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INTRODUCTION

In early 2007, an increase in subprime mortgage defaults caused some softness in the financial markets. Later in 2007, that softness spread and intensified, causing a liquidity and credit crisis affecting even prime mortgages. Still later, in 2008, the crisis expanded further, resulting in the collapse of one of the most venerated investment banks on Wall Street—Lehman Brothers. The crisis continued with an economic recession that some say was the worst since the Great Depression in the 1930s.[1]

During this period of economic turmoil, stock market indices, such as the Dow Jones Industrial Average and the S&P 500, tumbled. The multi-trillion dollar market for fixed-income investments, such as asset-backed securities, lost even more value. Not surprisingly, investments of both institutional investors and individuals saving for retirement declined in value. In the wake of these losses, investors sued either their financial advisors or others involved in the sale of the securities that turned out to be poor investments.

Louisiana was not immune to the poor conditions in the financial markets, and many Louisiana investors whose investments lost value, like those in other states, brought lawsuits seeking to recoup their losses. Such investors often invoked the Louisiana Securities Law, which was originally enacted in 1920[2] and was later re-enacted in 1985.[3] These investors, or their attorneys, likely

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* Mr. Miles has devoted much of his practice to representing individuals and corporations in claims arising under the Louisiana Securities Law and federal securities laws. The views and opinions expressed herein are not necessarily the views and opinions of any other person or entity and should not be viewed as such.

1. *See* Lawrence Mishel & Heidi Sheirholz, *The Worst Downturn Since the Great Depression*, ECON. POLICY INST. (June 2, 2009), http://www.epi.org/publication/jobspict_200906_preview/, archived at http://perma.cc/GYD6-GTN3.

2. State v. Powdrill, 684 So. 2d 350, 353 (La. 1996) ("Louisiana enacted its first blue sky law in 1920."). State securities laws, including Louisiana's, are often referred to as "blue sky laws." *See id.* The Louisiana Supreme Court offers that this moniker is derived from a United States Supreme Court decision describing the purpose of state securities laws "as the prevention of 'speculative schemes which have no more basis than so many feet of blue sky.'" *Id.* (citing Steven M. Axler, Comment, *The Blue Sky Laws of Louisiana*, 41 LOY. L. REV. 1 (1995) (quoting Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917))).

3. LA. REV. STAT. ANN. §§ 51:701–724 (2003).

found that, despite being on the books for years, the Louisiana Securities Law had infrequently been interpreted by Louisiana courts, leaving investors with little guidance on certain important issues.

This Article explores the private right of action under the Louisiana Securities Law, noting interpretations of that law provided recently by courts in the wake of the financial crisis and recession.[4] It also examines those provisions of the law that have not often been interpreted by the courts, offering comparisons of the language of Louisiana's private right of action to that of its federal analogue, section 12(2) of the Securities Act of 1933, which may be utilized to fill the gap left by the dearth of Louisiana Securities Law cases that exists even after the 2008–2009 financial crisis.

I. THE FEDERAL SECURITIES ANTIFRAUD PROVISIONS

An understanding of the private right of action under the Louisiana Securities Law requires a review of the federal securities private right of action on which the Louisiana Securities Law is based.[5] There are at least two provisions of federal securities laws that have relevance here: section 12(2) of the Securities Act of 1933 and section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b–5 promulgated thereunder.

A. Section 12(2) of the Securities Act of 1933

In the wake of the stock market crash of 1929, Congress undertook to regulate transactions in securities.[6] As part of this effort, Congress enacted the Securities Act of 1933. Section 12(2) of that Act provides a private remedy for purchasers of securities in an initial distribution of securities where the sale is made by

4. To the author's knowledge, no such examination of the provisions of the Louisiana Securities Law has appeared in any publication since 1995 when a helpful piece was published in the Loyola Law Review. *See* Axler, *supra* note 2, at 1. This Article provides an update in light of the recent financial crisis, with a focus on the private right of action available under the Louisiana Securities Law.

5. *See Powdrill*, 684 So. 2d at 353 (Louisiana courts "look to the federal law and jurisprudence interpreting the securities law for guidance in interpreting the Louisiana provisions."); *see also* Heck v. Triche, 775 F.3d 265, 282 (5th Cir. 2014) ("Because there is a dearth of law interpreting the definition of a seller under the state statute, we look to federal law interpreting the Louisiana law's model.").

6. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 (1976).

means of "an untrue statement of a material fact" or an omission.[7] The cause of action may be brought against "[a]ny person who":

> Offers or sells a security . . . by 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 (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.[8]

The cause of action is a narrow one. It is only available to securities purchasers—not securities sellers—and may only be brought against so-called statutory sellers.[9] Although the law applies to oral communications as well as prospectuses,[10] it is directed primarily at the initial distribution of securities, rather than at secondary market transactions.[11] Purchasers also need not prove scienter[12] or reliance,[13] but instead must merely prove that they did not know of the untruth or omission.[14] Purchasers, however, must prove that the untruth concerned a material fact or that an omitted fact was material.[15]

The text of section 12(2) offers a statutory seller two defenses in addition to the common law defenses that have been recognized by various courts.[16] The seller can offer evidence "that he did not know, and in the exercise of reasonable care could not have

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7. *See* Securities Act of 1933, § 12(2) (as amended), 15 U.S.C. § 77*l*(a)(2) (2012).

8. *Id.*

9. Pinter v. Dahl, 486 U.S. 622, 641–42, 647–54 (1988). *See also* Cortec Indus. v. Sum Holding, 949 F.2d 42, 50 (2d Cir. 1991) (finding that section 12 liability extends to sellers, but not purchasers).

10. § 12(2).

11. *See* Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 578 (1995).

12. Scienter generally means acting "with intent to deceive, manipulate, or defraud." Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983).

13. *See Gustafson*, 513 U.S. at 576 (stating that section 12(2) provides "buyers a right to rescind without proof of reliance"); Schlesinger v. Herzog, 2 F.3d 135, 141 (5th Cir. 1993) (holding that scienter and reliance are not elements of a section 12(2) claim).

14. § 12(2).

15. *See, e.g.*, Simpson v. Se. Inv. Trust, 697 F.2d 1257, 1258 (5th Cir. 1983) (describing materiality standard for Section 12(2) claims); TSC Indus. v. Northway, Inc., 426 U.S. 438, 444–47 (1976) (discussing materiality standard for claim brought pursuant to section 14(a) of the Securities Exchange Act of 1934).

16. *See infra* note 131.

known, of such untruth or omission."[17] The seller can also reduce the damage recoverable by showing that the damages sought were not caused by the untruth or omission.[18]

The damages recoverable by a purchaser under section 12(2) are significant. A purchaser may obtain from a statutory seller found liable rescission or damages calculated based upon the consideration paid if the purchaser no longer owns the security.[19]

B. Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5

The second relevant federal remedy was not expressly created by Congress but rather is an implied remedy long ago recognized by the United States Supreme Court. For many years, the Court has recognized that securities market participants have a private right of action under section 10(b) of the Securities Exchange Act of 1934[20] and Rule 10b–5[21] promulgated thereunder.[22] Rule 10b–5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

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17. § 12(2); Junker v. Crory, 650 F.2d 1349, 1361 (5th Cir. 1981) ("Section 12(2) provides the seller a defense if he sustains 'the burden [of] proof that he did not know, and in the exercise of reasonable care could not have known, of (the) untruth or omission . . . .'" (quoting section 12(2)).

18. § 12(2).

19. *Id.* An aggrieved purchaser may sue "to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." *Id.*

20. 15 U.S.C. § 78j(b).

21. Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b–5 (2014).

22. *See* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (confirming the existence of private cause of action under Rule 10b–5); Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983) ("[A] private right of action under section 10(b) of the 1934 Act and Rule 10b–5 has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure.").

> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[23]

The implied right of action under section 10(b) and Rule 10b–5 has six elements: (1) material misrepresentation (or omission); (2) scienter; (3) a connection with a purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.[24] Section 10(b) and Rule 10b–5 provide a private cause of action in a wider variety of circumstances than does a claim under section 12(2) of the Securities Act of 1933. For example, the Supreme Court has interpreted Rule 10b–5 to provide a private right of action for purchasers *and* sellers of securities, unlike section 12(2) claims, which may be brought only by purchasers.[25] Rule 10b–5 also is not limited to securities bought or sold in an initial distribution.[26]

Section 10(b) and Rule 10b–5 claims, however, require the plaintiff to bear a heavier burden of proof than the plaintiff bringing a section 12(2) claim.[27] To prove a Rule 10b–5 claim, a plaintiff is required to show both reliance and loss causation,[28] although there is a presumption of reliance in failure-to-disclose cases.[29] As well, a section 10(b)/Rule 10b–5 plaintiff must prove that "the defendant acted with scienter,"[30] rather than merely proving negligence.

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23. 17 C.F.R. § 240.10b–5 (2014).

24. Dura Pharmaceuticals v. Broudo, 544 U.S. 336, 341–42 (2005).

25. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730–31 (1975) (affirming rule that private action under section 10(b) and Rule 10b–5 is available only to purchasers and sellers of securities).

26. *Huddleston*, 459 U.S. at 382 (noting the cause of action "can be brought by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance' in connection with the purchase or sale of a security").

27. *Id.*

28. *See* Stoneridge Inv. Partners v. Scientific-Atlanta, 552 U.S. 148, 159 (2008) ("Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action."); *Dura Pharmaceuticals*, 544 U.S. at 338 ("A private plaintiff who claims securities fraud must prove that the defendant's fraud caused an economic loss.").

29. *See* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153–54 (1972) ("Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision.").

30. *Huddleston*, 459 U.S. at 382. *See also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976) (holding that a private cause of action for damages under Section 10(b) and Rule 10b–5 will not lie "in the absence of any allegation of 'scienter'—intent to deceive, manipulate, or defraud").

II. A Private Right of Action Under the Louisiana Securities Law—Louisiana's Analogue to Section 12(2) of the Securities Act of 1933

The Louisiana Securities Law provides a private right of action roughly analogous to a federal section 12(2) claim. Two provisions of the Louisiana Securities Law create the private right of action. First, Louisiana Revised Statutes section 51:712(A)(2), which has language analogous to section 12(2), prohibits certain practices in connection with the sale of securities. Separately, Louisiana Revised Statutes section 51:714(A) creates a private right of action against those who violate section 712(A)(2).[31] While a section 712(A)(2) claim is different from a federal section 12(2) claim in several important ways,[32] Louisiana courts are nearly uniform in recognizing that section 712(A)(2) is the analogue to section 12(2) of the Securities Act of 1933.[33]

The Louisiana Securities Law also includes language similar to section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b–5, which can be found in Louisiana Revised Statutes section 51:712(D). Like its federal counterpart, Louisiana Revised Statutes section 51:712(D) prohibits "any person in connection with the offer, sale, or purchase of any security," from "employ[ing] any device, scheme, or artifice to defraud."[34] However, the section

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31. Section 714(A) also creates a private right of action for violations of section 712(A)(1) and section 712(A)(3), which contain registration requirements for securities and those who sell them. LA. REV. STAT. ANN. § 51:714(A) (2003).

32. *See infra* Part III.

33. *See* Heck v. Triche, 775 F.3d 265, 279 (5th Cir. 2014) ("Section 712 of the Louisiana Securities Law . . . is *not* based on Section 10(b) of the Securities and Exchange Act of 1934, but is '[m]odeled after Section 12(2) of the Securities Act of 1933.'" (citation omitted) (quoting State v. Powdrill, 684 So. 2d 350, 354 (La. 1996))); Guidry v. Bank of LaPlace, 954 F.2d 278, 286 (5th Cir. 1992) ("The Louisiana Blue Sky Laws . . . were patterned after the 1933 Act."); Bamburg v. Axis Onshore LP, No. 08-1466, 2009 WL 1579512, at *8–9 (W.D. La. June 4, 2009) (describing claim under Section 712(A) as "Louisiana's § 12(2) equivalent"); State v. Powdrill, 684 So. 2d 350, 353 (La. 1996) ("The provisions of the Louisiana Securities Law, (formerly known as Louisiana Blue Sky Law) are analogous to the provisions of the federal Securities Act of 1933."); Ponthier v. Manalla, 951 So. 2d 1242, 1254 (La. Ct. App. 2007) ("The provisions of the Louisiana Securities Law are analogous to the provisions of the Federal Securities Act of 1933 . . . ."); Taylor v. First Jersey Sec., Inc., 533 So. 2d 1383, 1385 (La. Ct. App. 1988) ("[T]he parties agree that parts of the Louisiana Blue Sky Law are analogous to provisions of the federal Securities Act of 1933 and that LSA-R.S. 51:712(A)(2) is analogous to Section 12(2) of the 1933 Act."). *But see* Landry v. Thibaut, 523 So. 2d 1370, 1379 (La. Ct. App. 1988) (stating that the language of the predecessor to Section 712(A) "closely tracks that of rule 10b–5").

34. Section 712(D), in its entirety, provides:

conferring the private right of action, section 714(A), does *not* include any language granting a private right of action against those who violate the Louisiana analogue to federal Rule 10b–5.[35]

Relying on the language of section 714(A), Louisiana federal courts and one state court have rejected attempts by investors to assert a private right of action under section 712(D), the state version of Rule 10b–5, in cases decided both before and after the most recent financial crisis began.[36] The conclusions reached by these courts are largely supported by the interplay between the federal and state schemes. As previously noted, the Louisiana Securities Law and, in particular, sections 712 and 714 were re-enacted in 1985.[37] By that time, the United States Supreme Court had, on multiple occasions, recognized an implied private right of action for violations of section 10(b) and Rule 10b–5.[38] Securities plaintiffs have argued that the Louisiana Legislature believed that by enacting language similar to section 10(b) and Rule 10b–5, it was confirming the existence of a private right of action under Louisiana law. But, more likely, the Legislature's choice when re-enacting the Louisiana Securities Law not to include any language expressly creating a private right of action for violations of section 712(D) suggests an intent *not* to create such a right. In contrast, other states, such as Alabama and Tennessee, have explicitly included a cause of action for violations of the state counterpart to

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> It shall be unlawful for any person in connection with the offer, sale, or purchase of any security, directly or indirectly:
> (1) To employ any device, scheme, or artifice to defraud.
> (2) To engage in any transaction, act, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser or seller.

LA. REV. STAT. ANN. § 51:712(D) (2003).

35. *See id.* § 51:714(A) (providing right to recover damages against "[a]ny person who violates R.S. 51:712(A)").

36. *See* Blanchard v. Lee, No. 13-220, 2013 WL 5701667, at *3 (E.D. La. Oct. 18, 2013) ("Louisiana law does not support the § 51:712(D) claim relied on by plaintiffs in their opposition."); Tranchina v. Howard, Weil, Labouisse, Friedrichs, Inc., No. 95-2886, 1996 WL 312026, at *5 (E.D. La. June 7, 1996) (noting the investor had no right of action for violation of Section 712(D), the analogue to federal Rule 10b–5); *see also* Hiern v. Sarpy, No. 94-835, 1995 WL 640528, at *16 (E.D. La. Oct. 31, 1995) (same); Dendinger v. First Nat'l Corp., Nos. 87–4611, 88–0165 & 89–0824, 1992 WL 318593, at *9 (E.D. La. Oct. 28, 1992) (same); Solow v. Heard McElroy & Vestal, L.L.P., 7 So. 3d 1269, 1281–82 (La. Ct. App. 2009).

37. *See supra* text accompanying note 3; *see also* LA. REV. STAT. ANN. §§ 51:712, 51:714 (2003).

38. *See supra* text accompanying note 22.

Rule 10b–5.[39] It is thus reasonable to conclude that the Louisiana Legislature, which is deemed to know relevant Rule 10b–5 jurisprudence,[40] deliberately chose not to provide a private right of action to remedy violations of section 712(D).

III. STATUTORY ELEMENTS OF A PRIVATE CLAIM UNDER SECTION 712(A)(2)

With no private right of action available to remedy violations of section 712(D), the primary state law remedy for Louisiana investors is found in section 712(A)(2). Section 712(A)(2) of the Louisiana Securities Law reads as follows:

> A. It shall be unlawful for any person:
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> * * *
>
> (2) To offer to sell or to sell a security by means of any oral or written untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, if such person in the exercise of reasonable care could not have known of the untruth or omission.[41]

Unpacking this language, it appears that the text of the Louisiana Securities Law sets forth four principal elements: (1) an offer or sale of a security; (2) such offer or sale is by means of any oral or written untrue statement of fact or any omission of fact; (3) the statement or omission relates to a material fact; and (4) the buyer does not know of the untruth or omission. A fifth element exists, but has been interpreted in such different ways as to make

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39. *See* TENN. CODE ANN. § 48-2-122(a)(1) (West 2015) (setting forth liability for those who "sell a security" in violation of Section 48-2-121(a), which itself includes language analogous to both Section 12(2) and Rule 10b–5); *see also* ALA. CODE § 8-6-19(a) (2002) (setting forth liability for those who sell securities in violation of any provision of the Act, which includes both an analogue to Section 12(2) and Rule 10b–5).

40. Borel v. Young, 989 So. 2d 42, 48 (La. 2007) ("A long line of jurisprudence holds that those who enact statutory provisions are presumed to act deliberately and with full knowledge of existing laws on the same subject, with awareness of court cases and well-established principles of statutory construction, with knowledge of the effect of their acts and a purpose in view, and that when the Legislature changes the wording of a statute, it is presumed to have intended a change in the law.").

41. LA. REV. STAT. ANN. § 51:712(A)(2) (2003).

describing it succinctly in a list of elements next to impossible. The statute requires that "such person in the exercise of reasonable care could not have known of the untruth or omission," but the cases diverge widely on who—plaintiff–purchaser or defendant–seller—bears the burden of proof on this point as well as on what must be proven, with most cases holding that the defendant's reasonable care is at issue, while at least one case holds that this "element" concerns the diligence of the plaintiff.[42] Finally, more than one case provides that loss causation is an element of a Louisiana Securities Law claim.[43]

Judicial interpretations of the elements of a section 712(A)(2) claim are discussed below, with particular emphasis on those provisions that have recently been interpreted by Louisiana courts as well as on those provisions that remain unexamined. In both instances, the discussion compares section 712(A)(2) and section 12(2) of the Securities Act of 1933. A wealth of caselaw interpreting section 12(2) has developed over the years and provides much-needed guidance in interpreting section 712(A)(2).

A. The "Seller" Requirement Under Louisiana Law

An analysis of the text of section 712(A)(2) confirms that the Louisiana Securities Law includes a requirement that the defendant be a "seller" of securities. For comparison purposes, section 12(2) of the federal Securities Act of 1933 applies to "any person who . . . offers or sells a security."[44] Because this language specifically refers to the actions of "offer[ing]" and "sell[ing]," courts interpreting section 12(2) have concluded that a section 12(2) claim may only be brought against a seller of securities, not a purchaser.[45]

The equivalent portion of section 712(A)(2) includes nearly identical language, rendering it unlawful "[t]o offer to sell or to sell a security" if the other elements of the cause of action are met.[46] Section 712(A)(2) also references the "buyer" needing to prove

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42. *See infra* Part III.F and cases cited therein.

43. Fishman v. Morgan Keegan & Co., No. 10–2, 2011 WL 4853367, at *11 (E.D. La. Oct. 13, 2011) ("Loss causation is . . . an essential element of Plaintiffs' claims under Louisiana's Blue Sky Law."), *aff'd on other grounds by* Fishman v. Morgan Keegan & Co., 574 F. App'x 449 (5th Cir. 2014). *See also* Williams v. Edward D. Jones & Co., 556 So. 2d 914, 916 (La. Ct. App. 1990) (explaining that a claim under the Louisiana Blue Sky Law "is governed by the causation standard articulated in numerous federal cases interpreting federal securities law").

44. Securities Act of 1933, § 12(2) (as amended), 15 U.S.C. § 77*l*(a)(2) (2012).

45. *See, e.g.*, Cortec Indus., Inc. v. Sum Holding, L.P., 949 F.2d 42, 50 (2d Cir. 1991) (stating that section 12 liability extends to seller, not purchasers).

46. LA. REV. STAT. ANN. § 51:712(A)(2) (2003).

that he did not know "of the untruth or omission."[47] Although caselaw interpreting this language in section 712(A)(2) is sparse even after the 2008–2009 financial crisis, the language of the statute suggests that a state law claim for violating section 712(A)(2) may only be brought by a buyer against a seller of a security, not by a seller against a buyer.

A question exists regarding who is a "seller"—the person or entity who solicited the sale or transferred title, or others more tangentially involved in the sale, such as lawyers and accountants. The United States Supreme Court answered this question in 1988 in *Pinter v. Dahl* with respect to section 12(2)'s "seller" requirement, which is analogous to section 712(A). In *Pinter*, as recognized by one federal court in Louisiana,

> The Supreme Court held that generally, liability should not extend beyond those who offer securities for [sale] or solicit offers for sale but that inclusion of the phrase "solicitation of an offer to buy" within the [federal] definition of "offer" brings a non-owner who engages in solicitation within the scope of the [Securities Act of 1933].[48]

Pinter overruled a line of federal precedent that had interpreted "seller" in section 12(2) broadly to cover all persons who were a "substantial factor" in bringing about the transaction, including lawyers and accountants.[49]

Despite *Pinter*'s narrowing of the persons who are statutory "sellers" under section 12(2), and the similarity in language

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47. *Id.*

48. Keller v. Bryan-Worley & Co., Nos. 88-1620, 88-1722, 1989 WL 1771, at *2 (E.D. La. Jan. 10, 1989) (citing Pinter v. Dahl, 486 U.S. 622, 641–42, 647–54 (1988)). *See also* Taylor v. First Jersey Sec., Inc., 533 So. 2d 1383, 1384–86 (La. Ct. App. 1988) (concluding that investor stated a claim pursuant to section 712(A) where broker allegedly "used 'high pressure' sales techniques and fraudulent misrepresentations to induce him to make a number of purchases of extremely speculative stock").

49. *See* Pharo v. Smith, 621 F.2d 656, 667 (5th Cir. 1980) (Section 12(2) liability reaches to those "whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place."), *overruled by Pinter*, 486 U.S. at 648–55. Of note, the Supreme Court in *Pinter* interpreted section 12(1) of the Securities Act of 1933, which is identical to section 12(2). *See Pinter*, 486 U.S. at 648–55. Federal appellate courts have since followed *Pinter* in confirming that the substantial factor test does not apply to section 12(2) claims. *See, e.g.*, Ryder Int'l Corp. v. First Am. Nat'l Bank, 943 F.2d 1521, 1527 (11th Cir. 1991) ("Much of the same reasoning the Supreme Court used to reject the substantial-factor test as employed by the Fifth Circuit to determine section 12(1)'s scope, also applies to whether that test has continued validity under section 12(2) . . . ." (citations omitted)); Capri v. Murphy, 856 F.2d 473, 478–79 (2d Cir. 1988) (holding that *Pinter* applies to section 12(2)).

between section 12(2) and section 712(A)(2), the timing of the enactment of section 712(A)(2) allows an argument for a broader interpretation of "seller"—one that potentially includes lawyers, accountants, or others involved in the sale of securities. As noted above, the Louisiana Securities Law was re-enacted in 1985. At that time, the language of section 12(2) was interpreted broadly under the line of precedent later overruled by *Pinter*. Anyone determined to be a "substantial factor" in bringing about the sale was considered to have "[o]ffer[ed] or s[old] a security" for purposes of section 12(2) liability.[50] Against this legal backdrop, which the Louisiana Legislature is deemed to know, the Legislature re-enacted the Louisiana Securities Law using the language of federal section 12(2) that was then being interpreted broadly.[51] It is therefore at least plausible that the Louisiana Securities Law should be interpreted to allow a cause of action against anyone who is a "substantial factor" in bringing about the sale.[52] However, because the Supreme Court in *Pinter* rejected the "substantial factor" test based upon its careful reading of the language employed in section 12(2), and because the language of the Louisiana Securities Law is identical in relevant respects to that of section 12(2), the substantial factor test likely does not have much of a foothold in Louisiana law.

B. By Means of "Any Oral or Written Untrue Statement of Material Fact or Omission"

The second statutory element of a section 712(A)(2) claim has been interpreted very infrequently. A comparison of the wording of section 712(A)(2) to that of section 12(2), however, provides some insight into the meaning of the requirement that the security be sold by means of "any oral or written untrue statement of material fact or omission."[53]

The federal section 12(2) claim has a limited application. The United States Supreme Court in *Gustafson v. Alloyd Co., Inc.* held that a section 12(2) claim applies only to the sale of securities made during the initial distribution of securities, i.e., initial public

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50. *See Pharo*, 621 F.2d at 667.

51. LA. REV. STAT. ANN. § 51:712(A)(2) (2003) (imposing liability on those who "offer[ed] to sell or [sold] a security").

52. *See* Solow v. Heard McElroy & Vestal, L.L.P., 7 So. 3d 1269, 1280–81 (2009) (considering whether an accountant was a substantial factor in bringing about a sale in determining potential liability under section 712(A)(2), but stopping short of adopting substantial factor test).

53. LA. REV. STAT. ANN. § 51:712(A)(2) (2003).

offerings.[54] The Court in large part limited the applicability of section 12(2) because of that statute's use of the phrase "prospectus." The Court reasoned that because section 12(2) applied to "[a]ny person who . . . [o]ffers or sells a security . . . by means of a prospectus or oral communication," and because the term "prospectus" referred to "public offers by an issuer or its controlling shareholders," section 12(2) was limited to initial public offerings.[55]

Section 712(A)(2), in contrast to section 12(2), does not include the phrase "prospectus," the key word central to the *Gustafson* decision. Instead of the phrase "a prospectus or oral communication, which includes an untrue statement of a material fact" found in section 12(2), section 712(A)(2) employs the phrase "any oral or written untrue statement of a material fact."[56] Section 712(A)(2) thus appears to apply to a broader group of transactions than does section 12(2). In this regard, the language of section 712(A)(2) approximates that of federal Rule 10b–5, which prohibits the making of "any untrue statement of material fact"[57] and has been interpreted to apply beyond the initial distribution of securities.[58] Although no Louisiana case has considered whether there are *Gustafson*-type limitations on section 712(A)(2), the plain text of section 712(A)(2) suggests there are not.

Similar to a section 12(2) claim, the second element of a section 712(A)(2) claim also includes a requirement that the investor prove that the statement made was "untrue" or that a statement is "misleading" because of an omitted material fact.[59] Although countless federal cases discuss in detail whether particular alleged statements are untrue as made or misleading without the disclosure of additional material facts, there is by comparison a dearth of caselaw discussing in detail what the terms "untrue" or "misleading" mean in the Louisiana Securities Law. Many older Louisiana cases do not mention at all whether the particular statements made were untrue or misleading.[60] Or, alternatively, the cases address the issue

54. Gustafson v. Alloyd Co. Inc., 513 U.S. 561, 575–78 (1995).
55. *Id.* at 567–78.
56. LA. REV. STAT. ANN. § 51:712(A) (2003).
57. 17 C.F.R. § 240.10b–5 (2014).
58. *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1417 (3d Cir. 1997) ("The private right of action under Section 10(b) and Rule 10b–5 reaches beyond statements and omissions made in a registration statement or prospectus or in connection with an initial distribution of securities and creates liability for false or misleading statements or omissions of material fact that affect trading on the secondary market." (footnote omitted)).
59. LA. REV. STAT. ANN. § 51:712(A)(2) (2003).
60. *See, e.g.*, Taylor v. First Jersey Sec., Inc., 533 So. 2d 1383, 1386 (La. Ct. App. 1988) (mentioning that plaintiff alleged that the defendant made

only in passing and with much less explanation of why the statement is untrue or misleading than can be found in cases discussing the similar requirement under section 12(2).[61] Nonetheless, because section 712(A)(2) is patterned after section 12(2), litigants can refer to the vast body of federal caselaw discussing when a statement is "untrue" or "misleading" for guidance.

One recent Louisiana case provides some guidance, at least for cases involving omissions. In *Macareno v. Karon*, Judge Hicks of the United States District Court for the Western District of Louisiana considered a claim brought pursuant to the Louisiana Securities Law by investors in a mineral lease against the person who sold them their interest.[62] The transaction was consummated when the investors wired their purchase money to the seller, who then was to operate the lease.[63] Before analyzing the statements at issue, the court acknowledged that "affirmative statements or misrepresentations" are a prerequisite for a Louisiana Securities Law claim.[64] It then reasoned that the seller's "instruction to wire the purchase money to [the seller] directly" was misleading without an explanation that the money wired would *not* be used as intended.[65] The court also noted that the seller immediately after the purchase sent to the investors an operating agreement, which provided that the seller, through a wholly owned limited liability company, would operate the leases, and the court concluded that this was misleading without an accompanying disclosure that the seller had "limited experience operating mineral leases."[66] Based on this reasoning, the court concluded that the investor's claim should survive summary judgment, and the omissions issue should be presented to the jury.[67]

The *Macareno* case is one of the only Louisiana cases that helpfully explains that affirmative statements or misrepresentations are a prerequisite to any omissions claim under section 712(A)(2)

"specific allegations" regarding the misstatements of material fact without discussing what those misstatements were).

61. *See, e.g.*, Se. Wireless Network, Inc. v. U.S. Telemetry Corp., 954 So. 2d 120, 123 (La. 2007) (referencing the defendant's alleged "misrepresentations and omissions of material fact related to the state of [the defendant corporation's] financial condition and the state of its technology").

62. Macareno v. Karon, No. 08-0292, 2010 WL 743564, at *1 (W.D. La. Feb. 24, 2010).

63. *Id.*

64. *Id.* at *6.

65. *Id.*

66. *Id.*

67. *Id.*

and provides examples of the types of statements rendered misleading by an omission. Nonetheless, there remains a dearth of caselaw on point, and reference to the better-developed federal law will be of use to investors and sellers alike to determine whether the particular statements at issue are "untrue" or "misleading" without additional disclosures.

C. Materiality

The recent *Macareno* decision also provides helpful insight into the meaning of the materiality requirement under section 712(A)(2).[68] In considering whether certain undisclosed facts were material, the court there closely followed federal law, stating that, under the Louisiana Securities Law, "the standard for materiality is objective, not subjective."[69] Going further, the court articulated a working definition of materiality exclusively by reference to federal law, concluding that various facts not disclosed to the investor were material because such facts "'would have been viewed by the reasonable investor as having altered the total mix of information made available.'"[70] The *Macareno* court's articulation of the meaning of materiality and its reliance on federal law make sense. Both section 712(A)(2) and section 12(2) use the term "material" in similar ways.[71] Accordingly, there is no reason to believe that materiality under Louisiana law should mean anything different than it does under federal law. Although there is little caselaw interpreting section 712(A)(2), under *Macareno*, and considering the similarity between the federal and state law, litigants and practitioners seeking to interpret "materiality" under section 712(A)(2) would be justified in referring to the vast body of federal caselaw that explores the contours of what constitutes information that "would have been viewed by the reasonable investor as having altered the total mix of information made available."[72]

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68. *Id.* at *4, 5.
69. *Id.* at *5.
70. *Id.* at *5 (quoting Nathenson v. Zonagen Inc., 267 F.3d 400, 418–19 (5th Cir. 2001)).
71. Both statutes prohibit certain "untrue statement[s] of material fact" and require the disclosure of "material fact[s] necessary in order to make" certain statements "not misleading." *See* LA. REV. STAT. ANN. § 51:712(A)(2) (2003); Securities Act of 1933, § 12(2) (as amended), 15 U.S.C. § 77*l*(a)(2) (2012).
72. *Macareno*, 2010 WL 743564, at *5. This vast body of federal caselaw finds its origins in the Supreme Court case of *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), which explained that to fulfill the materiality requirement "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having

D. The Purchaser's Knowledge of the Untrue Fact or Omission

The section 712(A)(2) requirements of knowledge and reliance have been infrequently interpreted by Louisiana courts, but the text of section 712(A)(2) is nearly identical to the text of section 12(2). Section 712(A)(2) states clearly that the "buyer" must not "know[] of the untruth or omission,"[73] while the section 12(2) purchaser similarly must show that he did "not know[] of [the] untruth or omission."[74]

There is, however, no requirement that the buyer prove reliance on the untruth or omission. Recently, Judge Hicks in *Macareno* so held,[75] as did a panel of the Fifth Circuit,[76] thus confirming that, under section 712(A)(2) of the Louisiana Securities Law, the investor need not prove that he or she relied on any statements to recover, just like a section 12(2) claim.[77]

E. Loss Causation

Section 712(A)(2) does not explicitly state that loss causation—a causal connection between the misrepresentation and the loss—is an element of a Louisiana Securities Law fraud claim.[78] However, one older case as well as a post-financial crisis

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significantly altered the 'total mix' of information made available." *See also* Basic Inc. v. Levinson, 485 U.S. 224, 249 (1988) (adopting *TSC Industries* materiality test for the Section 10(b) and Rule 10b–5 context).

73. LA. REV. STAT. ANN. § 51:712(A)(2) (2003).

74. §12(2).

75. *Macareno*, 2010 WL 743564, at *5 (stating that "it is clear that reliance is not a part of the requirements for fraud in Louisiana" when discussing the investors' Louisiana Securities Law claim). *See also* Taylor v. First Jersey Sec., Inc., 533 So. 2d 1383, 1385–86 (La. Ct. App. 1988) (setting forth the elements of a Louisiana Securities Law cause of action, which do not include reliance as listed).

76. Heck v. Triche, 775 F.3d 265, 281 (5th Cir. 2014) ("Section 712 does not require a plaintiff to prove that he relied on the defendant's misrepresentation or omission.").

77. *See* Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 576 (1995) (noting the 1933 Securities Act section 12(2) grants "buyers a right to rescind without proof of reliance"); Wright v. Nat'l Warranty Co., 953 F.2d 256, 262 (6th Cir. 1992) ("Section 12(2) . . . has no requirement of justifiable reliance on the part of a purchaser." (citation omitted)); Schlesinger v. Herzog, 2 F.3d 135, 141 (5th Cir. 1993) (scienter and reliance are not elements of a section 12(2) claim).

78. Loss causation is different from transaction causation. Loss causation is "a causal connection between the material misrepresentation and the loss." Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 342 (2005) (citation omitted). "Transaction causation is akin to reliance, and requires only an allegation that

case both hold that loss causation is an essential element of a section 712(A)(2) claim.[79]

These cases' interpretations of Louisiana Securities Law are different than the requirements for a section 12(2) claim. Section 12(2) does not require the plaintiff–purchaser to prove loss causation but instead provides the defendant–seller an affirmative defense of loss causation: the defendant–seller may prove that the losses claimed are *not* the result of the "depreciation in value of the subject security resulting from" the untruth or omission.[80]

Interestingly, the language of section 12(2) was amended in 1995 to specifically include the loss causation affirmative defense.[81] Before that amendment, the language of section 12(2) did not even mention loss causation, and at least some federal courts held that a section 12(2) claim did not require proof of loss causation.[82] The

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'but for the claimed misrepresentations or omissions, the plaintiff would not have entered into the detrimental securities transaction.'" Lentell v. Merrill Lynch & Co., Inc., 396 F.3d 161, 172 (2d Cir. 2005). Reliance is not an element of a section 712(A)(2) claim. *See* discussion *supra* Part III.D.

79. Fishman v. Morgan Keegan & Co., No. 10–2, 2011 WL 4853367, at *11 (E.D. La. Oct. 13, 2011) ("Loss causation is . . . an essential element of Plaintiffs' claims under Louisiana's Blue Sky Law."), *aff'd on other grounds by* Fishman v. Morgan Keegan & Co., 574 F. App'x 449 (5th Cir. 2014). *See also* Williams v. Edward D. Jones & Co., 556 So. 2d 914, 916 (La. Ct. App. 1990) (explaining that a claim under the Louisiana Blue Sky Law "is governed by the causation standard articulated in numerous federal cases interpreting federal securities law").

80. 15 U.S.C. § 77*l*(b) (2012); *In re* Adams Golf, Inc. Sec. Litig., 381 F.3d 267, 277 (3d Cir. 2004) ("Under sections 11 and 12(a)(2), plaintiffs do not bear the burden of proving causation. It is the defendants who may assert, as an affirmative defense, that a lower share value did not result from any nondisclosure or false statement." (citing, *inter alia*, § 77*l*(b)).

81. *See* Dec. 22, 1995, Pub. L. 104-67, Title I, § 105, 109 Stat. 757. The loss causation requirement for a Section 12(2) claim reads:

> (b) Loss causation
> In an action described in subsection (a)(2) of this section, if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) of this section represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

§ 12(2).

82. *See* 15 U.S.C. § 77*l* (1994); *see also* Casella v. Webb, 883 F.2d 805, 808 (9th Cir. 1989) (For a section 12(2) claim, "[t]he buyer need not show any causal connection between the misrepresentation and his damage; indeed, he need not

language of section 712(A)(2) resembles section 12(2) before the 1995 amendment added the loss causation affirmative defense.[83] Nevertheless, under at least two decisions, loss causation is an essential element of a Louisiana Securities Law fraud claim.[84]

The loss causation requirement recognized by the *Williams* and *Fishman* courts is good policy, deserving of its foothold in Louisiana caselaw. Requiring investors to prove loss causation ensures that investors who seek to recover losses resulting from market conditions rather than the defendant's misrepresentation or omission do not obtain a windfall. Allowing investors to recover such market losses also unfairly penalizes defendant–sellers, potentially requiring them to compensate investors for market losses that investors knew were possible when the investment was made.

F. Scienter and Knowledge of the Untruth or Omission

A section 712(A)(2) claim under Louisiana law does not appear to require the plaintiff to prove scienter—an intent to deceive, manipulate, or defraud—with perhaps one notable exception. The text of sections 712(A) and 714(A) nowhere mentions deception, manipulation, or fraud.[85] And although the Louisiana Supreme Court has not addressed the issue, the Louisiana Fifth Circuit Court of Appeal in *Landry v. Thibaut* has held that the standard is negligence, unlike the standard for a federal Rule 10b–5 claim,

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even show that he has been damaged." (quoting L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 873 (1988))).

83. *Compare* 15 U.S.C. § 77*l* (1994), *with* LA. REV. STAT. ANN. § 51:712(A) (2003).

84. Fishman v. Morgan Keegan & Co., No. 10–2, 2011 WL 4853367, at *11 (E.D. La. Oct. 13, 2011) ("Loss causation is . . . an essential element of Plaintiffs' claims under Louisiana's Blue Sky Law."). *See also* Williams v. Edward D. Jones & Co., 556 So. 2d 914, 916 (La. Ct. App. 1990) (noting that a claim under the Louisiana Blue Sky Law "is governed by the causation standard articulated in numerous federal cases interpreting federal securities law"). The Fifth Circuit recently affirmed *Fishman*. *See* Fishman v. Morgan Keegan & Co., 574 F. App'x 449 (5th Cir. 2014). The Fifth Circuit, however, did not reach the issue whether loss causation is an element of a section 712(A)(2) claim. Instead, it concluded that the investors failed to preserve their argument on that issue, while also stating that "[t]he question whether the Louisiana Securities Law requires proof of loss causation does not have a straightforward answer." *Id.* at 454. Even more recently the Fifth Circuit reiterated that whether loss causation is an element of a section 712 claim "is uncertain." Heck v. Triche, 775 F.3d 265, 280 n.15 (5th Cir. 2014).

85. *See* LA. REV. STAT. ANN. §§ 51:712, 51:714 (2003).

which requires scienter.[86] The United States Court of Appeals for the Fifth Circuit, citing *Landry*, also has stated that "[s]ection 712 does not require a plaintiff to establish scienter, but, like Section 12(2) of the Securities Act of 1933, requires only a showing that the defendant was negligent."[87] These pronouncements are supported by the text of section 712(A)(2), which specifically refers to "the exercise of reasonable care" rather than deception, manipulation, or fraud.[88]

One exception is for cases where the financial advisor allegedly churns the investor's account—that is, makes excessive purchases and sales in the investor's account for the purpose of generating commissions that benefit the advisor. In 1988, the Louisiana Fourth Circuit Court of Appeal in *Taylor v. First Jersey Securities, Inc.* addressed whether the plaintiff investor had stated a cause of action for, *inter alia*, churning under the Louisiana Securities Law, and concluded that section 712(A) was broad enough to encompass a claim for churning.[89] The court's analysis began with a review of the text of section 712(A)(2), which does not mention scienter.[90] But the court later referred to the elements of a churning claim under section 10(b) and Rule 10b–5—which specifically include scienter—and in the next sentence stated that the petition in question "makes all the required allegations."[91] Although this language does not appear to explicitly adopt for Louisiana the elements of a churning claim under federal law, the court's reference to scienter suggests that scienter must be proven to prevail on a churning claim under the Louisiana Securities Law.[92] No Louisiana courts have addressed this issue since the *Taylor* decision in 1988.

For a non-churning case, it appears that negligence is the standard. But open questions remain: What is the burden of proof, and who bears that burden—the plaintiff–investor or the defendant–seller?

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86. Landry v. Thibaut, 523 So. 2d 1370, 1380 (La. Ct. App. 1988).
87. *Heck*, 775 F.3d at 280 (citing *Landry*, 523 So. 2d at 1380).
88. Of course, the Louisiana Securities Law does reference fraud and deceit in section 712(D), but as explained *supra* the Louisiana Legislature did not provide a private cause of action for violations of section 712(D). *See* discussion *supra* Part II.
89. Taylor v. First Jersey Sec., Inc., 533 So. 2d 1383, 1386 (La. Ct. App. 1988).
90. *Id.* at 1385–86. *See also* LA. REV. STAT. ANN. § 51:712(A) (2003).
91. *Taylor*, 533 So. 2d at 1386 (citing Miley v. Oppenheimer & Co., 637 F.2d 318, 324 (5th Cir. 1981)).
92. The court's reference to a federal 10b–5 churning claim, rather than to section 12(2)—the federal analogue to section 712(A)(2)—and the absence of a scienter requirement in the text of section 712(A)(2) calls into question whether *Taylor* was correct in recognizing a churning claim under Louisiana law.

Ambiguous wording of section 712(A)(2) following a statutory amendment has led to conflicting caselaw on these issues. Before a 1999 amendment, the last clause of section 712(A)(2) read: "if such person shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission."[93] In 1996, the Louisiana Supreme Court in *State v. Powdrill* considered this language in the context of a criminal prosecution for a purported violation of section 712(A)(2).[94] The court interpreted the phrase "such person" to refer to the seller and agreed with the prosecution's description of this last clause as an affirmative defense for which the seller bears the burden of proof.[95] In fact, the court held that section 712(A)(2) was unconstitutional to the extent that, in criminal prosecutions, it imposed on the defendant–seller a duty to prove what the court considered to be "an essential element" of a criminal violation of section 712(A)(2).[96]

The *Powdrill* court's view of section 712(A)(2), if not its ruling of unconstitutionality, was consistent with federal courts' interpretations of similar language in section 12(2). Section 12(2) imposes liability upon a seller "who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission."[97]

In an apparent response to the *Powdrill* decision, the Louisiana Legislature in 1999 amended section 712(A)(2) and deleted the phrase beginning with "shall not sustain the burden of proof that he did not know."[98] After the amendment, section 712(A)(2) read as it does now:

> A. It shall be unlawful for any person:
>
> * * *
>
> (2) To offer to sell or to sell a security by means of any oral or written untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, if such person in the

93. LA. REV. STAT. ANN. § 51:712(A)(2) (1998) (subsequently amended).
94. 684 So. 2d 350 (La. 1996).
95. *Id.* at 354.
96. *Id.* at 356.
97. Securities Act of 1933, § 12(2) (as amended), 15 U.S.C. § 77*l*(a)(2) (2012).
98. Act No. 250, 1999 La. Acts 1094–95.

> exercise of reasonable care could not have known of the untruth or omission.[99]

One might think that the *Powdrill* decision, along with the subsequent legislative amendment, shows that "such person" in section 712(A)(2) still refers to the defendant–seller, as it did prior to the amendment. One also might think that the plaintiff now must prove that "such person"—the defendant–seller—"in the exercise of reasonable care could not have known of the untruth or omission."[100]

Such a reading of section 712(A)(2), however, would lead to odd results. A securities plaintiff would seem to negate the defendant's negligence if he or she succeeded in proving that "in the exercise of reasonable care [the defendant] could *not* have known of the untruth or omission."[101] If the plaintiff were required to offer such proof, then arguably the plaintiff never could prove that the defendant breached the standard of care in failing to disclose what he or she could not have known. Or, as the Fifth Circuit recently put it, the statute would "penalize[] a seller that did not know, and, acting with reasonable care, still could *not* have known, of the falsity of the statement or the misleading nature of the omission."[102] Courts in Louisiana have interpreted the language in an attempt to make sense of the statute.[103] No consensus has been reached, however, and perhaps none will be reached until the Legislature amends the statute to add clarity or the Louisiana Supreme Court offers its interpretation.

Three interpretations have developed since the 1999 amendment. Several Louisiana courts, including three after the start of the most recent financial crisis, have concluded that the plaintiff bears the burden of proving that "the defendant knew, or in the exercise of reasonable diligence, could have known, of the untruth or omission."[104] These courts effectively read the word "not" out of

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99. LA. REV. STAT. ANN. § 51:712(A)(2) (2003).
100. *Id.*
101. *Id.*
102. Heck v. Triche, 775 F.3d 265, 279 (5th Cir. 2014).
103. *See infra* notes 104, 105, 107.
104. *See Heck*, 775 F.3d at 279–80 (concluding that the current language of section 712(A)(2) was the product of a "scrivener's error" included when the statute was amended in 1999 and "that the legislature simply intended to remove the burden of proof of demonstrating the exercise of reasonable care from the defendant and require the plaintiff, or state in a criminal proceeding, to prove the defendant's knowledge or negligence"); Bamburg v. Axis Onshore LP, No. 08-1466, 2009 WL 1579512, at *9 (W.D. La. June 4, 2009) (holding the plaintiff bears the burden of proving that "the defendant knew, or in the exercise of reasonable diligence, could have known, of the untruth or omission"); Ponthier

the last clause in section 712(A)(2) and require the plaintiff to prove that the defendant breached the standard of care by not discovering the untruth or omission. This interpretation is consistent with *Powdrill* and with the 1999 amendment in that it places the burden of proof on this issue on the plaintiff.

Taking a different view, Judge Hicks in *Macareno v. Karon* ascribed a meaning to the word "not" in the statute, concluding that the statute requires proof that "in the exercise of reasonable care [defendant] could not have known of the untruth or omission."[105] Citing pre-1999 amendment caselaw, Judge Hicks interpreted the provision as an affirmative defense, specifically stating that it is the defendant's burden to offer such proof.[106] Although it gives meaning to the word "not" in the statute, this interpretation appears to give little consideration to the *Powdrill* court's holding that the attempt by the prior version of the statute to place the burden on the defendant was unconstitutional in criminal cases or to the Legislature's subsequent attempt to cure the constitutional problem identified in *Powdrill*.

The third and final view that has developed since the 1999 amendment was in the United States District Court for the Eastern District of Louisiana in *Fishman v. Morgan Keegan & Co.*[107] There, Judge Carl Barbier interpreted section 712(A)(2) as placing the burden of proof on the plaintiff–investor, consistent with *Powdrill* and the 1999 amendment.[108] Judge Barbier, however, appears to have required the plaintiff–investor to prove that he or she—not the defendant–seller—in the exercise of reasonable care could not have known of the untruth or omission.[109] In so doing,

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v. Manalla, 951 So. 2d 1242, 1255 (La. Ct. App. 2007) (same); George v. White, 101 So. 3d 1036, 1045 (La. Ct. App. 2012) (quoting section 712(A)(2) and concluding that the plaintiff "has offered no evidence that [defendant] knew or 'in the exercise of reasonable care' could have known, that the statements made in the subscription agreement were not true").

105. *See* Macareno v. Karon, No. 08–0292, 2010 WL 743564, at *4 (W.D. La. Feb. 24, 2010) ("[W]hile plaintiff must plead all elements, 'defendant must sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known of the untruth or omission.'" (quoting Landry v. Thibaut, 523 So. 2d 1370, 1380 (La. Ct. App. 1988))).

106. *See id.*

107. Fishman v. Morgan Keegan & Co., No. 10–2, 2011 WL 4853367, at *11 (E.D. La. Oct. 13, 2011).

108. *See id.*

109. *See id.* ("Section 712(A)(2) of the Louisiana Blue Sky Law specifically provides that a buyer may only maintain a claim for securities fraud if 'in the exercise of reasonable care [he] could not have known of the untruth or omission.'").

the court necessarily interpreted the phrase "such person" in the last clause of section 712(A)(2) to mean the investor–plaintiff or "buyer," rather than the defendant–seller. Such a reading gives effect to the word "not" in the last clause of section 712(A)(2). And it reasonably concludes that the phrase "such person" refers back to the word "buyer" in the previous clause, which is logical given that "buyer" is the last "person" to which the statute refers before the phrase "such person" in the last clause appears. Although Judge Barbier's view is the best of the three interpretations emerging since the 1999 amendment, it nonetheless creates some tension with the history of section 712(A)(2) and its federal counterpart, both of which suggest the focus of the last clause is on the defendant's knowledge, not that of the plaintiff–investor.

In the end, none of these three interpretations is perfect, and the poorly worded 1999 amendment is to blame. Unless the Legislature amends the statute to add clarity or the Louisiana Supreme Court considers and resolves the issue, these three divergent and imperfect interpretations of section 712(A)(2) and perhaps others will proliferate in the jurisprudence, causing uncertainty for securities litigants and investors.

IV. CONTROL PERSON LIABILITY FOR VIOLATIONS OF SECTION 712(A)(2)

Louisiana sets forth control person liability for those who violate the analogue to a federal section 12(2) claim.[110] Control person liability generally is available to an investor against persons who, although not the seller of the securities, participated in a transaction and could have exercised control over the transaction and stopped the sale.

Control person liability, like many other securities law concepts, can be found in federal law.[111] Although there is some split of

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110. *See* LA. REV. STAT. ANN. § 51:714(B) (2003).

111. 15 U.S.C. § 77o(a) (2012). The full text of that statute reads:

> 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 sections 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.

Id.

authority,[112] the prevailing view among the federal courts of appeal is that control person liability attaches where the defendant participated in the general operations of the violator and possessed the power to control the specific activity complained of.[113]

Under the Louisiana Securities Law, control person liability is similar to control person liability under federal law. Louisiana control person liability extends to those "who directly or indirectly control[]" a person liable for violating section 712(A)(2), and to "every general partner, executive officer, or director of such person liable . . . , every person occupying a similar status or performing similar functions, and every dealer or salesman who participates in any material way in the sale is liable jointly and severally."[114] Louisiana courts have had few occasions to interpret this statute, even after the 2008–2009 financial crisis. On the occasions Louisiana courts have had to interpret this statute, they have determined that a supervisor of a seller was a control person, as were corporate directors of a seller, while an auditor of a seller, a bank that allegedly induced the sale of securities, and corporations whose employees were on the board of directors of a seller were not control persons.[115] From these cases, it seems some Louisiana

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112. *See In re* Fed. Nat'l Mortgage Ass'n Sec., Deriv., & "ERISA" Litig., 503 F. Supp. 2d 25, 43 (D.D.C. 2007) (describing split of authority).

113. *See, e.g.*, Metge v. Baehler, 762 F.2d 621, 631 (8th Cir. 1985); *see also* Harrison v. Dean Witter Reynolds, Inc., 974 F.2d 873, 881 (7th Cir. 1992) (explaining that the court considers "whether the alleged control-person actually participated in, that is, exercised control over, the operations of the person in general and, then, to whether the alleged control-person possessed the power or ability to control the specific transaction or activity upon which the primary violation was predicated, whether or not that power was exercised"). The United States Court of Appeals for the Fifth Circuit requires the plaintiff to "at least show that the defendant had an ability to control the specific transaction or activity upon which the primary violation is based," but has not determined whether the plaintiff must also show the defendant actually exercised such control, or whether the plaintiff must show general involvement in the operations of the violator. *See* Heck v. Triche, 775 F.3d 265, 283 & n.18 (5th Cir. 2014).

114. LA. REV. STAT. ANN. § 51:714(B) (2003).

115. *See* Bornstein v. Fed. Dep. Ins. Corp., No. 89–3052, 1991 WL 195812, at *2 (E.D. La. Sept. 6, 1991) (finding a fact issue existed as to whether defendants, who were on the board of directors of the seller, owned stock in the seller, and approved the stock offering at issue, were control persons); Marrero v. Banco di Roma (Chicago), 487 F. Supp. 568, 579 (E.D. La. 1980) (finding a bank that allegedly induced a sale by failing to disclose certain facts not a control person); Se. Wireless Network, Inc. v. U.S. Telemetry Corp., No. 06–1920, 2007 WL 1953148, at *2–3 (La. Ct. App. July 6, 2007) (finding a company whose employee was a director for the seller company not liable as control person); Solow v. Heard McElroy & Vestal L.L.P., 7 So. 3d 1269, 1281 (La. Ct. App. 2009) (finding an accountant auditing seller not a control person); Taylor v.

courts focus on the language of the statute, which imposes liability on "general partner[s], executive officer[s], or director[s]," as well as "dealer[s] or salesm[e]n who participate[]" in the sale.[116]

At least one federal court, the Fifth Circuit in *Heck v. Triche*, focused less on the wording of section 714. Instead it observed that the "Louisiana precedent is thin on when a defendant 'controls' a primary violator" and "look[ed] to federal law for instruction."[117] Applying the Fifth Circuit's federal control-person test,[118] the *Heck* court held that an accountant was liable as a control person.[119] The court's conclusion relied heavily on the clear-error standard of review and testimony from the primary violator, who testified that he was dependent on the accountant to help him emerge from debt, that the accountant "approved the financial concepts detailed in the prospectus" and helped arrange financing for the primary violator's debt, and that the accountant had discussions with investors about the collateral that was supposed to have secured their investment.[120] *Heck* demonstrates that individuals peripherally involved in the transaction at issue and that are not general partners, executives, supervisors, and the like may nonetheless be subject to control person liability. Whether such liability ultimately attaches will depend on the specific facts of the case.[121]

V. DAMAGES AVAILABLE

Similar to the caselaw interpreting the elements of a cause of action for a violation of section 712(A)(2), the caselaw interpreting the damages available to a successful plaintiff–investor is also undeveloped. The statute itself sets forth a remedy in two parts: one for those investors who still hold the shares purchased, and another for investors who have already sold their shares. How these remedies are implemented in particular factual circumstances may

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First Jersey Sec., Inc., 533 So. 2d 1383, 1387 (La. Ct. App. 1988) (finding a supervisor of seller liable as control person).

116. LA. REV. STAT. ANN. § 51:714(B) (2003).

117. *Heck*, 775 F.3d at 283.

118. *See supra* note 113.

119. *See Heck*, 775 F.3d at 284.

120. *See id.* at 284.

121. The *Heck* court underscored the fact-specific nature of the control person inquiry by distinguishing *Solow*, a case in which the Louisiana Court of Appeal for the Second Circuit held that an accountant providing audit services was not liable as a control person. *See id.* Because in *Heck* the accountant was not alleged to have controlled the primary violator "in his capacity as the CPA," the Fifth Circuit concluded that the defendant's actions in *Heck* "went far beyond the auditing services at issue in *Solow*." *Id.* at 285.

vary, given that securities transactions come in all shapes and sizes, and investments are made and securities sold in a variety of market conditions.

The availability of attorneys' fees also may vary, depending on whether the investor continues to hold, or has sold, the investment. An aggrieved investor who has not already sold his or her shares may obtain rescission plus attorneys' fees, interest, and court costs.[122] By contrast, where the investor already has sold his or her shares, the investor is only entitled to "damages," defined by the statute as "the difference between the fair value of the consideration the buyer gave for the security and the fair value of the security at the time the buyer disposed of it, plus interest thereon from the date of payment to the date of repayment."[123] There is no mention in the definition of "damages" of attorneys' fees or court costs.[124] It therefore seems that attorneys' fees and court costs are not recoverable when the investor has already sold her shares. There is no readily apparent reason why the Louisiana Legislature would have intended to allow aggrieved investors who have not sold their investment to recover attorneys' fees while affording those who have sold their investment no such right. Nonetheless, the plain language of the statute favors that interpretation.

VI. PRESCRIPTION AND AFFIRMATIVE DEFENSES

Some defenses are available for the seller whose purchaser has stated a prima facie case under the Louisiana Securities Law. Prescription is chief among these defenses. For all causes of action available under the Louisiana Securities Law, including a claim under section 712(A)(2), "[n]o person may sue . . . more than two years from the date of the contract for sale or sale, if there is no contract for sale."[125] Because Louisiana applies the doctrine of *contra non valentem*, prescription in most cases "does not begin to run until the plaintiffs have either actual knowledge of a violation or

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122. *See* LA. REV. STAT. ANN. § 51:714(B) (2003).

123. *See id.* § 51:714(A) (setting forth a remedy of "damages if [investor] no longer owns the security").

124. *Id.* ("Damages are the amount which equals the difference between the fair value of the consideration the buyer gave for the security and the fair value of the security at the time the buyer disposed of it, plus interest thereon from the date of payment to the date of repayment as computed in R.S. 51:714(C)(2).").

125. *Id.* § 51:714(C)(1). *See also* Williams v. Edward D. Jones & Co., 556 So. 2d 914, 916 (La. Ct. App. 1990) (noting that there is a two year prescriptive period for a Louisiana Securities Law claim).

notice of facts which, in the exercise of due diligence, should lead to actual knowledge."[126]

Some affirmative defenses are available as well. Most defenses, however, are not set forth in the Louisiana Securities Law itself but are nonetheless available under Louisiana law generally.[127] In fact, the Louisiana Securities Law does not identify any affirmative defenses except for one possible exception—that in the exercise of reasonable care, the defendant–seller could not have known of the untruth or omission.[128] Although at least one court identified the seller's exercise of reasonable care as an affirmative defense, other Louisiana courts have squarely held that the plaintiff bears the burden of proving that the defendant–seller could not have known of the untruth or omission.[129] Thus, whether the reasonable care issue is an affirmative defense at all, or is merely part of the plaintiff's prima facie case, remains unsettled.

What appears reasonably clear, however, is that those persons facing control-person liability may assert reasonable care as a defense. Section 714(B) specifically says that control persons are liable "unless the person whose liability arises under this Subsection sustains the burden of proof that he did not know and in the exercise of reasonable care could not have known of the existence of the facts by reason of which liability is alleged to exist."[130]

Defendants to a Louisiana Securities Law claim also may draw upon some affirmative defenses that are recognized under common law and in federal securities law cases. The affirmative defenses of *in pari delicto*, waiver, ratification, estoppel, laches, and failure to mitigate damages have been recognized by some courts as available

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126. Beckstrom v. Parnell, 730 So. 2d 942, 947 (La. Ct. App. 1998). *See also* Kidd v. Symbion, Inc., No. 10–3361, 2011 WL 4020814, at *7–8 (E.D. La. Sept. 9, 2011); Delgado v. Ctr. on Children, Inc., No. 10–2753, 2012 WL 2878622, at *7 (E.D. La. July 13, 2012); Jensen v. Snellings, 636 F. Supp. 1305, 1309 (E.D. La. 1986) ("The limitations period is triggered by the discovery of facts which would cause a reasonable man to inquire whether he has suffered a legal wrong. The plaintiff need only possess a low level of awareness; he need not fully learn of the alleged wrongdoing.").

127. The Louisiana Code of Civil Procedure lists certain affirmative defenses that must be set forth by the defendant with its answer. *See* LA. CODE CIV. PROC. art. 1005 (2015).

128. *See* Macareno v. Karon, No. 08–0292, 2010 WL 743564, at *4 (W.D. La. Feb. 24, 2010) ("[W]hile plaintiff must plead all elements, 'defendant must sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known of the untruth or omission.'" (quoting Landry v. Thibaut, 523 So. 2d 1370, 1380 (La. Ct. App. 1988))).

129. *See* discussion *supra* Part III.F.

130. LA. REV. STAT. ANN. § 51:714(B) (2003).

to those defending federal securities claims.[131] No Louisiana court has expressly recognized or rejected any of these defenses as being available to those against whom a Louisiana Securities Law claim has been asserted.

Nevertheless, some guidance to the question of whether these defenses are available for Louisiana Securities Law claims can be found in non-securities cases in which these affirmative defenses are discussed generally. For example, Louisiana law plainly does not recognize the common law defense of laches.[132] However, the concept of equitable estoppel has been recognized by Louisiana courts,[133] although it is not favored, and the defenses of waiver and ratification have been recognized as well.[134]

Perhaps the most important affirmative defense available is comparative fault pursuant to Louisiana Civil Code article 2323(A). Under Louisiana law, "[i]n any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined."[135] This code article, by its own terms, applies to "any

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131. Pinter v. Dahl, 486 U.S. 622, 634–35 (1988) (noting that an *in para delicto* defense is available under any federal securities law cause of action); Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 906 F.2d 1206, 1213 (8th Cir. 1990) (recognizing defenses of estoppel, ratification, and waiver to Rule 10b–5 claim); Mihara v. Dean Witter & Co., 619 F.2d 814, 822 (9th Cir. 1980) (analyzing whether defenses of estoppel, waiver, ratification, laches, and failure to mitigate damages were established in the particular case); Goldman v. Bank of Commonwealth, 467 F.2d 439, 446 (6th Cir. 1972) (quoting Royal Air Properties, Inc. v. Smith, 312 F.2d 210 (9th Cir. 1962)) (recognizing common law defenses of waiver and estoppel apply to federal securities law claims).

132. Fishbein v. State *ex rel.* La. State Univ. Health Scis. Ctr., 898 So. 2d 1260, 1270 (La. 2005) ("Because the doctrine of laches is in conflict with this state's civil laws of prescription, the statements contained in those civil opinions that suggest the doctrine of laches may be applicable under certain circumstances are hereby repudiated.").

133. *See* Roberson v. Lafayette Oilman's Sporting Clays Shoot, Inc., 845 So. 2d 1267, 1270 (La. 2003) ("Equitable estoppel or 'estoppel in pais' can be defined as the voluntary conduct of a party whereby he is barred from asserting rights against another party justifiably relying on such conduct and who has changed his position to his detriment as a result of such reliance." (citation omitted)). *See also* Morris v. Friedman, 663 So. 2d 19, 25 (La. 1995) (noting that "estoppels are not favored in our law" and that "[e]quitable considerations and estoppel cannot be permitted to prevail when in conflict with the positive written law"); Harvey v. Richard, 7 So. 2d 674, 677 (La. 1942) ("The cases holding that estoppels are not favored by our courts are legion in our jurisprudence."); Waste Mgmt. of La. v. Penn-America Ins. Co., 110 So. 3d 200, 203–04 (La. Ct. App. 2013).

134. Hogan Exploration, Inc. v. Monroe Eng'g Ass'n, Inc., 430 So. 2d 696, 700–01 (La. Ct. App. 1983) (identifying affirmative defenses of waiver and ratification); Favret v. Favret, 527 So. 2d 463, 467 (La. Ct. App. 1988) (same).

135. LA. CIV. CODE art. 2323(A) (2015).

action for damages," which necessarily includes causes of action under the Louisiana Securities Law.[136] Accordingly, the comparative fault defense allows defendants of Louisiana Securities Law claims to reduce their percentage of fault by attributing fault to others involved in causing the alleged loss, including the investor or any other advisors.[137] Moreover, because section 712(A)(2) is based upon federal section 12(2),[138] and because Louisiana courts look to federal law for guidance on interpreting Louisiana's Securities Law,[139] the defenses available to a section 12(2) claim should be available to a section 712(A)(2) claim to the extent those defenses are allowed under Louisiana law.

CONCLUSION

Even though the Louisiana Securities Law was enacted almost 100 years ago, the caselaw interpreting the Louisiana Securities Law remains undeveloped compared to many other areas of Louisiana law. The 2008–2009 financial crisis gave Louisiana courts some opportunity to interpret provisions of the Louisiana Securities Law, but most provisions still have seldom been interpreted, leaving uncertainty on many important securities law questions. Some cases whose treatment of issues have raised more questions than they have answered, such as the question of reasonable care, add to this uncertainty. Of course, no one can predict when many of these questions will be presented to a Louisiana circuit court or the Louisiana Supreme Court. Until such time, litigants invoking the Louisiana Securities Law will be left to glean what they can from the sparse Louisiana caselaw and then fill the gaps with reference to the vast body of caselaw interpreting the analogous section 12(2) claim under the Securities Act of 1933.

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136. *Id.*

137. A notable exception to this rule is where a defendant conspires with another defendant to commit an intentional tort. In this narrow circumstance, comparative fault principles do not apply. LA. CIV. CODE art. 2324(A) (2015). In addition, it is possible under certain circumstances that an alleged violator of the Louisiana Securities Law may have merely passive or derivative liability, and the violator himself may have a delictual indemnification claim against a person who caused his purported violation of the Louisiana Securities Law.

138. *See supra* note 33.

139. *See supra* note 5.