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Vicarious Liability for Securities Law Violations: Respondeat Superior and the Controlling Person Sections

VICARIOUS LIABILITY FOR SECURITIES LAW VIOLATIONS: RESPONDEAT SUPERIOR AND THE CONTROLLING PERSON SECTIONS

The Securities Act of 1933[1] and the Securities Exchange Act of 1934[2] regulate a broad range of activities involving securities transactions and impose civil liability for violations of various of their provisions and regulations promulgated thereunder.[3] Liability extends not only to those directly responsible for violations but, under section 15 of the Securities Act[4] and section 20(a) of the Securities Exchange Act,[5] jointly and severally to persons who "control" [6] violators. Each of these

1. 15 U.S.C. §§ 77a-77aa (1970).

2. *Id.* §§ 78a-78hh.

3. For a general discussion of civil liabilities under the securities laws, see 3 L. Loss, Securities Regulation 1683-1754 (2d ed. 1961, Supp. 1969).

4. 15 U.S.C. § 77o (1970) provides:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

5. *Id.* § 78t(a) provides:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

6. Neither the Securities Act nor the Securities Exchange Act specifically defines "control," "controlling," or "controlled." Indeed, it appears from the legislative history that the omission of a definition was intentional. With respect to the Securities Exchange Act, it was stated:

> It was thought undesirable to attempt to define the term ["control"]. It would be difficult if not impossible to enumerate or to anticipate the many ways in which control may be exerted. A few examples of the methods used are stock ownership, lease, contract, and agency. It is well known that actual control sometimes may be exerted through ownership of much less than a majority of the stock of a corporation either by ownership of such stock alone or through such ownership in combination with other factors.

H.R. Rep. No. 1383, 73d Cong., 2d Sess. 26 (1934). Although there is no definition of control within the statutes, the SEC, in keeping with the suggestion of the House report, has viewed control in very broad terms. SEC Rule 12b-2, for example, defines sections, however, provides a defense for the controlling person: Section 15 exempts a controlling person from joint and several liability if he "had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist";[7] section 20(a) exempts a controlling person who "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." [8]

Employer liability for certain employee misconduct exists at common law under the agency principle of respondeat superior.[9] Unlike the vicarious liability imposed by sections 15 and 20(a), no "good faith" or "no knowledge" defense is available where liability is premised upon respondeat superior, the employer being liable for the conduct of an employee within the scope of his employment regardless of any personal culpability on the part of the employer.[10] The distinction between these two theories of vicarious liability in terms of the availability of a defense has led to significant questions involving statutory interpretation and the policy of the securities laws. Specifically, where it is sought to impute liability to a brokerage house for securities law violations by an employee, the question arises whether the plaintiff may invoke the absolute liability imposed on an employer by respondeat superior or must proceed under the controlling person provisions of the securities acts,[11] in which case the brokerage house may escape liability by establishing the appropriate defense.

In *SEC v. Lum's, Inc.*,[12] the United States District Court for the Southern District of New York held that the controlling person sections provide the exclusive basis for imputing liability to the employer for an employee's violation of the securities laws. It is submitted that this holding was premised upon an overly broad reading of the precedents

control as "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 240.12b-2 (1973).

7. 15 U.S.C. § 77o (1970).

8. *Id.* § 78t(a).

9. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 215-67 (1958) [hereinafter cited as RESTATEMENT].

10. *Id.* §§ 219, 229.

11. The courts generally consider the controlling person provisions of the two acts together, citing authority construing one in support of a similar construction of the other. *See, e.g.*, Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973); Kamen & Co. v. Paul H. Aschkar & Co., 382 F.2d 689 (9th Cir. 1967); SEC v. Lum's, Inc., 365 F. Supp. 1046 (S.D.N.Y. 1973); Johns Hopkins Univ. v. Hutton, 297 F. Supp. 1165 (D. Md. 1968), *aff'd in part, rev'd in part, and remanded*, 422 F.2d 1124 (4th Cir. 1970).

12. 365 F. Supp. 1046 (S.D.N.Y. 1973).

cited and a failure to interpret the statutory language in a manner consistent with the remedial purpose of the securities laws. The nature of the harm these statutes were enacted to prevent suggests that the controlling person provisions were intended to be supplemental means for extending vicarious liability to certain situations in which liability could not be imputed under strict agency theory. The sections thus should not be construed as exclusive sources of relief, eliminating the investor protection traditionally available under the principle of respondeat superior.

The action by the Securities and Exchange Commission against the Lehman Brothers brokerage firm was based on the gratuitous passing by a firm member to persons holding securities of Lum's, Inc. of insider information concerning changes in the financial position of that corporation. Although holding the employee liable, the court relieved Lehman Brothers of liability for violation of section 10(b) of the Securities Exchange Act[13] and rule 10b-5[14] promulgated thereunder. Specifically rejecting the argument by the SEC that the brokerage firm should be liable for its employee's illegal activities under the principle of respondeat superior, the court concluded that section 20(a) is the exclusive standard for determining vicarious liability under the Securities Exchange Act.[15] Foundation for this position was argued to exist in the congressional intent in enacting the controlling person sections. In addition, although conceding that a broker-dealer's primary duty to the public is to provide adequate and reasonable supervision of its employees, the court held that the need for such supervision does not warrant imposition of absolute liability. After observing that "[e]very violation . . . by a salesman does not necessarily imply a breach of the employer's duty to supervise," [16] the court exonerated Lehman Brothers from liability as a controlling person under section 20(a) on the basis of its "good faith" defense that it neither induced its employee to commit the wrongful acts nor was negligent in failing to supervise him adequately.

Application of the controlling person sections to the typical employer-employee relationship is not novel;[17] the *Lum's* court, however, is the first to take such a forceful stand on the exclusivity issue. *Myzel v. Fields*[18] and *SEC v. First Securities Co.*[19] provide the strongest support

13. 15 U.S.C. § 78j (1970).
14. 17 C.F.R. § 240.10b-5 (1973).
15. 365 F. Supp. at 1062.
16. *Id.* at 1064.
17. *See* 36 FORDHAM L. REV. 95 (1967).
18. 386 F.2d 718 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).
19. 463 F.2d 981 (7th Cir.), *cert. denied*, 409 U.S. 880 (1972).

for the position that the controlling person sections are exclusive means of imposing vicarious liability for securities law violations. Cited by the court in *Lum's* for the proposition that "the respondeat superior standard does not apply" to securities acts cases,[20] both decisions employed the controlling person provisions in holding principals liable for their agents' securities violations. Although there was no discussion in either case whether vicarious liability under sections 15 and 20(a) is the exclusive means for imputing liability for an agent's violation of the securities laws, both courts recognized that a principal would be liable on agency grounds if his agent's actions constitute common law torts as well as statutory violations.[21] It is thus arguable that the courts considered agency theory restricted to common law torts and the controlling person sections determinative of a principal's liability for an agent's statutory violations.

Of the other cases cited by the *Lum's* court in which liability of a brokerage firm for the acts of its employees had been predicated on section 20(a), two invoked the controlling person provision without discussion of the possibility of liability based on respondeat superior,[22] while another contained dictum that liability under section 20(a) is "not *restricted* by principles of agency or conspiracy." [23] Despite its apparent importance to the *Lum's* court, the final case cited, *Kamen & Co. v. Paul H. Aschkar & Co.*,[24] is not without ambiguity in its application to the exclusivity question. In *Kamen* the plaintiff had contended that the statutory duties imposed on stock exchange members are nondelegable and that an employer therefore should be liable to the same extent as an employee committing violations. The Court of Appeals for the Ninth Circuit observed that the plaintiff's theories "may be valid propositions of law but they have no application to actions

20. 365 F. Supp. at 1062.

21. In *Myzel* the court held that the defendant's liability for his agent's rule 10b-5 violations was governed "neither by principles of agency nor conspiracy" but by section 20 of the Securities Exchange Act. It then observed that "under common law principles, a principal is liable for the deceit of his agent committed in the very business he was appointed to carry out." 386 F.2d at 738. The *First Securities* court, after holding the defendant corporation liable for its president's common law fraud on agency principles, in another section of its opinion founded liability for the same acts upon the controlling person provisions as violations of SEC Rule 10b-5. 463 F.2d at 985-87.

22. Douglass v. Glen E. Hinton Invs., Inc., 440 F.2d 912 (9th Cir. 1971); Hecht v. Harris, Upham & Co., 430 F.2d 1202 (9th Cir. 1970).

23. Richardson v. MacArthur, 451 F.2d 35, 41 (10th Cir. 1971) (emphasis supplied).

24. 382 F.2d 689 (9th Cir. 1967), *cert. granted*, 390 U.S. 942, *cert. dismissed*, 393 U.S. 801 (1968), *rev'g* CCH FED. SEC. L. REP. ¶ 91,565 (S.D. Cal. 1964).

maintained under the Securities Acts." [25] The defendant was exonerated under the controlling person sections on the basis of its good faith and lack of any reasonable grounds for knowledge of its employees' illegal conduct.

Although the *Lum's* court interpreted the holding in *Kamen* as implying that respondeat superior has no place in determining vicarious liability under the securities laws,[26] further examination reveals this view to be questionable. The *Kamen* court had already exonerated the defendant of common law agency liability for its employees' fraudulent misrepresentations on the ground that the plaintiff was sufficiently experienced in the securities industry to realize that Kamen's representatives were not authorized to engage in the particular misconduct with which they were charged.[27] Whether the court would have followed the same reasoning regarding the controlling person sections of the statutes if it had not already found an absence of common law liability on agency doctrines is, at best, conjectural.

Even less precedential value may be accorded *Lanza v. Drexel & Co.*,[28] in which *Kamen* was specifically approved by the Court of Appeals for the Second Circuit. The *Lum's* court, while recognizing that *Lanza* was not directly on point, cited that case as supportive of its exclusivity position. Not only is *Lanza* not directly on point, but, it is submitted, approval there of the *Kamen* decision is irrelevant to the conclusion reached in *Lum's.* In *Lanza* no principal-agent relationship was involved; rather, the issue was one of a director's liability for the rule 10b-5 violations of corporate officers, and the court approved the *Kamen* holding that section 20 is determinative of a controlling person's liability, as opposed to direct liability under the rule, and not as opposed to liability under agency principles.[29]

Of primary interest to the *Lum's* court was a statement in *Lanza* which it quoted as follows: " 'The intent of Congress in adding this section [20], passed at the same time as the amendment to section 15 of the 1933 Act, was obviously to impose liability only on those . . . who fall within its definition of control and who are in some meaningful sense culpable participants in the fraud perpetrated by controlled persons.' " [30] It is imperative to note that this quotation was taken out of

25. *Id.* at 697.
26. 365 F. Supp. at 1062-63.
27. 382 F.2d at 694-96. *See* 29 Md. L. Rev. 59, 65 (1969).
28. 479 F.2d 1277 (2d Cir. 1973).
29. *Id.* at 1301.
30. 365 F. Supp. at 1064, *quoting from* 479 F.2d at 1299.

context: It was presented in relation to a *corporate director's* liability, not an employer-employee relationship. Indeed, the convenient placement of ellipses by the *Lum's* court eliminated the single word "directors." [31]

The use of the word "agency" in section 15 of the Securities Act[32] arguably may indicate that the section was intended to preempt common law agency doctrine. Moreover, although neither "agency" nor any other relationship is specified in section 20(a) of the Securities Exchange Act, this lack of specificity appears to have been intentional, the draftsmen of that section having stated: "In this section . . . when reference is made to 'control', the term is intended to include actual control *as well as* what has been called legally enforceable control." [33] Congress thus apparently left undefined the term "control" in an effort to encompass the widest possible range of relationships where control of another exists, including those as yet unimagined schemes that were certain to be developed in attempts to frustrate the purpose of the Act.[34] Following this reasoning, and reading the two statutes *in pari materia*, it becomes apparent that section 20(a), as well as section 15 of the Securities Act, was intended to embrace agency relationships.

Nevertheless, there is nothing to suggest that existing liabilities were intended to be disturbed by either statute. Taking into account the atmosphere surrounding passage of the securities laws, it is hardly conceivable that Congress could have intended to narrow liabilities under common law agency principles while extending liability to persons formerly unreachable at common law. Rather, it is more probable that the controlling person provisions were enacted to extend liability into those agency situations where strict application of respondeat superior principles would preclude liability, that is, where the agency relationship is not founded upon the employer-employee nexus required for application of respondeat superior. The more limited vicarious liability under sections 15 and 20(a) would indeed be appropriate where the controlling person does not have the opportunity for supervision that is available, at least theoretically, in the employer-employee relationship.

31. 479 F.2d at 1299. Moreover, the legislative reports cited by the court in *Lum's* in support of its "ineluctable" conclusion (365 F. Supp. at 1063-64) relate to section 11 of the Securities Act, 15 U.S.C. § 77k (1970), and the direct liabilities of directors and others thereunder, not to liabilities under the controlling person sections. *See* H.R. REP. No. 152, 73d Cong., 1st Sess. 26 (1933).

32. *See* note 4 *supra*.

33. H.R. REP. No. 1383, 73d Cong., 2d Sess. 26 (1934) (emphasis supplied).

34. *See* notes 47-50 *infra* & accompanying text.

A second argument against imposition of strict vicarious liability upon an employer for the securities law violations of its employees similarly overlooks the remedial purposes of the securities acts. Arguably, the creation of new statutory causes of action[35] with lesser burdens of proof upon plaintiffs[36] than existed under common law theories imposes unreasonable responsibilities upon employers held strictly accountable under the principle of respondeat superior. According to this reasoning, the defenses available to controlling persons under the securities acts should be available to employers to compensate for the increased likelihood of plaintiff recovery for employee violations. The character of the harm the securities statutes were enacted to remedy indicates, however, an equal or greater likelihood that Congress, in fact, intended to increase the employer's exposure to liability.

Many, if not a majority, of the frauds perpetrated in the securities industry involve the misconduct of employees,[37] typically in the form of false or unfounded representations made to a customer by a sales representative and frequently without actual knowledge or bad faith on the part of the firm's management. The average investor, however, is entitled to, and customarily does, rely on the integrity, reputation, and responsibility of the brokerage firm itself, rather than the particular employee with whom he deals. Moreover, it is the firm which reaps benefits from the transaction, whether financial, as in most cases, or simply in the potential for future transactions, and it is the firm to whom the investor should be able to look for compensation. These considerations militate strongly against the suggestion that Congress intended to condone what, in effect, would be the "hear-no-evil, see-no-evil" approach to brokerage management[38] which would follow from requiring exclusive use of the controlling person sections, with their concomitant defenses, to impose vicarious liability for employee violations of securities laws.

35. For example, mere participation in an unregistered sale of stock may be actionable. *See* 15 U.S.C. § 771 (1970).

36. The plaintiff, for example, may be relieved of proving reliance upon the misrepresentations of a brokerage house employee, as well as any causal connection between his damages and the employee's misconduct. Newberg v. American Dryer Corp., 195 F. Supp. 345, 352 (E.D. Pa. 1961).

37. Brief for SEC as Amicus Curiae at 23, Paul H. Aschkar & Co. v. Kamen & Co., 390 U.S. 942 (1968), in Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 606 n.37, 607 n.41 (1972) [hereinafter cited as SEC Brief].

38. *See* Johns Hopkins Univ. v. Hutton, 297 F. Supp. 1165, 1212 (D. Md. 1968).

A more reasonable interpretation of the purpose of the controlling person sections is illustrated by *Johns Hopkins University v. Hutton*,[39] in which an employee of the Hutton brokerage firm had made material misrepresentations to induce the purchase of certain oil production payments. Finding an agency relationship, the court imposed Securities Act liability upon the firm for the employee's fraudulent acts under the doctrine of respondeat superior.[40] In reply to the firm's contention that its liability was that of a "controlling person" subject to the defenses of section 15, the court characterized the purpose of that provision to have been a means of imposing liability "which would supplement, and extend beyond, common law principles of agency and *respondeat superior*."[41] *Johns Hopkins* thus stands for the proposition that the controlling person sections were intended to apply only where liability cannot be imposed under other theories.[42]

Recently, in *Fey v. Walston & Co.*,[43] the Court of Appeals for the Seventh Circuit, in applying the principle of respondeat superior to alleged violations by a brokerage house employee of antifraud provisions of the Securities Exchange Act, stressed that "the 'control' doctrine . . . has not preempted or restricted operation of general rules in the securities field."[44] Observing that "the recognized policy of public protection requires the two types of remedy to be complementary,

39. 297 F. Supp. 1165 (D. Md. 1968), *aff'd in part, rev'd in part, and remanded*, 422 F.2d 1124 (4th Cir. 1970).

40. *Id.* at 1210. The court relied upon section 257 of the RESTATEMENT OF AGENCY, *supra* note 9.

Professor Ruder has observed: "The use of agency principles to support liability in securities litigation suggests that the semicodified principles of the common law as set forth in the *Restatement of Agency* . . . are becoming part of the securities law civil liability framework." Ruder, *supra* note 37, at 603 (footnote omitted). For other examples of courts citing the RESTATEMENT OF AGENCY in securities litigation, see Lewis v. Walston & Co., 487 F.2d 617, 623 (5th Cir. 1973); Kamen & Co. v. Paul H. Aschkar & Co., 382 F.2d 689, 695 (9th Cir. 1967).

41. 297 F. Supp. at 1212.

42. In fact the court's language assigns more than a primary role to respondeat superior: "[T]his Court . . . does not believe that Section 15, relating to 'controlling' persons applies to the employer (brokerage house)—employee relationship." *Id.* at 1211. Thus, *Johns Hopkins* appears to be the complete converse of *Lum's*, both decisions adopting an exclusivity position but *Johns Hopkins* holding that it is respondeat superior which is the exclusive means of imputing liability. In light of the specific language of the controlling person sections, the interpretation in *Johns Hopkins* excluding their application to any employment relationship appears overly restrictive.

43. Nos. 72-1487, -1488, -1489 & -1490 (7th Cir. Mar. 14, 1974).

44. *Id.* at 22.

rather than exclusive,"[45] the court held that a basis for imputing liability to the employer "need not be sought within the confines of Section 20(a)."[46]

Support for this view exists in the legislative history surrounding enactment of the controlling person sections. The primary purpose of section 15 of the Securities Act was to thwart the use by corporate directors of "dummies"[47] in efforts to avoid personal liability for their corporate acts.[48] Since section 20(a) of the Securities Exchange Act obviously was patterned after its counterpart in the Securities Act, it may be inferred that it, too, was aimed at other than the typical employ-

45. *Id.* n.18.

46. *Id.* at 22. Instructions to the trial jury had contained references to the defendant's failure to maintain "a reasonably adequate system of internal supervision and control" over its employees and its lack of "reasonable diligence" in enforcing such a system as possible grounds for finding that the defendant "did not act in good faith within the meaning of the Securities Exchange Act." The defendant, nevertheless, objected to the failure of the trial court specifically to refer to the text of section 20(a) or otherwise to emphasize the defenses available thereunder. The appellate court dismissed this objection, stating: "[Defendant], in view of the doctrine of *respondeat superior*, obtained a more favorable instruction through even general reference to the Section 20(a) defense than it was entitled to, and is in no position to complain." *Id.*

47. The Senate bill defined "dummy" as "a person who holds legal or nominal title to any property, but is under a moral or legal obligation to recognize another as the owner thereof; or a person who has the nominal authority to act in any capacity but is under a moral or legal obligation to act therein in accordance with the direction of another." S. 875, 73d Cong., 1st Sess. § 2(k) (1933).

48. The SEC has made the following excellent analysis of the legislative history of section 15:

> The legislative history of the controlling-persons provisions supports this analysis of their precise focus. The original Senate version of the 1933 Act contained a number of provisions designed to "aid in preventing directors from evading the liabilities incident to signing the registration statement * * *." This draft of the Act dealt with the use of a "dummy" signer of a registration statement and made the fraudulent use of a "dummy" unlawful. The House version, which contained registration and anti-fraud provisions very much like those eventually adopted, contained no sections expressly dealing either with "dummies" or with controlling persons. In conference these "'dummy provisions' which were calculated to place liability upon a person who acted through another, irrespective of whether a direct agency relationship existed but dependent upon the actual control exercised by one party over the other * * * [were] welded into one and incorporated as a new section in the substitute." The "new section" is what is now the controlling-persons provision of Section 15. Thus, that section was the result of congressional concern with the special problem presented by the use of "dummies", and was not designed to govern the usual employment situation.

SEC Brief, *supra* note 37, at 14.

er-employee relationship. A statement by Thomas O. Corcoran, former presidential advisor and an author of the Securities Exchange Act, supports this contention: "The purpose [of section 20] is to prevent evasion of the provisions of the section by organizing dummies who will undertake the actual things forbidden by the section." [49] That this view was shared by the securities industry at the time is indicated by the statement of Richard Whitney, then President of the New York Stock Exchange: "These provisions seem to apply more particularly to corporations and officers, directors and stockholders of corporations than to exchanges or brokers." [50]

The SEC has consistently taken the position that respondeat superior is the proper theory for imposing vicarious liability, whenever possible, for violations of the securities laws,[51] and SEC administrative holdings are to that effect.[52] Such precedents, which admittedly are not controlling on judicial tribunals, were found unpersuasive by the *Lum's* court.[53] Nevertheless, the interpretation given a statute by the agency charged with its administration is entitled to considerable weight.[54] Holdings of the SEC, particularly, "have fared well in the courts. Their precedent value has often been recognized." [55] In at least two cases, *Armstrong, Jones & Co. v. SEC*[56] and *SEC v. Charles A. Morris & Associates*,[57] courts have relied heavily upon SEC administrative decisions in holding employers liable on an agency basis for employee violations of the securities laws.

Supplemental, rather than exclusive, liability under the controlling person sections also appears in line with the trend of judicial interpretation of other sections of the securities laws. In light of the remedial nature of the acts, and the liberal construction to be given them, the courts have generally expanded, rather than restricted, liabilities there-

49. *Hearings on S. Res. 48 (72d Cong.) and S. Res. 56 & 57 (73d Cong.) Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 6571 (1933).

50. *Id.* at 6639.

51. Armstrong, Jones & Co. v. SEC, 421 F.2d 359, 362 (6th Cir.), *cert. denied*, 398 U.S. 958 (1970). *See* SEC Brief, *supra* note 37, at 9-15.

52. *See, e.g.*, Cady, Roberts & Co., 40 S.E.C. 907, 911 (1961); H.F. Schroeder & Co., 27 S.E.C. 833, 837 (1948); E.H. Rollins & Sons, 18 S.E.C. 347, 379 (1945).

53. 365 F. Supp. at 1062.

54. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 49.05 (4th ed. rev. 1973).

55. 1 A. BROMBERG, SECURITIES LAW: FRAUD § 1.3(1) (1973). *See, e.g.*, Armstrong, Jones & Co. v. SEC, 421 F.2d 359, 362 (6th Cir. 1970); United States v. Re, 336 F.2d 306, 316 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964); Charles Hughes & Co. v. SEC, 139 F.2d 434, 437 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944).

56. 421 F.2d 359 (6th Cir. 1970).

57. CCH FED. SEC. L. REP. ¶ 93,756 (W.D. Tenn. 1973).

under.[58] As Professor Ruder has noted, cases involving implied private rights of action for violations of the Securities Exchange Act are particularly supportive of retaining respondeat superior as a theory of vicarious liability, where applicable. The courts have refused in these implied action cases to apply defenses which would have been available had the action been brought under a section expressly imposing liability.[59] By analogy, it can be argued that the stricter liability imposed under the respondeat superior doctrine should not be diluted by the defenses of the controlling person sections.

CONCLUSION

Although several recent decisions suggest doubts concerning the proper application of the principle of respondeat superior to securities law violations, the decision in *SEC v. Lum's, Inc.* that the controlling person provisions of the securities acts provide the exclusive means for imputing vicarious liability for such violations is without firm support, either in precedent or policy. It is submitted that effectuation of the language of the controlling person sections, as well as of a primary purpose of the securities laws of investor protection, requires interpretation of the sections, with their defenses, as supplements to common law agency principles, to be applied where agency doctrine is unavailable to impute liability.

58. For example, the scope of the phrase "any person . . . who offers or sells" in section 12 of the Securities Act, 15 U.S.C. § 77l (1970), has been expanded to include brokers of the seller or buyer, as well as those who actually pass title. *See* 3 L. Loss, *supra* note 3, at 1712-19. Other examples include creation of implied private remedies under section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) (1970), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1973) (*see* 3 L. Loss, *supra*, at 1763-71) and under the federal proxy rules (*see* 2 *id.* at 932-56).

59. Ruder, *supra* note 37, at 608 & n.43. For example, an action under section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j (1970), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1973), is not barred merely because the conduct giving rise to the action might also be maintained under sections 11 and 12 of the Securities Act, 15 U.S.C. §§ 77k, 77l (1970), and the rule 10b-5 action is free of the restrictions of those sections. *E.g.*, Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951).