55

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 15 1988
CLERK, SUPREME COURT
By______
Deputy Clerk

CASE NUMBER 72,361

E. F. HUTTON & COMPANY, INC.,

Defendant - Appellant

V.

CHRIST M. ROUSSEFF,

Plaintiff - Appellee

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

THE APPELLEE'S ANSWER BRIEF

ROTHBERG, GALLMEYER,
FRUECHTENICHT & LOGAN

Martin T. Fletcher, Sr.
Scott T. Niemann
Anne Carney

Attorneys for
Appellee - Plaintiff,
Christ M. Rousseff

Suite 800
915 South Clinton Street
Post Office Box 11647
Fort Wayne, Indiana 46859-1647
(219) 422-9454

TABLE OF CONTENTS

		Page
TABLE OF CONTENTS		i
TABLE OF AUTHORITIES		ii
I.	STATEMENT OF THE CASE	1
II.	SUMMARY OF THE ARGUMENT	6
III.	THE PLAIN LANGUAGE OF THE STATUTES DOES NOT REQUIRE PROOF OF LOSS CAUSATION	8
	A. The Cardinal Rule of Construction	8
	B. The Plain Language of Section 211	9
	C. The Plain Language of Section 301	20
IV.	ANALOGOUS PROVISIONS OF FEDERAL SECURITIES ACT SUPPORT THE VIEW THAT SECTION 211 DOES NOT REQUIRE PROOF OF LOSS CAUSATION	23
	A. Two Distinct Bodies of Law	23
	B. This Court should Look to the Securities Act of 1933 for Guidance	24
	C. Loss Causation is not Required under Securities Act of 1933, Section 12	30
V.	THE ANALOGY TO RULE 10b-5 IS INAPPROPRIATE	35
VI.	THE HISTORY AND APPLICATION OF THE FLORIDA ACT	40
VII.	HUTTON'S POLICY ARGUMENTS ARE SPECIOUS	44
VIII.	THE ONLY PROPER POLICY CONSIDERATION	46
IX.	CONCLUSION	47
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases: Page

A. R. Douglass, Inc. v. McRainey,
102 Fla. 1141, 137 So. 157, 159 (1931) 8

Affiliated Ute Citizens v. United States,
406 U.S. 128, 92 S.Ct. 1456,
31 L.Ed. 2d 741 (1972) 37

Arrington v. Merrill Lynch, Pierce, Fenner
& Smith, 651 F. 2d 615 (9th Cir. 1981) 27

Artistic Door Corp. v. Rheney,
384 So. 2d 179 (Fla. 3d DCA 1980) 43

Barnes v. Resource Royalties, Inc.,
795 F. 2d 1359 (8th Cir. 1986) 30

Bill Smith, Inc. v. Cox, 166 So. 2d 497,
498 (Fla. 2d DCA 1964) 23

Bradley v. Hullander, 287 S.E. 2d 140
(S.C. 1982) 29

Campbell v. Shearson/American Express,
Nos. 85-1703, 85-1714, slip op.
(6th Cir. Sept. 9, 1987) 34,35

Chasins v. Smith Barney & Co.,
438 F. 2d 1167 (2d Cir. 1970) 42

Chiarella v. U.S., 445 U.S. 222,
100 U.S. 1108, 63 L.Ed. 2d 348, (1980) 26

Currey v. Lehman, 55 Fla. 847,
47 So. 18 (1908) 8

Davis v. Avco Financial Services, Inc.,
739 F. 2d 1057 (6th Cir. 1984),
cert. denied, 470 U.S. 1005, 105 S.Ct. 1359,
84 L.Ed. 2d 381 (1985) 30

Dokken v. Minnesota-Ohio Oil Corp.,
232 So. 2d 200 (Fla. 1970)
(McNulty, J. in dissent) 47

DuPuy v. DuPuy, 551 F. 2d 1005, 1024,
(5th Cir. 1977) cert. denied, 434 U.S. 911,
98 S.Ct. 312, 54 L.Ed. 2d 197 (1977) 37

Cases: Page

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed. 2d 668, (1976) 27

Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F. 2d 527, 532 (10th Cir. 1962) 41

Fallani v. American Water Corp., 574 F. Supp. 81 (D.C. Fla. 1983) 27

Florida Real Estate Comm. v. McGregor, 268 So. 2d 529 (Fla. 1972) 8

Garnatz v. Stefel, Nichols & Co., 559 F. 2d 1357 (8th Cir. 1977), cert. denied, 435 U.S. 951, 98 S.Ct. 1578, 55 L.Ed. 2d 801 (1978) 34

Gordon v. Burr, 366 F. Supp. 156 (S.D. N.Y. 1973), aff'd, 506 F. 2d 1080 (2d Cir. 1974) 42

Haas v. Empire Petroleum Co., 302 F. Supp. 647 (D.C. Colo. 1969) 37

Hancock v. Board of Public Instruction, 158 So. 2d 519, 522 (Fla. 1963) 22

Hatrock v. Edward D. Jones & Co., 750 F. 2d 767 (9th Cir. 1984) 42

Haygood v. Adams Drugs, Inc., 346 So. 2d 612 (Fla. 2d DCA 1977) 43

Herman & MacLean v. Huddleston, 640 F. 2d 534 (5th Cir. 1981) aff'd in part and rev'd in part on other grounds, 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed. 2d 548 (1983) 28,37

Herpich v. Wallace, 430 F. 2d 792, 810 (5th Cir. 1970) 37

Holloway v. Howerdd, 377 F. Supp. 754 (M.D. Tenn. 1973), aff'd, 536 F. 2d 690 (6th Cir. 1976) 27

Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) 12

In Re Opinion to Governor, 60 So. 2d 321 (Fla. 1952) 13

Cases: Page

John R. Lewis, Inc. v. Newman, 466 F.2d 800 (5th Cir. 1974) 27

12 Joseph C. Long Blue Sky Law § 1.04[4][b] (1988) . . 31

Kaufman and Enzer v. Dedman, 680 F. Supp. 805 (D.C. La. 1987) 27,35

Kelsey v. Nagy, 410 N.E. 2d 1333 (Ind. App. 1980) . . . 44

Kenalos v. H. V. Green Co., 81 N. H. 426, 128 A. 335 (1925) 44

Krutel v. Stolberg, 356 So. 2d 1299 (Fla. App. 3d DCA 1978) 43

Lintz v. Dillon, 568 S.W. 2d 147 (Tex. Civ. App. 1978) rev'd on other grounds, 582 S.W. 2d 394 44

McElfresh v. State, 151 Fla. 140, 9 So. 2d 277 (1942) 32

Merrill Lynch, Pierce, Fenner & Smith v. Byrne, 320 So. 2d 436 (Fla. 3d DCA 1975), writ discharged, 341 So. 2d 498 (Fla. 1977) . . . . . . passim

Nichols v. Yandre, 151 Fla. 87, 9 So. 2d 157 (1942) 41

Oppenheimer & Co. v. Young, 456 So. 2d 1175 (Fla. 1984), vacated on other grounds 470 U.S. 1078, 105 S.Ct. 1830, 85 L.Ed. 2d 131 (1985) 24,28,29

Pfeffer v. Cressaty, 223 F. Supp. 756 (S.D. N.Y. 1963) (1933 Act) 27

Randall v. Loftsgaarden, 478 U.S. 647, 106 S.Ct. 3143, 3149, 92 L.Ed. 2d 525 (1986) 27,30,31

Richardson v. MacArthur, 451 F. 2d 35 (9th Cir. 1971) 37

Robinson Lenk & Co. v. Leedy Wheeler & Co., 154 Fla. 596, 18 So. 2d 523 (1944) 41

Rolf v. Blyth, Eastman Dillon & Co., 570 F. 2d 38 (2d Cir. 1978) cert. denied, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed. 2d 698 (1978) 34

Cases:	Page
Rousseff v. E. F. Hutton Co., Inc., Nos. 87-3290, 87-3560 (11th Cir. May 2, 1988)	4,29
Ruden v. Medalie, 294 So. 2d 403 (Fla. 3d DCA 1974)	43
State v. Houghtaling, 181 So. 2d 636 (Fla. 1965)	26
Stimmel v. Shearson Hammill & Co., 411 F. Supp. 345 (D.C. Or. 1976)	29
Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693, 694 (1918)	9,12
Wigand v. Flo-Tek, Inc., 609 F. 2d 1028 (2d Cir. 1979)	26,27
Wilko v. Swan, 346 U.S. 427 74 S.Ct. 1982 (1953)	29
Wilson v. Ruffa & Hanover, [Current] Fed. Sec. L. Rep. (CCH), ¶ 93,701 (2d Cir. April 12, 1988) (to be reported at 844 F. 2d 81)	32,33

Statutes:

Fla. Stat. § 95.11(4)(e) 45

Fla. Stat. § 517.07 11,13

Fla. Stat. § 517.011. 1

Fla. Stat. § 517.12 . . . . 11,13 24,36

Fla. Stat. § 517.211 (previously Fla. Stat. § 517.21) . . . . passim

Fla. Stat. § 517.301. passim

Fla. Stat. § 517.311. 16

Fla. Stat. § 517.312. 16

17 C.F.R. § 240.10b-5 (Rule 10b-5) . . . . passim

15 U.S.C. § 78j(b) (Section 10b) . . . . passim

15 U.S.C. § 77l (Section 12) . . . . passim

15 U.S.C. § 77o 27

15 U.S.C. § 78bb(a) (Section 28) 36,37 38

Ind. Code § 23-2-1-19 44

Unif. Securities Act § 410, 7B U.L.A. (1958) 24,28 29

Other:

Draftsman's Comments, December 14, 1974 25,28

L. Loss, Fundamentals of Securities Regulation 878 (2d ed. 1988) 25,28

III L. Loss, Securities Regulation, p. 1728 (2d ed. 1961) 35

I.

STATEMENT OF THE CASE

The question certified to this Court is:

> In an action under the Florida Securities and Investor Protection Act, Fla. Stat. § 517.301, 517.211, is the claimant required to prove that his loss was proximately caused by the Defendant's fraud?

The issue presented concerns the interpretation of the civil liability provision of the Florida Securities and Investor Protection Act[1], F.S.A. § 517.211, as it existed in 1982.[2] The certified question presents the issue as an abstract proposition. The issue is, however, more clearly presented if the facts giving rise to the issue are briefly stated.

The Appellee, Christ M. Rousseff (hereinafter "Rousseff") in 1982 paid Two Million Two Thousand Dollars ($2,002,000.00) to purchase units of limited partnership interests in an oil and gas drilling venture known as Anadarko Oil and Gas Partners 1982, Ltd. (hereinafter "AOGP"). Rousseff made the purchase from AOGP's general partner, Anadarko Land and Exploration Company (hereinafter "Anadarko"). The Appellant, E. F. Hutton & Company, Inc. (hereinafter "Hutton") was a broker dealer who acted as Anadarko's exclusive sales agent in selling the units of AOGP to Rousseff.

---

[1]The proper title of the Act presently is as here stated. For economy of expression, the Appellee will, however, refer to the Act as the "Florida Securities Act" or the "Florida Act" in this Brief, since that was the proper title in 1982 when Rousseff made his purchase. *See*, F.S.A. § 517.011.

[2]The Appellee includes the text of all pertinent statutes in the Appendix to this brief.

In 1985, Rousseff filed suit against Hutton and Anadarko. In this suit, Rousseff sought to rescind his purchase of the AOGP units and to recover the price he had paid therefor. Rousseff claimed in his suit that he had been induced, by Hutton and Anadarko, to purchase the units of AOGP by material false statements and by omissions to disclose material facts to him.

Rousseff's suit relied upon the implied remedies recognized under Rule 10b-5 of the Securities Exchange Act of 1934, 17 C.F.R. § 240.10b-5, and upon the express civil liability provisions of the Florida Securities Act, F.S.A. § 517.211(2).

Briefly, Section 211(2) of the Florida Securities Act provides that one who sells securities "in violation of" F.S.A. § 517.301 of the Florida Act would be liable to rescind the sale and to repay to the purchaser the "consideration paid for the security." Liability for "rescission" is expressly extended to the seller's agents who "participated or aided in making the sale." F.S.A. § 517.211(2). Section 301 of the Florida Act provides that it is unlawful, in connection with the sale of any security:

> To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading.

F.S.A. § 517.301(1)(a)(2).

In the trial court, certain matters were uncontested. The units of limited partnership interest in AOGP were "securities" under the Florida Act. Rousseff had paid the sum of Two Million Two Thousand Dollars ($2,002,000.00) for the units of AOGP. The

parties stipulated to the amount of "income" Rousseff received on the securities. Moreover, it was uncontested that Hutton had acted as the exclusive sales agent for Anadarko and thus had "participated or aided" in the sale to Rousseff. Thus, Hutton could be liable for "rescission" under the express words of F.S.A. § 517.211(2) of the Florida Act, if the "sale" were shown to have violated Section 517.301 of that Act.

The trial was to a jury, which returned a verdict in the form of Answers to Special Interrogatories. The jury's verdict is included in the Appendix hereto. The jury specifically found, inter alia:

1. Hutton had omitted to disclose to Rousseff one or more material facts necessary, under the circumstances, to make the statements made by Hutton not misleading (Special Interrogatory 1).
2. Rousseff reasonably relied upon the omitted material facts in making his decision to invest in AOGP (Special Interrogatory 5(D)).

Although not directly pertinent to the issue before this Court, the jury also determined that Hutton "intended Rousseff to rely" upon the omissions (Special Interrogatory 5(C)); that Hutton acted with "scienter" in failing to disclose material facts to Rousseff (Special Interrogatory 2); and that Rousseff would not have invested in AOGP had the undisclosed facts been revealed to him (Special Interrogatory 3). Each of these jury findings was either not challenged on appeal to the Eleventh Circuit or, if challenged, was upheld by the Eleventh Circuit.

See, *Rousseff v. E. F. Hutton Co., Inc.*, Nos. 87-3290, 87-3560 (11th Cir. May 2, 1988).[3]

In the trial court, Rousseff took the position that he was entitled to rescission under Section 211 of the Florida Act if he proved the sale had violated Section 301. Rousseff took the position that to prove a violation of Section 301, he was obliged to prove *only* that the sale had been made to him "by means of" the omission to disclose any facts necessary in order to make the statements made, not misleading. Thus, Rousseff's position was that he was not obliged to prove that the omissions had "proximately caused the security to decline in value."

In the trial court, Hutton argued that Rousseff was entitled to rescission under the Florida Act *only* if, in addition to proving the sale was induced by omissions to disclose material facts, Rousseff also proved that the concealed facts had "proximately caused the securities to decline in value."

The District Court Judge agreed with Rousseff's position on the issue of "loss causation." Accordingly, the District Court did not submit to the jury the issue of whether or not the omitted material facts had been proven to have "proximately caused the securities to decline in value." Upon receiving the jury's answers, that the sale had violated Section 301 of the Act, the District Court entered judgment for Rousseff, granting

---

[3]On Appeal, Hutton challenged only the jury's finding that Rousseff had "relied" upon the omissions. The Eleventh Circuit affirmed the jury's finding as being amply supported by the evidence.

him rescission pursuant to Section 211 of the Florida Act. (Answers to Special Interrogatory 1).

On appeal, the Eleventh Circuit ruled that the District Court erred when it declined to submit the issue of "loss causation" to the jury as to Rousseff's claim under Section 10b and Rule 10b-5. The Eleventh Circuit recognized, however, that the same result did not necessarily follow as to Rousseff's claims under the Florida Securities Act. Lacking a sufficient guidepost in Florida law, the Eleventh Circuit certified the question to the Florida Supreme Court.

With the foregoing in mind, the issue certified to this Court may be stated as follows:

Section 211(2) provides <u>expressly</u> that one induced to purchase securities in violation of Section 301 is entitled to "rescission." "Rescission" is defined as the recovery of the "consideration paid" plus interest, but less income received. F.S.A. § 517.211(3). Section 301 provides <u>expressly</u> that a sale of securities violates the Act when it is "by means of any false statement of a material fact or any omission to disclose" a material fact.

The issue presented is this:

> Under the language of Sections 211(2) and 301, in order to be entitled to "rescission," must a purchaser prove not only that the sale was made in violation of Section 301 (because induced by false statements or omissions to disclose material facts), but also that such false statements or

omissions were "the proximate cause of the securities decline in value"?

II.

SUMMARY OF ARGUMENT

The beginning point must be the plain language of the statute. The Florida Act's civil liability provision, Section 211(2), provides that a seller of securities "is liable" for rescission whenever the "sale" was made "in violation of s. 517.301." There is nothing in Section 211 which suggests that the seller is liable only if the violation "proximately caused" the security to decline in value. The text of Section 211, to the contrary, shows that the legislature did not intend to condition relief on the "causes" for a security declining in value. Thus, the plain, unambiguous language of Section 211 does not require proof of "loss causation" as a condition precedent to the purchaser obtaining rescission.

The language of Section 301 does not require proof of loss causation. Hutton agrees that the legislature was "silent" in Section 301 as to any requirement of loss causation. What is prohibited is "any" dishonest, false or misleading statement used as a "means" of selling securities. The sale of securities by means of "any" material false or misleading statement is prohibited; not "any . . . which causes the security to decline in value."

Since the legislature was silent in both Sections 211 and 301 as to any requirement of 'loss causation,' under settled rules of construction this Court must apply and enforce the

statutes as written. If the 'silence' of the statute is to be broken, it must be by the legislature, and not by the Court.

In construing the Florida Act, the Court may look to the interpretation given similar federal laws. The civil liability provision of the Florida Act is most similar to Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2). This Court, and the Eleventh Circuit in the Rousseff case, have previously looked to Section 12 cases for guidance. In suits under Section 12, proof of loss causation is not required.

Although Section 301 of the Florida Act tracks the language of Rule 10b-5 under the Federal Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), it is inappropriate to look to Rule 10b-5 cases for guidance. Cases under Rule 10b-5 which find a "loss causation" requirement do so because the loss causation requirement functions to limit the amount of damages. "Loss causation" in Rule 10b-5 cases does not flow from the language of Rule 10b-5. Rather, it is deduced from the limitations set by Section 28 of the 1934 Act which requires damages to be limited to "actual damages on account of the act complained of." The Florida Legislature did not adopt such a damages limitation as Section 28 and, hence, must not have intended to adopt the "proximate cause" limitation of Rule 10b-5 cases.

Hutton's "public policy" arguments are irrelevant and specious. The only policy consideration which may properly be taken into account is the policy of the legislature as reflected in the Act. Reading into the statute a "loss causation" condition prece-

dent to the right of rescission would ill serve the policy of the Act.

III.

THE PLAIN LANGUAGE OF THE STATUTES DOES NOT REQUIRE PROOF OF LOSS CAUSATION

A.

The Cardinal Rule of Construction

The issue before the Court concerns the elements of proof required by the civil liability provision of the Florida Securities Act, F.S.A. § 517.211. The issue is one of statutory interpretation. When called upon to interpret a statute, the Court's role is to ascertain and to give effect to the intention of the legislature. All other rules of construction are subordinate to this "cardinal rule." Currey v. Lehman, 55 Fla. 847, 47 So. 18 (1908); Florida Real Estate Comm. v. McGregor, 268 So. 2d 529 (Fla. 1972).

Where the intention of the legislature may be fairly ascertained from the language of the statute, the statute must be understood and applied in accord with its words. Thus, where the intention of the legislature appears from clear and unambiguous language, there is no occasion for construction or interpretation. A. R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 137 So. 157, 159 (1931). Long ago, this Court observed:

> The legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain and unambiguous,

> the courts have only the simple and obvious duty to enforce the law according to its terms.

Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693, 694 (1918). This Court's inquiry must, therefore, begin with an examination of the words of the statutes involved.

B.

The Plain Language of Section 211

In large part, Hutton's brief ignores Section 211 of the Florida Securities Act, preferring to dismiss Section 211 as merely "describing" the remedies available for sales in violation of Section 301. Hutton's arguments are unpersuasive, because Hutton fails to deal with the plain language and necessary import of Section 211.

Section 211 is the civil liability provision of the Florida Securities Act. It alone gives rise to the right of rescission. Section 211 is, in fact, seminal to the issue before this Court, because Section 211 defines precisely what plaintiff must prove in any action for rescission under the Act.

Section 211(1) and (2) state what conduct of defendants will render them liable for rescission. These sections provide:

> (1) Every sale made in violation of s. 517.07 or s. 517.12 may be rescinded at the election of the purchaser; and the person making the sale and every director, officer, partner, or agent of or for the seller, if the director, officer, partner, or agent has personally participated or aided in making the sale, is jointly and severally liable to the purchaser in an action for rescission, if the purchaser still owns the security, or for damages, if the purchaser has sold the security. . . .
>
> (2) Any person purchasing or selling a security in violation of s. 517.301, and every director, officer, partner, or agent of or for the purchaser

> or seller, if the director, officer, partner, or agent has personally participated or aided in making the sale or purchase, is jointly and severally liable to the person selling the security to or purchasing the security from such person in an action for rescission, if the plaintiff still owns the security, or for damages, if the plaintiff has sold the security.

F.S.A. § 517.211(1) and (2).

Subsections (3) and (4) then proceed to define precisely "rescission" and "damages." Those subsections provide:

> (3) In an action for rescission: (a) A purchaser may recover the consideration paid for the security, plus interest thereon at the legal rate, less the amount of any income received by the purchaser on the security upon tender of the security. . . .
>
> (4) In an action for damages brought by a purchaser of a security, the plaintiff shall recover an amount equal to the difference between: (a) The consideration paid for the security, plus interest thereon at the legal rate from the date of purchase; and (b) The value of the security at the time it was disposed of by the plaintiff, plus the amount of any income received on the security by the plaintiff.

F.S.A. § 517.211(3) and (4).

Hutton asserts that Section 211 does not specify any of the "elements" which must be proven by a purchaser seeking "rescission" thereunder (Hutton, Brief, p. 5). This is clearly erroneous. Section 211 defines precisely what the purchaser must prove to obtain the remedy of rescission. The plaintiff must prove:

1. That the plaintiff "purchased"
2. A "security" as defined in the Act and
3. That the defendant was the "seller;" or one who as "agent of the seller" had "personally participated or aided in the sale" and

4. That the "sale" was made "in violation of" one of the designated provisions of the Act (i.e., F.S.A. §§ 517.07; 517.12; 517.301). Where plaintiff relies on Section 301, he must prove the sale was made "by means of" any false statement or omission of a fact which was "material."

5. If the plaintiff "still owns" the security, he must prove the date and the amount of "consideration paid" for the security, and the amount of "income received" by him so that upon "tender" of the security he may be granted "rescission" <u>or</u>

6. If the plaintiff has disposed of the security, he must prove the date and the amount of the "consideration paid" for the security, the amount of "income received" thereon and the "value of the security" at the time of its disposition, so as to permit calculation of the amount of damages which the legislature stated he "shall" recover.

Rousseff submits that the language of Section 211 is plain and unambiguous. Hutton does not contend otherwise. The language of Section 211 requires the plaintiff to prove that the <u>sale</u> was made "in violation of" one of the designated provisions of the Act. The plain and unambiguous language of Section 211 does <u>not</u> require plaintiff to further prove that the "violation" was somehow a "proximate cause of the securities decline in value."

This point is so important as to bear repetition: Section 211 of the Act does not by its express terms require proof of so-called "loss causation" or "proximate cause" of the loss. Nor is there any claim by Hutton that some words used by the legislature therein are ambiguous, so that upon interpretation, the element of "loss causation" can be read into Section 211.

Recently, this Court warned:

> Courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms . . . . To do so would be an abrogation of legislative power. (Citation omitted.)

Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984).

Hutton would have this Court read into Section 211 an additional element or condition of proof. The effect of doing so would be to narrow and to limit the scope of Section 211. Plaintiffs could prevail only by proving that the sale violated some provision of the Act, and also proving the violation "proximately caused the security to decline in value." This the Court cannot do consistent with a decent respect for the proper roles of the Courts and legislature. Holly v. Auld, id.; Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918).

There is much in the language of Section 211 which shows that the legislature did not intend that the remedies therein provided were to be available only upon proof that the violation "proximately caused the security to decline in value." It is appropriate to look to these indicia of legislative intent, for the Court should consider all parts of the statute in arriving at

the intention of the legislature. In Re Opinion to Governor, 60 So. 2d 321 (Fla. 1952).

First, in Section 211(1), the legislature provided that where securities were sold in violation of Sections 7 or 12, the purchaser was entitled to rescission or damages as defined in the Act. Section 7 of the Act prohibits the sale of securities without "registration" under the Act. F.S.A. § 517.07. Section 12 prohibits persons from engaging in the business of selling securities unless licensed under the Act. F.S.A. § 517.12. The fact that securities have not been "registered" or the fact that the seller has not registered as a securities dealer or agent are facts which inherently could not impact upon the value of securities. Yet in both these instances, the legislature in Section 211(1) expressly provides that a purchaser may recover in rescission the full amount paid for the security or, if the security has been sold, damages measured by the full difference between the price paid for the security and the value received upon its disposition.

The legislature clearly could not have intended to require purchasers to prove these violations had "proximately caused the securities to decline in value." This is so because the inherent nature of the "violations" is such that it would never be a cause for the security to decline in value. Thus one knows from the language of Section 211(1) that the legislature did intend that the remedies under the Act be available in these instances where the defendant's "wrongful act" could never be said to have "proximately caused the security to decline in value."

In providing the purchaser with the remedy of rescission for sales in violation of Section 517.301, the legislature in Section 211(2) used exactly the same language as it had used in subsection (1). That is, the remedy of "rescission" is available where the sale was made "in violation of s. 517.301." This use of identical words to confer the remedy in each subsection can only suggest that the legislature had the same intention under both subsections with respect to the element of "proximate causation of loss." Had the legislature intended to require proof of "loss causation" in subsection (2) cases, in contrast to cases under subsection (1), the legislature would surely have so provided through the use of some distinguishing phraseology.

Second, the legislature provided a mechanism in the statute by which the defendant could "cut off" a plaintiff's right to sue under Section 211. To cut off the plaintiff's rights, the defendant is required to make, in effect, a statutory offer. The statute provides:

> No purchaser otherwise entitled will have the benefit of this subsection who has refused or failed, within 30 days of receipt, to accept an offer made in writing by the seller, if the purchaser has not sold the security, to take back the security in question and to refund the full amount paid by the purchaser or, if the purchaser has sold the security, to pay the purchaser an amount equal to the difference between the amount paid for the security and the amount received by the purchaser on the sale of the security, together, in either case, with interest on the full amount paid for the security by the purchaser at the legal rate for the period from the date of payment by the purchaser to the date of repayment, less the amount of any income received by the purchaser on the security.

F.S.A. § 517.211(1) (Emphasis added).[4]

The Court will note that the defendant may "cut off" the plaintiff's rights to sue under Section 211 _only_ by an offer of the "full amount" of the consideration paid or the full amount of plaintiff's economic loss and not by a lesser sum where the violation had not "caused" the security to decline in value.

Third, the legislature dealt _expressly_ with the "value of the securities" in its definition of the remedies in subsections (3) and (4) of Section 211. In so doing, the legislature gives no consideration to the factors which "caused" the security to decline or to increase in value.

Where the plaintiff's remedy is rescission, subsection (3)(a) allows a purchaser to recover the full amount of the purchase price paid. There is no suggestion in the language of the statute that plaintiff's remedy would or could be less if the security had declined in value due to factors unrelated to defendant's wrongful conduct.

Where the plaintiff's action is for "damages," _a purchaser who has resold_ can recover the difference between what he paid to acquire the security and "the value of the security at the time it was disposed of" under Section 211(4). Again, the legislature provided for the full difference to be recovered, without making any express allowance for factors which caused the "value" of the security to become whatever it happened to be "at the time of

---

[4]Although the statutory offer provision appears in subsection (1), it applies as well in suits under subsection (2) of Section 211. _See_, _Merrill Lynch, Pierce, Fenner & Smith v. Byrne_, 320 So. 2d 436 (Fla. 3d DCA 1975) _writ discharged_, 341 So. 2d 498 (Fla. 1977).

disposition." Likewise, a seller who seeks damages under the provision of Section 211 may recover the difference between "the value of the security at the time of the complaint" and price he received upon the sale. Once again, the legislature made no provision for taking into account what factors had "proximately caused" the security to rise in value between the defrauded seller's initial sale and the date the "complaint" was filed. F.S.A. § 517.211(4).[5]

The legislature must be presumed to have known that securities would fluxuate in value due to a myriad of factors which had nothing to do with the defendant's illegal acts. Had the legislature intended to deny or to limit either the right or the remedy granted by Section 211 by consideration of the "causes" for the securities' decline in value, the legislature could have so stated in Section 211. Yet subsections (3) and (4) of the Act clearly define what "damages" shall be under the Act, and nowhere therein appears any concept that such "damages" are limited to the "decline in value proximately caused by" the defendant's wrongful acts.

This last matter was the subject of review in the case of Merrill Lynch, Pierce, Fenner & Smith v. Byrne, supra. This is the only Florida case which has addressed the issue, now before

---

[5]In 1984, the Florida Legislature added sections prohibiting "boiler rooms" and the making of certain specific representations as to the government's having sponsored, approved or even passed on the qualifications of securities or of those who sell them. F.S.A. §§ 517.311 and 517.312. Once again, the legislature made available the same rescission and damage remedies under Section 211, although again, the conduct and representations prohibited would not, inherently, ever be the proximate cause of the securities declining in value.

this Court, in any context. In Byrne, the plaintiff purchased securities at $57.00 a share after being told that a "stop loss order" could and would be placed on the securities at $54.00. After plaintiff purchased the securities at $57.00 per share, it was discovered that a stop loss could not be placed on the security in question. The broker informed Byrne of this fact. The securities initially fell in value below the level of the "stop order." Later, however, the securities rose in market price so that Byrne could have sold and eliminated all or part of his losses. Though urged by the broker to sell, Byrne did not do so. The security again fell in price, and Byrne elected to sue under the Florida Act for rescission pursuant to Section 211 (then F.S.A. § 517.21).

At trial, the broker argued that it should not be held responsible for the full amount of Byrne's loss since the plaintiff could have avoided a substantial part of that loss. Although presented as an issue of estoppel, the broker was arguing (as Hutton does here) that the broker should not have to repay the full purchase price in rescission under the Act, where the decline in value of the security was due to (and Byrne's loss 'caused by') outside factors - vis, Byrne's refusal to sell when the market price improved.

The trial court found that the broker had "omitted to state a material fact" and, hence, that the sale had "violated" the Act. Since the civil liability provision (then F.S.A. § 517.21) provided that a purchaser was entitled to rescission of any sale "in

violation of" the Act, the trial court granted rescission and ordered the broker to repay the full consideration.

On appeal, the Florida Court of Appeals observed:

> The main thrust of appellants' argument - and the portion that at first blush appeared palatable to us - was that, although the statute was clearly applicable to the transaction, when it was discovered that the stop order was inapplicable to Curtiss-Wright stocks, the later rise in the market value accompanied by the action of the broker in so advising the buyer and urging him to sell at a price above the point agreed in the original purchase, that the buyer caused the subsequent loss and was bound thereby - or at least such loss should be no more than the difference between the later price above the stop order price and the cost to the buyer. (Citation omitted). On further consideration, however, we think this argument is untenable here because the statute clearly and unmistakably places the burden on the broker to "offer in writing" to take back the securities and refund the purchase price in full together with interest to be computed as provided in detail in the statute. The broker, therefore, is able to limit its loss in most cases by prompt action so the argument that the broker should not have to bear the loss here when the buyer - by selling at the higher price - could have prevented it, is without substance. Moreover, we feel that the statute is clearly designed for the benefit of the buyer - not the broker who is presumed to have superior knowledge and is in a position to minimize his losses. The statute also gives the buyer two years to bring an action where such offer to repurchase is not made. It must be assumed the Legislature knew that in a two-year period the loss to the broker could be substantial and placed the limitation there to enforce the sanctions imposed and to compel immediate attention to buyers who do not get what they thought they bought.
>
> And so, if we literally apply the statute - which we must - the simple answer is that the broker should have immediately told the buyer he could have his money back and offered it "in writing" to him. This was not done. The buyer is guilty of nothing. He is protected by the statute. He has a right to invoke its sanctions. He has done so within the time the statute prescribed and in the manner prescribed and the trial court was correct in requiring the broker to do what the

statute says it should do and to add to the judgment the additional charges authorized.

Merrill Lynch, Pierce, Fenner & Smith v. Byrne, 320 So. 2d at 441 (emphasis added).

Significantly, the Florida Supreme Court initally granted certiorari in Byrne. After the Supreme Court heard the arguments in the case, the writ was withdrawn. Merrill Lynch, Pierce, Fenner & Smith v. Byrne, 341 So. 2d 498 (Fla. 1977). While one must be wary of reading too much into the Supreme Court's withdrawal of certiorari after hearing the arguments in Byrne, the fact is that the Florida Supreme Court therein declined an opportunity to read into the statute the concept of "loss causation."[6]

Byrne stands for the proposition that a purchaser who seeks rescission under Section 211 because the sale of securities violated Section 301, is entitled to the remedy of rescission, as defined in the statute, even though the seller's misconduct did not "cause" the full amount of the purchaser's loss.

In conclusion, then, Section 211 does not by its express terms require the purchaser to prove that the defendant's "violation of" the Act "proximately caused the security to decline in value." Nor is the language of Section 211 ambiguous. Many features of Section 211 argue strongly that the legislature did

---

[6]The present version of the Florida Securities Act was adopted in 1978, after the Byrne decision. The presumption is that the legislature is aware of judicial interpretations of statutes it is amending, and if the legislature disapproves of the judicial interpretation, it would amend the statute accordingly. However, in the 1978 version of the Act, no change in the statutory language was made to indicate any legislative disapproval of Byrne.

not intend to require plaintiffs to prove "loss causation." This view is consistent with the decision of the Florida Court of Appeals in Byrne.

C.

The Plain Language of Section 301

In order to obtain rescission under Section 211, Rousseff was obliged to prove that the sale of AOGP units to him was made "in violation of s. 517.301." Finding no support in Section 211 for any "loss causation element," Hutton's argument is concerned almost exclusively with Section 301 of the Act.

Again the beginning point must be the language of the statute itself. So far as here pertinent, Section 301 provides:

> It is unlawful and a violation of the provisions of this chapter for a person: (a) In connection with the offer, sale, or purchase of any security . . . (2) To obtain money or property by means of any untrue statement of a material fact . . . necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

F.S.A. § 301(1)(a)(2).

Rousseff agrees with Hutton that Section 301 "describes the conduct" which renders the defendant liable for rescission under Section 211(2) (Hutton, Brief, p. 4). The misconduct described in Section 301 is "read into" the civil liability provision of Section 211(2), since the latter provision requires the plaintiff to prove the sale was "in violation of s. 517.301." In short, we do not look to Section 301 for the foundation of the right to rescission nor the elements of proof required; that is provided by Section 211(2) of the Act.

Section 301 does not by its express terms require proof that the false statement or omission "proximately caused the security to decline in value." Indeed, Section 301 makes no reference to the "value of the securities," to any "decline" thereof, or to the "proximate causes" of such decline. Nor does Section 301 use any words which even remotely suggest these elements. There is nothing in the words chosen by the legislature in Section 301 which can be read as requiring proof of "loss causation."

Section 301 was enacted for the self-evident purpose of prohibiting dishonesty in the inducement of the purchase or the sale of securities. What Section 301 prohibits is the making of any false statement or any omission to disclose any material fact as a means of inducing a transaction. The legislature did not, by the plain terms of Section 301, condemn dishonesty only in those instances where the dishonesty "proximately causes the securities to decline in value."

Curiously, Hutton agrees with Rousseff's analysis of the plain language of Section 301. In its Brief, Hutton concedes that "[t]he language of § 517.301 is silent as to whether the conduct must be the proximate cause of the claimant's injury." (Hutton, Brief, pp. 4-5.) (Emphasis added). Hutton makes the same concession as to Section 211. (See, Hutton, Brief, p. 5).

Rousseff could not agree more with Hutton. It is true that in neither Section 211 nor in Section 301 did the legislature require proof of "loss causation." The legislature has been "silent" as to any such requirement or limitation upon the right to rescission. Of course, had the legislature intended to require proof of "loss causation," it would not have remained "silent" upon the matter.

In effect, Hutton here advocates a new and unique rule of statutory interpretation. Under this new rule, the Court would be at liberty to read into statutes any requirement, modification or limitation which the legislative language does not expressly prohibit. This rule proposed by Hutton would turn the process of statutory interpretation upon its head. As this Court observed:

> We do not deem it necessary to cite any of the myriad of cases wherein we have, without exception, held that under our system of three distinct, separate and independent branches of government - executive, legislative, and judicial - no one of them should infringe upon the province of either of the others. Courts construe and interpret the laws, but they do not make them. They should never assume the prerogative of judicially legislating.

Hancock v. Board of Public Instruction, 158 So. 2d 519, 522 (Fla. 1963).

If - as Hutton admits - the Florida Legislature has been silent in both Section 211 and 301 as to any requirement of proof of "loss causation," it must be because the legislature intended to be silent. Such silence of the legislature can only be construed by a Court as indicating the legislative intention not to condition relief on proof of "loss causation". "The Court in

construing a statute cannot and will not attribute to the legislature an intent beyond that expressed." Bill Smith, Inc. v. Cox, 166 So. 2d 497, 498 (Fla. 2d DCA 1964).

In Section 211(2), the legislature declared that one who sells securities "in violation of s. 517.301 . . . is liable . . . in an action for rescission." In Section 301, the legislature declared that a sale made "by means of" any material false statement or omission violated the Act. Proof of so-called "loss causation" is no more required by Section 301 than is "loss causation" required under the provisions prohibiting the sale of unregistered securities, sales by unlicensed persons, sales through "boiler rooms" or by representations that the government has "passed on" the seller's qualifications.

In conclusion, the plain and unambiguous language of both Sections 211 and 301 do not show any legislative intention to require a purchaser to prove that the defendant's violation of Section 301 "proximately caused the security to decline in value" as a condition of obtaining rescission under Section 211(2).

IV.

ANALOGOUS PROVISIONS OF FEDERAL SECURITIES ACT SUPPORT THE VIEW THAT SECTION 211 DOES NOT REQUIRE PROOF OF LOSS CAUSATION

A.

This Court may consider the interpretation and construction given to substantially similar federal and state securities

laws.[7] Oppenheimer & Co. v. Young, 456 So. 2d 1175 (Fla. 1984), vacated on other grounds 470 U.S. 1078, 105 S.Ct. 1830, 85 L.Ed. 2d 131 (1985). The problem, of course, is to determine which federal securities statute is most similar to the civil liability statute of the Florida Act, for there are two distinct bodies of federal law available as an analogy. One body of law developed under the judicially created remedies under Section 10b and Rule 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), 17 C.F.R. 240.10b-5. The other developed under the express remedies provided by Section 12 of the Securities Act of 1933.

B.

This Court Should Look to the Securities Act of 1933 for Guidance

Upon proper analysis, the body of federal securities law to which this Court should look for guidance is that which exists under the express liability provisions of Section 12, 15 U.S.C. § 77l. Section 12 of the Securities Act of 1933 most closely resembles the civil liability provision of the Florida Act in its totality. Indeed, the language of the Florida Act's civil liability provision is derived from Section 12 of the Securities Act of 1933, and from Section 410 of the Uniform Securities Act (1958) based, again, on Section 12 of the Securities Act of 1933.

---

[7]Appellee recognizes that where the intention of the legislature may, as here, be determined from the plain and unambiguous words of the statute, there is no occasion for resort to secondary sources or rules of construction. But even when the plain language rule is applicable, a conclusion reached thereon may be buttressed by examination of other, consonant statutes.

This becomes clear from the following discussion. Professor Loss, the Chief Commentator on the Uniform Securities Act, has observed:

> Consistently with the aim of furthering federal-state coordination as well as uniformity, the draftsmen of the Uniform Securities Act closely modeled § 410(a) after § 12 of the Securities Act of 1933.

L. Loss, Fundamentals of Securities Regulation 878 (2d ed. 1988).

The present version of the civil liability provision of the Florida Act was part of a general revision and expansion of the Florida Act in 1975. The current version of the Florida Act was largely drafted by Professor Mofsky, Professor of Law at the University of Miami, for the Florida Legislative Research Council in 1974. Commenting on the civil liability provision, he stated:

> The civil liability provisions of the new Act do not warrant great comment since they are modeled after comparable provisions in the Uniform Securities Act adopted in a majority of the states.

Draftsman's Comments, December 14, 1974.

Section 12(2) of the Securities Act of 1933 provides an express remedy to purchasers of securities who were induced to purchase such securities:

> [B]y means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading. . . .

15 U.S.C. § 77l(2).

When Section 301's prohibition against the sale of securities "by means of any false statement of a material fact or any

omission to disclose" is read into Section 211 of the Florida Act, the textual similarity of the Florida Act to Section 12(2) of the Securities Act of 1933 is readily apparent. The substantial similarities between Section 211 of the Florida Act and Section 12 of the Securities Act of 1933 can be contrasted with the implied remedy under Rule 10b-5.

First, both Section 211 and Section 12 are legislatively created express remedy provisions, which specifically describe the conduct which results in civil liability. In contrast, Rule 10b-5 is a criminal provision under which the Courts by decisions have implied a civil remedy and developed the parameters of the remedy.

Second, both Section 211 and Section 12 provide express remedies for the sale of unregistered securities as well as for sales induced by false representations and omissions and other specific statutory violations. In contrast, Rule 10b-5 provides no remedies for registration violations or other specific statutory violations. Rule 10b-5 is a "catch all" provision. Chiarella v. U.S., 445 U.S. 222, 100 U.S. 1108, 63 L.Ed. 2d 348, (1980).

Third, both Section 211 and Section 12 impose express remedies without requiring proof of the element of scienter or of intent to deceive. Merrill Lynch, Pierce, Fenner & Smith v. Byrne, supra; State v. Houghtaling, 181 So. 2d 636 (Fla. 1965); Wigand v. Flo-Tek, Inc., 609 F. 2d 1028 (2d Cir. 1979) (as to Section 12). In contrast, Rule 10b-5 case laws clearly require

proof of intent to deceive or "scienter." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed. 2d 668, (1976).

Fourth, both Section 211 and Section 12 expressly define the remedies available. Moreover, the remedies are the same under the two acts. If the purchaser still owns the security, his exclusive remedy under either Section 211 or Section 12 is rescission. Wigand v. Flo-Tek, Inc., supra; Pfeffer v. Cressaty, 223 F. Supp. 756 (S.D. N.Y. 1963) (1933 Act); Fallani v. American Water Corp., 574 F. Supp. 81 (D.C. Fla. 1983) (Fla. Act). If the purchaser has disposed of the securities, the remedy is damages. Damages under both Section 211 and Section 12 are identical. F.S.A. § 517.211(3); Kaufman and Enzer v. Dedman, 680 F. Supp. 805 (D.C. La. 1987); Randall v. Loftsgaarden, 478 U.S. 647, 106 S.Ct. 3143, 3149, 92 L.Ed. 2d 525 (1986).

In contrast, Rule 10b-5 contains no express remedies, and the Courts are free to fashion whatever remedy is appropriate on a case-by-case basis. John R. Lewis, Inc. v. Newman, 466 F.2d 800 (5th Cir. 1974). Rescission is available under Rule 10b-5 cases only in the discretion of the Court. Arrington v. Merrill Lynch, Pierce, Fenner & Smith, 651 F. 2d 615 (9th Cir. 1981); Randall v. Loftsgaarden, supra.

Fifth, both Section 211 and Section 12 expressly extend liability for rescission or for damages to a limited class of defendants. A plaintiff can sue only those in privity with him and certain designated others. Moreover, both Section 211 and Section 12 impose primary liability only upon the "seller" of securities. F.S.A. § 517.211(1) and (2); 15 U.S.C. § 77o; Holloway

v. Howerdd, 377 F. Supp. 754 (M.D. Tenn. 1973), aff'd, 536 F. 2d 690 (6th Cir. 1976) (corporate officers and directors under Section 20).

In contrast, Rule 10b-5 imposes liability upon "any person" who engages in the proscribed conduct "in connection with" the sale of a security and thus imposes liability upon non-sellers and non-participants in the sale or the purchase of the securities. Thus, liability under Rule 10b-5 is not confined to those who participate in the sale. Herman & MacLean v. Huddleston, 640 F. 2d 534 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed. 2d 548 (1983). Indeed it was the extensive reach of Rule 10-5 to those beyond the parties to the transaction which was the primary justification given in Huddleston for requiring proof of loss causation in Rule 10b-5 cases.

Sixth, both Section 211 and Section 12 remedies are subject to express anti-waiver provisions. Oppenheimer & Co. v. Young, 456 So. 2d 1175 (Fla. 1984), vacated on other grounds, 470 U.S. 1070, 105 S.Ct. 1830, 85 L.Ed. 2d 131 (1985).

The foregoing similarities are not the product of mere chance, for Section 211 of the Florida Act was, ultimately, derived from Section 12 of the Securities Act of 1933. L. Loss, supra; Draftsman's Comments, supra. The Uniform Securities Act (1958) contains a civil liability provision, Section 410. This provision (reproduced in Appendix) is both substantively and structurally similar to the civil liability provision of the Florida Act. The official comments to Section 410 of the Uniform

Securities Act observes, "Clause (2): This clause is almost identical with Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2)." Uniform Securities Act, Official Comment to § 410, 76 U.L.A. 644 (1958). Many states have adopted the Uniform Securities Act's civil liability provision. In these states, it is common for the Courts to construe the civil remedy provision in accordance with the interpretations given Section 12 of the 1933 Securities Act. See, e.g. Bradley v. Hullander, 287 S.E. 2d 140 (S.C. 1982); Stimmel v. Shearson Hammill & Co., 411 F. Supp. 345 (D.C. Or. 1976); Oppenheimer & Co. v. Young, supra; Rousseff v. E. F. Hutton Co., Inc., supra.

In the Rousseff case, an issue was presented as to the meaning of "less income received on the security" in Section 211. The Eleventh Circuit noted that this language was almost identical to Section 12(2) and, therefore, construed the words in the Florida Act in a manner harmonious with the construction given to similar words in Section 12(2). Rousseff v. E. F. Hutton & Co., Inc., supra.

The Florida Supreme Court itself has relied upon decisions construing Section 12(2) to interpret the Florida Securities Act. Oppenheimer & Co. v. Young, supra (relying upon the United States Supreme Court's decision in Wilko v. Swan construing the 1934 Act.)

For all of the foregoing reasons, it is appropriate for this Court to look to the interpretations given to Section 12 of the Securities Act of 1933 in determining whether the Florida State

Legislature intended to require proof of "loss causation" as an element of civil liability under Section 211.

C.

Loss Causation is Not Required Under Securities Act of 1933, Section 12

It is absolutely clear that, in suits under Section 12 of the Securities Act of 1933, proof of "loss causation" is not required. To obtain the rescission remedy under Section 12, the purchaser must prove that the transaction was induced "by means of" some material false statement or omission. The purchaser is only required to prove that the transaction was a result of the false statement or omissions. This is sometimes referred to "transaction causation." Barnes v. Resource Royalties, Inc., 795 F. 2d 1359 (8th Cir. 1986); Davis v. Avco Financial Services, Inc., 739 F. 2d 1057 (6th Cir. 1984), cert. denied, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed. 2d 381 (1985); Randall v. Loftsgaarden, supra. The purchaser is not required to prove that such false statement or omission "proximately caused" the security to decline in value. The purchaser suing under the Securities Act of 1933 is entitled to recover the full amount paid for the security, regardless of what factors "caused" the security to decline in value.

The United States Supreme Court recently commented upon the purpose and effect of this feature of Section 12(2):

> [T]he 1933 Act is intended to do more than ensure that defrauded investors will be compensated: the Act also "aims . . . to prevent further exploitation of the public by the sale of unsound, fraudulent and worthless securities through misrepresentation [and] to place adequate and true information before the investor." (Citations omitted.)

> We may, therefore, infer that Congress chose a rescission remedy when it enacted § 12(2) in order to deter prospectus fraud and encourage full disclosure as well as to make investors whole. Indeed, by enabling the victims of prospectus fraud to demand rescission upon tender of the security, Congress shifted the risk of an intervening decline in value of the security to defendants, whether or not that decline was actually caused by the fraud. (Citations omitted.) Thus, rescission adds an additional measure of deterrence as compared to a purely compensatory measure of damages.[8]

Randall v. Loftsgaarden, 92 L.Ed. 2d at 539. (Emphasis added.)

The words of the United States Supreme Court above would be equally applicable to ascertaining the intention of the Florida Legislature. By Section 301, the legislature condemned and prohibited the inducing of the purchase or the sale of securities by means of any false statements and omissions. One of the techniques to enforce this policy, was to declare that a transaction was tainted and to allow the purchaser to rescind and recover the full amount paid for the security. This "shifts" to the seller the risk of declining securities values. Precisely because the statute allows such a "shift" of the risk, the statute provides

---

[8]Professor Joseph Long, Special Counsel for the North American Securities Administration Association, in his book has indicated that exactly the same position exists under Section 410 of the Uniform Securities Act:

> Civil liability under this Section [410] does not depend upon reliance as the misstatement or omission by a purchaser. . . . Nor is it significant to liability that an omission or a misstatement is the basis of a plaintiff's loss or that a plaintiff has, in fact, suffered a loss. (citations omitted). Purchasers are entitled to rescind transactions merely on the basis that a seller violated the provision (citation omitted).

12 Joseph C. Long Blue Sky Law § 1.04[4][b] (1988).

an additional deterrent to the making of such dishonest inducements.

One can, of course, argue that the goals of the legislature to prevent dishonesty in the inducement of transactions could be adequately served by a statute which condemned such dishonesty only in those instances where it "caused" the security to decline in value. But the evident goal of the legislature was to prevent, if possible, _any_ dishonesty and that purpose cannot be served by a reading of the statute which permits dishonesty to go unchecked whenever the dishonesty does not adversely affect the value of what was purchased.

Statutes, such as the Florida Act here, are remedial in nature. Their purpose is not merely to assure that purchasers get securities which are worth what has been paid for them. Their purpose is also to compel those who deal in securities to deal on the basis of the truth. Such statutes are to be read and construed broadly and liberally in favor of purchasers to achieve these ends. _McElfresh v. State_, 151 Fla. 140, 9 So. 2d 277 (1942).

Hutton cites _Wilson v. Ruffa & Hanover_, [Current] Fed. Sec. L. Rep. (CCH), ¶ 93,701 (2d Cir. April 12, 1988) (to be reported at 844 F. 2d 81) for the proposition that the federal courts require proof of loss causation under Section 12. Hutton has simply failed to read the entire case. In _Wilson_, the suit was brought against attorneys (Ruffa and Hanover) and _not_ the sellers of the securities. In discussing Section 12(2), the Sixth Cir-

cuit made it absolutely clear that loss causation is _not_ an element of the usual suit under Section 12(2):

> Section 12(2) thus provides for liability in favor of _purchasers_ of securities against _offerors_ or _sellers_ who negligently make misleading statements or omissions, without regard to whether the purchaser actually relied upon the misleading communication. (citations omitted). It also provides the remedy of rescission to a purchaser who continues to hold the security and thus compensates for all losses, _whether or not caused by the misstatement_.

Wilson, at p. 98,232 (Emphasis added).

In _Wilson_, the Court required either proof of "loss causation" or "scienter," because the defendants there were not "sellers" within the normal confines of Section 12(2). This view, the Court noted "renders actions against collateral participants under Section 12(2) essentially identical to actions under the 'catch-all' Section 10b." _Id_. at 98,233. But the _Wilson_ court left no doubt as to the loss causation element where the suit was against those who were clearly sellers under the Act:

> We do not mean to suggest, of course, that plaintiffs must demonstrate loss causation or transaction causation in suits against actual sellers or those who control them. In drafting Section 12(2), Congress obviously sought to provide a heightened deterrent against sellers who make misrepresentations, by rendering tainted transactions voidable at the option of the defrauded purchaser _regardless of whether the loss is due to the fraud or to general market decline_.

_Id_. at 98,233 (Emphasis added.).

It is clear that Hutton was a person within the confines of the statute - not a mere collateral entity. The statute _expressly_ provides that an agent (Hutton) of the seller (Anadarko) is "jointly and severally liable . . . in an action for rescission."

F.S.A. § 517.211(2). Like Congress in enacting Section 12(2), the Florida Legislature also sought to impose a "heightened deterrent" (to borrow the words of Wilson) on parties expressly identified in the statute. To achieve this end, like Congress in Section 12(2), the Florida Legislature provided for the remedy of rescission "regardless of whether the loss is due to the fraud or to general market declines." Wilson v. Ruffa.[9]

Hutton then cites Campbell v. Shearson/American Express as an example of a court construing a state blue sky law similar to the Florida Act as requiring proof of 'loss causation.' Campbell recognized that the state law question was substantially similar to Section 12(2) of the Federal Securities Act, but did not construe it in harmony with that Act. Instead, the Court apparently looked to Section 11(e) of the Securities Act of 1933. Section 11(e) (15 U.S.C. § 77k(e)) is a unique provision applicable only to suits against signers of registration statements and certain experts. Section 11(e) contains an express provision under which a defendant can escape liability to the extent the defendant proves that the security declined in value due to factors indepen-

---

[9]In addition to Wilson v. Ruffa & Hanover, Hutton also cited Garnatz v. Stefel, Nichols & Co., 559 F. 2d 1357 (8th Cir. 1977), cert. denied, 435 U.S. 951, 98 S.Ct. 1578, 55 L.Ed. 2d 801 (1978) and Rolf v. Blyth, Eastman Dillon & Co., 570 F. 2d 38 (2d Cir. 1978) cert. denied, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed. 2d 698 (1978). Neither of these cases could possibly support Hutton's assertion that "loss causation" was required in suits under Section 12 of the Securities Act of 1933, because neither case involved nor even mentioned that Act! Both Garnatz and Rolf were suits under Rule 10b-5. In Garnatz, the Court allowed a purchaser who had been "induced by defendant's wrongful concealments" to buy certain bonds . . . to recover "the full decline in value," even though the Court recognized that "neither [defendant] caused plaintiff's bonds to decline in value." Garnatz, id.

dent of the defect in the registration statement. Professor Loss has referred to this unique feature of Section 11(e) as "causation with a reverse twist." III L. Loss, Securities Regulation, p. 1728 (2d ed. 1961). The Michigan Act, of course, contained nothing remotely like the express "causation with a reverse twist," and the Sixth Circuit in Campbell offers no explanation for its reliance on Section 11 or its obviously erroneous statement that loss causation was required in cases under Section 12(2) of the Securities Act of 1933. Nor does Campbell contain any considered analysis of the language or words of the Michigan statute. In short, Campbell is not a reasoned decision by which this Court should be guided. In fact, Campbell was a decision not intended for publication or citation, as it plainly shows.

Campbell was probably wrongly decided if, as the Sixth Circuit noted, the Michigan Act was substantially similar to Section 12(2) of the Securities Act of 1933. In a case under Section 12(2), involving the same misrepresentaions as to the selling agents' commissions, the District Court in Kaufman & Enzer v. Dedman, 680 F. Supp. 805 (W.D. La. 1987) allowed rescission under Section 12(2) where the Court found no proof of loss causation (and hence denied relief under Rule 10b-5).

V.

THE ANALOGY TO RULE 10B-5 IS INAPPROPRIATE

Hutton argues, of course, that because the language of a part of Section 301 is substantially similar to Rule 10b-5, this Court should look to cases which have addressed the "loss causation" issue under Rule 10b-5. Admittedly, the language of part

of Section 301 is substantially similar to Rule 10b-5. But the analogy to Rule 10b-5 is clearly less compelling than that to Section 12 of the Securities Act of 1933, for the reasons discussed above. Moreover, the analogy to Rule 10b-5 fails to give any weight to either the express liability provisions of Section 211 of the Florida Act or to the intention of the legislature.

Hutton's argument for construing Section 301 as requiring proof of loss causation proceeds upon the premise that the courts have found the requirement of "loss causation" in the language of Section 10b and/or Rule 10b-5 itself. This is not correct. "Loss causation" in Rule 10b-5 cases does not spring from any legislative intent discerned from the language of Section 10b or Rule 10b-5. Its true origin is elsewhere.

In Affiliated Ute Citizens v. United States, the United States Supreme Court noted that in suits based upon Rule 10b-5, the "correct measure of damages" is that specified in "Section 28 of the Act, 15 U.S.C. § 78bb(a). Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed. 2d 741 (1972). Section 28 (15 U.S.C. § 78bb(a)) provides:

> [N]o person permitted to maintain a suit for damages under the provision of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.

Section 28 of the 1934 Act is recognized as being the measure of damages in suits under Rule 10b-5. Id. Its language functions to limit the damages in Rule 10b-5 suits to those losses "on account of" (vis. caused by) the act complained of.

Haas v. Empire Petroleum Co., 302 F. Supp. 647 (D.C. Colo. 1969); Richardson v. MacArthur, 451 F. 2d 35 (9th Cir. 1971).

Many of the decisions relied upon by Hutton commonly look to the language of Section 28 as the basis for requiring proof of loss causation in suits under Rule 10b-5.[10] See, e.g. DuPuy v. DuPuy, 551 F. 2d 1005, 1024, (5th Cir. 1977) cert. denied, 434 U.S. 911, 98 S.Ct. 312, 54 L.Ed. 2d 197 (1977); Herpich v. Wallace, 430 F. 2d 792, 810 (5th Cir. 1970). Virtually without exception, these Courts either rely upon Section 28 of the 1934 Act as the ultimate source of the "proximate cause" element, or they rely upon a rationale which views "proximate cause" as essential to achieving the same limitation on damages reflected in the language of Section 28.

The case upon which Hutton most relies is Herman & MacLean v. Huddleston, supra. That Court observed that in Affiliated Ute, supra, the United States Supreme Court "indicated that Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) establishes the proper measure of damages in a Rule 10b-5 case." Huddleston at 554. Moreover, the Court in Huddleston, in its discussion of "the proper measure of damages to reflect the loss proximately caused by," the violation of Rule 10b-5, adopted the rule "applied by the Supreme Court in Affiliated Ute" (i.e. that required by 15 U.S.C. § 78bb(a)).

---

[10]While Hutton cites a plethora of cases for the proposition that "loss causation" is required in Rule 10b-5 cases, many of the cited decisions do not discuss the element at all in these terms, or merely refer to Huddleston.

In enacting the Florida Securities Act civil liability provision, the legislature did not adopt the limiting language from Section 28 of the 1934 Act. If the Florida Legislature intended to adopt the concept of "loss causation," it would not merely have adopted the language of Rule 10b-5, but also the language of damages limitation contained in Section 28. Because the Legislature chose not to adopt the limiting language of Section 28, and chose instead to adopt other remedies (F.S.A. § 517.211(3) and (4)), it would be inappropriate for this Court to look to decisions which are, at least in substantial part, premised upon the limiting language of Section 28 of the 1934 Act.

Hutton argues that requiring proof of "loss causation" is necessary or desirable because dishonest sellers should not have to bear losses which were not "caused by" that dishonesty. However, this policy which Hutton advocates cannot be achieved unless this Court were to amend the statute to provide different remedies than those enacted by the legislature.

Whether based upon Section 28 or upon philosophical considerations of fairness, it is clear that "loss causation" in cases under Rule 10b-5 is primarily an element which functions to limit the amount of plaintiff's damages. One can, of course, engage in a philosophical argument as to whether the concept of "proximate cause" is an aspect of the "liability" or of the "damages" part of a legal claim. Hutton attempts to suggest that proof of loss causation is necessary to establish "liability" and thus must be proven even though the amount of damages under Section 211(3) and (4) is not dependent upon "proximate cause" of

the loss. In other words, Hutton argues here that under the Act, a purchaser must prove that he suffered an economic loss as a proximate result of the false statement, even though the amount of damages the purchaser is entitled to recover is, under the Act, determined by rules which do not take such proximate cause into account. This would not seem to make very good legislative sense.

An example may help to explain the point. If, hypothetically, a purchaser paid $1,000.00 for a security based upon some material false statement, he can sue under Section 211. The false statement is then proven by plaintiff (under Hutton argument) to have "proximately caused the security to decline in value" by $500.00. Our hypothetical purchaser sues for rescission and by the time of trial the security has become worthless due to other market factors. Upon tender of the security under F.S.A. § 517.211(3), plaintiff will be entitled to recover "the consideration paid" or $1,000.00 and the seller will receive back the worthless stock certificate. Thus, the dishonest seller would clearly bear the burden of the entire decline in value - both the part "caused by" the false statement and the part "caused by" outside factors. This is the necessary and inevitable result of the fact that rescission is the remedy provided by the legislature. It is clear that the legislature intended the dishonest seller to bear the burden of the entire decline, even if purchaser were required to prove that the false statement had proximately caused the security to decline in value. The only way this result can be avoided would be to amend the remedies

provision of the Act to provide that damages were to be limited to the loss proximately caused by the false statement or omission.

VI.

THE HISTORY AND APPLICATION OF THE FLORIDA ACT

Hutton asserts that when, in 1965, the Florida Legislature adopted the language of Rule 10b-5 as part of Section 301, F.S.A. § 517.301(1), the Florida Legislature must have intended to adopt the "federal precedent." This is so, Hutton asserts, because "prior to 1965, Florida did not have in its statutory scheme a private cause of action for fraudulent statements or omissions made outside a prospectus." (Hutton, _Brief_, p. 8.) Hutton's recitation of the history of the Florida Act is seriously flawed.

The Florida Act has a long history which even antedates the adoption of the federal statutes in 1933 and 1934. At least as early as 1931, Florida had an express liability provision under which a purchaser could recover "the full amount paid by the purchaser" whenever the "sale was made in violation of any of the provisions of" the Act. _See_, Acts of 1931 § 6002, _et seq_. The 1931 Act provided:

> Every sale made in violation of any of the provisions of this law shall be voidable at the election of the purchaser; and the person making the sale and every director, officer or agent of or for such seller, if such director, officer or agent shall have personally participated or aided in any way in making such sale shall be jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender of the securities sold or of the contract made for the full amount paid by such purchaser, with interest, together with all taxable court costs and reasonable attorney fees.

For many years before 1965, the Florida Act prohibited the sale of securities by false statements. The predecessor to the present Section 301, F.S.A. § 517.301, was Section 31. Section 31 prohibited the making of "any false, fictitious or fraudulent statements or representations" in the sale of securities. Acts 1957, ch. 57-748, Laws of Florida. The Courts of Florida recognized and enforced such civil remedies long before 1965. Nichols v. Yandre, 151 Fla. 87, 9 So. 2d 157 (1942); Robinson Lenk & Co. v. Leedy Wheeler & Co., 154 Fla. 596, 18 So. 2d 523 (1944).

When in 1965 the state legislature adopted the language of Rule 10b-5 into Section 301, it made no change in the basic civil liability provision from its 1931 form. Indeed, throughout its history, the most salient feature of the Florida Act's civil liability section has been its persistent provision for the purchaser to recover the "full amount paid" in rescission. See, e.g. Acts of 1978, ch. 517.211 which is, in this respect identical to the 1931 Act.

Hutton asserts (Brief, p. 8) that when in 1965 the Florida Legislature adopted the language of Rule 10b-5 as part of Section 301, F.S.A. § 517.301, there was "well developed" federal case law requiring proof of "loss causation" in Rule 10b-5 cases. In support of this assertion, Hutton then cites four cases. Only one was decided before 1965. (Hutton, Brief, p. 9.) The one case pertinent to the pre-1965 time frame is Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F. 2d 527, 532 (10th Cir. 1962). Estate Counseling shows

that the Court required proof of damages proximately caused by the wrongful act because of the special limit imposed by Section 28, 15 U.S.C. § 78bb(a). As noted above, both in 1965 and presently, the Florida Legislature did not adopt the limiting language of Section 28 as part of the Florida civil liability provision. Thus, the cases cited by Hutton certainly do not support the grandiose statement that by 1965 the federal courts had a settled and well-developed requirement of loss causation for Rule 10b-5 cases. Indeed, there are extant a number of decisions even after 1965 under Rule 10b-5 which did not require proof of a causal connection between the false statement and the decline in value of the securities, especially where the remedy under Rule 10b-5 was rescission. See, e.g. Gordon v. Burr, 366 F. Supp. 156 (S.D. N.Y. 1973), aff'd, 506 F. 2d 1080 (2d Cir. 1974); Hatrock v. Edward D. Jones & Co., 750 F. 2d 767 (9th Cir. 1984) ("the plaintiff should not have to prove loss causation where the evil is not the price the investor paid for a security, but the broker's fraudulent inducement to purchase the security"); Chasins v. Smith Barney & Co., 438 F. 2d 1167 (2d Cir. 1970).

The point of the foregoing is not, of course, to argue with the proposition of whether "loss causation" is now required in suits under Rule 10b-5. The point is to show that as of 1965, and indeed thereafter, whether "loss causation" was required in Rule 10b-5 cases was not such a "settled point" as Hutton would have this Court believe. To the extent it had been recognized, the Courts (such as in Estate Counseling) had done so because of

a provision of Section 28 of the Securities Act of 1934, which the Florida Legislature did not adopt. Thus, Hutton's effort to establish the intention of the legislature as of 1965 is, at least, highly suspect in its conclusions.

Since the first adoption of such Acts, the Courts in Florida have been often called upon to enforce the civil remedy provisions of Florida's Securities Act. In enforcing the civil remedy provisions, the Courts have done so in accord with the terms of the statute, granting recovery of the "full amount" specified by the statute. In over a half century of experience, no Florida court has ever suggested that the right and/or remedy granted by these essentially unchanging provisions could be denied or limited by reading into such statutes a requirement that plaintiff prove that the securities had "declined in value as a proximate result of" the wrongful conduct which violated the Act. See, e.g. Krutel v. Stolberg, 356 So. 2d 1299 (Fla. App. 3d DCA 1978); Artistic Door Corp. v. Rheney, 384 So. 2d 179 (Fla. 3d DCA 1980); Ruden v. Medalie, 294 So. 2d 403 (Fla. 3d DCA 1974); Haygood v. Adams Drugs, Inc., 346 So. 2d 612 (Fla. 2d DCA 1977); Merrill Lynch, Pierce, Fenner & Smith v. Byrne, supra. It is, perhaps, not too trite an argument to suggest that if a legal principle so common as that of "proximate cause of the loss" were truly intended by the legislature to have limited responsibility under the Florida Act, it would have surfaced in some judicial forum where the Act has been enforced for the last half century.

In those state blue sky laws which are based upon the Uniform Securities Act (and thus are similar to the Florida Act's

Section 211), the Courts have ordinarily looked to Section 12 of the 1933 Act and, hence, have construed such Acts as not requiring proof of "loss causation."

Kelsey v. Nagy, 410 N.E. 2d 1333 (Ind. App. 1980) was an action by purchasers of securities to rescind the purchase based on the civil liability provision of the Indiana Securities Act, I.C. § 23-2-1-19. The provision of the Indiana Act is exactly identical to Section 211 of the Florida Act. The "fact" misrepresented in Kelsey was merely "the source of the stock." The sellers argued that such a fact, even if material, did not affect the price or value of the security. The Court of Appeals affirmed a judgment granting the purchaser rescission explaining:

> Kelsey further argues that the judgment on the evidence was improper because the Nagys did not show that the failure to disclose the source of the stock affected the price of the stock. The Nagys, however, were not seeking damages; they were seeking a rescission of the purchase. It is not necessary that a party seeking to rescind a purchase establish that the facts misrepresented or omitted were such as to affect the price of the stock. It is sufficient that the facts misrepresented or omitted were material (citations omitted). As discussed earlier, the source of the stock was a material fact. The Nagys established that they were entitled to rescission.

Kelsey v. Nagy, id. at 1337. See also, Lintz v. Dillon, 568 S.W. 2d 147 (Tex. Civ. App. 1978) rev'd on other grounds, 582 S.W. 2d 394; Kenalos v. H. V. Green Co., 81 N. H. 426, 128 A. 335 (1925).

VII.

HUTTON'S POLICY ARGUMENTS ARE SPECIOUS

Hutton argues that various "public policy" considerations "mandate" reading loss causation into the Florida Act. These

arguments are proper considerations for the legislature, not the Court. The Court neither declares public policy, nor alters statutes to conform to its view of sound policy. The legislature declares what shall be the public policy in its statutes.

Hutton's policy arguments are entirely specious. Hutton argues that, absent a requirement of proof of "loss causation," the Florida Act will become a form of insurance policy under which investors can adopt a wait and see attitude. This is nonsense. The legislature povided that suit under the Act must be brought within two years after the purchaser "discovers" the violation. F.S.A. § 95.11(4)(e). If, when the purchaser discovers the violation, he has already sold the securities, his remedy is limited to the difference between what he paid for the security and what he received upon its disposition. F.S.A. § 517.211(3). He has no opportunity for speculation. If, upon discovery of the violation, the purchaser still owns the security, the legislature still intended the purchaser to have two years to decide whether to sue or not. But the legislature provided the honest seller with the right to "cut off" the purchaser's 'speculation' by making a statutory offer to return the consideration and take back the security. F.S.A. § 517.211(1). Thus, whether the purchaser is permitted to 'speculate' for the period of the statute of limitations after his discovery of the defendant's misconduct, is simply a function of whether the dishonest seller chooses to allow the purchaser to do so or chooses to do the "right thing" as the legislature provided he could.

Hutton argues that, absent a requirement of 'loss causation' the remedy under the Florida Act will be "inconsistent" with that under Rule 10b-5. But it is just as true that if the Florida Act were read as requiring "loss causation," it would then be inconsistent with the express civil remedies under Section 12(2) of the Securities Act of 1933 where loss causation is clearly not required.

Hutton argues that, if the Florida Act is construed as not requiring proof of "loss causation," there will be an "acute" or "substantial" increase in the number of cases filed in the Courts under the Florida Act. No authority is cited for this bit of histrionics. Although no Court has ever held that proof of loss causation <u>is</u> required under the Florida Act, the Courts of Florida have not been inundated with cases under the Act.

VIII.

THE ONLY PROPER POLICY CONSIDERATION

There is only one proper policy consideration for this Court to consider. The Court should consider the evil which the statute aimed to proscribe and adopt a construction which best effectuates that policy. The self-evident purpose of the Florida Securities Act was to impose high standards of honesty upon those who deal in securities. The objective of the law was to insure that citizens purchasing securites could do so on the basis of truthful and complete (as opposed to false or misleadingly incomplete) information. "The technique used is to condemn and render voidable the transaction, i.e. the sale itself, as being against

public policy." Dokken v. Minnesota-Ohio Oil Corp., 232 So. 2d 200 (Fla. 1970) (McNulty, J. in dissent).

To achieve these goals and policies, the legislature prohibited all dishonesty in the inducement of transactions in securities. Thus, any sale of securities by means of false or misleading material statements is declared unlawful by Section 301. To enforce this high standard of honesty, the legislature provided purchasers the right to rescind any purchase induced by dishonesty and to recover the full amount paid for the security. Requiring proof of loss causation under the Act will simply mean that dishonesty will be permitted to occur in securities transactions so long as it does not have a demonstrable, direct impact upon the value of the security. Not requiring proof of loss causation under the Act, simply means that all dishonesty in the inducement of securities transactions will be discouraged, and thus, that truthful and complete disclosures of all facts (whether related to value of the security or not) will be encouraged. Construing the Act as not requiring proof of loss causation most effectively carries out the policy of the legislature.

IX.

CONCLUSION

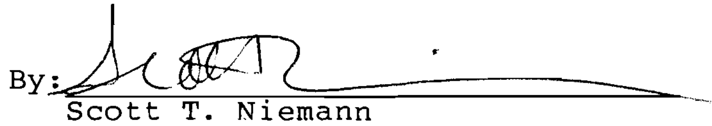
It is clear that the Florida Legislature has not, by the language of the statutes in question, required a purchaser seeking rescission of a purchase induced by false representations or omissions to prove that such misrepresentations "proximately

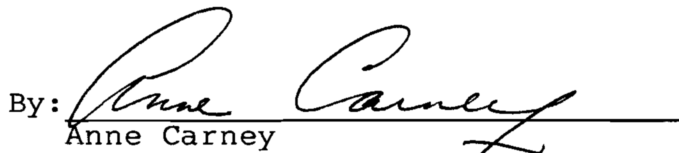
caused" the securities to decline in value. Accordingly, the certified question should be answered in the negative.

Respectfully submitted,

ROTHBERG, GALLMEYER,
FRUECHTENICHT & LOGAN

By: Martin T. Fletcher, Sr.


By: Scott T. Niemann


By: Anne Carney

Attorneys for Plaintiff-Appellee
Christ M. Rousseff

Suite 800
915 South Clinton Street
Post Office Box 11647
Fort Wayne, Indiana 46859-1647
Telephone: A.C. 219 422-9454