Legal Responsibility

Of Investment Advisers

Investment advisers should not assume that they are necessarily protecting themselves against the possibility that they could be sued for libel by issuing a circular to clients and correspondents and stating thereon that the circular is "Confidential—for the information of clients and correspondents only" or some similar form of words. Such phrases do not of themselves render a circular a privileged publication, as in all cases it is the relationship between the author and the reader and the subject matter of the document which determines whether or not it is privileged.

Circular Contents

Likewise, the statement: "The contents of this circular are not guaranteed although based upon information which we believe to be accurate and reliable" would not, according to legal advice, afford protection against proceedings for libel. If a statement of this nature is of value, it is in absolving the adviser from liability to persons who might act to their detriment on the advice contained in the circular.

Needless to say a company can be defamed as it is clear law that a company has a trading character, the defamation of which may ruin it. It could therefore maintain an action of libel for any words which are calculated to injure its reputation in the way of its trade or business. Such an action will lie for example if any implication is made that a trading company is insolvent, although a mere assertion that a company's finances are over-strained or an expression of a view on the strength or weakness of a company's financial structure would not in the ordinary way be defamatory.

In general the principle can be expressed this way: A company could commence an action based upon any statement made as to the mode in which it conducts its business and such as to lead reasonable people to the opinion that it conducts its business in a dishonest, improper or inefficient manner.

Investment advisers, of course, often recommend to their clients in the normal course of business, that certain shares should be bought or sold, and when this advice is given in private conversation with clients, there is obviously very little risk that the company under discussion, if inadvertently defamed, would even hear of the matter and, if it did, take proceedings.

However, when an investment adviser is seeking to advise his clients and correspondents who reside or are established in the country, interstate or overseas, he clearly must commit his views to paper and the practical possibility that a libel action would lie would therefore be correspondingly greater.

The position does not appear to be very much different in the case of an investment adviser replying to a specific enquiry in writing and the case where an investment adviser issues a circular to clients and correspondents. Often his advice would be directed to appraising whether the market value of the company's shares in question was considered to be over-valued.

By P. S. Philips
Member, Sydney Stock Exchange.
ample, statements made by members of Parliament in the course of proceedings; statements made by persons in the course of judicial proceedings.

Qualified Privilege

Other communications are subject to qualified privilege which means that the communication is privileged if made in good faith. Sections 14 and 17 of the Act list the circumstances under which qualified privilege attaches to certain publications. By section 17 (e), publication of defamatory matter is privileged if the publication is made in good faith for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has an interest in knowing the truth. Likewise by section 17 (d) it is lawful to publish defamatory matter in answer to enquiry made by a person who has an interest in knowing the truth. According to counsel these provisions would afford privilege in respect of a communication by an investment adviser to a client or correspondent provided that such communication is made in good faith.

"Good Faith"

The expression "good faith" is defined by the Act and, in order for good faith to exist, the following requirements must be met:

- The matter published must be relevant to the matters the existence of which may excuse the publication if made in good faith.
- The manner and extent of the publication must not exceed what is reasonably sufficient for the occasion.
- The person by whom it is made must not be actuated by ill will or other improper motive.
- The person making the publication must not believe the defamatory matter to be untrue.

A publication of the nature under consideration almost invariably comprises both fact and comment. It would appear lawful to publish comment so long as that comment is fair and is based upon facts which are themselves true. As to whether or not comment is or is not fair is a question of fact and the question of malice or improper motive is important. In one leading case the test was said to be as follows:

"Is the inference (that is, the comment) the honest expression of the opinion which the defendant held upon the facts truly stated, and warranted by the facts in the sense that a fair minded man might reasonably draw that inference?"

True Facts

It is necessary, therefore, that the facts upon which the comment is based must be true and that the comment must be without malice and must not impute corrupt or dishonourable motives.

The defence of qualified protection under section 17 of the Act, however, is available although the facts upon which the defamatory statement is based are in fact untrue provided the author did not believe them to be untrue. Proof that the author of the libel has made little or no effort to ascertain the true facts may be evidence of malice or other improper motive sufficient to destroy the defence.

In addition, the circular must not impute to the company, its directors or officers dishonourable, corrupt or dishonest motives or acts nor must it suggest that the company's business is conducted in a dishonest, improper or inefficient manner. Specifically, it must not suggest that the balance sheet, for example, has been deliberately written up in such a way as to misrepresent the company's true position; or that a method of accountancy or auditing practice has been deliberately adopted with the purpose of distorting the real facts.

It must not suggest that the balance sheet or other financial statements have been drawn in such a way as to induce members of the public to their detriment to invest money in this company. In short, there must be no imputation of dishonesty or even inefficiency if this imputation might be likely to injure the company's trading reputation.

It is clear from the above that an investment adviser must be extremely careful in what he says about a company when in suggesting that a company's shares are over-valued he seeks to give reasons for the apparent over-valuation. Yet circulars of this sort could often be of more value than the type of circular which merely recommends an investment.

What additional steps then can such an investment adviser take to ensure that he does not suffer loss as a result of a libel action based on a circular which is both fair in its comment and prepared with considerable care and with due regard to the principles discussed above?

Obviously one thing that can be done is to arrange insurance against loss as a result of a libel action based on such a circular or insurance against loss as a result of a libel action based on any circular issued over a period.

So far as the writer is aware, the most experienced insurers in this field are Lloyds, who are responsible for the libel insurance of most country newspapers and periodically issued trade publications.

Similar Policy

It is understood, however, that a similar policy could be arranged by Lloyds for investment advisers, subject, of course, to investigations of the proposer's relevant history together with his ability and standing in the organisation of which he is a member.

As might be expected, it is a condition of the Lloyds' libel policy that "the Assured will not light-heartedly commit to paper ill-considered opinions believing that he has cast the burden of resultant action entirely to another". Lloyds

(Continued on page 14)
The main purpose of this article is to provoke some thinking on this subject. It may well be that the basis outlined is not the best one and in this connection it is worth noting that in an N.A.A. Bulletin of February, 1962, at least 12 different methods as used by U.S.A. companies were listed. These companies used this ratio to assess management performance within their various divisions.

Another factor which is also of importance is that, so far as it is possible to tell, Australian management thinking up-to-date has been concentrated on earnings to ordinary capital. Earnings can be varied quite extensively by changes in various provisions such as depreciation provisions, stock provisions, so that a company can be disguised just as a company can support their proposition in a detailed way. When buy orders have been received on the floor, they are filled at the offering price until the entire block has been sold. A Special Offering must be approved by Exchange authorities before it is announced.

The offering must remain open for at least fifteen minutes after its announcement, unless the announcement is made at least one hour before the offering becomes effective. When buy orders have been received on the floor, they are filled at the offering price until the entire block has been sold. A Special Offering must be approved by Exchange authorities before it is announced.

A Special Bid may be made by an investor seeking to acquire a large block of stock of an issue.

There is little purpose in the piecemeal additions of new ideas to a system perhaps troubled by the inadequacies of growing empirically. It would seem that not only must the method of marketing large parcels but the operation of the whole market must be re-thought and re-planned to remove what anomalies still exist and prevent more developing.

NEW METHODS FOR LARGE DEALINGS
(Continued from page 9)

SPECIAL OFFERING OR BID

Still larger blocks (25,000 to 100,000 shares) of stock may be sold through the Special Offering procedure. In this instance, a price for the shares is predetermined, taking into account the current quotation in the auction market.

For the buyer, the price is net. He obtains stock at the offering price without paying the usual commission. He may also obtain stock at a price slightly below the best offer in the auction market at the time of the offering. Selling brokers are offered a special, incentive commission, perhaps two to two and one-half times the usual commission on a sale.

The offering must remain open for at least fifteen minutes after its announcement, unless the announcement is made at least one hour before the offering becomes effective. When buy orders have been received on the floor, they are filled at the offering price until the entire block has been sold. A Special Offering must be approved by Exchange authorities before it is announced.

A Special Bid may be made by an investor seeking to acquire a large block of stock of an issue.

There is little purpose in the piecemeal additions of new ideas to a system perhaps troubled by the inadequacies of growing empirically. It would seem that not only must the method of marketing large parcels but the operation of the whole market must be re-thought and re-planned to remove what anomalies still exist and prevent more developing.

LEGAL RESPONSIBILITY OF INVESTMENT ADVISERS
(Continued from page 11)

attempt to ensure that this does not occur by issuing a policy on condition that the assured bears a predetermined percentage of the risk (normally 10 per cent.).

The policy also provides that the insurer will take over complete defence of any action for alleged libel but should the assured insist on defending or resisting a case where the insurer has a legal opinion from counsel of standing that the matter should be compromised, the insurer will not in that case be liable for costs, damages or expenses incurred from the date of refusal to compromise. Subject to this the insurer undertakes to pay all damages, costs or legal expenses incurred as a result of such an action.

Whilst it is understood as mentioned above that libel insurance policies are taken out in connection with periodically issued trade publications and by the country Press, there is apparently no known occasion as yet where such a policy has been taken out by a member of a Stock Exchange and because of this it is assumed that in the absence of a loss history, premium charges might be relatively minor.

If this article serves to reduce the number of investment advisers who are prepared to suggest that a given share is over-valued and to support their proposition in a detailed way, it would be most unfortunate, because it is probable that in the public interest there are too few people at the moment who are prepared to issue circulars of this kind.

As a practical matter, moreover, it would be unlikely that libel proceedings would be initiated against an investment adviser unless there had been fairly considerable provocation and if responsible circulars are prepared with due regard to the facts, and in the ordinary course of business, there should be little risk.

The Australian Security Analysts' Journal