

Eleventh Circuit: Solicitation of Unregistered Securities Under Section 12 Can Occur Through Online Videos, Including on Social Media (Securities Law Alert)

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On February 18, 2022, the Eleventh Circuit reversed the district court’s dismissal of a class action alleging that the promoters of a new cryptocurrency violated Section 12 of the Securities Act by soliciting the purchase of unregistered securities through online videos. [Wildes v. BitConnect](#), 25 F.4th 1341 (11th Cir. 2022) (Grant, J.). The court held that neither the Securities Act nor Eleventh Circuit precedent restrict liability to sales pitches to individual people, while excluding liability for communications directed to the public at large. Noting that solicitation has long occurred through other mass communications, the court determined that solicitation under Section 12 can occur through online videos.

Background

This case arose from an online lending platform where users could trade their digital currency for the platform’s native token—a new cryptocurrency—and earn interest based on their token holdings. Promoters of the cryptocurrency posted thousands of videos online, on independent websites as well as social media, urging people to buy the new cryptocurrency. The videos were viewed millions of times.

Following scrutiny by state regulators, the trading platform closed, and the value of the cryptocurrency fell by almost 90%. Subsequently, buyers of the cryptocurrency sued alleging that the promoters of the cryptocurrency were liable under Section 12 of the Securities Act for soliciting the purchase of unregistered securities through their videos. The promoters moved to dismiss, arguing that their videos did not “directly communicate” with plaintiffs and that “the Securities Act covers sales pitches to particular people, not communications directed to the public at large.” The district court dismissed, concluding that plaintiffs failed to state a Section 12 claim because they based their case on interactions with the promoters’ “publicly available content” and that they needed to allege that the promoters had “individually” urged plaintiffs to purchase the cryptocurrency.

Promoting a Security in a Mass Communication Is Solicitation

The Eleventh Circuit framed the issue as “whether a person can solicit a purchase, within the meaning of the Securities Act, by promoting a security in a mass communication.” The court began its analysis by noting that “nothing in the Securities Act makes a distinction between

individually targeted sales efforts and broadly disseminated pitches.” The court continued that Section 12 authorizes buyers of an unregistered security to sue a person who “offers or sells” it. Under the Securities Act, “a person offers a security every time he makes an offer to dispose of—or a solicitation of an offer to buy—a security for value.” The court noted that Congress did not limit solicitations to “personal” or individualized ones as the district court did. Pointing out that the Securities Act suggests the opposite, the court explained that the Securities Act “makes a person who solicits the purchase of an unregistered security liable for using ‘any means’ of communication[,]” which the Securities Act defines to include radio and television advertisements. The court further stated that “Securities Act precedents do not restrict solicitations under the Act to targeted ones.” The court noted that the Eleventh Circuit has “never added that those efforts at persuasion must be personal or individualized.”

Solicitation Under the Securities Act Encompasses “New Means of Solicitation”

The Eleventh Circuit took issue with the district court’s “cramped” reading of the Securities Act, which under its interpretation would hold a seller liable for recommending a security in a personal letter but not “for making the exact same pitch in an internet video—or through other forms of communication listed as exemplars in the Act, like circulars, radio advertisements, and television commercials.” The court declined to adopt an approach that would allow a seller to dodge liability by selecting one means of communication over another, particularly where the Act expressly covers “any means” of communication. Determining that a “new means of solicitation is not any less of a solicitation[,]” the court concluded that when the promoters urged people to buy the cryptocurrency in online videos, they solicited the purchases that followed.

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