Implied Private Right Of Action And The Corporate Securities Law of 1968

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Section 25235 of the California Corporations Code declares that is unlawful for an investment adviser to engage in a number of specified activities, including employing "any device, scheme, or artifice to defraud any client or prospective client". The fact that an activity is "unlawful" does not necessarily mean that a private right of action exists. In fact, Corporations Code Section 25510 expressly negates implied civil liability under the Corporate Securities Law:

"Except as explicitly provided in this chapter, no civil liability in favor of any private party shall arise against any person by implication from or as a result of the violation of any provision of this law or any rule or order hereunder. Nothing in this chapter shall limit any liability which may exist by virtue of any other statute or under common law if this law were not in effect."

As Professor Harold Marsh, Jr. explained the thinking of the authors of the CSL as follows:

"It was also decided to make it clear that the judiciary is not authorized to invent causes of action inconsistent with or additional to those provided in the statute."

Practice Under the California Securities Laws (Rev. ed.) § 14.02[1] (footnote omitted). This isn't to say that there are no private rights of action under the CSL. In fact, Part 6 of the CSL bestows civil remedies on private plaintiffs for violations of a number of different CSL provisions.

Part 6, however, provides no remedy for violations of Section 25235. While this suggests that no private right exists, Magistrate Judge Jacqueline Scott Corley recently ruled otherwise in a case in which the plaintiff alleged that the defendant had acted as an unlicensed investment adviser. Yokell v. Draper, 2018 U.S. Dist. LEXIS 117427. In this case, Judge Corley found that Code of Civil Procedures Section 1029.8 provides a private right of action for persons harmed by "[u]nlicensed persons who cause injury or damage . . . as a result of providing goods or performing services for which a license is required." She nonetheless dismissed the cause because the plaintiff had failed to plausibly plead that the defendant had acted as the plaintiff's investment adviser or meet the heightened pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure.

Founding a cause of action on CCP Section 1029.8 does lead to an asynchronous result as it provides a private right of action for violations of Corporations Code Section 25235 against unlicensed, but not licensed, persons.