

State of Oregon v. Nistler.
Expert Testimony in
Securities Litigation

Presented to the Oregon State Bar's
Securities Regulation Section
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Panelists: Tippi Pearse, Caroline Smith, and Jason Weber

Panelists

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Facts of the Case

- ▶ Investments in a housing development in Jackson County, Oregon called Tennessee Acres (2006–2007)
- ▶ Nistler raised \$1.2 million from at least seven investors to build houses, but spent less than \$400,000 on the Tennessee Acres project
- ▶ Profile of investors: Most of the investors were elderly
- ▶ The investors knew there were other investors
- ▶ How they learned about the investment: advertisement

Facts of the Case – *continued*

- ▶ Generally, investors were promised returns of at least 12% per annum on the funds they invested
- ▶ In return for their funds, the investors generally received a note and trust deed
- ▶ Housing development not completed
- ▶ Investors lost most of the funds they invested
- ▶ Loss of their funds invested in Tennessee Acres changed the standard of living for some the victims

Advertisement

In 2006 – 2007, Nistler ran an advertisement in a newspaper that stated:

“ATTENTION INVESTORS

Earn 12–15% return...

...All secured by land...

Call Jim Nistler, First Call Mortgage”

The newspaper ad included Nistler’s telephone number.

FINANCIAL

800

803

BANK TURNED DOWN?

Real estate, auto loans,
Pool credit OK 783-3841
Oregon Land Mortgage

805

MAXHAM FINANCIAL SERVICES

Pay Cash for owner financed
mortgages. Professional
Services & Est. closing.
784-633-2216

806

ATTENTION INVESTORS

Earn 12-15% return
\$10,000 min. investment
All secured by land 22 units
\$400,000 / 12 units \$350,000
10 units (duplex) \$350,000
Construction loan \$100,000
Call Jim Ristler
First Call Mortgage
858-5887 840-4887



James Nistler

- Medford-area developer
 - Former high-ranking HUD official
- Licensed mortgage broker (Owner, FirstCall Mortgage)
 - Licensed realtor

Indictment

- ▶ Nistler indicted in May 2009, in Jackson County, Oregon and charged with racketeering, aggravated theft, and securities fraud
- ▶ Jason Weber appointed Special Prosecutor for Jackson County District Attorney
- ▶ Tippi Pearse on the prosecution team

Pre-Trial Motions

- ▶ Pre-trial motion regarding expert testimony, OEC 702 and OEC 704, and the opinion of the State's expert witness (Caroline Smith) that the transactions were investment contracts
- ▶ Defense argued that Smith's testimony would impermissibly invade the province of the jury, because the determination of whether the transactions at issue were "investment contracts" was, ultimately, committed to the jury
- ▶ Defense argued that Smith's testimony "touched on ultimate opinion"

Defense objection to the expert's testimony

Defense argued: “This is an ultimate question of fact, for the jury, as to whether or not these were securities beyond a reasonable doubt” and “if they are securities, that’s tantamount to he’s guilty”

Trial

- ▶ Jury trial held in Jackson County, Oregon in November 2010
- ▶ Caroline Smith testified as expert witness for the State

Security or loan?

- ▶ Each securities fraud count against Nistler was alleged as involving “a security: to wit: an investment contract”
- ▶ Defense argued: Nistler transactions were loans, not investment contracts

Real estate paper– Defense argued exemption

- ▶ Real estate paper sold by a mortgage broker is included in the definition of a security. ORS 59.015(19)
- ▶ Real estate paper exemption under ORS 59.035(7) not applicable in this case because the real estate paper/notes were not sold to a single purchaser

"Any transaction in a vendor's interest in a land sale contract, or a bond or note secured by a mortgage or trust deed upon real estate, so long as the entire vendor's interest or mortgage or trust deed, with all the bonds or notes secured thereby, are sold to a single purchaser, in a single sale." ORS 59.035(7)

Security or loan?

Oregon Court of Appeals distinguished Nistler transactions from loans:

We emphasize that this case does not involve a simple, single, and straightforward loan of money by an individual to develop a piece of property, secured by a trust deed on the property. Rather, here:

- (1) Defendant actively solicited “investors” through newspaper advertisements;*
- (2) the investors were told that they, as a group, were invested in the development of Tennessee Acres, which consisted of multiple lots;*
- (3) the investors understood that there were multiple investors, some of which had their loans secured by the same lots within Tennessee Acres; and*
- (4) the investments of the multiple investors were pooled, ostensibly for the purpose of developing the lots in Tennessee Acres.*

Given those indicia of a “common enterprise,” the transactions here were “investment contracts.”

Expert testimony during trial

- ▶ Caroline Smith testified regarding definition of a security, investment contract, and securities registration and licensing requirements
- ▶ After pre-trial motions, Court allowed testimony regarding the securities charges
- ▶ Doesn't happen all the time. [Contrast: Josephine County criminal case that went to trial in 2011, *State of Oregon v. Andrew Hugh Meyer*, judge did not allow expert testimony regarding whether or not there were investment contracts, securities in that case]

Test for “investment contract” in Oregon

The requirements are:

- (1) an investment of money (or money’s worth),
- (2) in a common enterprise,
- (3) with the expectations of a profit,
- (4) to be made through the management and control of others.

Pratt v. Kross, 276 Or 483, 487, 555 P2d 765 (1976)

Trial Transcript: Expert Witness Testimony in Nistler case (Excerpt)

99

1 Q: After reviewing the transaction materials and
2 investment questionnaire's, were you able to form an opinion
3 whether [REDACTED]'s transaction was an investment contract?

4 A: Yes, I did form an opinion, and yes it was an
5 investment contract?

6 MR. KELLINGTON: And I objected on the basis that it
7 touched on ultimate opinion. That's - -

8 THE COURT: The objection is overruled.
9

Conviction

- ▶ In November 2010, a Jackson County jury convicted Nistler of racketeering, aggravated theft, and securities fraud.

Sentencing

- ▶ Nistler sentenced to serve 19-month prison sentence (sentence was stayed pending appeal)
- ▶ Nistler ordered to pay \$257,611 in victim restitution

Appeal – Oregon Court of Appeals

- ▶ Nistler filed appeal with Oregon Court of Appeals on January 5, 2011
- ▶ Court of Appeals opinion handed down on January 22, 2015
- ▶ Court of Appeals affirmed all securities counts, reversed regarding theft counts, based on SOL issues
- ▶ Court of Appeals remanded case to trial court for re-sentencing

Appeal – Oregon Supreme Court

- ▶ Nistler petitioned for review with the Oregon Supreme Court
- ▶ Oregon Supreme Court denied review
- ▶ *State v. Nistler*, 268 Or App 470, 342 P.3d 1035 (2015), *rev den*, 357 Or 551 (2015).

Securities Issues on Appeal

- ▶ Was the “common enterprise” prong of the investment contract test met in this case?
- ▶ Admissibility of expert testimony for the State regarding securities and investment contracts

Issues – Expert Testimony

- ▶ Is expert testimony appropriate/helpful to a jury in a securities case?
- ▶ If so, what is the scope of expert witness testimony that is admissible?
- ▶ Is expert testimony regarding the ultimate issue admissible?

Issue

Did the State's expert have "specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue"? OEC 702.

Test for determining when experts may be used

“Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. There is no more certain test for determining when experts may be used than the common sense inquiry whether *the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.*”

Legislative Commentary to OEC 702, *reprinted in* Laird C. Kirkpatrick, *Oregon Evidence* § 702.02, 619 (6th ed 2013)(internal quotation marks and citation omitted; emphasis added).

Quotes from the Nistler Opinion

“This case is the archetype of the emphasized commentary: The regulation of securities is not within the purview of the average ‘untrained layman’—nor, for that matter, most legally trained professionals.”

Quotes from the Nistler Opinion

“An overview of what is a security, and how securities are regulated, by someone with ‘specialized understanding of the subject,’ provides jurors with valuable context for understanding, and determining—for the ultimate determination is, most assuredly, theirs—whether particular transactions violated criminal laws prohibiting securities fraud.”

What the Oregon Court of Appeals did NOT do in *Nistler*

- ▶ Did not change the investment contract test in Oregon.
- ▶ The *Nistler* opinion does not clarify which test for vertical commonality required to meet Oregon's definition of an investment contract (*e.g.*, dependence on promoter expertise; investment interwoven with and dependent on the fortunes of others, so that the investor and the promoter can be said to conduct a common venture; or fortunes of the investor and the promoter intertwined as to both profit and loss).
- ▶ The Court found horizontal commonality was present in the *Nistler* case, affirmed that horizontal commonality was sufficient to meet the investment contract test in Oregon, and it did not need to consider whether or not vertical commonality was present in this case.

Takeaway

- ▶ In complex cases, particularly securities cases, where expert testimony may assist a finder of fact, *Nistler* is an Oregon case to cite to regarding admissibility of expert testimony in such cases.
- ▶ *Pratt v. Kross* remains the go-to case in Oregon for the definition of an investment contract.

Re-Sentencing

- ▶ Nistler was re-sentenced in October 2015 to serve 19-month prison term for racketeering and securities fraud
- ▶ Nistler reported to jail in Jackson County on November 2, 2015



James Nistler

Jackson County Booking Photo,
11/2/15

Any questions?

State v. Nistler, 268 Or App 470,
342 P.3d 1035 (2015), *rev den*,
357 Or 551 (2015).