III. Business Associations

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There were a number of significant judicial and legislative developments in the corporate and business association area during the past year. Unfortunately, space limitations preclude anything more than an overview.[1]

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[1]There are several cases that warrant at least passing reference in this survey. One is Warner v. Young Am. Volunteer Fire Dep't, 326 N.E.2d 831 (Ind. Ct. App. 1975), a per curiam affirmance of a denial of defendant's motion for relief from judgment pursuant to Indiana Rule of Trial Procedure 60(B) because he had failed to preserve and present any issues for appeal. *See generally* 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 196-201, 204-05, 208-23 (1971). One of the issues the defendant attempted to raise was that the judgment was void because the complaint was not in the correct corporate name of the plaintiff, an Indiana not-for-profit corporation. The court held that failure to plead the affirmative defense of plaintiff's lack of capacity to sue waived the defense. Also, the minor variance between the true corporate name and the name as styled in the complaint was of no legal significance since defendant was well aware of plaintiff's identity. For a discussion of the consequences of misnaming a corporate party to a law suit see 9 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 4492, 4494, 9545 (perm. ed. rev. 1964) [hereinafter cited as FLETCHER]. For a general discussion of the capacity of corporations to sue and be sued see *id.* §§ 4215, 5226-27; H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS §§ 80, 352 (2d ed. 1970) [hereinafter cited as HENN]. *See also* IND. CODE § 23-1-2-2(b)(2) (Burns 1972).

Also of some interest is Tindall v. Enderle, 320 N.E.2d 764 (Ind. Ct. App. 1974) (Staton, J.), where the court recognized the distinct tort theory that imposes liability on an employer who negligently hires an employee with negligent or violent proclivities. *See* Broadstreet v. Hall, 168 Ind. 192, 80 N.E. 145 (1907). However, the *Tindall* court, in affirming a judgment for defendants, held that the tort theory applies only in special circumstances and not where, as in the instant case, the employer has stipulated the employee was acting within the scope of employment. In such situations the plaintiff is limited by the traditional doctrine of respondeat superior. *See* Lange v. B & P Motor Express, Inc., 257 F. Supp. 319 (N.D. Ind. 1966). The court noted that many decisions failed to differentiate between the two doctrines, *see* cases cited at 320 N.E.2d at 768 n.5, but concluded that permitting a plaintiff to prove the negligent hiring theory after prevailing on respondeat superior would be a waste of judicial resources and might unduly prejudice the defendant. It would be appropriate, though, where there was a request for punitive damages. The court left open the issue of what would occur when the alternative theories of negligent hiring and respondeat superior were raised and the employer refused to stipulate that the employee was acting within the scope of employment. 320 N.E.2d at 768 n.6. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 61, 69 (4th ed. 1971); RESTATEMENT (SECOND) OF

A. *Trust Fund Theory*

The trust fund theory of capital was involved in *Abrahamson*

TORTS §§ 315, 317 (1965); W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 82B (1964); 53 AM. JUR. 2D *Master and Servant* §§ 422, 458 (1970); Annot., 34 A.L.R.2d 372 (1954).

Mishawaka Fed. Sav. & Loan Ass'n v. Brademas, 319 N.E.2d 674 (Ind. Ct. App. 1974), is a case touching on partnership authority. The court held that the general partners of a limited partnership, which in turn was the general partner of a second limited partnership, had the authority to execute and acknowledge a mortgage binding both limited partnerships. Since the mortgage was within the scope of the partnership business, the general partner as agent could bind the partnership. *See* IND. CODE §§ 23-4-1-9, -2-9 (Burns 1972). *See generally* J. CRANE & A. BROMEBERG, PARTNERSHIP §§ 48-50 (1968) [hereinafter cited as CRANE & BROMBERG]. The actual limited partners of the two limited partnerships would not be bound as such by the obligations, *see* IND. CODE § 23-4-2-1 (Burns 1972), unless they sacrificed their protected status by taking part in the control of the business. *Id.* § 23-4-2-7. *See generally* 1 CAVITCH, BUSINESS ORGANIZATIONS § 12.02[3] (rev. ed. 1975) [hereinafter cited as CAVITCH]; 2 *id.* § 39.01; CRANE & BROMBERG § 26; HENN §§ 28-36; N. LATTIN, THE LAW OF CORPORATIONS § 7 (2d ed. 1971) [hereinafter cited as LATTIN]. The current Indiana Uniform Partnership Act, IND. CODE §§ 23-4-1-1 to -43 (Burns 1972), and the Code sections dealing with limited partnerships, *id.* §§ 23-4-2-1 to -31, are based on the Uniform Partnership Act and the Uniform Limited Partnership Act. For a discussion of the prior Indiana statutes on limited partnerships, ch. 82, § 2, [1859] Ind. Acts 131, *as amended* ch. 80, §§ 1-10, [1903] Ind. Acts 308 (repealed 1949), see Brown, *The Limited Partnership in Indiana*, 5 IND. L.J. 421 (1930).

A federal case with Indiana connections and some interesting observations on the Indiana General Corporation Act, IND. CODE §§ 23-1-1-1 to -12-6 (Burns 1972), is Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975). *Schlick* was a suit brought by a minority shareholder of a publicly-held Indiana corporation alleging that a merger of that corporation into its controlling shareholder violated the common law and the antifraud and proxy provisions of the Securities Exchange Act of 1934 and its implementing rules. 15 U.S.C. §§ 78j(b), 78n(a) 1970); 17 C.F.R. §§ 240.10b-5, .14a-9 (1974). In holding that plaintiff's complaint was sufficient to withstand a motion to dismiss, the Second Circuit Court of Appeals posited that the rationale denying appraisal rights to dissenting shareholders of publicly traded corporations, *see* IND. CODE § 23-1-5-7 (Burns 1972), might not exist where the market price of those shares had been manipulated so as not to reflect their true value. 507 F.2d at 377 n.6. For a discussion of the appraisal remedy, perhaps more aptly called the shareholders right to dissent, see 6 CAVITCH § 112; 13 FLETCHER §§ 5906.1-.17; HENN § 349; LATTIN § 161. The remedy has generated considerable academic comment. *See* articles cited in HENN § 349, at 724 nn.1 & 3. For a discussion of the Indiana appraisal procedure see Apartment Properties, Inc. v. Luley, 143 Ind. App. 227, 239 N.E.2d 403 (1968), *rev'd*, 252 Ind. 201, 247 N.E.2d 71 (1969); Shaffer v. General Grain, Inc., 133 Ind. App. 598, 182 N.E.2d 461 (1962).

In United Hosp. Serv. Inc. v. United States, 384 F. Supp. 776 (S.D. Ind. 1974), the court held that a corporation organized under the Indiana Not-for-Profit Corporation Act of 1971, IND. CODE §§ 23-7-1.1-1 to -66 (Burns 1972),

v. Levin,[2] where the Third District Court of Appeals affirmed a summary judgment entered against Leo Abrahamson by the Lake Superior Court. The suit was an interpleader action brought by a bank to determine who was entitled to certain corporate funds. It arose out of efforts by Lillian and Saul Levin to satisfy debts owing by Abrahamson Motor Sales, Inc. The Levins were shareholders, directors, and officers of the corporation, as were Lillian's two brothers, Leo and Jack Abrahamson.[3] The opinion does not specifically state that the corporation was insolvent, but it clearly was in financial difficulty. In fact, it was being, or at least had been, kept afloat by loans from the Levins and from Leo Abrahamson. The loans were evidenced by demand notes executed by the corporate officers, although the court indicated that the loans had been made and in some cases repaid without formal action by the board of directors.[4]

In September 1968, the Levins drew a check for $22,284.69 on the corporation's checking account at a time of pressing financial difficulties for the corporation. The check was in repayment of the balance of the loans made by the Levins. The bank refused to honor the check until bank loans had been repaid pursuant to a subordination agreement executed by the four. It did agree to place the funds in an escrow savings account until the debt was satisfied, but it still refused to pay over the funds at that point because Leo Abrahamson had advised the bank that there were other claimants to the funds. To avoid the possibility of double liability, the bank filed an interpleader action naming the four individuals and the corporation as defendants and paid the disputed funds into the court.

Initially, the two Abrahamsons and the corporation claimed the funds, thus denying the Levins' claim. Each group filed a cross-complaint against the other. The Levins moved for summary judgment and then filed their cross-complaint solely against Leo, inasmuch as Jack Abrahamson and the corporation had withdrawn from the litigation by that time. Leo Abrahamson, along with a corporate creditor permitted to intervene, opposed the summary judgment motion to no avail, and the funds were ordered paid to the Levins. In so ruling, the trial court emphasized that Leo's cross-complaint for his loans was against the *corporation* and not against the fund on deposit. The court of appeals noted that Leo's

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to furnish laundry service to several hospitals was an exempt charitable organization under sections 501(a) and 501(c)(3) of the Internal Revenue Code of 1954, and therefore was entitled to a refund of taxes paid.

[2]319 N.E.2d 351 (Ind. Ct. App. 1974) (Hoffman, C.J., Staton, J., concurring with opinion).

[3]*Id.* at 352.

[4]*Id.* at 352-53.

cross-complaint alleged that the Levins' efforts to be repaid had not been approved by the directors or the officers, which was an improper effort to become preferred creditors to the detriment of Leo and others. Therefore, the funds on deposit should be used to pay the claims of corporate creditors, including Leo, with any balance being paid pro rata to the four shareholders. In other words, Leo was claiming as a general creditor of the corporation and not in any corporate capacity.

This might have been a tactical error on Abrahamson's part.[5] As the court of appeals pointed out he was

> not attempting to execute upon alleged corporate assets to satisfy a judgment lien against the corporation. And, it is apparent that appellant's cross-complaint does not state a derivative cause of action seeking to recover the funds paid into the trial court for the benefit of the corporation by reason of his status as a shareholder. Furthermore such cross-complaint does not seek the appointment of a receiver to preserve or liquidate the assets of the corporation for the benefit of its creditors. Rather, it avers only the detriment suffered by appellant as a creditor of the corporation as a basis for requesting the trial court to set aside the preference inuring to the Levins as fully reimbursed creditors of the corporation.[6]

Instead of utilizing these approaches, Abrahamson sought to proceed under the equitable trust fund theory, where the capital stock of a corporation or the assets of an insolvent corporation representing the stock is considered a *res* or trust fund for the benefit of creditors.[7] The theory was first applied in the 1824 case of *Wood v. Dummer*.[8] Justice Story posited that corporate creditors rely on the capital stock or assets for repayment, so both legal principle and common sense mandate that the fund be set apart and pledged for the payment of debts. Thus creditors are given additional security and protection against overreaching by a corporation or its principals, since no liens or preferences can be created either voluntarily or by operation of law favoring a cred-

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[5]The intervening creditor, of course, had no choice. That creditor did not appeal.

[6]319 N.E.2d at 354.

[7]*See* Valhalla Memorial Park Co. v. Lowery, 209 Ind. 423, 428, 199 N.E. 247, 249 (1936); Nappanee Canning Co. v. Reid, Murdoch & Co., 159 Ind. 614. 64 N.E. 870 (1902); 15A FLETCHER § 7369. *See generally* 7 CAVITCH § 155.02, at 155-57; 15A FLETCHER §§ 7369-89; HENN § 171; R. STEVENS, HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS § 190 (2d ed. 1949); Johnson, *Is the Trust Fund Theory of Capital Stock Dead?*, 34 ACCOUNTING REV. 607 (1959).

[8]30 F. Cas. 435 (No. 17,944) (C.C.D. Me. 1824).

itor once insolvency occurs.[9] However, the fund is only an aid in reaching assets. No express trust is established,[10] and creditors do not have any right, without more, to interfere in corporate operations.[11] It is also a doctrine that has not been well received by the courts in Indiana or in other jurisdictions.[12]

The *Abrahamson* court cited and relied on the leading Indiana case on point, *Nappanee Canning Co. v. Reid, Murdoch & Co.*,[13] where the Indiana Supreme Court considered and ostensibly rejected the doctrine. The attitude of the *Nappanee* court was that corporate creditors should be aware that the assets of an insolvent corporation may be applied to pay or secure debts due favored creditors. Creditors presumably bargain at arm's length, and when creditors extend credit, they are subject to the corporation's right to grant creditor preferences.[14] This is true even if the creditor was a director or officer, including an interested director who had voted to grant the preference.[15]

The *Nappanee* court did recognize that a corporation in receivership or otherwise subject to the equity jurisdiction of the courts could not grant preferences. This lends support to Fletcher's postulate that many courts rejecting the theory are only repudiating it in its broadest application, where creditors could claim a lien or interest in the assets of a solvent, viable corporation, or where the trust would be imposed simply because the enterprise is

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[9]*See id.*; 15A Fletcher §§ 7369-71, 7374, 7376, 7380-83. Since the doctrine was first announced in a case involving an insolvent bank, it has frequently been applied to financial institutions. *Id.* § 7369, at 49 n.49. *See also* Miller v. First Nat'l Bank, 103 Ind. App. 99, 1 N.E.2d 671 (1936).

[10]*See, e.g.*, Shoen v. Sioux Falls Gas Co., 63 S.D. 527, 261 N.W. 393 (1935). *See generally* 15A Fletcher §§ 7375-76.

[11]Thus a creditor cannot enjoin improvident contracts or conveyances unless intended to defraud creditors. Sweeney v. Happy Valley, Inc., 18 U.2d 113, 417 P.2d 126 (1966); 15A Fletcher § 7377.

[12]*See, e.g.*, Automatic Canteen Co. of America v. Wharton, 358 F.2d 587 (2d Cir. 1966); Nappanee Canning Co. v. Reid, Murdoch & Co., 159 Ind. 614, 64 N.E. 870 (1902); Nathan v. Lee, 152 Ind. 232, 52 N.E. 987 (1899); Levering v. Bimel, 146 Ind. 545, 45 N.E. 775 (1897); Fricke v. Angemeier, 53 Ind. App. 140, 101 N.E. 329 (1913). Fletcher considers Judge Mitchell's opinion in Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N.W. 1117 (1892), as the best statement rejecting the trust fund concept, although recognizing that creditors are entitled to some protection against corporate overreaching. 15A Fletcher §§ 7384-85. Fletcher lists the jurisdictions rejecting the doctrine in *id.* § 7385, at 79 n.19.

[13]159 Ind. 614, 64 N.E. 870 (1902) (one judge dissented).

[14]*Id.* at 621-23, 64 N.E. at 872-73.

[15]The lower Indiana courts were not uniformly hospitable to *Nappanee*. In City Nat'l Bank v. Goshen Woolen Mills Co., 34 Ind. App. 562, 69 N.E. 206 (1904), the court analyzed and criticized *Nappanee* and suggested that it be repudiated. However, the *Goshen* case was transferred to the supreme court, which reaffirmed its earlier decision. 163 Ind. 214, 71 N.E. 652 (1904).

insolvent.[16] The United States Supreme Court aptly described the theory when it posited that it was not a trust that attached to the property as such for the benefit of creditors or shareholders, but rather was a trust in administering assets after possession by an equity court.[17]

It is interesting to note that the *Abrahamson* court did not cite *Automatic Canteen Co. of America v. Wharton,*[18] a federal case applying Indiana law. *Canteen* involved the propriety of transferring a vending company route from an Indiana subsidiary corporation to a parent corporation. The Second Circuit Court of Appeals acknowledged that Indiana was among those jurisdictions rejecting the trust fund theory; therefore, directors do not have to treat all creditors alike even after insolvency. However, it went on to distinguish the situation involving a favored creditor, even an oficer or director, from the situation where assets are being distributed as dividends to the shareholders. The court concluded, citing *Fricke v. Angemeier*[19] and *State ex rel. Thompson v. City of Greencastle,*[20] that a creditor could trace the assets to the shareholders notwithstanding the repudiation of the trust fund theory. The *Canteen* court imposed a constructive trust on the assets in favor of the creditor, concluding that Indiana's rejection of the theory was not so conclusive that a creditor would not be protected under these circumstances. The court's statement that directors of an insolvent corporation have a fiduciary duty to creditors comparable to the duty owed by directors of a solvent corporation to the corporation and its shareholders[21] is not truly consistent with *Nappanee* where the court stated that "[t]he directors of a manufacturing corporation are not the agents or trustees of the creditors, but are simply and solely the representatives of the stockholders and of the corporation."[22] However, *Canteen's* proposition that creditors would be protected by Indiana courts even if there is no fiduciary duty as such is probably correct since

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[16]15A FLETCHER §§ 7374, 7376, 7379-82, 7385-86. *See* Miller v. First Nat'l Bank, 103 Ind. App. 99, 1 N.E.2d 671 (1936); Marcovich v. O'Brien, 63 Ind. App. 101, 114 N.E. 100 (1910). *See also* 7 CAVITCH § 155.02; HENN § 171.

[17]Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371 (1893).

[18]358 F.2d 587 (2d Cir. 1966).

[19]53 Ind. App. 140, 101 N.E. 329 (1913). After recognizing the effect of *Nappanee*, the *Fricke* court held that dividends paid by an insolvent corporation could be recovered from shareholders by the receiver. *Fricke* was cited in *Abrahamson*. 319 N.E.2d at 354.

[20]111 Ind. App. 640, 40 N.E.2d 388 (1942). The *Thompson* court held that the shareholders of a corporation that had sold its assets were liable for unpaid corporate debts.

[21]358 F.2d at 590.

[22]159 Ind. at 622, 64 N.E. at 873.

there are other theories available, and there is always receivership.[23]

The *Abrahamson* court emphasized the passage in *Nappanee* that acquiescence by the corporation or its shareholders in disposing of corporate assets, including the satisfaction of just debts owing to directors or officers, precludes recovery by other creditors. It concluded Abrahamson had acquiesced by not having a receiver appointed or by otherwise causing a court of equity to acquire jurisdiction over the assets and, consequently, he and other creditors were without recourse.[24]

A separate issue before the court in *Abrahamson* was the impact of the Indiana Code provision relating to assignments for the benefit of creditors.[25] The provision recognizes that debtors can prefer particular creditors under certain circumstances but provides that "no corporation shall in any case prefer any creditor where any *director* of the corporation is a surety on the indebtedness preferred . . . ."[26] The court acknowledged the provision but limited it because of the long standing rule permitting corporate preferences. *Travis v. Porter*,[27] where the statutory language was not applied to corporate officers, was cited in support. The provision is strictly construed and limited to director suretyships, and it would not be extended to the type of preferences involved in *Abrahamson*.

Finally, the court rejected Abrahamson's argument that, as interested persons, the Levins' conduct should be "closely scrutinized" to insure that the debt was actually due and that they were not abusing their position to the detriment of other creditors. Abrahamson urged *Bossert v. Geis*[28] as controlling. The court acknowledged the supportive language of *Bossert* but dismissed it as only an "objective test" to validate the good faith of director-corporation transactions at a time when such transactions were disfavored by the law. The *Abrahamson* court evidenced a clear recognition of the change in judicial attitude toward corporate conflicts of interest.[29] The court conceded that after a receiver has been ap-

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[23]Many of these theories, such as assignments for the benefit of creditors and fraudulent conveyances, are discussed in 15A FLETCHER. *See also* HENN § 171.

[24]319 N.E.2d at 355.

[25]IND. CODE § 32-12-1-1 (Burns 1973). *See generally* 15A FLETCHER §§ 7390 to 7406.1.

[26]IND. CODE § 32-12-1-1 (Burns 1973) (emphasis added).

[27]86 Ind. App. 369, 158 N.E. 234 (1927). Of course, fraudulent preferences are void. *See, e.g.*, Grubbs v. Morris, 103 Ind. 166, 2 N.E. 579 (1885); Lewis v. Citizens Bank, 98 Ind. App. 655, 190 N.E. 453 (1934). *See generally* 15A FLETCHER § 7403.

[28]57 Ind. App. 384, 107 N.E. 95 (1914).

[29]The cases and commentary on director conflicts of interest and the

pointed, *Bossert* is appropriate in passing on the receiver's defenses to claims of directors as corporate creditors. Since no court had acquired equitable jurisdiction over the assets in *Abrahamson*, the scrutiny was inappropriate.

In the end, the court decided the ultimate issue revolved around which of the two groups had superior title to the fund. The judgment for the Levins was upheld because they had shown title and Abrahamson had not. Since he could prevail only on the strength of his own title and not on the defects, if any, in the Levins' title,[30] there was no genuine issue of material fact and summary judgment was proper.[31]

B. *Joint Venture Liability*

The scope of a joint venture and the relationship of the venturers to each other and to third persons was the issue before the First District Court of Appeals in *O'Hara v. Architects Hartung & Association*.[32] The court affirmed a judgment of the Monroe County Superior Court in favor of Hartung in a suit to foreclose a mechanics' lien on real estate for architectural services.

Defendant O'Hara originally owned the real estate but conveyed it to defendant Wickes Corporation as part of an abortive arrangement for building an apartment. Wickes, which was in the building supply trade, was to supply the materials and O'Hara was to supervise. Problems with an earlier project of O'Hara and Wickes prompted them to agree to obtain detailed plans at the outset in order to accurately cost the project. According to the court, the evidence disclosed that a Wickes' employee requested O'Hara to employ an architect for the plans and indicated that Wickes would pay the fee. Hartung was retained. Sometime later he advised

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validity of contracts between a corporation and an interested director are legion. *Compare* Munson v. Syracuse, G. & C. Ry., 103 N.Y. 58, 8 N.E. 355 (1886), *with* State *ex rel.* Hayes Oyster Co. v. Keypoint Oyster Co., 64 Wash. 2d 375, 391 P.2d 979 (1964). *See generally* 6 CAVITCH § 127.05; 3 FLETCHER §§ 913-88; HENN § 238; LATTIN § 80. For a list of articles discussing conflicts of interest see HENN § 238, at 465 n.1. One Professor Henn does not list, but which Professor Cary does in his encyclopedic corporations casebook, W. CARY, CASES AND MATERIALS ON CORPORATIONS 471 (4th ed. abr. 1970), is Marsh, *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35 (1966), which sets forth the chronology of the decline alluded to by the *Abrahamson* court.

[30]*See* Lane v. Sparks, 75 Ind. 278 (1881); Aircraft Acceptance Corp. v. Jolly, 141 Ind. App. 515, 230 N.E.2d 446 (1967).

[31]Judge Staton's concurring opinion lends credence to the proposition that Abrahamson made a tactical error in using the trust fund theory by emphasizing he had proceeded as a general creditor and had not sought relief in his shareholder or director capacity. 319 N.E.2d at 357.

[32]326 N.E.2d 283 (Ind. Ct. App. 1975) (Lowdermilk, J.).

O'Hara of his various fee schedules and requested an initial payment. The letter was forwarded to Wickes, and a check was issued to Hartung by Wickes' area manager. Hartung completed the plans, but O'Hara and Wickes refused to pay the fee of $5,810.50. Hartung then instituted the foreclosure suit.[33]

O'Hara and Wickes raised two main arguments on appeal: (1) That there was no contract between Wickes, the record owner, and Hartung because the evidence failed to show that Wickes and O'Hara were involved in a joint business venture; and (2) that there could be no mechanics' lien as a matter of law since the services did not improve or add to the property. There was no dispute about an architect's right to secure and enforce a mechanics' lien since that right has been specifically granted by the legislature.[34]

The court decided that the appellant's first argument assumed that a mechanics' lien may arise only from a contractual relationship. According to the court, this was a misconception, or at least it was to the extent that a formal contractual relationship was deemed needed. Judge Lowdermilk, writing for the court, first set forth the pertinent statutory provisions giving rise to the claim and then observed that the "statute," presumably referring to both the mechanics' lien statutes[35] and the architect's lien statute[36] does not "require" a contract.[37] A contract is the clearest basis for a

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[33]*Id.* at 285.

[34]IND. CODE § 32-8-25-1 (Burns 1973). The statute does not spell out the specifics of the lien but rather grants registered architects, registered professional engineers, and registered land surveyors the right to enforce the same lien enjoyed by contractors and others. *Id.* §§ 32-8-3-1 *et seq.* The key is that the services must involve the practice of architecture which is defined by statute to include, among other activities, preliminary studies and the preparation of specifications and contract documents. *Id.* § 25-4-1-17 (Burns 1974). Although it is well established in Indiana that architects can be considered "laborers" under the statute, Mann v. Schnarr, 228 Ind. 654, 95 N.E.2d 138 (1950); Beeson v. Overpeck, 112 Ind. App. 195, 44 N.E.2d 195 (1942), there was some question as to whether all professional activities were covered. This could present a problem since mechanics' lien statutes, being in derogation of common law, are strictly construed and a person claiming the lien has the burden of proving the application of the statute. *See* Puritan Eng'r Corp. v. Robinson, 207 Ind. 58, 191 N.E. 141 (1934); William F. Steck Co. v. Springfield, 151 Ind. App. 671, 281 N.E.2d 530 (1972). *See also* Kolan v. Culveyhouse, 144 Ind. App. 249, 245 N.E.2d 683 (1969). An architect who drew plans and specifications but did not supervise the construction was denied a lien under the Alaska statute in Rivers v. Pastro, 11 Alaska 491 (1948). For a discussion of an architect's rights to enforce mechanics' liens see Annot., 28 A.L.R.3d 1014 (1969); 5 AM. JUR. 2D *Architects* §§ 20-22 (1962).

[35]IND. CODE §§ 32-8-3-1 to -15 (Burns 1973).

[36]*Id.* § 32-8-25-1. *See* note 34 *supra*.

[37]In one respect the mechanics' lien statutes do require a formal undertaking. Section 32-2-3-1 specifies that "no lien" contracts are valid only if in

lien,[38] but the relationship need not be that formal. It is sufficient if the landowner is aware of and actively consents to the furnishing of service or supplies.[39] Passive consent or mere acquiescence will not suffice. For example, record owners of land occupied by others were not bound by a mechanics' lien where they had no knowledge that work was being done on the premises.[40] As was pointed out in *Courtney v. Luce,*[41] a case relied on in *O'Hara,* the key is whether the "materials [were] furnished or labor performed by the authority and direction of the owner . . . ."[42] The doctrine that a contractual relationship is irrelevant to a lien was recently reaffirmed in *Saint Joseph's College v. Morrison, Inc.,*[43] where the statutory requirements were deemed satisfied when the mechanic notified the landowner of the lien.

The court acknowledged that there was some conflict in the record as to whether Wickes had actively consented to Hartung's employment. Starting with the premise that the judgment of the lower court would not be disturbed if it was supported by the evidence, viewing the evidence in a light most favorable to Hartung's position,[44] the court concluded that there was sufficient evidence to show that Wickes gave active consent to Hartung. Even though Hartung was contacted by O'Hara, the court considered Wickes' making of the initial payment without questioning Hartung's services and fees as showing the requisite acquiescence.

A separate ground for affirmance was that the evidence supported the finding that O'Hara and Wickes were engaged in a joint venture to build the apartment. Once this was established it automatically followed that Wickes was bound by O'Hara's act of retaining Hartung if it was within the scope of the enterprise.[45] The

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writing. IND. CODE § 32-8-3-1 (Burns 1973). *See* Baldwin Locomotive Works v. Edward Hines Lumber Co., 189 Ind. 189, 127 N.E. 275 (1920).

[38]Saint Joseph's College v. Morrison, Inc., 302 N.E.2d 865, 873 (Ind. Ct. App. 1973).

[39]*See* Courtney v. Luce, 101 Ind. App. 622, 200 N.E. 501 (1936); Robert Hixon Lumber Co. v. Rowe, 83 Ind. App. 508, 149 N.E. 92 (1925).

[40]Woods v. Deckelbaum, 244 Ind. 260, 191 N.E.2d 101 (1963).

[41]101 Ind. App. 622, 200 N.E. 501 (1936).

[42]*Id.* at 626, 200 N.E. at 503.

[43]302 N.E.2d 865 (Ind. Ct. App. 1973). The case is discussed in Townsend, *Secured Transactions and Creditors' Rights, 1974 Survey of Indiana Law,* 8 IND. L. REV. 234, 253 (1974). For a general discussion of the contractural requirements for mechanics' liens see 53 AM. JUR. 2D *Mechanics' Liens* §§ 113-18 (1970).

[44]*See* Phar-Crest Land Corp. v. Therber, 251 Ind. 674, 244 N.E.2d 644 (1969); A.S.C. Corp. v. First Nat'l Bank, 241 Ind. 19, 167 N.E.2d 460 (1960); Harris v. Second Nat'l Bank, 146 Ind. App. 468, 256 N.E.2d 594 (1970). *See generally* 3 W. HARVEY, INDIANA PRACTICE 420-30 (1970).

[45]*See* Hogle v. Reliance Mfg. Co., 113 Ind. App. 488, 48 N.E.2d 75 (1943). *See also* Bushman Constr. Co. v. Air Force Academy Housing Inc., 327 F.2d

easily found that a request for architectural plans was within the scope of the venture. The *O'Hara* court recognized that a joint venture is an association of two or more persons combining property and services to carry out a single business enterprise for profit.[46] The joint venture form of organization is frequently found in the construction areas.[47]

A joint venture is a form of business akin to a partnership, differing only, if there is any diference, in its more limited scope. The distinction between a partnership and a joint venture has generated some academic debate,[48] but as Professors Crane and Bromberg point out in their treatise on partnership, the debate is truly "academic," since partnership rules apply whether it is a species of partnership or merely analogous to one.[49] Like a partner, a joint venturer is liable for venture debts incurred within the scope of the venture. The *O'Hara* court further recognized that in a joint venture each party must have some control over the enterprise and share in profits and losses. This is conventional wisdom, since without co-ownership there would be a principal-agent relationship.[50] Here the evidence that defendants were pooling capital, talent, and material for the apartment sufficed to show a joint venture.

The court then considered and rejected the appellant's second contention that a lien could not attach because the land had not been "improved" by Hartung's services since the building was never erected. As a general proposition the materials or services must be used in a building or project before the lien attaches, but there are exceptions, sometimes on an estoppel basis. This will preclude injustice where an owner may have failed to complete the work[51] and thereby try to avoid the mechanics' lien. This exception is particularly significant for architectural services, which are substantially completed before the construction starts. However, the court seemed to require a nexus between the plans and the project

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481 (10th Cir. 1964). *See generally* 1 CAVITCH § 41.10[1]; CRANE & BROMBERG § 35, at 192-94; HENN § 49.

[46]326 N.E.2d at 286. The court cited in support Indiana Gross Income Tax Div. v. Musselman, 141 Ind. App. 36, 212 N.E.2d 407 (1965); Baker v. Billingsley, 126 Ind. App. 703, 132 N.E.2d 273 (1956). *See generally* CRANE & BROMBERG § 35; HENN § 49.

[47]*See* examples cited in CRANE & BROMBERG § 35, at 189 n.84.

[48]*See* articles cited *id.* at 189 n.82, 190 n.84. *See also* Tufts v. Mann, 166 Cal. App. 170, 2 P.2d 500 (1931).

[49]CRANE & BROMBERG § 35, at 192-95.

[50]*See* Baker v. Billingsley, 126 Ind. App. 703, 132 N.E.2d 273 (1956); CRANE & BROMBERG § 35, at 191.

[51]The court cited and relied on Scott v. Goldinghorst, 123 Ind. 268, 24 N.E. 333 (1889), and Jackson v. J.A. Franklin & Son, 107 Ind. App. 38, 23 N.E.2d 23 (1939). *See generally* Annot., 1 A.L.R.3d 822 (1965).

before the lien attaches. The nexus clearly existed in *O'Hara*, since the plans were drawn up to facilitate accurate cost estimates for the project, and it was a fair conclusion that the plans were used by the defendants in making decisions.

C. *Partnership Status*

A family dispute involving a partnership, or purported partnership, resulted in *Puzich v. Pappas*[52] where the Third District Court of Appeals reversed the Porter County Superior Court in an action brought by Puzich's three brothers, the defendants Pappas, to dissolve a partnership operating a family business, to obtain an accounting for partnership profits, and to appoint a receiver. Puzich filed a counterclaim requesting similar relief. The parties stipulated that the only issue before the trial court was whether Puzich was a partner. The trial court ruled against Puzich. On appeal she raised two issues: (1) Did a 1958 release affect her partnership status, and (2) did the evidence and all reasonable inferences lead to the conclusion that she was a partner. In reversing, the court of appeals held that the sole conclusion from the evidence was that she was a partner and that the release did not have any prospective effect.

The release issue was summarily handled by the court. Judge Staton, for the court, noted that it was executed when Puzich was having domestic troubles and was designed to prevent her husband from claiming against her interest. There was no evidence that the parties intended the release to have a prospective effect on her interests after it was signed in March 1958. In fact, the language specifically provided that it covered the period "from the beginning of the world to the date of these presents."[53] Also, she continued to work in the business after signing the release. It is a well-settled and fundamental rule of construction of releases that the intention of the parties controls[54] and that a party seeking the protection of a release must plead and prove it.[55]

The evidence relating to the issue of release was also pertinent in determining Puzich's status as a partner. The court noted that she had worked in the business for a number of years, but following her mother's death, her brothers restricted her activities

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[52]314 N.E.2d 795 (Ind. Ct. App. 1974) (Staton, J.).

[53]*Id.* at 796. Presumably a prospective intention would have run to the end of the world.

[54]*See* Landers v. McComb Window & Door Co., 145 Ind. App. 38, 248 N.E.2d 358 (1969) (cited by the *Puzich* court); Gates v. Fauvre, 74 Ind. App. 382, 119 N.E. 155 (1920). *See generally* 66 Am. Jur. 2d *Release* § 30 (1973).

[55]*See* Thanos v. Fox, 128 Ind. App. 416, 149 N.E.2d 315 (1958). *See generally* 66 Am. Jur. 2d *Release* §§ 46, 50-52 (1973).

and would not permit her to take care of the concern's books. The relationship continued to deteriorate, and when she returned in 1968 after a 9-month absence, her brothers physically ejected her from the business. The family dispute might explain the breakup of the business, but it did not affect Puzich's status as a partner. Rather, the court had to determine whether the Indiana Uniform Partnership Act[56] provisions for determining the existence of a partnership were satisfied by the undisputed and uncontroverted evidence.

The key provisions in issue were sections 23-4-1-6 and 23-4-1-7(4) of the Act. The former defines a partnership in terms of a business association of two or more persons "to carry on as co-owners a business for profit."[57] The latter provides that "the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner . . . .", but specifies five situations where the inference is improper, including where the profits are received in payment "as wages of an employee."[58] No doubt the Pappases argued that Puzich was an employee, but the court concluded that she was not within any of the exceptions to section 23-4-1-7(4) and thus had an interest in the business.

Actually, the partnership evidence was irrefutable. The net profits were returned to a common business account, from which the four drew equal salaries and from which they used funds to purchase their automobiles. The business's income taxes were paid from the account. The court noted that for 8 years Puzich was listed on federal partnership tax returns as a "partner" having a 25% share of the net business profits and devoting "100% of her time" to partnership business.[59] Needless to say, this was an admission against interest by the defendants, creating a presumption of partnership.[60] Furthermore, one of the brothers included

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[56] IND. CODE §§ 23-4-1-1 to -43 (Burns 1972).

[57] *Id.* § 23-4-1-6. Crane and Bromberg extensively discuss the nature of the partnership. CRANE & BROMBERG §§ 4-14. *See also* 1 CAVITCH §§ 11.02, 12.01, 13.01; HENN §§ 19-20, 22.

[58] IND. CODE § 23-4-1-7(4)(b) (Burns 1972). *See generally* 1 CAVITCH § 14.05; CRANE & BROMBERG §§ 14A to 20 (discussion of the presumptions and nonpresumptions). The intention of the parties is the key to the relationship, Kamm & Schellinger Co. v. Likes, 93 Ind. App. 598, 179 N.E. 23 (1931), and the substance, not the name, controls. Watson v. Watson, 231 Ind. 385, 108 N.E.2d 893 (1952).

[59] 314 N.E.2d at 797.

[60] The court cited two non-Indiana decisions for the proposition. Clauson v. Department of Fin., 377 Ill. 399, 36 N.E.2d 714 (1941); *In re* Rosenberg's Will, 208 App. Div. 707, 202 N.Y.S. 324 (1923). Although there do not appear to be any Indiana cases on point, federal tax returns are an accepted method of showing the co-ownership element of a partnership. CRANE & BROMBERG § 14, at 66. Interestingly, the *Puzich* court did not discuss whether she shared

her as a partner in a pleading and the other two admitted in an answer to an interrogatory that she was a "partner as to 25% of the profits."[61] With these admissions it is somewhat surprising that the issue ever reached the appellate court or that the trial judge ruled against Puzich. Since the evidence and the reasonable inferences could lead only to a conclusion contrary to the ruling of the trial court, the court of appeals was justified in reversing.[62]

D. *Corporate Stock and Employment Relationships*

United States Controls Corp. v. Windle[63] is a Seventh Circuit Court of Appeals decision with an Indiana connection. In *Windle* the court affirmed in part and vacated and remanded in part a decision of the United States District Court for the Northern District of Indiana in a diversity action brought by a corporation and its two majority shareholders for a judgment declaring there was no binding and enforceable contract to transfer one-third of the corporate shares to Windle and that Windle had no right to any stock. Windle counterclaimed, seeking damages, specific performance, and an accounting. The trial judge ruled for the plaintiffs on the stock issue, but held that Windle was entitled to recover $26,009.25 as reasonable compensation for his services. On appeal the court upheld the first point as not clearly erroneous, but concluded that Windle's award should be doubled since he had secured the corporation's two main customers. Under a *quantum meruit* theory of recovery, the judgment was the obligation of the corporation.

The suit's genesis was in 1968 when one plaintiff approached Windle and the other plaintiff about the possibility of forming a new business to manufacture electric controls. Windle at the time was a salesman for a company which produced such controls. He was responsible for introducing the plaintiffs to a buyer for the Whirlpool Corporation. Efforts to interest Whirlpool in a pro-

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control of the enterprise with her brothers. Joint control is as integral to co-ownership as is profit sharing. 1 CAVITCH § 14.05[2]; CRANE & BROMBERG § 14, at 69-72, § 65.

[61]314 N.E.2d at 797. The sharing of profits is the primary attribute of partnership, and while it is not the only one, it is the only one singled out for a statutory presumption under the Indiana Uniform Partnership Act. IND. CODE § 23-4-1-7(4) (Burns 1972). *See* 1 CAVITCH § 14.05; CRANE & BROMBERG § 14.

[62]The court of appeals recognized the burden an appellant must sustain before a trial court will be reversed, citing Gariup v. Stern, 254 Ind. 563, 261 N.E.2d 578 (1970), and Sekerez v. Gary Redev. Comm'n, 301 N.E.2d 372 (Ind. Ct. App. 1973), but concluded that the burden was met. *See also* note 44 *supra*.

[63]509 F.2d 909 (7th Cir. 1975) (Hastings, J.).

posed buzzer came to naught, but eventually Whirlpool invited the plaintiffs to design a special relay. At times Windle sat in on the Whirlpool negotiations. Eventually an order for the relays was placed with U.S. Controls Corporation, which had not yet been formed. It was subsequently incorporated by the plaintiffs, who each received 4,300 of the authorized common shares. A third shareholder, who eventually became a director, received 200 shares. Initially Windle was asked to be a director, but the offer was withdrawn, and he was not informed of the incorporation or the issuance of the stock. Shortly after the company started production, Windle demanded one-third of the stock. His demand was refused. He then was offered compensation for his services, which he declined. The litigation followed.

The Seventh Circuit, rather summarily, adversely decided Windle's contention that he was entitled to one-third of the shares. Judge Hastings, for the court, reviewed the record and concluded that the lower court's finding that the evidence failed to establish "even by implication, an agreement between the parties"[64] was not clearly erroneous.[65] Consequently, there was no reason to consider whether the agreement fell within the Statute of Frauds.

There was no doubt that Windle was entitled to some compensation. The absence of an enforceable contract did not defeat his right to recover the reasonable value of his services under a *quantum meruit* theory.[66] The court noted that the company's principal customers had been contacted by Windle and that the services were rendered with a reasonable expectation of payment. Thus, the Seventh Circuit agreed with the district court's finding that this was a "proper case for equitable relief in order to prevent the manifest unjust enrichment of plaintiffs at the expense of Windle."[67]

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[64]*Id.* at 911.

[65]Rule 52(a) of the Federal Rules of Civil Procedure establishes the clearly erroneous test which has its genesis in the former federal equity practice and the seventh amendment with respect to common law jury trials. For a general discussion of the rule and its impact on the review process see 5A J. MOORE, FEDERAL PRACTICE ¶¶ 52.01-.10 (2d ed. 1975); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2571-91 (1971). *See also* 3 W. HARVEY, INDIANA PRACTICE 420-30 (1970).

[66]The court cited Goldberg v. Liston, 431 F.2d 1101, 1103 (7th Cir. 1970), involving former world heavyweight boxing champion, Sonny Liston, as recognizing the principle of *quantum meruit,* although in that case the plaintiff's claim had been satisfied. For a discussion of this doctrine see J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 9-10, 238, 241 (1970); 1 A. CORBIN, CORBIN ON CONTRACTS § 20 (1963); 5 *id.* §§ 1102, 1104, 1109 (1964); A. CORBIN, CORBIN ON CONTRACTS § 20 (one vol. ed. 1952); 66 AM. JUR. 2D *Restitution and Implied Contracts* §§ 1-7 (1973); 58 AM. JUR. *Work and Labor* §§ 3-4, 6, 10 (1948).

[67]509 F.2d at 912.

However, the court was not willing to grant Windle the compensation he wished—one-third of the stock. The trial court had decided on a commission of 2.5 percent of the net sales of over $1 million, but the Seventh Circuit rejected this amount as inadequate. Since commissions in the Milwaukee area in the appliance control field averaged 5 percent, the court concluded that this was an appropriate rate to be paid by the corporation. The court accepted the two years prior to June 30, 1971, as the compensation period, but it might have "fudged" on the rate to get Windle a fairer deal, since it noted the corporation had subsequent sales of over $2,500,000.

Interestingly, Controls argued that Windle was precluded from any compensation because he breached his duty to his employer by not relaying to it the Whirlpool sales opportunity. The court did not respond to this argument other than to note that the trial court had found that Windle's employer was not engaged in manufacturing similar devices and that Windle continued to work for his employer and a successor. The Seventh Circuit seems wrong in concluding that the fact the employer was not producing similar devices absolved Windle. An agent's duty of loyalty to a principal very likely precludes conduct like Windle's,[68] but the point would more appropriately be raised by Windle's employer than by Controls, which was attempting to avoid an obligation. Perhaps the court's comment that Windle continued to be employed is simply a shorthand indication that the employer was not objecting to Windle's moonlighting activities.

E. Appointment of Receiver

The propriety of a Marion County Superior Court interlocutory order appointing a receiver without notice was the issue in the per curiam decision of the Second District Court of Appeals in *Environmental Control Systems, Inc. v. Allison.*[69] The court of appeals reversed because plaintiffs had not complied with the sta-

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[68]*See* Cavanaugh Nailing Mach. Co. v. Cavanaugh, 167 Cal. App. 2d 657, 334 P.2d 954 (1959); Bockemuhl v. Jordan, 270 Wis. 14, 70 N.W.2d 26 (1955). *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 383-394 (1958); W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY §§ 147-49, 151 (1954); Comment, *The Obligation of a High-Level Employee to His Former Employer: The* Standard Brands *Case*, 29 U. CHI. L. REV. 339 (1962).

[69]314 N.E.2d 820 (Ind. Ct. App. 1974). Appellees might have had some doubts about their prospects on appeal since no brief was filed. Consequently, a prima facie demonstration of error would mandate a reversal. Bill v. Bill, 290 N.E.2d 749 (Ind. Ct. App. 1972); Capitol Dodge, Inc. v. Haley, 288 N.E.2d 766 (Ind. Ct. App. 1972).

tutory requirement that excuses notice of an application for a receiver "only upon sufficient cause shown by affidavit."[70]

The purported verification of the allegations of the complaint were made "upon belief," and the court, citing *Henderson v. Reynolds*[71] as authority, held that such a complaint is inadequate. In *Henderson,* which also involved an appeal from an interlocutory order, the court held that verifications that statements were true to the best of the "knowledge" or "information and belief" of the pleader are legally insufficient and not admissible in evidence at a hearing on the application for a receiver. In other words, to be admissible, such allegations must be verified in positive terms. The use of a complaint rather than a separate affidavit in *Allison* was not improper, since such a procedure was approved in *Second Real Estate Investments, Inc. v. Johann.*[72] The *Johann* court commented that the statutory requirement implied a written affidavit or verified complaint filed as the cause of the receiver's appointment. Otherwise "the adverse party may [not] know the exact facts on which the judge acted in appointing a receiver in his absence and wresting from him the control of his property without a hearing or an opportunity for such hearing."[73] This attitude is consistent with cases holding *ex parte* proceedings in disfavor and emphasizing that they should be avoided wherever possible. To justify such an appointment "[t]here must exist a pressing emergency which shows that waste, loss or destruction of property will probably occur before reasonable notice can be given and the parties heard and the lack of any other available remedy before a court may appoint a receiver on an *ex parte* hearing."[74]

Since the complaint and affidavit are all a court has before it in appointing a receiver without notice, it is of utmost importance that they conform to the statutory requirements. As *Allison*

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[70]IND. CODE § 34-1-12-9 (Burns 1973). For a general discussion on appointing receivers without notice see 1 R. CLARK, RECEIVERS § 82 (3d ed. 1959). Clark specifically discusses the Indiana statute. *Id.* § 82(e).

[71]168 Ind. 522, 523-26, 81 N.E. 494, 495-96 (1907).

[72]232 Ind. 24, 111 N.E.2d 467 (1953).

[73]*Id.* at 30, 111 N.E.2d at 470.

[74]Fagan v. Clark, 238 Ind. 22, 26, 148 N.E.2d 407, 409 (1958). The *Fagan* court noted that bonds afford some protection against improvident injunctive relief but that the statute, IND. CODE § 34-1-12-9 (Burns 1973), does not require a bond. However, the supreme court in State *ex rel.* Nineteenth Hole, Inc. v. Marion Superior Court, 243 Ind. 604, 189 N.E.2d 421 (1963), held that the court's equity jurisdiction authorized it to require an indemnifying bond. *See* note 70 *supra. See also* 65 AM. JUR. 2D *Receivers* §§ 97-98, 105 (1973). A defendant who obtains an appeal bond is entitled to have the appointment suspended during the appeal. IND. CODE § 34-1-12-10 (Burns 1973); 65 AM. JUR. 2D *Receivers* § 106 (1973). The *Allison* court apparently had ordered a bond. 314 N.E.2d at 823.

points out, the Indiana Supreme Court has, on numerous occasions, discussed what must be shown to justify the *ex parte* proceedings. *Johann & Sons v. Berges*[75] requires a showing, by affidavit or verified complaint, that plaintiff's rights can only be protected by extraordinary relief and that waste or loss is threatened and would occur if there was delay until notice could be given. *Indianapolis Machinery Co. v. Curd*[76] emphasized the need to show by specific facts an immediate threat to corporate assets and further opined that a conclusion a defendant might abscond with assets is insufficient. A "belief" will not suffice. The even more recent decision in *Inner-City Contractors Service, Inc. v. Jolley*,[77] reiterating the language of the earlier cases, made it clear that lower courts should act with the utmost circumspection.

In applying these rules, the *Allison* court concluded the complaint was deficient particularly because the allegations were mere conclusional statements, some only hearsay supported by plaintiffs' belief. In fact it was so deficient that it alleged "facts" that had not occurred. Such clairvoyance, as the court stated, could at best mean that plaintiffs felt "defendants might in the future dissipate or encumber corporate assets"[78] to their detriment and under *Indianapolis Machinery Co.*, "[t]he mere possibility or potentiality of doing injury or violating the law cannot be made the basis alone for equitable interference by a court."[79]

F. Securities Law Exemptions

Indiana Securities Law[80] exemptions were in issue in *Worsley v. State*,[81] where the First District Court of Appeals affirmed Worsley's conviction in a jury trial in the Hamilton County Superior Court. Worsley had been charged with six counts of violating the statute: (1) Offering for sale unregistered securities; (2) selling unregistered securities; (3) offering securities for sale while not registered as a broker, dealer or agent; (4) unlawfully selling securities; (5) making untrue statements of a material fact in connection with the offer of the sale of securities; and (6) making untrue statements of a material fact in connection with the sale of securities. Only two of the four issues raised on appeal are

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[75]238 Ind. 265, 150 N.E.2d 568 (1958).

[76]247 Ind. 657, 221 N.E.2d 340 (1966).

[77]257 Ind. 593, 277 N.E.2d 158 (1972). The *Jolley* case is discussed in Galanti, *Corporations, 1973 Survey of Indiana Law*, 7 IND. L. REV. 77, 87-88 (1973).

[78]314 N.E.2d at 824 (emphasis supplied by the court).

[79]247 Ind. at 665, 221 N.E.2d at 345, *quoted at* 314 N.E.2d at 825.

[80]IND. CODE §§ 23-2-1-1 to -25 (Burns 1972).

[81]317 N.E.2d 908 (Ind. Ct. App. 1974).

pertinent to this section: whether two of the counts were duplicitous, prejudicing his trial, and whether the conviction was contrary to law.[82] The court disposed of Worsley's duplicity contention concerning counts 2 and 4 which is not surprising since the two counts alleged violations of different statutory provisions.[83] Although the court cited no authority, it is proper in Indiana to charge separate violations in separate counts of an indictment.[84] In fact joinder in one count might have been duplicitous.[85]

The court also rejected Worsley's contention that the conviction was contrary to law because the state had failed to negate an exception to liability under counts 2 and 4 and had not proved he was a "broker, dealer or agent" under counts 1 and 2. The main issue was the exception contained in section 23-2-1-18(b) imposing criminal liability on persons who sell or offer to sell unregistered securities "except such securities as are exempt under Section 102(a) [subsection (a) of 23-2-1-2] or unless sold in any transaction exempt under Section 102(b) [subsection (b) of 23-2-1-2] of this Act . . . ."[86] The court, looking to section 23-2-1-16(j), which provides that the party claiming the benefits of an exemption or classification has the burden of proof,[87] found that Worsley clearly had failed to meet this burden. Worsley also argued that the evidence showed that he was an "issuer" of the stock rather than a broker-dealer or agent, and that the provisions underlying counts 1 and 2 applied only to agents or broker-dealers, not to issuers. The court simply noted the pertinent statutory definitions[88]

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[82]The court also rejected Worsley's arguments that a state exhibit was improperly admitted into evidence and that his trial counsel was incompetent. 317 N.E.2d at 909-11.

[83]Count 2 charged a violation of IND. CODE § 23-2-1-18(a) (Burns 1972), and Count 4 charged a violation of *id.* § 23-2-1-18(b).

[84]Albrecht v. United States, 273 U.S. 1 (1926); Lawson v. State, 202 Ind. 583, 177 N.E. 266 (1931); Campbell v. State, 197 Ind. 112, 149 N.E. 903 (1925).

[85]Ault v. State, 249 Ind. 545, 233 N.E.2d 480 (1968); Glazer v. State, 204 Ind. 59, 183 N.E. 33 (1932); *cf.* State v. Schell, 248 Ind. 183, 224 N.E.2d 49 (1967).

[86]IND. CODE § 23-2-1-18(b) (Burns 1972). For a general discussion of Indiana Securities Law exemptions see Note, *Securities Registration Requirements in Indiana,* 3 IND. LEGAL F. 270, 285-94 (1969). *See generally* 14 FLETCHER § 6754.

[87]IND. CODE § 23-2-1-16(j) (Burns 1972). *See* Hippensteel v. Karol, 304 N.E.2d 796 (Ind. Ct. App. 1973), *discussed in* Galanti, *Business Associations, 1974 Survey of Indiana Law,* 8 IND. L. REV. 24, 29-35 (1974).

[88]IND. CODE §§ 23-2-1-1(b) (agent), -1(f) (issuer) (Burns 1972). Although an individual can be an issuer under certain circumstances, the Act clearly contemplates that an issuer will be a business entity. The definition is similar to that found in the Federal Securities Act of 1933, 15 U.S.C. § 77b(4) (1970), although someone in Worsley's position might be an "under-

and did not really discuss the nature of "issuers" or "agents" under the statute. Rather, it took refuge in the proposition that the jury's finding him an agent selling the stock of an Indiana corporation had support in the record.[89]

G. Statutory Developments

The 1975 first regular session of the 99th Indiana General Assembly adopted several significant amendments to the Indiana Code relating to corporate affairs. The two most significant are a new Business Takeover Law and amendments to the Indiana Securities Law.[90]

1. Business Takeover Law

The most significant legislative development in the corporate area during this survey period was the adoption of a Business Takeover Law.[91] The new law puts Indiana in the forefront of those states[92] recognizing the problems created by the current phenome-

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writer" or a "control person" under the 1933 Act with greater statutory responsibilities. *See generally* 1 L. Loss, Securities Regulation (2d ed. 1961, Supp. 1969) c. 3A.

[89]*See In re* Estate of Barnett, 307 N.E.2d 490 (Ind. Ct. App. 1974); Lindenborg v. M & L Builders & Brokers, Inc., 302 N.E.2d 816 (Ind. Ct. App. 1973); Ind. R. App. P. 15(M); *cf.* Ind. Code § 35-1-47-9 (Burns 1975). *See also* notes 44 & 62 *supra.*

[90]Other enactments that deserve noting are: Ind. Pub. L. No. 44 (Apr. 29, 1975), *amending* scattered sections of Ind. Code tits. 5, 27 & 28 (codified in scattered sections of *id.* (Burns Supp. 1975)) (relating to investments in certain federal obligations); Ind. Pub. L. No. 252 (Apr. 21, 1975), *amending* Ind. Code § 22-4-10-6 (Burns 1974) (codified at *id.* (Burns Supp. 1975)) (relating to unemployment compensation contributions of successor employers); Ind. Pub. L. No. 262 (Apr. 30, 1975) (codified at Ind. Code §§ 23-2-2.5-1 to -50 (Burns Supp. 1975)) (authorizing the securities commissioner to regulate franchises. *See* discussion in *Contracts infra*); Ind. Pub. L. No. 286 (Apr. 29, 1975), *amending* Ind. Code §§ 28-1-21-2, -10, -22 to -26 (Burns 1973) (codified at *id.* §§ 28-1-21-1 to -45 (Burns Supp. 1975)) (permitting building and loan associations to serve as trustees under Federal IRA accounts and broadening the lending authority of such associations).

[91]Ind. Pub. L. No. 263 (Apr. 29, 1975) (codified at Ind. Code §§ 23-2-3-1 to -12 (Burns Supp. 1975)). The Act was deemed an emergency measure and became effective on May 1, 1975. The author wishes to acknowledge the helpful comments about this Act made by Gregory D. Buckley, Esq., at an Update Seminar on Indiana Securities Laws sponsored by the Indiana Continuing Legal Education Forum on June 13, 1975, and the helpful comments on the new amendments to the Indiana Securities Law made by Stephen W. Sutherlin, Indiana securities commissioner, at the same seminar. *See* text accompanying note 117 *infra.*

[92]Minn. Stat. Ann. §§ 80B.01-.13 (Cum. Supp. 1974); Nev. Rev. Stat. §§ 78.376-.3778 (1973); Ohio Rev. Code Ann. § 1707.04.1 (Page Supp. 1974); Va. Code Ann. §§ 13.1-528 to -540 (Repl. Vol. 1973); Wis. Stat. Ann.

non of business takeovers and attempting to regulate the process without a flat prohibition. The phenomenon is of particular concern at present because even with the spring-1975 market rebound, prices of equity securities of many publicly traded corporations are still relatively depressed. Thus, an offeror can take over valuable business enterprises at prices not related to value—perhaps for beneficial or perhaps for "raiding" purposes. Furthermore, many money markets are flush with cash, often petrodollars, which opens up American industry to foreign control. Maybe we would be getting our "just desserts," but that does not negate the threat.[93] Of course, while managements of target companies tend to view askance any takeover attempt, it must be recognized that they do serve a valid corporate purpose.[94]

Corporate takeovers are regulated in various degrees under federal and state securities statutes. However, many have felt that existing regulation is inadequate and that the area is an appropriate one for state involvement. The principal federal statute involving takeovers is the Williams Act,[95] which added section

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§§ 552.01-.25 (Spec. Pamphlet 1975). For a discussion of state regulation of takeovers see Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U.L. REV. 767 (1971); Bromberg, *Tender Offers: Safeguards and Restraints—An Interest Analysis*, 21 CASE W. RES. L. REV. 613 (1970); Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722 (1970); Sommer, *The Ohio Takeover Act: What is It?*, 21 CASE W. RES. L. REV. 681 (1970); Note, *Take-over Bids in Virginia*, 26 WASH. & LEE L. REV. 323 (1969). The *sine qua non* for persons interested in the takeover phenomenon and the reponses of courts and legislatures is E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL (1973). *See also* Robinson, Book Review, 47 S. CAL. L. REV. 1647 (1973).

[93]Robinson, *supra* note 92, at 1653, points out the increase in international tender offers in recent year and quotes from an article in *The Economist*, July 14-20, 1973, at 70, suggesting that European interests take advantage of the depressed market to "buy American." Indiana has first hand experience of the threat. In 1974 the Magnavox Corporation of Fort Wayne and the Bio-Dynamics Corporation of Indiana were taken over by foreign interests. *See* Wall Street Journal, Feb. 25, 1975, at 4, col. 2 (Bio-Dynamics); *id.*, May 1, 1975, at 3, col. 4 (Magnavox).

[94]A common theme of those critical of efforts to regulate and restrict takeovers is that it entrenches "dead wood" management. *See, e.g.*, Brudnev, *A Note on Chilling Tender Solicitations*, 21 RUTGERS L. REV. 609 (1967); Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 DUKE L.J. 231; Sommer, *supra* note 92. *See also Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. (1967).

[95]15 U.S.C. §§ 78m(d)-(e), n(d)-(f) (1970). The literature on the Williams Act is legion. For a sampling see the articles listed in R. JENNINGS & H. MARSH, SECURITIES REGULATION 940 (3d ed. 1972). Of course other SEC rules and regulations, such as rules 10b-5 and 10b-13, 17 C.F.R. § 240.10b-5,

13(d) and (e) and 14(d), (e) and (f) to the Securities Exchange Act of 1934. One of the problems with the Williams Act is that it does not require notice to the target company of a proposed tender until the required disclosure information is filed with the Securities and Exchange Commission (SEC) coincidental with making the tender.[96] This makes it difficult for management to work out a better deal. Also, the amount of information of the offeror reaching the offeree under implementing SEC rules[97] to the Williams Act might not be enough to allow the offeree to make a sound decision. Without complete disclosure, shareholders who are receptive to a tender might not know if the price adequately reflects the value of the corporation. This is true even under the best of market conditions, and even more so with takeovers of undervalued stock. Even if the tender price exceeds the current market price, shareholders might still suffer a loss. If they are not receptive, they might not know their prospects as minority shareholders, which can include being merged out at unfavorable terms.[98] Also, one does not have to be a xenophobe to fear that foreign interests might be after quick profits, perhaps from a liquidation of assets, without regard to the American economy, society, or labor force that sees jobs evaporating.

Clearly a state has an interest in business takeovers. The Indiana legislature's response to this interest was the Business Takeover Law[99] which provides the following: (1) A notice period to the target company; (2) a full disclosure statement that must be filed with the Indiana Securities Commissioner; and (3) the opportunity for the target company to request a hearing before the commissioner, or on the commissioner's own volition, to determine the fairness of the disclosure materials and even the terms of the offer. Because of space limitations only the highlights of the Act can be noted here. Section 1 is a definitional section, but as is common in this type of legislation, it is jurisdictional in character since it determines which tender offers are within and which are without the Act. A key feature of the section is that it defines "affiliates,"

.10b-13 (1975), apply as well. *See* Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969).

[96]15 U.S.C. § 78m(d) (1970).

[97]*See* SEC Rules 13d-1, 14d-1, 17 C.F.R. §§ 240.13d-1, .14d-1 (1975). *See also* Corenco Corp. v. Schiavone & Sons, 362 F. Supp. 939 (S.D.N.Y. 1973).

[98]*See, e.g.*, Green v. Sante Fe Indus., Inc., 391 F. Supp. 849 (S.D.N.Y. 1975); David J. Green & Co. v. Schenley Indus., Inc., 281 A.2d 30 (Del. Ch. 1971). *See also* Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 Harv. L. Rev. 1189 (1964).

[99]Ind. Code §§ 23-2-3-1 to -12 (Burns Supp. 1975). Citations to particular sections will be omitted, unless otherwise appropriate.

"associates," and "control" in a manner that keeps offerors from avoiding the impact by the Act by utilizing different corporate entities. The section broadly defines "equity security" as securities possessing the right to vote on corporate matters at the time of the offer. The General Assembly appears to have encompassed all securities, including convertible securities, that influence control of the business enterprise. Thus, the Act is not limited to corporate common stock. "Target company" is defined as a "corporation or other issuer of securities," which would seem to include enterprises such as limited partnerships. An enterprise must be publicly held to be within the Act. Subsection 1(i) defines a "takeover offer"[100] as an offer to acquire the equity securities of a target company where, after the acquisition, the offeror would be directly or indirectly a record or beneficial owner of more than 10 percent of any class of outstanding equity security. The section specifically excludes tenders "made to the owners of equity securities of a target company with less than one hundred (100) owners of record at the time of the offer."

Subsection 1(i) contains further exclusions. Ordinary brokerage transactions are excluded, as are de minimis offers to 2 percent of the class within the preceeding 12-month period. Offers by a company for its own securities are excluded; therefore, tenders to increase a supply of treasury shares for corporate purposes, a stock option for example, are outside the scope of the Act. This exemption might be a legislative error considering the even newer phenomenon of publicly held corporations "going private" a few years after going public.[101] Shareholders of these corporations are entitled to as much protection, if not more, as are the shareholders of other target companies. Subsection 1(i)(5) excludes offers initiated or approved by the board of directors of the target company. Normally the problem tender offers are the unfriendly ones, but it is not inconceivable that shareholders might be jeopardized where management might be "selling out" the shareholders.[102] The

[100]*Id.* § 23-2-3-1(i). Interestingly, neither the Securities Exchange Act itself nor the Williams Act amendments define tender offer or takeover offer in so many words. However, the meaning of the term is becoming well established under federal law. *See* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973).

[101]There was considerable furor over this practice in the fall of 1974 when A. A. Sommer, Jr., an SEC Commissioner, attacked the practice in a speech given at the Law Advisory Council lecture of Notre Dame Law School on November 14, 1974. *See* Wall Street Journal, Nov. 15, 1974, at 8, col. 2; *id.*, Nov. 21, 1974, at 13, col. 3. Shareholder attacks on the practice have been unsuccessful so far, *see* Kaufman v. Lawrence, 386 F. Supp. 12 (S.D.N.Y. 1974), but the SEC is investigating the matter.

[102]A shareholder derivative suit would afford some protection, *see, e.g.*, Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952

section raises questions as to what happens when a hostile tender offer is subsequently approved by the board. It would seem that the subsequent approval of the offer would moot the issue. Lastly, the commissioner, who is charged with administering the Act, can determine by ruling that a takeover attempt is not aimed at corporate control and exempt it from the Act.

One of the most intriguing provisions is subsection 1(j), which defines "target company" as an enterprise organized under the laws of Indiana or where its "principal place of business or a substantial portion of its assets" are in this state. Thus, the Act applies to corporations that are primarily Indiana enterprises but which happen to be organized in another state, such as Delaware. This is not out of the ordinary, but the final phrase encompassing companies with substantial assets in Indiana is somewhat extraordinary in that it might include companies such as General Motors and U.S. Steel. However, "substantial" is a broad and somewhat ambiguous term, and the commissioner or the courts could determine that a tender offer for General Motors, as unlikely as that may be in the current climate in the automobile industry, is not subject to the Act.[103] Of course this problem pales when it is realized that the Act seems to have worldwide application, that is, a Saudi Arabian tendering for English-owned shares would have to comply. This last possibility seems to raise constitutional questions.[104]

The other key provision is section 2, which allows takeovers only if effective under the Act, or exempted by regulation or order of the commissioner. Before an offer can become effective, a disclosure statement similar to an Indiana Securities Law registration statement must be filed with the commissioner.[105] Subsection 2(c) specifies in detail the information that must be disclosed. The information includes all the items and matters that a security holder, the target company, or the commissioner would find ma-

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(1955); Barr v. Wackman, 329 N.E.2d 180 (N.Y. 1975), but the procedural hurdles discount such suits as an effective remedy. *See generally* 13 FLETCHER §§ 5961-71.10; HENN §§ 368-71; LATTIN §§ 102-16.

[103]This aspect of the comparable Ohio provision, OHIO REV. CODE ANN. 1707.041(a)(1) (Page 1974), is discussed in Sommer, *supra* note 92, at 689, and Shipman, *supra* note 92, at 751-55.

[104]Shipman, *supra* note 92, at 740-50, also considers this issue and concludes that the Act is constitutional. It does not appear to have been tested in the courts.

[105]*Compare* IND. CODE § 23-2-1-5 (Burns 1972) (Securities Law), *with id.* §§ 23-2-3-2(b)-(c) (Burns Supp. 1975) (Business Takeover Law). Interestingly, section 23-2-3-2(b) requires that an Indiana licensed attorney file the disclosure statement. Although it will not make Indiana securities practitioners unhappy, the ostensible reason is to give the commissioner a responsible person in Indiana to deal with when considering and reviewing the statement.

terial. This statement must be sent to the target company and must be publicly disclosed[106] no later than the date of filing with the commissioner. Under Subsection 2(d) the commissioner can request additional information or permit the omission of insignificant information.

Under Subsection 2(e) an offer automatically becomes effective 20 days after it is filed unless the target company requests a hearing before the commissioner, or the commissioner orders one, to determine if the proposed tender offer is fair, just, and equitable to the security holders. If the target company agrees, the effective date can be accelerated, not unlike the process for the effectiveness of registration statements under the Indiana Securities Law.[107] Subsection 2(f) authorizes the commissioner to deny the effectiveness of the offer or require changes if it fails to provide full and fair disclosure of all material information concerning the offer or if the takeover is unfair or inequitable to the offerees.[108] This section also provides that an order making an offer effective does not constitute an approval of the takeover, and thus does not insulate the offeror against later charges of fraud. Section 4 makes it unlawful for any person to engage in "fraudulent, deceptive, or manipulative acts or practices" in connection with a takeover offer and specifically includes certain acts such as "gun-jumping," use of false or misleading information, sales by target company insiders at prices higher than paid to offerees unless made at the existing market price,[109] and acquisition of shares other than pursuant to the tender after it is announced.

The Act does not apply only to the tender offeror. In addition to section 4, section 3 requires that materials sent to the shareholders by either the offeror or the target company must be filed with the commissioner three full business days before they are used. This gives the commissioner the opportunity to review the materials and eliminate anything misleading or erroneous. Subsection 3(b) complements section 4 by prohibiting filings that

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[106]The intent of the public announcement requirement no doubt is to prevent persons with advance knowledge of the takeover from taking advantage of that knowledge in the securities market.

[107]*Compare* IND. CODE § 23-2-1-5(c) (Burns 1972) (Securities Law), *with id.* § 23-2-3-2(e) (Burns Supp. 1975) (Business Takeover Law).

[108]There are some possible problems with this procedure, but the drafters seem to have avoided some of the problems of the Ohio statute. *See* Sommer, *supra* note 92, at 697-703.

[109]It is not absolutely clear what would happen under the Act if the sale by insiders to the offeror at inflated prices occurred before the takeover offer was formalized and the board of the target company approved. *Cf.* Perlman v. Feldmann, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955).

contain false or misleading information, thus paralleling federal provisions in this area.[110]

The Act contains other substantive provisions. Subsection 5(a) allows offerees to withdraw securities up to three days before the offer expires. Subsection 5(b) requires pro rata treatment of tenders if more than the requested number of shares are tendered. This means equal treatment of offerees, but it can result in all offerees ending up as minority shareholders if less than all of their shares are accepted. The arbitrageurs, however, will reduce this possibility.[111] Subsection 5(c) is a most-favored-nation clause, requiring that persons who are tendering be paid any subsequent increase in tender price. Subsection 5(d) prohibits offers by offerors who are involved in actions by the commissioner. Subsection 5(e) closes a potential loophole by precluding offerors from making a tender to all shareholders other than Indiana residents.

Section 6 authorizes the commissioner to administer the Act and to promulgate necessary regulations. Section 7 sets a $750 fee for filing the disclosure statement and for a target company's request for a hearing. Although the fees seem high on their face, they are reasonable considering the amount of time and effort that will be spent in considering tender offers. Subsection 8(a) grants the commissioner injunctive powers and the right to obtain relief similar to the powers granted under the Indiana Securities Law.[112] Subsection 8(b) empowers the target company, the offeror, or any offeree to bring suit to enjoin violations of the Act or to enforce compliance.[113]

Sections 9 and 10 of the Act are the criminal and civil liability sections. Section 9 makes misdemeanors of the failure to file a disclosure statement and of miscellaneous other violations, but publishing false material or intentionally omitting or withholding

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[110]Although it is somewhat out of date because of the explosive developments in the securities area in the past 15 years, L. Loss, Securities Regulation (2d ed. 1961) and the 1969 Supplement is still an outstanding reference work on the sources and development of federal regulation of securities transactions. *See also* A. Bromberg, Securities Laws: Fraud—SEC Rule 10b-5 (1969).

[111]For a discussion of the role and function of these somewhat arcane individuals see Henry, *Activities of Arbitrageurs in Tender Offers,* 119 U. Pa. L. Rev. 466 (1971).

[112]*Compare* Ind. Code § 23-2-1-17.1 (Burns 1972) (Indiana Securities Law), *with id.* § 23-2-3-8 (Burns Supp. 1975) (Business Takeover Law). The reference to the Securities Law provision is to the new language added by Ind. Code §§ 23-2-1-1 to -20 (Burns Supp. 1975). *See* pp. 59-63 *infra.*

[113]Professor Shipman posited that one of the defects in the Ohio Act was that the target company and offerees might not have standing to seek an injunction against a blatantly improper tender offer. Shipman, *supra* note 92, at 739.

material information is a felony. Subsections 10(a) and (b) are civil liability provisions, authorizing rescission or damages to persons who tendered securities and damages for those who did not because of improper statements or misleading information. Subsection 10(c) extends liability to those indirectly involved unless they are not and could not be aware of the facts creating the liability. Subsection 10(d) is a three year statute of limitations,[114] and subsection 10(e) makes the rights and remedies cumulative. Section 11 provides for a trial de novo from any final order of the commissioner, which is similar to the judicial review provision of the Indiana Securities Law.[115] It also means that a target company can delay a tender offer almost indefinitely. Even without an appeal it can take up to 100 days for an offer to become effective. This gives a target company time to work out better terms or to arrange a defensive merger with another, perhaps more compatible, company. Finally, section 12 excludes tenders for target companies regulated by other statutes, such as insurance companies and utilities.[116]

2. *Securities Law Amendments*

Also of significance were several major amendments to the Indiana Securities Law.[117] Perhaps the most significant amendment is the new private offering exemption provided by amended subsection 23-2-1-2(b)(10). Previously the exemption was contingent on not offering the securities to more than 20 persons within a 12-month period. The provision now tracks SEC Rule 146.[118] It

[114]Although the period is the same as in the newly amended securities law section, the provisions in the two laws are not cast in exactly the same terms. *Compare* IND. CODE § 23-2-1-19(e) (Burns Supp. 1975) (Indiana Securities Law), *with id.* § 23-2-3-10(d) (Burns Supp. 1975) (Business Takeover Law).

[115]*Compare* IND. CODE § 23-2-1-20 (Burns 1972) (Securities Law), *with id.* § 23-2-3-11 (Burns Supp. 1975) (Business Takeover Law).

[116]The rationale no doubt was based on the assumption that those target companies could be best protected by the agencies charged with their regulation. This is a broader exemption than provided in the Ohio Act. *See* Shipman, *supra*, note 92, at 728-29.

[117]Ind. Pub. L. No. 261 (Apr. 30, 1975) (codified at IND. CODE §§ 23-2-1-1 to -20 (Burns Supp. 1975), *amending* IND. CODE §§ 23-2-1-1 to -25 (Burns 1972). The Act was deemed an emergency measure, and became effective on May 1, 1975. As with the Business Takeover Law, statutory citations will be omitted unless otherwise required.

[118]17 C.F.R. § 230.146 (1975). For a general discussion of private placements under the 1933 Securities Act and rule 146 see Borton & Rifkind, *Private Placement and Proposed Rule 146*, 25 HASTINGS L.J. 287 (1974); Note, *Maryland Blue Sky Reform: One State's Experiment with the Private Offering Exemption*, 32 MD. L. REV. 273 (1972); Note, *Revising the Private Placement Exemption*, 82 YALE L.J. 1512 (1973).

exempts offers or sales of securities by the issuer if certain conditions are met. The most significant conditions are the following: (1) There are more than 35 purchasers of the securities in any private offering excluding purchasers in exempt transactions or purchasers of registered securities; (2) the securities are not offered or sold through general advertisements or solicitations; (3) the purchasers give "investment letters" representing that the securities are being acquired for investment purposes only; and (4) no commission or remuneration is paid with respect to the transactions unless the offerees are furnished with an offering statement setting forth material facts and the commissioner is notified in writing of the terms of the offer and does not disallow the exemption. An apparent oversight in this provision is that the exemption is available only to issuers and not also to persons reselling such securities. Thus, the exemption is narrower than SEC Rule 146. Persons acquiring shares in exempt private placements will have to find other exemptions before they can be resold. Otherwise, the shares will have to be registered.[119] The most likely exemptions would be those that involve the isolated nonissuer sale or the nonissuer sale pursuant to an unsolicited offer to buy.[120] However, these exemptions, at least with respect to the number of persons, are not as broad as the exemption available to issuers.

One important definitional change was the deletion of the "intentional" and "gross negligence" elements in Indiana Code subsection 23-2-1-1(d), defining fraud and deceit. This raises the standards the statute imposes on persons dealing in securities by making even negligent misrepresentations actionable.[121] The amended language further provides that the courts are not limited to common law deceit[122] when applying the phrase "fraud and deceit."

Another important definitional change was the addition of new language to subsection 23-2-1-1(i), and conforming amendments to other relevant provisions, to include "purchases" as a security transaction. A purchaser obviously does not have to comply with as many statutory provisions as a seller or issuer, but a purchaser committing a fraud is now subject to the sanctions of

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[119]*See* IND. CODE §§ 23-2-1-4 to -7 (Burns 1972).

[120]*See id.* §§ 23-2-1-2(b)(1), (2).

[121]This brings the statute more closely in line with the sections 101 and 410 of the Uniform Securities Act which relate to fraudulent transactions. *See generally* 14 FLETCHER § 6759; 3 L. LOSS, SECURITIES REGULATION 1631-52 (Supp. to 2d ed. 1969).

[122]This language also parallels that in section 401(d) of the Uniform Securities Act. *See* authorities cited note 121 *supra*.

the securities law.[123] Subsection 23-2-1-1(k) was amended by making securities of "commodity futures contracts" and options for such contracts. Apparently, concern over the somewhat unregulated commodities market prompted the move to give the commissioner regulatory authority.[124]

Another area where regulation was deemed inadequate was remedied by a complete revision of subsection 23-2-1-1(n) which now defines "investment advisers" as persons who, for compensation, either inform others, directly or through publications, of the value of securities or of the advisability of investing or who analyze or report on securities as a regular business activity. Because such a broad definition could encompass persons not normally considered to be in the securities business, the provision specifically excludes the following: Banks and other financial institutions; lawyers, accountants, and other professionals acting in a professional capacity; broker-dealers advising solely incidentally to their brokerage business; publishers of bona fide newspapers, or business or financial publications of general circulation; persons advising on exempt securities; persons advising other investment advisers, pension trusts, and other institutions deemed to possess adequate knowledge and skill to protect their own interests; and such other persons as the commissioner may exempt. Under amended section 23-2-1-8, investment advisors must register with the commissioner; section 23-2-1-9 sets forth what must be disclosed in a registration application. Sections 23-2-1-10 and 23-2-1-11, relating to record keeping and regulations, were amended to conform to the other changes. Section 23-2-1-12.1 was added. The section makes it unlawful for investment advisors to engage in fradulent practices and specifically outlaws certain types of investment advisory contracts. Practioners can expect the commissioner to use the rulemaking provisions to promulgate specific regulations for investment advisors.[125]

A new subsection, 23-2-1-1(o), was added defining "transferable shares" as securities representing equity interests in corporations or business trusts but excluding open-end investment compan-

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[123]The fraud provision of the Uniform Securities Act, section 101, also applies to purchasers, which is not surprising considering it is based on the ubiquitous rule 10b-5, 17 C.F.R. § 240.10b-5 (1975).

[124]Federal regulation of these activities was recently expanded with the enactment of the Commodity Futures Trading Commission Act of 1974, 7 U.S.C.A. §§ 4a *et seq.* (Supp. 1, 1975).

[125]The SEC also regulates investment advisors under the authority of the Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1 to -21 (1970). *See generally* Note, *The Investment Advisors Act and the Supreme Court's Interpretation of Its Antifraud Provisions*, 37 S. CAL. L. REV. 359 (1964), *reprinted in* 7 CORP. PRAC. COMMENTATOR 58 (1965-66).

ies as defined by the Investment Company Act of 1940.[126] Subsection (p) was added defining a "qualified transfer agent" as Federal Deposit Insurance Corporation-insured banks or persons independent of the issuer approved by the commissioner. This complements new subsection 23-2-1-6(k) denying exemptions to transferable shares unless the issuer has designated a qualified transfer agent. The sections relating to "independent transfer agents" were repealed.[127]

The new amendments also changed subsection 23-2-1-2(a) by adding "industrial development bonds" and deleting the securities of charitable and religious organizations from the list of exempt securities. As to the latter, the drafters no doubt knew of the activities of Rex Humbard and his Cathedral of Tomorrow and acted to prevent the same from happening in Indiana.[128] Memberships in such organizations are still exempt. Subsection 23-2-1-2(b) which establishes certain exempt transactions, was also amended to increase the information that must be disclosed before nonissuer offers or sales by registered broker-dealers are exempt. This subsection also authorizes the commissioner to revoke any exemption because of the financial condition of the issuer or where there are insufficient shares or market makers to establish a "current market price."

An interesting addition, and one which the bar should find most helpful, is the language added to subsection 23-2-1-2(c) authorizing the commissioner to issue opinion letters on the meaning or interpretation of any section of the securities law or any rules issued thereunder. The provision specifies that the letters are not official statements and are not binding on the courts in judicial proceedings. Even with this proviso, however, these letters can aid Indiana corporate practitioners and attorneys with questions as to the interpretation of the law. There is a small fee for this service. With respect to fees in general under the law, the minimum fee for an application for registration was raised in subsection 23-2-1-6(b) to $100, but the same section now provides for a maximum fee of $500 except for certain types of companies. This last change will benefit large corporations.

The commissioner under new section 23-2-1-17.1, replacing repealed section 23-2-1-17, is now authorized to issue cease and desist orders and may sue in the name of the state for injunctive

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[126]15 U.S.C. §§ 80a-1 to -52 (1970).

[127]Ch. 333, § 505, [1961] Ind. Act 984 (repealed 1975); ch. 255, § 11, [1967] Ind. Acts 694 (repealed 1975).

[128]A brief sampling of such activities can be found in N.Y. Times, Jan. 18, 1974, at 11, col. 1; *id.* Feb. 13, 1973, at 9, col. 1; Washington Post, Feb. 13, 973, at 1, col. 6.

relief or for the appointment of a receiver against persons violating the Indiana Securities Law. The remedy sections, both criminal and civil, were also amended. A new section 23-2-1-18.1 was added making violations of the statutes felonies. Previously, some violations were misdemeanors. Subsections 23-2-1-19(a) and (b) were amended to make purchasers as well as sellers civilly liable for violations. The new criminal provision clearly applies to investment advisors, but it is not clear whether the civil liability provisions apply to such persons. However, a court might be willing to imply a remedy to rectify an apparent oversight.[129]

Another significant change is that the statute of limitations in subsection 23-2-1-19(e) has been increased from two to three years after the discovery of the violation. This provision, like the statute of limitations in the Business Takeover Law,[130] seems to mean actual and not constructive discovery. Unlike the Securities Act of 1933, which sets an outside limit for bringing suit,[131] the Indiana statutes permit a defrauded purchaser or seller to bring suit any number of years following the actual transaction. However, the language does not preclude the possibility of laches.[132]

3. *Corporate Partnerships*

A gap, or more accurately a possible gap, in the corporate authority of Indiana corporations was filled by the General Assembly. Subsection 23-1-2-2(b)(14)[133] was added to the Indiana General Corporation Act. The new subsection expressly empowers Indiana corporations "to be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other enterprise . . . ." Thus, doubts as to the authority of a corporation to be a partner or participate in other business ventures have been resolved.[134]

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[129]There is precedent for this at both the federal level and the state level. *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); People v. Hooker, 147 N.Y.S.2d 605 (Sup. Ct. 1955); Shermer v. Barker, 2 Wash. App. 845, 472 P.2d 589 (1970).

[130]*See* note 114 *supra.*

[131]115 U.S.C. § 77m (1970).

[132]Waiver, estoppel, and laches are available as defenses to actions brought under rule 10b-5 even though the 1934 Securities Exchange Act does not have an express statute of limitations. Royal Air Properties, Inc. v. Smith, 333 F.2d 568 (9th Cir. 1964); Royal Air Properties, Inc. v. Smith, 312 F.2d 210 (9th Cir. 1962).

[133]IND. CODE § 23-1-2-2(b)(14) (Burns Supp. 1975), *amending id.* § 23-1-2-2 (Burns 1972).

[134]It is well settled in Indiana that corporations do not have the implied power to be a partner. *See* Traders Loan & Invest. Co. v. Butcher, 74 Ind. App. 548, 129 N.E. 257 (1920); Breinig v. Sparrow, 39 Ind. App. 455, 80 N.E. 37 (1907). Both of these cases recognized the effect of provisions in the

There are some theoretical arguments against partnership arrangements for corporations, such as the concern that a partner might impinge on the directors' managerial prerogatives.[135] However, the statutory trend, following the leadership of the Model Business Corporation Act,[136] has been to permit participation. Furthermore, even without statutory sanction, specific provisions in articles of incorporation authorizing partnerships have been allowed as long as the partnership business is compatible with the scope of the corporation's articles.[137] In fact, a 1951 Indiana Attorney General Opinion[138] upholds this practice. The Opinion does not expressly refer to joint ventures, but there is little doubt that the rationale applies to other types of business ventures. Although the Opinion takes a contrary position, it is even arguable that the Indiana Uniform Partnership Act,[139] specifying corporations as persons who, or which, can be partners, impliedly amended the General Corporation Act. The courts are somewhat antipathetic to implied amendments,[140] but it would have been an interesting argument.

Even though the Opinion permits partnerships, amending the Act was wise since it now covers those corporations which do not

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corporate articles authorizing partnerships, and *Traders Loan* acknowledged that a corporation could be estopped to deny partnership liability. *See generally* 1 CAVITCH § 15.07; 2 *id.* § 39.05[3]; CRANE & BROMBERG §§ 6, 9; 6 FLETCHER §§ 2520-22; HENN § 183, at 351-52; Armstrong, *Can Corporations be Partners?*, 20 BUS. LAW. 899 (1965); Annot., 60 A.L.R.2d 917 (1958).

[135]*See* Frieda Popkov Corp. v. Stack, 198 Misc. 826, 103 N.Y.S.2d 507 (Sup. Ct. 1950); Mallory v. Hananer Oil-Works, 86 Tenn. 598, 8 S.W. 396 (1888). Many of the authorities cited in note 134 *supra* are critical of the ultra vires rationale. *See, e.g.*, CRANE & BROMBERG § 9, at 52-53.

[136]1 ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 4(g), (p) (2d ed. 1971). *See* Comments to section 4(p), *id.* at 200-08. The language added to IND. CODE § 23-1-2-2 (Burns Supp. 1975) is taken from section 4(p) of the Model Act.

[137]*See* Lurie v. Arizona Fertilizer & Chem. Co., 101 Ariz. 482, 421 P.2d 330 (1969).

[138][1961] OPS. ATT'Y GEN. IND. NO. 74, at 227. The proposition was later reaffirmed. [1962] OPS. ATT'Y GEN. IND. NO. 90, at 91. *See* authorities cited note 134 *supra*.

[139]*See* IND. CODE §§ 23-4-1-2, -6(a) (Burns 1972) (Uniform Partnership Act). The Indiana limited partnership statutes, *id.* §§ 23-4-2-1 to -31, do not define "person," but section 23-4-1-6(2) of the Indiana Uniform Partnership Act provides that the Uniform Partnership Act, which does define person, applies to limited partnerships except so far as the two acts are inconsistent. *See generally* CRANE & BROMBERG § 26. The drafters of the Uniform Partnership Act recognized that the *capacity* of a corporation to enter into partnerships is a corporate law matter. UNIFORM PARTNERSHIP ACT § 2 (1914). However, it is generally accepted that the Uniform Act does authorize corporate partnerships. Memphis Natural Gas Co. v. Pope, 178 Tenn. 580, 161 S.W.2d 211 (1941).

[140]*See, e.g.*, United States v. Welden, 377 U.S. 95, 102 n.12 (1964).

specifically refer to partnerships in their articles. The power might have been included in the articles had the drafter considered the matter, but without this foresight a corporation wishing to become a partner would have to go through the amendment process.[141] No longer is this a problem since the general powers enumerated in the Act inhere to all corporations unless limited or restricted by law or the articles. Consequently, incorporators have a choice; if they do not want the corporation to enter into partnerships, the power can be excluded.

4. Not-for-Profit Corporations

The General Assembly also filled a rather substantial gap in the statutory provisions regulating meetings of the members and the directors of Indiana not-for-profit corporations. A new provision was added to the Not-for-Profit Corporation Act authorizing members of such corporations to vote by consent in writing on matters calling for membership action.[142] The consent must be executed by all members entitled to vote on the issue beforehand, and it must be filed with the minutes of the proceedings of the members. The consent has the effect of a unanimous vote of the members. Similar informal action by the board of directors or any committe of the board is now also authorized.[143] This authority can be limited by the articles of incorporation if desired. The provisions of the Not-for-Profit Corporation Act are now in line with the provisions in the General Corporation Act regulating meetings of shareholders[144] and directors.[145] The new provisions will make the running of the affairs of these corporations more efficient, although the membership provision might be impractical for all but the smallest groups.

A typographical error in the provision of the Act authorizing not-for-profit corporations to indemnify directors and officers[146] was corrected, but the legislature did not see fit to bring the provision in line with the comparable provisions in the General Corporation Act[147] and the Indiana Insurance Act.[148] The indemni-

[141] IND. CODE §§ 23-1-4-1 to -7 (Burns 1972).

[142] *Id.* § 23-7-1.1-9(h) (Burns Supp. 1975), *amending id.* § 23-7-1.1-9 (Burns 1972).

[143] *Id.* § 23-7-1.1-10 (Burns Supp. 1975).

[144] *Id.* 23-1-2-9(i) (Burns 1972).

[145] *Id.* § 23-1-2-11(i).

[146] *Id.* § 23-7-1.1-4 (Burns Supp. 1975), *amending id.* § 23-7-1.1-4 (Burns Supp. 1974). The primary purpose of this amendment was to permit "tourist, amusement, and nonfreight-carrying railroad[s]" to incorporate under the Indiana Not-for-Profit Corporation Act. These railroads are becoming more and more common in this day of nostalgia.

[147] *Id.* § 23-1-2-2(b)(9) (Burns Supp. 1975).

[148] *Id.* § 27-1-7-2(b)(8) (Burns 1975).

fication provision was added to the Not-for-Profit Corporation Act in 1974 and the language is basically that of the pre-1973 General Corporation Act provision. Similarly, the inconsistencies contained in the provision authorizing the purchase of "director and officer" insurance by not-for-profit corporations were not eliminated.[149]

IV. Civil Procedure and Jurisdiction

*William F. Harvey**

A. *Jurisdiction and Service of Process*

In *Baker v. Sihsmann*[1] service of process by means of the nonresident motorist statute[2] was challenged on due process grounds. Plaintiff Sihsmann filed suit on May 30, 1973, against Baker for damages arising from an automobile accident. Sihsmann elected to serve Baker through the Indiana secretary of state, who received the summons on June 1, 1973. The secretary of state mailed the summons on June 4 and Baker received it on June 11. Sihsmann defaulted Baker on July 3, 1973, and took judgment against him two days later.

The court of appeals reversed. The summons sent to Baker was a printed form which advised him that he had 20 days, beginning the day after receipt, to respond to the complaint. The court held that this wording was not reasonably calculated to give Baker actual notice of the proceeding and an opportunity to be heard, and so violated fourteenth amendment due process.[3] The court stated that the effect of the summons was to mislead

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[149]*Id.* § 23-7-1.1-4(b)(10) (Burns Supp. 1975). For a discussion of the 1973 amendments to the General Corporation Act see Galanti, *Corporations, 1973 Survey of Indiana Law,* 7 IND. L. REV. 77, 103-09 (1973); for discussion of the 1974 amendments to the Not-for-Profit Corporation Act see Galanti, *Business Associations, 1974 Survey of Indiana Law,* 8 IND. L. REV. 24, 54-59 (1974).

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[1]315 N.E.2d 386 (Ind. Ct. App. 1974).

[2]IND. CODE § 9-3-2-1 (Burns 1973). The statute provides that the operation of a motor vehicle by a nonresident or by a resident who thereafter becomes a nonresident shall be deemed equivalent to an appointment by such person of the secretary of state as his attorney for service of process for actions growing out of motor vehicle collisions in which the nonresident is involved.

[3]*See* Milliken v. Meyer, 311 U.S. 457, 463 (1940).