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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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In the matter of:

JOHN R. WALLRICH and JANE DOE
WALLRICH, husband and wife
10742 SW Heron Place
Beaverton, OR 97007,

Respondents.

DOCKET NO. S-03506A-02-0000

**SECURITIES DIVISION'S
MEMORANDUM OF LAW
REGARDING EFFECT OF A.R.S.
§ 44-2031(C) IN THIS ACTION**

The Securities Division ("Division") of the Arizona Corporation Commission (the "Commission") submits the following Memorandum of Law in response to Respondents' contention that A.R.S. § 44-2031(C) cannot be applied to impose liability upon Respondent Jane Doe Wallrich. Respondents have misinterpreted the effect of that section, and have ignored established Arizona law on the liability of community property for obligations incurred during marriage. Jane Doe Wallrich properly has been brought before the Commission in this action, and the Commission appropriately may determine the liability of the community of Respondents John R. Wallrich ("Wallrich") and Jane Doe Wallrich for violations of the Arizona Securities Act, A.R.S. §§ 44-1801 through 44-2126 (the "Securities Act").

FACTS

Respondents have admitted that, at all times material to the Division's claims, Wallrich was a resident of Arizona and was married to Jane Doe Wallrich. See Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, for Restitution, for Administrative Penalties, and for Other Affirmative Action ("Notice"), ¶¶ 2, 3; Answer to Proposed Order to Cease and Desist, for Restitution, for Administrative Penalties, and for Other Affirmative

1 Actions (“Answer”), ¶¶ 2, 3. They go on, however, to “specifically deny that A.R.S. Sec.
 2 44-2031(C) applies to any action taken by Jack Wallrich prior to the effective date of said
 3 statute.” Answer, ¶ 3. The Division expects Respondents to argue for dismissal of any claims
 4 against the community of Wallrich and Jane Doe Wallrich.¹

5 Respondents’ position misses the point, and misconstrues both existing Arizona law and
 6 the effect of A.R.S. § 44-2031(C). Jane Doe Wallrich is properly before the Commission, which
 7 may determine the liability of the community property for the actions of Wallrich.

8 LEGAL ARGUMENT

9 I. THE 2002 AMENDMENT TO THE SECURITIES ACT

10 A number of amendments to the Securities Act went into effect on August 22, 2002. *See*
 11 2002 Ariz. Sess. Laws, Ch. 157 (securities regulation bill, signed by governor May 6, 2002); *see*
 12 *also* Ariz. Const. Art. 4 Pt. 4 Sec. 1 subsec. (3) (all acts shall be effective ninety days after
 13 signature by the governor). One of those amendments added language to the statute governing the
 14 Commission’s jurisdiction in administrative proceedings:

15 **44-2031. Jurisdiction and venue of offenses and actions; 16 joinder of spouse**

17 A. The superior court in this state shall have jurisdiction
 18 over violations of this chapter, the rules and orders of the
 19 commission under this chapter and all actions brought to enforce
 20 any liability or duty created under this chapter, except actions or
 21 proceedings brought under section 44-2032, paragraph 2, 3 or 4
 22 or appeals filed under article 12 of this chapter, over which the
 23 superior court in Maricopa county shall have exclusive
 24 jurisdiction.

25 B. Any action authorized by this chapter may be brought
 26 in the county in which the defendant is found, is an inhabitant or
 transacts business, or in the county where the transaction took
 place, and in such cases, process may be served in any other
 county in which the defendant is an inhabitant or in which the
 defendant is found.

C. The commission may join the spouse in any action
 authorized by this chapter to determine the liability of the
 marital community.

1 The Division specifically stated in the Notice that Jane Doe Wallrich was joined in the action solely to determine the liability of the marital community of Wallrich and Jane Doe Wallrich for the actions of Wallrich. Notice, ¶ 3.

1 A.R.S. § 44-2031 (2002). The amendment made minor changes in the first two subsections, and
2 added subsection (C), which provides for jurisdiction of the Commission with respect to the
3 spouse of an alleged violator, who may be joined solely for the purpose of determining the liability
4 of the marital community for the alleged violator's misconduct. 2002 Ariz. Sess. Laws, Ch. 157,
5 Sec. 14.

6 The jurisdiction of an administrative agency may be limited by the statutes authorizing the
7 agency to act. *See, e.g., Rural/Metro Corp. v. Arizona Corp. Comm'n*, 129 Ariz. 116, 117, 629
8 P.2d 83, 84 (1981) ("such powers as the Commission may exercise do not exceed those to be
9 derived from a strict construction of the constitution and *implementing* statutes" [emphasis in
10 opinion]). As a result, previously the Division had no specific authority permitting it to join the
11 spouses of persons who had allegedly violated the Securities Act. The 2002 amendment to A.R.S.
12 § 44-2031 made clear that the Division could properly join such a spouse. A.R.S. § 44-2031(C).
13 The amended statute does not *create* community liability, it simply establishes a *procedure* for the
14 Commission to exercise jurisdiction over the spouse and thereby determine the community liability
15 under Arizona law.

16 **A. The 2002 Amendment Is Procedural, and May Apply Retroactively.**

17 In this case, the Division did not apply the statute retroactively. The action against these
18 Respondents was not commenced before the Commission until November of 2002. The statute
19 became effective in August, and was already in effect when the Division filed the Notice.
20 However, even if joinder of Mrs. Wallrich could be taken to be a retroactive application of the
21 statute, because Wallrich's acts alleged in the Notice did occur before the statute's effective date,
22 Arizona law permits such retroactive application.

23 Even when the legislature is silent on a statute's retroactivity, a court² may apply the statute
24

25 ² Or, in this case, an administrative agency exercising adjudicatory functions. *Cf. Ross v.*
26 *Arizona State Personnel Bd.*, 185 Ariz. 430, 916 P.2d 1146 (App. 1995) (agency may determine its
own jurisdiction and decide contested cases within that jurisdiction).

1 retroactively if the statute is merely procedural. *In re Shane B.*, 198 Ariz. 85, 87, 7 P.3d 94, 96
2 (2000). In a criminal context, this has been held to mean that a statute may apply retroactively if it
3 has no effect on the underlying offense or the resulting punishment for the offense. *Id.* at 88, 7
4 P.3d at 97.

5 In this case, if we review the provision permitting the Division to join a Respondent's
6 spouse by analogy to the criminal cases discussing the distinction between substantive and
7 procedural measures, that statute plainly has no effect on the underlying violations of the
8 Securities Act alleged in the Notice. It also has no effect on the extent of the administrative
9 penalty to be assessed if such violations are found to have occurred. Its only effect is procedural—
10 the statute gives the Division explicit permission to join a spouse so the Commission can properly
11 determine, under the Arizona statutes applicable to community property, the liability of the
12 community property for the wrongful conduct of a respondent.

13 “Substantive law creates and defines rights, while procedural law prescribes the method by
14 which substantive law is enforced or implemented.” *E.C. Garcia & Co., Inc. v. Arizona State*
15 *Dep't of Revenue*, 178 Ariz. 510, 518, 875 P.2d 169, 177 (App. 1993). “Litigants do not have a
16 vested right in any given mode of procedure, and a statute relating solely to procedural law such as
17 burden of proof and rules of evidence can be applied retroactively.” *Allen v. Fisher*, 118 Ariz. 95,
18 96, 574 P.2d 1314, 1315 (App. 1977).

19 The Arizona statutory section requiring the joinder of a spouse to establish community
20 property liability on obligations incurred by either spouse for the benefit of the community
21 provides, in part:

22 Except as prohibited in section 25-214, either spouse may contract
23 debts and otherwise act for the benefit of the community. ***In an***
24 ***action on such a debt or obligation the spouses shall be sued***
25 ***jointly*** and the debt or obligation shall be satisfied: first, from the
community property, and second, from the separate property of the
spouse contracting the debt or obligation.

26 A.R.S. § 25-215(D) (emphasis added). That section has been interpreted as a procedural measure

1 by both Arizona and non-Arizona courts. *E.g.*, *Gagan v. Monroe*, 269 F.3d 871, 875-76 (7th Cir.
2 2001); *National Union Fire Ins. Co. of Pittsburgh v. Greene*, 195 Ariz. 105, 108, 985 P.2d 590,
3 593 (App. 1999).

4 Because the amendment to A.R.S. § 44-2031 is likewise a procedural measure enabling the
5 Commission to comply with the joinder procedure established under A.R.S. § 25-215(D), and does
6 not affect a Respondent's substantive rights in this matter, retroactive application of A.R.S.
7 § 44-2031(C) is permitted.

8 **B. The Marital Community's Liability for Actions of One Spouse Is Governed by**
9 **Arizona's Community Property Statutes.**

10 The liability of community property under Arizona law is governed by the community
11 property statutes in Title 25.³ Those statutes provide, in pertinent part:

12 **25-211. Property acquired during marriage as community**
13 **property; exceptions**

14 All property acquired by either husband or wife during
the marriage is the community property of the husband and wife
except for property that is:

- 15 1. Acquired by gift, devise or descent.
- 16 2. Acquired after service of a petition for dissolution of
marriage, legal separation or annulment if the petition results in
a decree of dissolution of marriage, legal separation or
annulment.

17 **25-214. Management and control**

18 A. Each spouse has the sole management, control and
disposition rights of each spouse's separate property.

19 B. The spouses have equal management, control and
disposition rights over their community property and *have equal*
20 *power to bind the community.*

21 C. *Either spouse separately may* acquire, manage,
control or dispose of community property or *bind the*
22 *community*, except that *joinder of both spouses is required in*
any of the following cases:

- 23 1. Any transaction for the acquisition, disposition or
encumbrance of an interest in real property other than an
unpatented mining claim or a lease of less than one year.
- 24 2. Any transaction of guaranty, indemnity or suretyship.
- 25 3. To bind the community, irrespective of any person's
intent with respect to that binder, after service of a petition for

26 ³ See, e.g., A.R.S. §§ 25-201(2), 25-211, 25-214, and 25-215.

1 dissolution of marriage, legal separation or annulment if the
 2 petition results in a decree of dissolution of marriage, legal
 3 separation or annulment. (Emphasis added.)

4 **25-215. Liability of community property and separate
 5 property for community and separate debts**

6 A. The separate property of a spouse shall not be liable
 7 for the separate debts or obligations of the other spouse, absent
 8 agreement of the property owner to the contrary.

9 B. The community property is liable for the premarital
 10 separate debts or other liabilities of a spouse, incurred after
 11 September 1, 1973 but only to the extent of the value of that
 12 spouse's contribution to the community property which would
 13 have been such spouse's separate property if single.

14 C. The community property is liable for a spouse's debts
 15 incurred outside of this state during the marriage which would
 16 have been community debts if incurred in this state.

17 D. Except as prohibited in section 25-214, *either spouse
 18 may contract debts and otherwise act for the benefit of the
 19 community. In an action on such a debt or obligation the
 20 spouses shall be sued jointly* and the debt or obligation shall be
 21 satisfied: first, from the community property, and second, from
 22 the separate property of the spouse contracting the debt or
 23 obligation. (Emphasis added.)

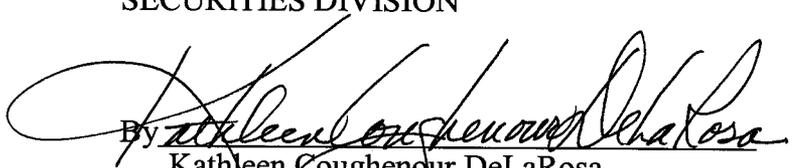
24 Under those statutes, had Wallrich been sued in an Arizona court, Mrs. Wallrich plainly
 25 would have been a proper party to determine the obligations of the community. The fact that this
 26 proceeding is to be heard before the Commission does not mean that different law would apply to
 those obligations. Civil judgments, even those arising from administrative actions, have been
 enforced against Arizona community property, even when the judgments arose from a proceeding
 outside Arizona in which the spouse was *not* joined. *E.g., Alberta Sec. Comm'n v. Ryckman*, 200
 Ariz. 540, 30 P.2d 121 (App. 2001) (failure of Alberta Securities Commission to join spouse did
 not prevent domestication of judgment against marital community); *Mermis v. Weeden & Co.*, 8
 Ariz. App. 166, 444 P.2d 524 (1968) (permitting enforcement of New York judgment against
 community property). *Cf. Gagan v. Monroe*, 269 F.3d 871 (7th Cir. 2001) (permitting enforcement
 of federal RICO judgment against Arizona community property, despite fact that spouse was not
 joined in underlying action.)

In this case, the liability of the marital community for any obligation to the Arizona
 Corporation Commission will be determined by applying Arizona law governing community

1 property—law that was in effect well before Wallrich allegedly committed the acts complained of
2 by the Division. That substantive law will not be applied retroactively. The measure that permits
3 the Division to join Mrs. Wallrich in its Notice may, however, apply retroactively as a procedural
4 measure affecting only the method of enforcing the substantive law. Mrs. Wallrich is a proper
5 party to this proceeding, and the Wallrich's marital community cannot escape liability merely
6 because the joinder statute might be applied retroactively.

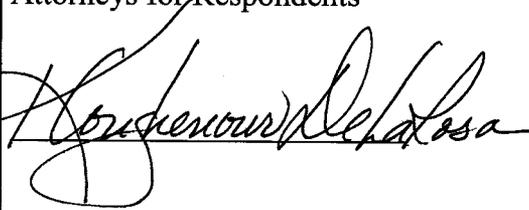
7 RESPECTFULLY SUBMITTED this 4th day of February, 2003.

8 ARIZONA CORPORATION COMMISSION,
9 SECURITIES DIVISION

10 
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15 Hand-delivered this 4th day
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