Indiana Law Review

Volume 54 **2021** **Number 2**

NOTES

SECURITIES FRAUD AND RELIANCE: INDIANA'S SECURITIES FRAUD STANDARD

JACOB ANTRIM*

INTRODUCTION

By enacting the Securities Act of 1933 and the Securities Exchange Act of 1934, Congress sought to quell the practice of sellers of securities from using deceptive and fraudulent methods to induce investors to invest in securities.[1] However, Congress' initial intent in passing the federal securities laws and regulations has been diluted by the practice of allowing sellers of securities to prevent investors from bringing securities fraud claims through contractual barriers.[2] Indiana's current securities fraud standard better accomplishes Congress' initial purpose for passing securities fraud laws because it does not leave a blatant loophole for allowing sellers to avoid securities fraud liability. Specifically, Indiana's securities fraud standard does not completely bar investors from bringing securities fraud claims after simply signing a boilerplate "non-reliance" clause in a securities purchase agreement.[3]

Indiana's securities fraud standard better discourages investment brokers and sellers from making misrepresentations regarding the assets and debts of security interests because Indiana does not require "reasonable reliance" as an element to prove in a securities fraud action.[4] This allows investors to bring securities fraud actions when they are lied to, and does not bar them from bringing claims based solely on boilerplate contract clauses.[5] With this, the Indiana securities fraud standard creates higher degrees of trust in securities transactions as a whole. These higher levels of trust in securities transactions should empower investors to freely invest their capital in companies, while also minimizing their potential

---

* J.D. Candidate, 2021, Indiana University Robert H. McKinney School of Law; B.A. 2017, Indiana University – Bloomington, Indiana.

1. *See generally* 15 U.S.C. § 78 (2019).
2. *See* Rissman v. Rissman, 213 F.3d 381, 384 (7th Cir. 2000); *see also* Harsco Corp. v. Segui, 91 F.3d 337, 339 (2d Cir. 1996).
3. *See generally* Manns v. Skolnik, 666 N.E.2d 1236, 1248 (Ind. Ct. App. 1996).
4. *See* Arnold v. Dirrim, 398 N.E.2d 426, 435 (Ind. Ct. App. 1979); s*ee also Manns*, 666 N.E.2d at 1248.
5. *Arnold*, 398 N.E.2d at 435.

risk of relying on misrepresentations.[6] Therefore, since Indiana's securities fraud standard does not bar the substantive analysis of a securities fraud claim when an investor signs a boilerplate contract that contains a non-reliance clause, it better accomplishes Congress' goals in passing the Securities Act of 1933 and the Securities Exchange Act of 1934 (together, the "Securities Acts") than the current federal standard.

Part I of this Note explains Congress' initial reasons for passing the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"). Part II explores the federal cause of action for a securities fraud claim. Part II also examines how multiple federal courts of appeals have drifted away from Congress' original purpose in passing the Securities Acts by allowing non-reliance clauses to completely bar securities fraud claims. This Part also examines a few federal circuits that have not adopted this standard but is not meant to be a comprehensive analysis of the circuit split on the effect and enforceability of non-reliance clauses in investment agreements. Part III analyzes Indiana's securities fraud statutes and case law. Part IV analyzes how investor trust and psychology impact the decision to invest in certain securities, and how an emphasis on the efficiency of non-reliance clauses may create a more volatile economic and investment climate. This Part also advocates that Indiana's stronger investor protections and securities fraud standard create a higher degree of investor trust and are more aligned with Congress' original purpose of passing securities laws.

I. OVERVIEW OF CONGRESS' INTENT & PURPOSE OF THE SECURITIES ACT OF 1933 & THE SECURITIES EXCHANGE ACT OF 1934

There can often be an unequal power distribution between investors and managers of companies, which can perpetuate and conceal fraudulent activities within companies.[7] In most publicly traded corporations, investors typically have a relatively small stake in the company compared to the overall size of the venture.[8] This means investors are often "powerless" with general operations of the corporation.[9] However, the managers of corporations, who have knowledge about business' undertakings and operations, can conceal information about the company and insulate their own activities from investors through omissions and misrepresentations.[10] Because of this vastly unequal power distribution between managers and investors, managers can situate themselves in a way that they can divert income to themselves and mismanage corporate assets.[11] Managers and securities sellers can also be less overt and sinister in their deception, engaging

6. *See* Luigi Guiso et al., *Trusting the Stock Market*, 63 J. FIN. 2557 (2008).

7. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1416 (1989).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

in fraud by unintentionally making false statements or omitting material facts to induce investors to invest in securities.[12] This fraud may be performed subtly, and even it if does not exist in a particular instance, "the potential for misconduct remains. Only some form of regulation can protect investors [from these deceptive tactics]."[13]

Congress is acutely aware of securities sellers' propensity to make material misrepresentations or omissions when trying to induce investors to purchase securities.[14] Congress passed the Securities Acts with the intent that federal securities law coverage be broadly applied for the purpose of protecting investors.[15] The construction of the Acts evidences Congress' awareness, where Congress broadly defined a "security" to encompass a wide variety of transactions in order to protect investors for a multitude of different types of dealings.[16] Congress defined a "security" as:

> any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance, which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.[17]

This definition of "security" within the Securities Acts "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[18] Identifying something as a security causes significant changes in its legal classification, giving the buyer substantially more

---

12. *See* Manns v. Skolnik, 666 N.E.2d 1236, 1248 (Ind. Ct. App. 1996); *see also* Arnold v. Dirrim, 398 N.E.2d 426, 430 (Ind. Ct. App. 1979).

13. Easterbrook & Fischel, *supra* note 7, at 1416.

14. *See generally* 15 U.S.C. § 78b (2019).

15. Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 349-50 (2003).

16. *Id*. at 350.

17. 15 U.S.C. § 78c(a)(10).

18. SEC v. W. J. Howey Co., 328 U.S. 293, 299 (1946).

rights than in a regular contractual transaction, and exposing the seller to expansive liability for false statements.[19]

The Securities Acts centered on "mandatory disclosures and antifraud rules," therefore further promoting fair dealing and accurate information in securities transactions.[20] Additionally, Congress sought to ensure that "the highest ethical standards prevail in every facet of the securities industry" by passing and enforcing its securities acts and regulations.[21] A fundamental purpose of passing securities laws was "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."[22] To further safeguard the rights of investors and to balance the bargaining power between sellers and investors, Congress included explicit anti-waiver provisions in the securities laws.[23] For example, Section 29(a) of the Exchange Act forbids the waiver of provisions of the Act, stating that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this title . . . or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void."[24] With this, Congress wanted to prevent a party to a securities transaction from being able to waive the securities law protection that the federal Securities Acts provided.[25] Despite this anti-waiver provision, several federal circuits have allowed for contractual barriers to prevent investors from bringing securities fraud claims even if they have been subjected to repeated misrepresentations about the assets and debts of the security interest.[26]

II. The Federal System Has Drifted Away from the Original Purpose of the Securities Acts

A. Federal Securities Fraud Causes of Action & Reliance

The federal cause of action for securities fraud stems from 15 U.S.C. § 78j(b).[27] This statute forbids any person "[t]o use or employ, in connection with the purchase or sale of any security . . . or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe . . . for the protection of

19. Nicholas Georgakopoulos, The Logic of Securities Law 21 (2017).

20. Paul G. Mahoney, *The Development of Securities Law in the United States*, 47 J. Acct. Res. 325, 328 (2009).

21. Kokesh v. SEC, 137 S. Ct. 1635, 1640 (2017) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186-87 (1963)).

22. *Capital Gains*, 375 U.S. at 186.

23. Shearson/Am. Express v. McMahon, 482 U.S. 220, 252 (1987).

24. 15 U.S.C. § 78cc(a) (2019).

25. Prentice, *supra* note 15, at 351.

26. *See* Rissman v. Rissman, 213 F.3d 381, 384 (7th Cir. 2000); *see also* Harsco Corp. v. Segui, 91 F.3d 337, 339 (2d Cir. 1996).

27. 15 U.S.C. § 78j(b).

investors."[28] The Securities and Exchange Commission promulgated Rule 10b-5, which provides the cause of action for investors seeking claims for securities fraud under the federal standard.[29] Rule 10b-5 makes it unlawful for a seller of securities:

> (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
> (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.[30]

To constitute a valid action under Rule 10b-5, the plaintiff must prove there was:

> (1) a material misrepresentation (or omission);
> (2) scienter, i.e., a wrongful state of mind;
> (3) a connection with the purchase or sale of a security;
> (4) reliance, often referred to in cases involving public securities markets . . . as "transaction causation";
> (5) economic loss; and
> (6) "loss causation," i.e., a causal connection between the material misrepresentation and the loss.[31]

Specifically for the reliance element of a Rule 10b-5 claim, "a plaintiff's reliance on the defendant's misrepresentation must have been reasonable in order for the claim to proceed."[32] Further, "[a]n investor may not justifiably rely on a misrepresentation if, through minimal diligence, the investor should have discovered the truth."[33] The conventional way for a plaintiff to show reliance "is by showing that he was aware of a company's statement and engaged in a relevant transaction . . . based on that specific misrepresentation."[34] However, additional factors for determining reasonable reliance include:

> (1) [t]he sophistication and expertise of the plaintiff in financial and securities matters;

---

28. *Id.*

29. 17 C.F.R. § 240.10b-5 (2020).

30. *Id.*

31. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005) (emphases omitted) (citations omitted).

32. Ashland Inc. v. Morgan Stanley & Co., 652 F.3d 333, 337 (2d Cir. 2011).

33. *Id.* at 337-38 (quoting Brown v. E.F. Hutton Grp., Inc., 991 F.2d 1020, 1032 (2d Cir. 1993)).

34. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 461 (2013) (quoting Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 810 (2011)).

(2) the existence of longstanding business or personal relationships;
(3) access to the relevant information;
(4) the existence of a fiduciary relationship;
(5) concealment of the fraud;
(6) the opportunity to detect the fraud;
(7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and
(8) the generality or specificity of the misrepresentations.[35]

While Congress' construction of the Securities Acts may have aimed at the goal of protecting investors from deceptive sales tactics, several of the federal courts of appeals have upheld contract language that prevents investors from pursuing securities fraud claims, known as "non-reliance clauses."[36] Specifically, to negate the "reliance" element in a securities fraud action under the federal standard, sellers of securities insert "non-reliance" clauses into securities purchase agreements to ensure they are not liable for any oral misrepresentations they may have made to induce sales of securities.[37] In a non-reliance clause, a party promises or represents that it is not relying on any representations by the other party except for those included in the definitive securities agreement.[38] These non-reliance clauses typically negate the reasonable reliance element of an action under Rule 10b-5.[39]

The Seventh Circuit in *Rissman v. Rissman* defined a non-reliance clause as "not identical to a truthful disclosure, but it has a similar function: it ensures that both the transaction and any subsequent litigation proceed on the basis of the parties' writings, which are less subject to the vagaries of memory and the risks of fabrication."[40] It further explained the peculiarity of memory, and that even when acting in good-faith, people may "remember" things that may not have actually happened but are now remembered in a self-serving way.[41] Additionally, the court expressed concern that certain nuances or emphases over time may change in memory, and that this change could cause a vast difference in meaning.[42] The *Rissman* court commented that "[p]rudent people protect themselves against the limitations of memory (and the temptation to shade the truth) by limiting their dealings to those memorialized in writing, and promoting the primacy of the written word is a principal function of the federal securities

35. *Ashland*, 652 F.3d at 338 (quoting *Brown*, 991 F.2d at 1032).

36. *See generally* Rissman v. Rissman, 213 F.3d 381, 383-84 (7th Cir. 2000); *see also Ashland*, 652 F.3d at 337.

37. *See Rissman*, 213 F.3d at 384.

38. Robert T. Miller, *Rule 10b-5 and Business Combination Transactions*, 21 U. PA. J. BUS. L. 533, 534 (2019).

39. *See Rissman*, 213 F.3d at 384.

40. *Id.*

41. *Id.* at 385.

42. *Id.* at 384.

laws."[43]

Non-reliance clauses can act as a safeguard for sellers of securities to avoid liability for potentially fabricated claims from dissatisfied investors.[44] Robert T. Miller, professor of law at the University of Iowa College of Law, described that "non-reliance clauses merely make express what sophisticated, value-maximizing parties involved in business combination transactions have already agreed to."[45] He explained that the purpose of non-reliance clauses is "to identify and include in the agreement all and only the efficient representations. They are tools for facilitating the creation of efficient agreements."[46] Professor Miller contends that non-reliance clauses are efficient in two ways.[47] First, they bring structure to the complex process of sharing information and negotiation in order to reach an efficient set of representations in the agreement.[48] Second, non-reliance clauses "exclude from the transaction only representations that were not efficient, representations that the parties omitted from their agreement precisely because the cost of including them would have exceeded the benefit of doing so."[49] Because of this reasoning, non-reliance clauses have become a prudent and efficient way for securities sellers to ensure they can avoid securities fraud liability for certain claims.[50]

B. Federal Circuits That Have Strictly Enforced Non-Reliance Clauses

Multiple federal circuits have upheld non-reliance clauses barring securities fraud claims based on oral representations that induced investors to buy security interests.[51] In *Carr v. CIGNA Securities, Inc.*, Carr consulted CIGNA Financial Advisors, Inc. ("CIGNA"), for investment advice.[52] CIGNA advised Carr to invest in two commercial real estate limited partnerships that CIGNA had created.[53] Carr played professional basketball in the National Basketball Association and did not have sophisticated knowledge about limited partnerships or commercial real estate.[54] Carr claimed that CIGNA's representative made oral representations to him that those investments were safe and conservative.[55] Relying on these representations, Carr invested $450,000, which eventually led

---

43. *Id.*
44. *See* Carr v. CIGNA Sec., Inc., 95 F.3d 544, 545 (7th Cir. 1996).
45. Miller, *supra* note 38, at 632.
46. *Id.*
47. *Id.* at 634-35.
48. *Id.* at 635.
49. *Id.*
50. *See* Rissman v. Rissman, 213 F.3d 381, 384 (7th Cir. 2000).
51. *See generally Rissman*, 213 F.3d at 384; *see also* Ashland Inc. v. Morgan Stanley & Co., 652 F.3d 333, 337 (2d Cir. 2011).
52. Carr v. CIGNA Sec., Inc., 95 F.3d 544, 545 (7th Cir. 1996).
53. *Id.*
54. *Id.* at 547.
55. *Id.* at 545.

to him lose his entire $450,000 investment.[56] However, the Seventh Circuit held that the plaintiff was bound by the written warnings of risk contained in his investment contracts.[57] Despite the fact that the investment contracts were 427 pages long and that Carr was unfamiliar with complex investment documentation and terminology, the Seventh Circuit reasoned that a simple and foundational principal of fraud is that if a seller orally tells you an investment is safe, but gives you a document warning about risk, you cannot sue for fraud.[58] The court further reasoned its holding, stating that "[t]his principle is necessary to provide sellers of goods and services, including investments, with a safe harbor against groundless, or at least indeterminate, claims of fraud by their customers."[59]

Additionally, in *Harsco Corp. v. Segui*, the Harsco Corporation ("Harsco") was interested in expanding its industrial services manufacturing and marketing business internationally.[60] To accomplish this goal, Harsco entered into negotiations to acquire MultiServ, a steel manufacturing company in the Netherlands.[61] In April 1993, representatives from Harsco and MultiServ met to discuss Harsco's possible acquisition of MultiServ.[62] During this meeting, the parties discussed projections of future earnings, where MultiServ's representatives expressed that these projections were modeled conservative economic expectations and accounted for the prospects of risk.[63] These projections led Harsco to continue to pursue its acquisition of MultiServ, and Harsco began conducting its due diligence with MultiServ.[64] However, during the due diligence phase, MultiServ failed to provide certain documents that Harsco had requested.[65] Following Harsco's acquisition of MultiServ, Harsco alleged that former officials and shareholders of MultiServ made false representations and omissions regarding the company.[66] The securities purchase agreement contained a non-reliance clause that stipulated that the seller disclaimed any representations and warranties between the parties except those contained in the purchase agreement.[67] The Second Circuit held that the non-reliance clause did not violate the anti-waiver provision of Section 29(a) of the Exchange Act because each party had sophisticated and detailed substantive writings during negotiations.[68] The court upheld the non-reliance clause's effect to bar Harsco from bringing a

---

56. *Id.*
57. *Id.* at 548.
58. *Id.* at 547-48.
59. *Id.* at 547.
60. Harsco Corp. v. Segui, 91 F.3d 337, 340 (2d Cir. 1996).
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 341.
67. *Id.* at 342.
68. *Id.* at 343-44.

federal securities fraud claim.[69]

In *Rissman v. Rissman*, the plaintiff sold his one-third interest in Tiger Electronics, a toy and game company, to his brother, who already owned two-thirds interest in the company, for $17 million.[70] The plaintiff sold his interest in the company based on his brother's statements that he never intended to sell the company or take it public.[71] Relying on these statements, the plaintiff concluded that his stock would remain illiquid, and he would never be able to receive dividends; therefore, he sold the stock for whatever his brother would pay for it.[72] Thirteen months later, the brother sold the company to Hasbro for $335 million, and the plaintiff's one third interest would have been worth around an additional $95 million.[73] However, the contract contained a "non-reliance clause" that stated that there were not any promises or inducements outside the purchase agreement, that the plaintiff entered into the agreement voluntarily and without reliance or representation by any party or its agents, that the plaintiff had read and understood the provisions in the agreement, and that the plaintiff was advised by counsel before entering into the agreement.[74] These clauses led the Seventh Circuit to affirm the dismissal of the plaintiff's federal securities fraud claim.[75] The court reasoned that "[c]ontractual language serves its functions only if enforced consistently," and that its "language forecloses any damages based on oral representations."[76]

C. Federal Circuits That Have Not Strictly Enforced Non-Reliance Clauses

Despite the fact that several of the federal circuits have typically upheld contractual non-reliance clauses barring investors from bringing securities fraud claims, some federal circuits have deviated from this standard. In *AES Corp. v. Dow Chemical Co.*, AES brought a securities fraud action against Dow Chemical and its subsidiary, alleging that Dow misrepresented the value of its subsidiary when it attempted to sell the subsidiary company.[77] During negotiations between the parties, AES signed a confidentiality agreement containing a non-reliance clause, which stated that AES agreed it was not entitled to rely on any representations and warranties except for those provided in the final merger agreement.[78] After AES acquired Dow Chemical's subsidiary, AES discovered that the acquisition of the subsidiary would result in a loss of $70 million rather than the projected $31 million profit based on Dow Chemical's representations

69. *Id.*
70. Rissman v. Rissman, 213 F.3d 381, 382 (7th Cir. 2000).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 383.
75. *Id.* at 387.
76. *Id.* at 385.
77. AES Corp. v. Dow Chem. Co., 325 F.3d 174, 176 (3d Cir. 2003).
78. *Id.*

during due diligence.[79]

The Third Circuit held that the non-reliance clause barring AES's fraud claims would be inconsistent with Section 29(a) of the Exchange Act (the anti-waiver provision).[80] The court reasoned that a non-reliance clause acts as an anticipatory waiver of any future securities fraud claims based on fraudulent misrepresentations, in contrast with Section 29(a), which "seeks to prevent parties from contractually avoiding the requirements of Rule 10b-5."[81] However, the court explained that while the mere presence of a non-reliance clause may not completely bar a securities fraud claim, it may contribute to proof of lack of reliance.[82]

The First Circuit also deviated from the Seventh and Second Circuits with its securities fraud precedent. In *Rogen v. Ilikon Corp.*, three doctoral students at the Massachusetts Institute of Technology (including the plaintiff, Rogen), along with various other directors and stockholders, organized Ilikon Corporation ("Ilikon").[83] Ilikon's purpose was to research and develop work dealing with engineering and science.[84] Rogen previously acquired significant experience in an engineering consulting firm, and he was elected to serve as Ilikon's president and secretary.[85] He also held the largest number of stock by any individual stockholder.[86] Rogen managed multiple projects for Ilikon, and was negotiating with Reynolds Metal Company ("Reynolds") regarding the potential commercial use of a feasible method of fabricating aluminum that Ilikon developed.[87] However, several defendants and other Ilikon personnel grew dissatisfied with Rogen's performance in the company, and Ilikon's board dismissed Rogen as president and secretary and terminated his employment with the company.[88] Rogen also agreed to sell his Ilikon stock.[89] Rogen's securities purchase agreement contained a clause that he was "fully familiar with the business and prospects of the corporation, [was] not relying on any representations or obligations to make full disclosure with respect thereto, and [had] made such investigation thereof as [he deemed] necessary."[90] Following the execution of the securities purchase agreement, Rogen sought rescission of the deal, believing Ilikon failed to disclose material facts when negotiating the securities purchase agreement, which Ilikon refused.[91] Rogen later sued and claimed that Ilikon failed

79. *Id.* at 177.
80. *Id.* at 180.
81. *Id.* at 184 (Wallace, J., concurring and dissenting).
82. *Id.* at 180.
83. Rogen v. Ilikon Corp., 361 F.2d 260, 262 (1st Cir. 1966).
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 262-63.
90. *Id.* at 265.
91. *Id.*

to disclose to him renewed negotiations with Reynolds, Ilikon failed to disclose the progress on the feasible method of fabricating aluminum, and Ilikon made false representations relating to the market, which were made to reduce the price Rogen received for his stock.[92]

Ilikon alleged the non-reliance clause barred Rogen from pursuing his claim.[93] The First Circuit disagreed with Ilikon, and the court refused to conclude as a matter of law that the non-reliance clause acted as a complete bar to the plaintiff's securities fraud claim.[94] The court stated that "there is enough possibility of a finding for plaintiff on the reliance issue to foreclose our finding non-reliance as a matter of law."[95] The First Circuit reasoned its holding, asserting that "[w]ere we to hold that the existence of this provision constituted the basis (or a substantial part of the basis) for finding non-reliance as a matter of law, we would have gone far toward eviscerating Section 29(a)."[96] Accordingly, the plaintiff was able to pursue his securities fraud claim, despite the presence of a non-reliance clause.[97]

III. INDIANA'S SECURITIES FRAUD STANDARD

A. The Indiana Uniform Securities Act

In 2008, Indiana codified a new securities law called the Indiana Uniform Securities Act.[98] The prior securities fraud provision in the Indiana Code operated materially the same as the 2008 Indiana Uniform Securities Act.[99] Much like the federal Securities Acts, the Indiana Uniform Securities Act's definition of a security is also very broad, encompassing a vast litany of transactions.[100] This broad definition indicates Indiana's interest in excluding fraud from business deals by protecting a wide variety of transactions.

The Indiana Uniform Securities Act provides the cause of action under Indiana law for investors that have been induced to purchase securities by sellers' fraudulent and deceptive sales tactics.[101] The Indiana Uniform Securities Act states:

> It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:
>
> (1) to employ a device, scheme, or artifice to defraud;
>
> (2) to make an untrue statement of a material fact or to omit to state

---

92. *Id.* at 263.
93. *Id.* at 266.
94. *Id.* at 268.
95. *Id.*
96. *Id.*
97. *Id.*
98. IND. CODE § 23-19-5-1 (2019).
99. *Compare id.*, *with* IND. CODE § 23-2-1-12 (repealed 2008).
100. *See* IND. CODE § 23-19-1-2(28) (2019).
101. *Id.* § 23-19-5-9.

> a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading; or
> (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.[102]

In its plain reading, the securities fraud cause of action under the Indiana Uniform Securities Act reads much like federal Rule 10b-5.[103]

The Indiana Uniform Securities Act also provides an anti-waiver provision, stating that "[a] condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this article or a rule adopted or order issued under this article is void."[104] This provision gives the effect that non-reliance clauses and other boilerplate contract language by securities sellers in purchase agreements should be void and should not prevent investors from asserting securities fraud claims based on the seller's misrepresentations regarding the security interest.[105]

Further, the Indiana Uniform Securities Act also supports a private right of action, much like Rule 10b-5.[106] However, much like the federal securities fraud standard, the actual statutory text of the rule is fairly lacking in guidance, and courts must define the scope of securities fraud laws.[107] Indiana's case law has differentiated the state's securities fraud standard from the Seventh and Second Circuits' standards.[108] Further, the cases indicate that the same non-reliance clauses and contractual barriers may not bar a claim under Indiana's securities fraud standard as it could under the federal standard.[109]

B. Indiana Securities Fraud Case Law

In *Manns v. Skolnik*, the Indiana Securities Division brought an action against Manns, alleging Manns had violated Indiana securities fraud laws.[110] In the case, Janice Easterday visited her attorney to close on a real estate transaction.[111] Following the closing, Easterday received $20,000 and told her attorney she needed to invest this money.[112] Easterday's attorney, who was married to Manns, instructed Manns to bring him investment materials, but Manns was unable to

---

102. *Id.* § 23-19-5-1.

103. *Compare id.*, *with* 17 C.F.R. § 240.10b-5 (2020).

104. IND. CODE § 23-19-5-9(i).

105. *See id.* § 23-19-5-9.

106. *Id.*

107. *See* Jayme Herschkopf, *Morality and Securities Fraud*, 101 MARQ. L. REV. 453, 483 (2017).

108. *See* Manns v. Skolnik, 666 N.E.2d 1236, 1248 (Ind. Ct. App. 1996); *see also* Arnold v. Dirrim, 398 N.E.2d 426, 430 (Ind. Ct. App. 1979).

109. *See Manns*, 666 N.E.2d at 1248; *see also Arnold*, 398 N.E.2d at 430.

110. *Manns*, 666 N.E.2d at 1239-40.

111. *Id.* at 1238.

112. *Id.*

find them.[113] Manns then told Easterday about a platinum mining investment opportunity in Indonesia, and Manns stated that the investment was "a really lucrative deal" which should yield significant profit on her investment.[114] This induced Easterday to invest her $20,000 in the platinum mining venture.[115] The securities purchase agreement contained a non-reliance clause that stated there was no other agreement or representations between the parties except for those included in the securities purchase agreement.[116] After the transaction was completed, Manns never sent any additional documents about the investment, she never informed Easterday about any risks with the investment, and she did not tell Easterday that the securities were not registered with the Indiana Securities Division.[117] Additionally, Manns never sent Easterday any anticipated profit on the investment, and she never returned Easterday's initial investment.[118] This led Easterday to file a complaint, and then the Indiana Securities Division brought an action against Manns.[119]

The Indiana Court of Appeals interpreted Indiana's securities fraud statute regarding misrepresentations such that "[t]he statute requires that material information be disclosed. This statute turns entirely on whether the information disclosed was accurate, if disclosed at all. If material information is either misrepresented or omitted entirely, then the statute has been violated."[120] The court further explained that to be liable under Indiana's securities fraud laws, "an individual must only make material misrepresentations or omit material information, regardless of intent."[121] This language indicates that a seller must only make a material misrepresentation in fact, regardless of whether the investor's reliance on that misrepresentation would be "reasonable."

Further, in *Arnold v. Dirrim*, the Dirrims sued the National Guaranty Corporation ("NGC") and its officers, alleging that the Dirrims were fraudulently induced to invest in NGC after they were given a false and misleading prospectus.[122] Based on the representations in the prospectus, the Dirrims purchased a total of 1,500 shares of NGC stock.[123] Following their realizations that the prospectus was wholly inaccurate, the Dirrims initiated their securities fraud action.[124] Regarding the defendant's assertion that the Dirrims did not rely on NGC's misrepresentations, the Indiana Court of Appeals held the Indiana Securities Act "was not intended as a requirement that [a] buyer prove reliance

113. *Id.* at 1238-39.
114. *Id.* at 1239.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 1240.
120. *Id.* at 1248.
121. *Id.* at 1249.
122. Arnold v. Dirrim, 398 N.E.2d 426, 430 (Ind. Ct. App. 1979).
123. *Id.*
124. *Id.*

on the untrue statement or omission. The buyer need only show that he did not know of the untruth or omission. . . . Thus reliance was not an element to be proven under [the Indiana Securities Act]."[125] Accordingly, the court affirmed the trial court's judgment for the Dirrims in their securities fraud claim without proving reliance.[126]

The Southern District of Indiana considered Indiana's securities fraud standard in *Landeen v. PhoneBILLit, Inc.*, and distinguished it from a federal securities fraud claim under Rule 10b-5.[127] In this case, Landeen and Sann were shareholders of PhoneBILLit, Inc. ("PBI").[128] Lucas provided legal work for PBI, but PBI was unable to pay Lucas's $250,000 in attorney's fees.[129] To cover PBI's outstanding debt to Lucas, Landeen and Sann each gave nine percent of their interest in PBI to Lucas, giving Lucas an eighteen percent total share in PBI.[130] Additionally, PBI contracted with CPA Market, LLC ("CPA") to provide PBI with internet marketing services.[131] However, PBI was unable to pay CPA for its services, and accrued an outstanding debt to CPA.[132] This created tension among PBI's shareholders surrounding management and employee compensation at PBI, and Landeen filed a lawsuit seeking dissolution of PBI, and resigned from PBI as an employee.[133] Sann later alleged he "found out" Lucas could not have performed $250,000 worth of legal work for PBI, and that Sann relied on Lucas's billing for his legal work when Sann agreed to exchange nine percent of his PBI stock for his portion of Lucas's legal bills.[134] In response, Sann raised seventeen claims against Landeen and Lucas, including securities fraud claims under federal Rule 10-b(5) and Indiana's securities law.[135]

The court distinguished Sann's federal securities fraud claim from his Indiana claim, indicating that the reliance element required under a 10b-5 claim is not required for an action under the Indiana securities fraud statute.[136] The court cited *Arnold v. Dirrim* and concluded that a securities fraud plaintiff under Indiana law only needs to prove that the defendant made a false statement of material fact relating to the sale and purchase of a stock.[137] It further concluded that proof of a reliance element is not required for a securities fraud action under Indiana law.[138] However, "[the plaintiff] must still prove that the statement made was

125. *Id.* at 435 (citation omitted).
126. *Id.* at 441.
127. Landeen v. PhoneBILLit, Inc., 519 F. Supp. 2d 844, 864 (S.D. Ind. 2007).
128. *Id.* at 853.
129. *Id.*
130. *Id.*
131. *Id.* at 853-54.
132. *Id.* at 854.
133. *Id.*
134. *Id.* at 857, 863-64.
135. *Id.* at 857.
136. *Id.* at 864.
137. *Id.*
138. *Id.*

untrue."[139] The lack of a "justifiable" or "reasonable" reliance element for a claim under Indiana's securities fraud standard could lead to vastly different results for parties in securities litigation under Indiana law rather than federal law.

IV. INDIANA'S SECURITIES FRAUD STANDARD IS MORE ALIGNED WITH CONGRESS' ORIGINAL LEGISLATIVE INTENT OF THE SECURITIES ACTS

The federal securities fraud standard has been diluted over time to allow sellers of securities to contract around securities fraud liability. Indiana's securities fraud standard better addresses Congress' initial goals and aims of the Securities Act and the Exchange Act, than the current federal standard in the Seventh and Second Circuits. Indiana's standard reduces the likelihood that securities sellers can avoid securities fraud liability after making misrepresentations to investors.

A. The Importance of Investment & Trust

The economic system in the United States is largely dependent upon investors making investments in public companies.[140] Investors willingly part with their money, believing their returns from equities in companies will yield higher earnings than returns in bonds, banks, land, or gold.[141] The more capital outside investors can invest in companies, the more companies can make "business investments."[142] These business investments include spending on physical capital that aid in the production of goods and services.[143] When companies are able to invest more in physical capital across the country, this allows the economy's overall productivity capacity to increase.[144] With an increased productivity capacity, a greater number of goods and services can be produced at a more efficient level of resources.[145]

For this type of economic system to operate effectively, it requires a flow of accurate information about public companies between investors and sellers so investors can make knowledgeable and informed decisions with their capital.[146] Through investments by informed investors, businesses can build up their stock of physical capital, which increases their capacity to produce goods and services.[147] However, when fraudulent behavior is protected and insulated by non-reliance clauses, it undermines this entire system by reducing the accurate flow

---

139. *Id.*

140. ÖZGÜR ORHANGAZI, FINANCIALIZATION AND THE US ECONOMY 6 (2008).

141. Easterbrook & Fischel, *supra* note 7, at 1419.

142. JEFFREY M. STUPAK, CONG. RESEARCH SERV., IF11020, INTRODUCTION TO THE U.S. ECONOMY: BUSINESS INVESTMENT, https://fas.org/sgp/crs/misc/IF11020.pdf (last updated Nov. 14, 2019) [https://perma.cc/T99K-X5YR].

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

of information, and therefore reducing the amount of informed investing decisions by investors.[148] By having stringent securities fraud regulations with the goal of preventing fraud, securities pricing will likely be more accurate.[149] This accurate pricing makes trading attractive to prospective investors, which similarly reduces the overall costs of trading.[150] With more investors trading, markets will have higher liquidity.[151] More liquid markets attract more trading and also help ensure accurate pricing.[152] However, this market cycle depends on the strong securities fraud regulations which help ensure accurate pricing.[153]

According to "Trusting the Stock Market," a study on consumer trust in the stock market, "[t]he decision to invest in stocks requires not only an assessment of the risk-return trade-off given the existing data, but also an act of faith (trust) that the data in our possession are reliable and that the overall system is fair."[154] The concept of "trust" often drives investors' decisions on whether or not to invest in a particular security interest, where an investor will more likely invest in a company when that investor believes he has accurate information and if he is properly informed.[155] The same study defined "trust" as the "subjective probability individuals attribute to the possibility of being cheated."[156] It explained that the "subjective probability" is based on objective characteristics of the financial system that determine the likelihood of fraud (the quality of investor protection, its enforcement, etc.), and also the subjective characteristics of the person.[157] This study found that investors who trust the system are significantly more likely to invest and buy risky assets.[158] However, a low level of investor trust overall can help explain why a large percentage of individuals decide to not invest in stocks.[159] Investing may be hindered not only by general mistrust in the system but also by "mistrust in the institutions that should facilitate stock market participation," such as brokers or sellers of securities.[160]

Another study, "Corporate Fraud and Business Conditions: Evidence from IPOs," investigated the relation between investors' beliefs about business conditions and their effect on investment firms' incentives to commit fraud.[161]

---

148. *See generally* Umit G. Gurun et al., *Trust Busting: The Effect of Fraud on Investor Behavior*, 31 REV. FIN. STUD. 1341, 1347 (2017).

149. GEORGAKOPOULOS, *supra* note 19, at 79.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Guiso et al., *supra* note 6, at 2557.

155. *Id.*

156. *Id.*

157. *Id.* at 2558.

158. *Id.*

159. *Id.*

160. *Id.* at 2559.

161. Tracy Yue Wang et al., *Corporate Fraud and Business Conditions: Evidence from IPOs*, 65 J. FIN. 2255, 2257 (2010).

The study described that investor beliefs about industry conditions likely have a particularly significant effect on fraud in an initial public offering ("IPO") setting.[162] The study's results concluded that "voluntary monitoring by institutional investors or venture capitalists is less effective at reducing fraud when investors are optimistic about an industry's prospects."[163] Because of this result, it further concluded that only relying on investor incentives is unlikely to reduce fraud in good times because increasing fraud decreases investors' trust in financial markets and hurts investment firms' ability to capitalize on the market.[164] Because voluntary monitoring fails at effectively mitigating fraud in securities sales,[165] stringent investor protections are necessary through securities laws and regulations to protect investors from increasing fraud.

B. The Intersection Between Risk, Investor Trust, & Efficiency

Professor Nicholas Georgakopoulos defined "risk" as "uncertainty about the outcomes of future events," and individuals manage risk by understanding the nature of the uncertainty in question.[166] Often, investors seek to mitigate aggregate risk by diversifying their investments across multiple security interests.[167] This helps reduce risk because it makes extreme outcomes less likely.[168] Additionally, diversification increases the number of possible outcomes, which increases the probability of average returns on investment.[169] However, no matter how diversified an investor's portfolio may be, there remains the general risk and uncertainties from the economy as a whole.[170] While it is impossible to completely eliminate the risk for investors, it is possible to require sellers to be forthcoming and accurate about the security interests they are selling.

Logically, if investors have trust in the system and the transaction itself, they will be more likely to invest than if they believe they will be subjected to fraud. If individuals demonstrate "a high level of trust[, they] are more likely than others to invest in risky financial assets and tend to invest larger shares of their wealth in such assets."[171] However, when fraud occurs, it becomes extremely difficult to make an informed assessment of risk and determine what course of action to take.[172] The federal system has allowed a "loophole" for sellers to make misrepresentations about a company and avoid liability by inserting non-reliance

---

162. *Id.* at 2256.
163. *Id.* at 2257.
164. *Id.*
165. *Id.*
166. GEORGAKOPOULOS, *supra* note 19, at 31.
167. *Id.*
168. *Id.*
169. *Id.* at 34.
170. *Id.* at 37.
171. Hervé Stolowy et al., *The Construction of a Trustworthy Investment Opportunity: Insights from the Madoff Fraud*, 31 CONTEMP. ACCT. RES. 354, 354 (2014).
172. *See generally* Gurun et al., *supra* note 148, at 1346.

clauses into securities sales agreements; this effectively contracts away the investor's right to bring securities fraud claims, even if the seller made repeated misrepresentations about the assets, debts, and intentions of the security interest.[173] This type of standard would negatively affect investor trust because the quality of investor protections and their enforcement have been diluted by non-reliance clauses.[174] If investors come to doubt the validity of the promises securities sellers make to them, investment in the whole economy would fail.[175] Additionally, less stringent securities fraud regulations which allow fraud to be perpetuated could make projections of risk unstable because securities pricing will likely be less accurate.[176] By allowing sellers to be protected from liability after making misrepresentations to investors, the federal standard can insulate fraudulent activity and fail to properly promote truthful oral disclosures in securities transactions.

Those in favor of the federal securities fraud standard adopted by the Seventh and Second Circuits argue that enforcing non-reliance clauses is efficient.[177] This efficiency approach relies heavily on due diligence and representations and warranties in complex business transactions to provide enough safety for potential investors.[178] Additionally, they also argue that in a business combination transaction, "no potential buyer . . . could reasonably rely on the accuracy or completeness of any representations by the seller other than those in the definitive agreement."[179]

Through due diligence, proponents of this approach argue that prospective buyers will have analyzed substantial amounts of non-public information provided by the seller, which may include any organizational documents, financial information, lists of real and personal property owned by the business, lists of intellectual property owned by the business, compliance information, and lists of any contracts the business may have obligations to perform.[180]

However, due diligence has proved to not provide enough substantial protection for buyers, even in complex business transactions between sophisticated parties. In *Harsco Corp. v. Segui*, Harsco conducted significant due diligence before its decision to acquire MultiServ.[181] In addition to the due diligence phase prior to the acquisition of MultiServ, Harsco also had fourteen days of "confirmatory due diligence," which allowed Harsco to investigate the accuracy of MultiServ's representations and warranties as well as to review MultiServ's facilities, books and records, and contracts following the execution

173. *See generally* Rissman v. Rissman, 213 F.3d 381, 383 (7th Cir. 2000).
174. *See* Guiso et al., *supra* note 6, at 2558.
175. Easterbrook & Fischel, *supra* note 7, at 1447.
176. *See generally* GEORGAKOPOULOS, *supra* note 19.
177. Miller, *supra* note 38, at 608-09.
178. *Id.* at 609-10.
179. *Id.* at 608.
180. *Id.* at 610-12.
181. Harsco Corp. v. Segui, 91 F.3d 337, 340 (2d Cir. 1996).

of the purchase agreement.[182] Harsco would be able to terminate the transaction if it discovered during this period that any of MultiServ's representations were not true.[183] However, Harsco was unable to find any discrepancies in MultiServ's representations until after the fourteen-day confirmatory due diligence period elapsed.[184] Following this fourteen-day period, Harsco alleged proof of MultiServ's misrepresentations and omissions during due diligence, including the status of plant construction, the financial prospects for MultiServ's operations, and the status of intellectual property rights.[185] Despite these allegations, the Second Circuit refused to allow the suit to continue, and dismissed Harsco's complaint, largely because of the non-reliance clause contained in the purchase agreement.[186] Although due diligence may help some investors delineate accurate representations from inaccurate representations, it does not warrant circumventing the protections Congress specifically afforded to investors in favor of efficiency. Additionally, not every representation made by a party during due diligence and negotiations should be relied on because securities sellers can often puff up and overstate their products and services.[187] Over an extended due diligence period common in many complex business transactions, a party or one of its agents negotiating a transaction may make statements that appear to mean one thing in one context and appear to mean something very different in a subsequent context.[188] Therefore, due diligence alone does not afford investors of securities enough protection to justify a complete bar to securities fraud claims because of the presence of a non-reliance clause in an investment purchase agreement.

There is no doubt that enforcing non-reliance clauses is more efficient than having to consider statements not included in a securities agreement in every securities fraud case. However, much like the saying "one bad apple spoils the others,"[189] the deceitful actions of a few fraudsters are enough to taint the whole group of sellers of securities and necessitates a standard that requires more than a non-reliance clause to avoid liability, despite its efficiency.

Focusing purely on the efficiency of non-reliance clauses may highlight the short-term benefits they produce.[190] These short-term efficiency benefits may include reduced costs and assurances of predictable and consistent dealing

182. *Id.* at 340-41.

183. *Id.* at 341.

184. *Id.*

185. *Id.*

186. *Id.* at 346, 348-49.

187. Allen Blair, *A Matter of Trust: Should No-Reliance Clauses Bar Claims for Fraudulent Inducement of Contract?*, 92 MARQ. L. REV. 423, 434-35 (2009).

188. *Id.* at 435.

189. *See* Geoff Nunberg, *Bad Apple Proverbs: There's One in Every Bunch*, NPR (May 5, 2011, 9:55 AM), https://www.npr.org/2011/05/09/136017612/bad-apple-proverbs-theres-one-in-every-bunch [https://perma.cc/HH2R-4KL6].

190. *See* Roger L. Martin, *The High Price of Efficiency*, HARV. BUS. REV., Jan.-Feb. 2019, at 42.

structures.[191] Additionally, sellers' interests are served if all of their contracts are formed with the same basic set of terms and obligations, reducing the overall amount of uncertainty and variance with every transaction.[192] However, the efficiency-focus of non-reliance clauses may be at the expense of a more balanced and equitable business environment in the future.[193] Roger L. Martin, a business professor at the University of Toronto, argues that business and government should focus more strongly on strategies that emphasize "resilience" rather than always taking the more efficient option.[194] This includes policies that limit scale, foster some "friction" within industries, and promote "patient capital."[195] Martin emphasized that business structures and outcomes are continually shifting toward more efficient dealing, where industry consolidation is viewed as a desirable business model to become more efficient.[196] In the financial sector, Martin illuminates that "[i]n 1978 the 100 most profitable firms earned 48% of the profits of all publicly traded companies combined, but by 2015 the figure was an incredible 84%."[197] However, at some point, "the goal of efficiency ceases to be the long-term maximization of overall societal value. Instead, efficiency starts to be construed as that which delivers the greatest immediate value to the dominant player."[198] In the context of investors and securities sellers, when investor protections are watered down for the sake of efficiency, securities sellers become the dominant player, and reap the greatest value from the securities system.[199] The efficiency of non-reliance clauses potentially leaves investors without recourse in the event of fraud.

C. Non-Reliance Clauses & the Average Investor

Non-reliance clauses disproportionately affect unsophisticated investors because the unsophisticated buyer will likely rely on the expertise of the seller.[200] When the unsophisticated investor—often the average investor—seeks the advice of an investment service or broker, the unsophisticated investor does not usually have the means or time to conduct its own detailed due diligence on the suggested investment.[201] However, when an unsophisticated investor signs a non-reliance clause, often the unsophisticated investor disclaims any advice, representations, or

---

191. *See* Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I)*, 62 CLEV. ST. L. REV. 373, 385 (2014).

192. *See* Franklin G. Snyder & Ann M. Mirabito, *Boilerplate: What Consumers Actually Think About It*, 52 IND. L. REV. 431, 451 (2019).

193. *See* Martin, *supra* note 190.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *See generally id.*

200. *See generally* Carr v. CIGNA Sec., Inc., 95 F.3d 544, 545 (7th Cir. 1996).

201. *Id.*

expertise that the seller gave, even though that was the entire reason the investor went to the seller in the first place.[202] Additionally, when an unsophisticated investor enters into a securities purchase agreement, it is very unlikely he had any bargaining power with the contents of the contract.[203] Likely, the sophisticated seller drafted a form contract full of boilerplate contract language (including non-reliance clauses), and the unsophisticated investor signed it without reading or understanding the significance of the contract language.[204]

While not a perfect comparison, applying this practice to the medical context proves to be an interesting inquiry. For the purposes of this hypothetical, assume this jurisdiction's waiver for medical malpractice claims operates similarly to the Seventh Circuit's precedent for non-reliance clauses for securities fraud. For example, an individual (without any formal medical training) goes to a doctor and seeks medical advice for an ailing lower back. The doctor proceeds to examine the individual, conducting her own inquiries, and gives the individual various conclusive statements about the individual's health. Based on her examination, the doctor gives the individual a recommendation that the ailing back stems from a failing kidney, and that the kidney must be removed. During the examination, the doctor also discovers that the individual has a skeletal defect but fails to disclose this fact to the individual. Logically, the person without medical training will likely rely on the examination and advice from the doctor more than the advice of someone who does not have medical training, especially considering the entire reason the individual went to the doctor was to obtain her medical expertise. Therefore, based on the doctor's advice and expertise, the individual agrees to have surgery to remove his kidney. But, before the surgery, the doctor has the individual sign a statement as a prerequisite to the surgery that states the individual has sufficient knowledge and experience in medical matters, is capable of evaluating the merits and risks of the medical procedure, and that he has not relied on any representation, warranty, statement, or opinion disclosed or not disclosed regarding the medical procedure.

Months after the procedure is complete, the individual discovers it was not his kidney that was causing his back issues but the skeletal defect. Based on the way that multiple federal circuits have interpreted non-reliance clauses, the non-reliance clause in the signed statement would act as a complete bar to a malpractice claim against the doctor without inquiring into the underlying facts of the claim. This illustration serves to show how unreasonable it is for courts to enforce an unsophisticated investor's disclaimer of reliance on the seller when the entire reason the investor sought out the seller was for his advice and expertise.

Now applying *Carr v. CIGNA Securities, Inc.* to Indiana law, Carr was a professional athlete and an unsophisticated investor.[205] Carr relied on the expertise of a seller and trusted that the statements the seller made to him were accurate.[206]

---

202. *Id.*
203. Prentice, *supra* note 15, at 420.
204. *Id.*
205. *Carr*, 95 F.3d at 545.
206. *Id.*

Because of this reliance on the seller's expertise, Carr proceeded to invest based on the seller's statements, despite their eventual falsehood.[207] But the presence of a non-reliance clause acted as a complete bar to Carr's securities fraud claim.[208] Under Indiana's securities fraud standard, Carr likely would not have been completely barred from bringing his claim solely on the basis of the non-reliance clause in his securities purchase agreement. Much like in *Manns v. Skolnik* and *Arnold v. Dirrim*, the court in *Carr* likely would look to see if there were misrepresentations or omissions of material information and then determine under the totality of the circumstances if the seller engaged in fraudulent activity.[209] Reliance is not an element to be proven under Indiana's securities fraud standard, and the investor only needs to show that he did not know of the seller's misrepresentation or omission.[210] The presence of the non-reliance clause alone would likely not act as a complete bar to substantive analysis of Carr's claim.

D. Indiana's Securities Fraud Standard Better Protects Investors

While non-reliance clauses may be beneficial for sellers because they insulate sellers from frivolous securities fraud claims by unhappy investors that simply lose money in their investments, allowing non-reliance clauses to act as a complete bar to an investor's securities fraud claim runs contrary to the purpose of securities fraud laws.[211] By enacting the Securities Acts, Congress found it more important to stop sellers from fraudulently inducing investments than to require investors to be more careful with their capital.[212] By doing this, Congress sought to make investing in securities much safer for investors and attempted to restore national confidence and investor trust in the securities markets.[213]

Indiana's securities fraud system better fulfills Congress' initial purpose for passing securities regulations than many federal circuits. Indiana takes a more holistic approach to determining if investors were fraudulently induced to invest in securities, not barring claims solely based on a contract clause.[214] Indiana's standard encompasses Congress' original goal in passing the Securities Acts more than the current federal standard by encouraging the reduction of fraud in securities transactions and promoting the flow of truthful disclosures and accurate information.[215] The language in *Manns* indicates that a seller must only make a material misrepresentation of fact to be potentially liable, regardless of whether the

---

207. *Id.*

208. *Id.* at 547.

209. *See* Manns v. Skolnik, 666 N.E.2d 1236, 1248 (Ind. Ct. App. 1996); *see also* Arnold v. Dirrim, 398 N.E.2d 426, 433 (Ind. Ct. App. 1979).

210. *See Arnold*, 398 N.E.2d at 435.

211. *See* Prentice, *supra* note 15, at 349-50.

212. *Id.* at 351.

213. *Id.*

214. *See Arnold*, 398 N.E.2d at 435.

215. *Id.*; *see also* Manns v. Skolnik, 666 N.E.2d 1236, 1248 (Ind. Ct. App. 1996).

investor's reliance on that misrepresentation would be "reasonable."[216] This indicates that, under Indiana law, a non-reliance clause would likely not act as a complete bar to the substantive analysis of an investor's securities fraud claim. Indiana's stringent securities fraud standard would likely increase the average investor's general trust in Indiana's system because it eliminates a complete contractual bar to a securities fraud claim when an investor is lied to by a seller.[217]

Indiana's securities fraud standard would also likely raise investors' trust in brokers or sellers of securities that facilitate investor transactions because of the more stringent regulations and policies that brokers would have to follow.[218] If investors come to doubt the validity of the promises securities sellers make to them, investment success and opportunities in Indiana will fail.[219] By increasing investors' trust in securities transactions, investors will likely be more apt to invest in Indiana companies and stimulate the economy with their capital.[220] High levels of investor trust would create a positive effect on Indiana's stock market participation and a negative effect on dispersion of ownership.[221] Further, Indiana's stringent securities fraud regulations, aimed at reducing and preventing fraud, will likely yield more accurate securities pricing and encourage investor trust throughout the state.[222]

Additionally, Indiana's securities fraud standard does not circumvent the purpose of Congress' anti-waiver provision in Section 29(a) of the Exchange Act like many federal circuits have.[223] In fact, Indiana codified an anti-waiver provision similar to Congress' Section 29(a).[224] This anti-waiver provision explicitly prevents any contractual waiver of any provision of the Securities Acts.[225] Indiana courts have properly applied and interpreted this statutory anti-waiver provision while the federal system has not. By allowing non-reliance clauses to dominate the securities market, the federal system has effectively ignored Section 29(a), running contrary to the textual substance of the Securities Acts and their spirit of protecting investors.[226] Indiana's application of its anti-waiver provision in the Indiana Uniform Securities Act is more aligned with Congress' initial purpose for passing securities laws. Overall, investors have interests in having contract terms that provide them reasonable remedies and avoid fundamental unfairness.[227] Enforcing boilerplate non-reliance clauses as a total bar to a securities fraud claim clearly falls outside the realm of reasonable remedies and fundamental fairness.

However, despite the Indiana Court of Appeals' precedent in *Manns* and

---

216. *See Manns*, 666 N.E.2d at 1248-49.
217. *See* Guiso et al., *supra* note 6, at 2559.
218. *Id.*
219. Easterbrook & Fischel, *supra* note 7, at 1447.
220. *See* Guiso et al., *supra* note 6, at 2558.
221. *See id.* at 2559.
222. *See* GEORGAKOPOULOS, *supra* note 19, at 79.
223. *See* 15 U.S.C. § 78cc(a) (2019).
224. IND. CODE § 23-19-5-9 (2019).
225. 15 U.S.C. § 78cc(a).
226. *See* Prentice, *supra* note 15, at 358.
227. *See* Snyder & Mirabito, *supra* note 192, at 451.

Arnold and the Southern District of Indiana's precedent in *Landeen*, the Indiana Supreme Court has not yet explicitly detailed the current status of a reliance element in a securities fraud claim under the Indiana Uniform Securities Act. The Indiana Supreme Court should explicitly define the status of reliance in relation to a securities fraud claim under Indiana law and follow the precedent that has developed in Indiana and in the Third and First Circuits. By doing this, the Indiana Supreme Court can cement the precedent that Indiana's securities fraud standard allows investors to pursue securities fraud claims when they are fraudulently induced, despite the presence of non-reliance clauses. This explicit policy would promote greater investor trust and incentivize investment in the state by supporting greater investor protections.[228]

CONCLUSION

Congress sought to eliminate fraudulent activities and ensure ethical dealing in the selling and purchasing of securities by its enactment of the Securities Act of 1933 and the Securities Exchange Act of 1934.[229] However, the federal securities fraud standard has deviated from Congress' original intent, allowing sellers of securities to make inaccurate oral representations and avoid any securities fraud liability.[230] Namely, the federal standard allows investors to make misrepresentations and then avoid liability because of "non-reliance" contract clauses in securities purchase agreements.[231] This type of standard does not fulfill the original intention and entire purpose for Congress passing federal securities laws. Additionally, it provides less oversight and protections for investors to ensure that sellers provide accurate disclosures to investors, therefore reducing investor trust overall.[232]

Despite the dilution of the federal securities fraud standard, Indiana's securities fraud standard takes a more holistic approach to determining if fraudulent activity took place in a securities transaction, not barring securities fraud claims solely on the basis of a non-reliance clause in a contract. Indiana's standard better encompasses Congress' goal of deterring fraudulent sales tactics in securities transactions, better promotes the accurate flow of information, and increases investor trust overall.

---

228. *See* Guiso et al., *supra* note 6, at 2558.
229. *See* Kokesh v. SEC, 137 S. Ct. 1635, 1640 (2017).
230. *See* Rissman v. Rissman, 213 F.3d 381, 387 (7th Cir. 2000).
231. *See id.* at 385-87.
232. *See* Guiso et al., *supra* note 6, at 2558.