security for value."
41 Id.
alleged that the union had represented to the miners that lifetime health care coverage would be provided, but that in reality, the fund only provided for five year coverage. Judge Gesell in Robinson rejected the idea that a third party's contribution will suffice for the Howey requirement that a person invest his money notwithstanding the employer-employee relationship relied upon in Daniel to satisfy the test.

Moreover, had the miners themselves brought the suit, the court seemingly would have adhered to its strict interpretation of the Howey requirement. Judge Gesell also relied on Forman and found no expectation of profit on the part of the miners. The miners, in bargaining for the creation of the trusts, were more "interested in creating a sound, comprehensive health care plan, rather than making an investment for profit." Such reasoning delves into the state of mind of the investor, a line of thought which had been, until recently, consistently rejected by the courts. The Daniel court, however, also looked to the plaintiff's state of mind and found that Daniel did expect a profit, in order to come within the definition of an investment contract.

The District Court for the Central District of California in Hurn v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry also held contrary to the Daniel decision. This case, decided after the district court decision in Daniel, but prior to the appeals court decision, held that ERISA provided the exclusive remedy for disputes over pension benefits and that plaintiff's interest in the employee pension plan was not a security within the meaning of the securities laws. This conclusion, however, was not well supported by any discussion. The court relied on the Forman decision, but failed to discuss what elements of a security and a sale were lacking. In comparison to the thorough presentation of the reasoning used by the Daniel court, the Hurn decision lacked any supportive rationale and offered only the bare conclusion of law.

In Wiens v. International Brotherhood of Teamsters, also decided in the Central District of California, the court followed the Hurn decision. The author of the opinion stated that "[he did not believe that] . . . when

42 The United Mine Workers of America Health and Retirement Funds are four irrevocable trusts and are determined by fixed, per tonnage royalties paid by the coal operators. Labor Management Relations Act, 29 U.S.C. § 186 (Supp. V 1975).
43 435 F. Supp. at 247.
46 Id. at 81, 82.
you vote for a collective bargaining agreement that calls for a pension, you thereby purchase a security." This conceptualization in the judge's opinion in Wiens went further than Hurn. However, until Robinson and Daniel, an analysis of the investor's state of mind had not been considered appropriate, and emphasis had been on the substance of the transaction and not on the investor's intent. Reliance on an assessment of the investor's intent seems to represent a less principled basis for decision, yet these recent cases seem to represent an acceptance of this new method on the part of the lower courts.

Not content with merely passing the literal test of Howey, the Daniel court considered also the legislative history and earlier SEC interpretations of the securities acts to buttress their finding that a pension plan constitutes an investment contract. The Supreme Court in Howey, following Congress' liberal interpretation of the federal securities laws, stated that the term investment contract "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others. . . ." Further, as a matter of statutory construction, the Supreme Court has been willing to look to the spirit of the law and has not been restricted by the letter of the law itself. The foregoing analysis indicates a recognition by the Supreme Court of the intent of the makers of the 1933 Act to define the term "security" in sufficiently broad terms to include the various types of transactions in the commercial world that fall within the concept of security.

48 Id.
49 See 389 U.S. at 336, wherein it was stated that form should be disregarded in favor of the substance and the economic reality of the transaction. See also 328 U.S. at 298.
50 561 F.2d at 1238. Both the federal securities laws and their respective legislative histories are silent as to their applicability to pension plans. Yet, as early as 1941, the House rejected a Senate amendment to exempt certain offers made solely to employees of an issuer from registration. This particular action indicated to the SEC the intent of Congress to interpret the federal securities laws as applying to employee pension funds which did involve the sale of securities. Also, in 1941, Assistant General Counsel of the SEC indicated that it was his opinion that pension plans fell within the definition of "security" in the federal securities laws. Id.
52 328 U.S. 293, 299 (1946). The Howey court relied on S.E.C. v. Joiner Leasing Corp., 320 U.S. 344, 350 (1943), wherein the Supreme Court rejected an "ejusdem generis" rule which would have constricted the general terms which followed the more specific security definitions in 15 U.S.C. § 77b(1) since such a construction would have contradicted the general purposes of the statute. In Howey, the Supreme Court used the well-known canon of statutory construction in reviewing the 1934 Act stating that remedial legislation should be broadly construed to effectuate its purposes. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).
53 See, e.g., Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).
54 H.R. REP. No. 85, 73d Cong., 1st Sess. 11 (1933).
In dicta in *United States v. C. M. Joiner Leasing Corp.*, the Supreme Court left open the possibility that the economic realities underlying a particular transaction could be inquired into even though the particular type of transaction was not mentioned in the statutory definition. The court observed that "the reach of the [federal securities laws does] not stop with the obvious and commonplace." Stressing that economic reality and policy mandated the realization of the immense importance of private pension plans both as "the major, if not sole, form of investment for most American workers . . . [and] because of the now crucial role that such plans play in today's capital markets . . .," the *Daniel* court concluded that if such funds were exempted "from the anti-fraud provisions of the securities laws, then policing of the capital markets is significantly neutralized."

The *Daniel* decision appears to represent a recognition by the court that its role is to continue to modify the securities laws in order to adjust to changing economic situations. Since pension plans have grown and will continue to grow, laws passed prior to the advent of this growth must be judicially adapted if they are to continue to have relevant application.

The wording of each definitional section of the federal securities laws requires a nonrestrictive interpretation of the concept of "sale." In defining the word "security," the use in the definition of the word "include" instead of the word "means" seems to require such a broad interpretation. The phrase "in connection with the purchase or sale of any security" has been broadly construed by the courts so as not to frustrate its application to novel or atypical transactions. The terms "offer" and "sale" are defined to include contracts of sale, solicitations of offers to buy, and attempts to dispose of securities for value. The SEC had originally taken the position that a compulsory and noncontributory plan such as the one involved in *Daniel* would not involve an offer or sale within the meaning

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56 320 U.S. 344 (1943).
57 Id. at 345. In *Joiner*, the issue was whether assignments of interests in oil leases were securities.
58 Id. at 351.
59 561 F.2d at 1241.
60 Id. at 1236.
63 *See* El Khadem v. Equity Corp., 494 F.2d 1224 (9th Cir.), cert. denied, 419 U.S. 900 (1974) (where a borrower who gave collateral for her loan was held to have purchased a security); Collins v. Rukin, 342 F. Supp. 1282, 1286-87 (D.C. Mass. 1972) (where a stock option agreement to induce plaintiff to enter the employ of the corporation was found to be a security and false statements had been made "in connection with" its sale).
of the definitional section of the securities acts. The rationale to sustain this view was the "no sale" theory: the employer contributions were gifts rather than compensation to the employee with the consequence that there was no exchange for value.

The *Daniel* case, however, is not the first one in which the SEC has filed an amicus curiae brief urging extension of the applicability of the federal securities laws. In *Forman*, the SEC's brief contradicted its prior position in regard to real estate investment when it urged applicability of the anti-fraud provisions of the federal securities laws to the co-op apartment plan there in question. In the *Daniel* amicus curiae brief, the SEC sought to affirm its policy in favor of continued expansion of the application of the federal securities laws. The SEC claimed that the no-sale theory had never applied to the securities acts' anti-fraud provisions, and although it had applied to the registration provisions, any justifications for the theory no longer corresponded to economic reality. Economic reality, the SEC maintained, must now be understood to include the recognition that pension plans are one of the most important forms of compensation in labor negotiations, and an employee's decision to take or keep a job frequently depends upon the character of the pension benefits. Employer contributions to a pension fund are viewed as compensation for the employee's performance of service and thus the value requirement is satisfied.

While the majority opinion in *Daniel* accepted the view expounded

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64 561 F.2d at 1244.
66 Release No. 33-3547, 38 Fed. Reg. 1735 (January 18, 1973). This release applied to the "sale of condominium units, or other units in a real estate development." Only those real estate investments that are offered and sold with emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of a promoter are to be considered securities. The securities acts do not apply when "commercial facilities are a part of the common elements of a residential project... where the income from such facilities is used only to offset common area expenses." Id. at 1736.
67 393 U.S. at 465; 342 F. Supp. at 1287.
68 In 1940, approximately 4 million employees were covered by private pension plans; but in 1970, approximately 30 million employees were covered, and projections show that by 1984, 42.3 million workers will be covered. S. REP. No. 127, 93d Cong., 2d Sess. 2-3 (1973).
69 Hearings Before Special Subcommittee on Labor, House Committee on Education & Labor, 87th Cong., 1st Sess. 225 (1961). Testimony of labor leaders indicated that pensions are regarded as deferred wages and are given high priority in collective bargaining.
70 See, e.g., Inland Steel Co. v. N.L.R.B., 170 F.2d 247, 251 (7th Cir. 1948); Employing Plasterers' Ass'n of Chicago v. Journeymen Plasterers' Protective and Benevolent Soc'y of Chicago, Local 5, 279 F.2d 92, 99 (7th Cir. 1960).
by the SEC, Judge Tone, in his concurring opinion, was reluctant to have the court be the vehicle for change where neither Congress nor the Supreme Court had acted to modify the securities laws to apply to noncontributory pension plans. However, he felt compelled to follow the majority because his concern was seemingly outweighed by the need for a remedy which the court system could supply in this case.

Another issue presented to the court was the "no choice" argument. This argument rests on the premise that compulsory contribution to a pension plan forecloses the element of choice necessary for a sale. The Daniel court found that the securities acts' definitions of sale do not require that the investor act on his own volition for application of the anti-fraud provisions. However, if volition were necessary, such positive action is present because union members vote on the acceptance of the collective bargaining contract containing the pension fund and on the ratification of subsequent agreements governing the level of the employer contributions into the fund. Thus, while the Daniel court found that no volition was required for a sale, they further protected their decision by claiming the ability to find volition should it be nevertheless necessary.

The decision in Daniel purports to rest on the distinction between the anti-fraud and the registration provisions of the federal securities laws. While certain pension plans are exempted from the registration requirements, the anti-fraud provisions of the acts may still apply due to the rational distinction between the provisions and their differing purposes which exist notwithstanding their similar ultimate effect.

The court was justified in making a distinction as to independent applicability of such provisions of the securities acts. Further, in answer to the defendant's contention that ERISA repealed the anti-fraud provisions

71 561 F.2d at 1252.
72 Id. at 1243.
74 561 F.2d at 1243.
75 Id. at 1247.
76 In S. Rep. No. 634, 92d Cong., 2d Sess. 96 (1972) it was stated that voluntary, contributory plans which invest in the securities of the employer an amount greater than that contributed to the plan must be registered with the SEC. All others are exempted from registration under 15 U.S.C. § 77c(a)(2) (1970). Thus, the only remaining route for a court to use to require disclosures of pension plan requirements under the federal securities acts is by means of the anti-fraud provisions.
78 See United States v. Charnay, 537 F.2d 341, 351 (9th Cir. 1976).
of the securities acts as applied to union pension funds, the court responded
that in the absence of an explicit repealer provision in ERISA or a “cogent
repugnancy” between the pension and securities’ regulatory schemes, no
preemption of the securities laws existed. The court viewed section 514(d)
of ERISA as a general savings clause which could not be construed to
supersede any federal law. Since Congress preserved state securities laws,
many of which contain anti-fraud provisions, the court concluded that there
was no congressional intent for ERISA to preempt the federal securities
laws. The court seemed willing to accept no less than specific congressional
action as a basis for widening preemption.

By contrast, the *Hurn* court was willing to hold that ERISA preempted
the application of the federal securities laws to pension plans. However,
due to the brevity of the *Hurn* opinion, it is difficult to determine whether
preemption was found as a result of the language of ERISA or as a result
of the inability of the court to construe the securities laws to find a “sale”
of a security. The language of the court seems to indicate that ERISA
would preempt the securities laws even if the sale of a security had been
found; but such a conclusion is not explicit in the opinion.

The *Daniel* court preferred a reading of the two regulatory schemes
as being complementary to one another. The securities acts require dis-
closure of all material facts prior to the investment decision while ERISA
requires disclosure revealing plan provisions without particularizing how
benefits may be lost and allows disclosure to be made as late as four months
after the investment commitment. ERISA was viewed as providing only
limited protection to employees from the loss of benefits through ignorance
of the plan provisions while the securities acts were seen as protecting the
investor prior to his investment decision. Therefore, in the absence of
overlap between the two regulatory schemes, the court concluded that it
would be unwarranted to hold ERISA as overruling the anti-fraud provisions

70 561 F.2d at 1246.
72 561 F.2d at 1246.
73 Id.
74 This was the position suggested in the SEC amicus curiae brief. 561 F.2d at 1246.
75 Id. at 1248.
76 Under ERISA § 192(b), a statement of “circumstances which may result in disqualifica-
tion, ineligibility or denial or loss of benefits” from which employees could infer that there
is a risk of loss is required. 29 U.S.C. § 1022(b) (Supp. V 1975).
77 Disclosure of a new plan must be within four months of adoption. The amended provisions
of a plan need not be disclosed until after adoption and are given only as summaries until
78 561 F.2d at 1248.

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of the federal securities laws. The ultimate effect of such a decision would have been to leave a class of potential plaintiffs without a remedy.

Aside from the substantive issues, a confusing procedural aspect of the case dealt with a private cause of action under section 17(a) of the 1933 Securities Act. The Daniel court recognized that while it is well settled that section 10(b) of the Securities Exchange Act of 1934 creates a private cause of action for the breach of its substantive terms, it is unsettled whether section 17(a) of the 1933 Act also provides such a remedy. Since the operative provisions of the anti-fraud sections of the two acts were identical for purposes of this lawsuit, the court assumed that section 17(a) created such a private right. The court supported this position by relying upon the broad language of the statutory sections and by citing prior case law from within its own circuit.

In dictum in Surowitz v. Hilton Hotels Corp., the Seventh Circuit implied a right under section 17(a) alone. However, in that case, the complaint was phrased as a section 17(a) and a 10(b) action combined. In Reid v. Mann, a district court decision in the same circuit, the court stressed that there is no basis for implying a private civil remedy under section 17(a), and that no cases have been found where only a naked section 17(a) claim was sustained. Such confusion persists because of unclear judicial language in discussing a private cause of action under section 17(a) when coupled with rule 10(b)(5) and the further refinement of an independent section 17(a) action, the so-called naked section 17(a) claim. In Schaeffer v. First National Bank of Lincolnwood, claims under sections 17(a) and 10(b)(5) were again combined. The court stated, "while there is authority in this circuit for sustaining an implied right of action under section 17(a) alone, we need not deal directly with this issue." However, the court cited as authority the dictum in the Surowitz case. Interestingly enough, the Daniel court relied on the Schaeffer case as holding directly that section 17(a) permits a private cause of action. The Supreme Court in Blue Chip Stamps v. Manor Drug Store has ignored the
issue of whether there exists a private civil remedy under section 17(a), much less whether this claim could stand independently.\(^9\)

Thus, even in the Seventh Circuit where the issues surrounding section 17(a) have been litigated, a section 17(a) private action even along with a section 10(b)(5) action, while probably sustainable, may be subject to question because of cases such as \textit{Reid v. Mann}.\(^8\) To claim only an implied right of action under section 17(a) unsupported by a 10(b) claim under the 1934 Act seems to be an even more precarious position to assume.

When problems involving purchasers have arisen, both Congress and the courts\(^9\) have chosen to respond by requiring the disclosure of material, pertinent information.\(^10\) Since protection of the investing public has been the "traditional scope" of the securities laws, the decision in \textit{Daniel} can be viewed as not departing from this view even though the \textit{Robinson} court viewed the initial decision in \textit{Daniel} as stretching the securities laws.\(^11\)

The lack of "risk of loss" information made available to the plaintiff, \textit{i.e.}, "a statistically determinable risk that many employees covered by a plan will never receive their pension benefits"\(^12\) appears significant in understanding the court's ruling. Disclosure under ERISA could have eventually reached this disclosure requirement; however, ERISA applies prospectively only. Thus the most immediate effect of the \textit{Daniel} decision will be to protect retirees who otherwise would be without a legal remedy to protect themselves. Yet, pension plan liability is not unlimited, for the employee desiring to use the anti-fraud provisions must show justifiable reliance on a material misrepresentation and the causal connection which led to his injury.\(^13\) Statutes of limitations may further limit actions against the employer for nondisclosure. For the employer, the \textit{Daniel} holding indicates that even though a pension plan may be exempted from the registration provisions of the federal securities laws, a breach of the anti-fraud provisions of those statutes could still occur.

The case history which expanded the coverage of the federal securities laws, along with the concomitant growth of the pension plan as a means of investment for the American worker places the \textit{Daniel} decision at a strategic point in the development of the federal securities laws. It represents

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\(^9\) \textit{Id.} at 733-34.

\(^8\) 381 F. Supp. 525.


\(^12\) 561 F.2d at 1249.

\(^13\) \textit{Id.} at 1251.
construction and interpretation by the courts which have gradually expanded the scope of the law. On the other hand, Daniel stands at the forefront of a new wave of decisions which will place the pension plan investor in a secure position.

In essence, the net result upon the investor-employee is the same regardless of whether the source of the disclosure requirement is the registration or the anti-fraud provisions of the federal securities laws. The court claims a clear distinction between the two sets of provisions for purposes of concluding that some of the restrictions applicable to the registration provisions are not applicable to the anti-fraud provisions. However, once those purposes are met, the court’s language seems to imply a reunion of the two sets of provisions. The almost identical impact upon the investor-employee and the focus on disclosure indicate the similarity of the underlying philosophies of both sections.

Criticism of the Daniel decision may be based upon the weakness of some of the bases of the decision; for example, the beneficiary was not the direct investor in the fund, and the court explored the state of mind of the investor-employee, and relied upon a section 17(a) private cause of action. However, in the final analysis, although the court strained to reach the decision it did, justification for the decision lies in the equities of the case. Leaving Daniel and his class without a remedy would have worked an injustice to a large number of working Americans which the Daniel court felt compelled to protect. Despite the potential criticism of the Daniel decision, one cannot deny that this court did not shirk from its responsibility when it perceived an abuse which needed a remedy.

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