III. Business Associations

*Paul J. Galanti**

There were four judicial decisions during the period covered by this survey worth noting.[1] However, there were only minor legislative developments.

---

*Professor of Law, Indiana University School of Law—Indianapolis. A.B., Bowdoin College, 1960; J.D., University of Chicago, 1963.

The author wishes to express his appreciation to Douglas J. Atz and Stephen R. Nelson for their assistance in preparing this survey.

[1]There were several cases warranting a passing reference. One is Trifunovic v. Marich, 343 N.E.2d 825 (Ind. Ct. App. 1976), affirming a judgment denying Trifunovic's claim for half of the capital loss of an investment partnership. The arrangement contemplated Trifunovic furnishing the capital and Marich making the investment decisions. Marich's skills were questionable and most of the capital was lost. The court recognized that the Indiana Uniform Partnership Act contemplates partners sharing partnership losses, IND. CODE § 23-4-1-18(a) (Burns 1972), and that a partner has a right of contribution from other partners. *Id.* § 23-4-1-40(d),(f). *See* Goldstein v. Burstein, 185 Cal. App. 2d 725, 8 Cal. Rptr. 574 (1960); *see generally* J. CRANE & A. BROMBERG, PARTNERSHIP §§ 65(a), 90 (1968). These obligations can be modified by agreement, and the court concluded the agreement of the parties contemplated Marich would not be bound to share in the losses. *See* Petersen v. Petersen, 284 Minn. 61, 169 N.W.2d 228 (1969); *see generally* J. CRANE & A. BROMBERG, *supra* § 65.

A contractee's liability for the negligence of an independent contractor was in issue in Hale v. Peabody Coal Co., 343 N.E.2d 316 (Ind. Ct. App. 1976). Hale was employed by a subcontractor of a contractor selected by Peabody for a construction project. He was injured in a fall from a scaffold. Summary judgment for defendants was affirmed. The court held that Hale's employer was an independent contractor and not a servant of defendants because they retained only general supervisory control over the work, Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N.E. 365 (1914); and that he was not within the various exceptions to the general rule that a contractee is not vicariously liable to the servants of an independent contractor. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 409-29 (1965). The court also rejected Hale's claim that defendants were personally negligent, concluding they had provided a safe place to work and Hale's injury was caused by a fall from facilities owned and maintained solely by his employer. *See generally* W. PROSSER, *supra* at 469-70; RESTATEMENT (SECOND) OF TORTS § 413 (1965).

In Day v. State, 341 N.E.2d 209 (Ind. Ct. App. 1976), the court reversed the conviction of the president of a professional association for failing to file the required expense statement for a lobbyist. He had not paid the lobbyist personally and so was not obligated to file the report. The court refused to construe IND. CODE § 2-4-3-4 (Burns 1972) to impose a filing duty on all officers or members of the association who knew of the payments since the legislature considered the unincorporated association to be a separate legal entity apart from its members. Consequently, the association itself could be

A. Restraint of Trade

An unusual, but interesting, case is *Citizens National Bank v. First National Bank,*[2] in which the Second District Court of Appeals reversed and remanded a decision of the Wells Circuit Court granting the defendants' motions to dismiss. *Citizens* is a *rara avis,* one of the few reported treble damage actions brought under the Indiana Antitrust Act.[3] The suit culminated Citizens' efforts to open a banking office in Marion, where the two defendants operate.

Although Citizens' efforts began before 1966 it did not succeed until 1970. Its initial attempt was as a state bank in Van Buren and failed because the Indiana Financial Institutions Act bars branch banks in cities the size of Marion already served by existing banks.[4] Citizens then tried a new tack and petitioned the United States Comptroller of the Currency to become a na-

---

fined for failing to file the requisite report, United States v. A & P Trucking Co., 358 U.S. 121 (1958), but not an individual officer innocent of the infraction.

A case emphasizing the risks of ignoring corporateness is Smith v. Kinney, 338 N.E.2d 507 (Ind. Ct. App. 1975), affirming a directed verdict for defendant. Smith claimed injury from Kinney's undisclosed conflict of interest in a land annexation proceeding. His mistake was to sue in his own name although the title to the land was in a corporation he owned. The corporation, of course, is a separate entity apart from its shareholders, Benner-Coryell Lumber Co. v. Indiana Unemployment Compensation Bd., 218 Ind. 20, 29 N.E.2d 776 (1940); and consequently a shareholder under ordinary circumstances cannot for convenience ignore the corporation and recover on claims belonging to the corporation. *See* Progress Tailoring Co. v. FTC, 153 F.2d 103 (7th Cir. 1946); Cutshaw v. Fargo, 8 Ind. App. 691, 34 N.E. 376 (1893); *see generally* 6 Z. CAVITCH, BUSINESS ORGANIZATIONS § 118.02 (rev. ed. 1976) [hereinafter cited as CAVITCH]; 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 25 (rev. vol. 1974) [hereinafter cited as FLETCHER]; H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS §§ 149, 151 (2d ed. 1970) [hereinafter cited as HENN];N. LATTIN, THE LAW OF CORPORATIONS §§ 12-14 (2d ed. 1971) [hereinafter cited as LATTIN]; Comment, *Corporations: Disregard of the Corporate Entity for the Benefit of Shareholders,* 1963 DUKE L.J. 722.

[2]331 N.E.2d 471 (Ind. Ct. App. 1975) (Sullivan, P.J.).

[3]IND. CODE §§ 24-1-2-1 to -12 (Burns 1974). The Indiana Code contains other provisions relating to anticompetitive conduct. *Id.* §§ 24-1-1-1 to -6; -3-1 to -5; and -4-1 to -4. Although the bulk of antitrust litigation is federal, 16J J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION § 81.01[5] (rev. ed. 1976) [hereinafter cited as VON KALINOWSKI], state antitrust laws do serve a valid supplementing purpose. E. KINTNER, AN ANTITRUST PRIMER 159-63 (2d ed. 1973). There is no federal preemption of state antitrust laws. Standard Oil Co. v. Tennessee, 217 U.S. 413 (1910).

[4]IND. CODE § 28-1-17-1 (Burns 1974). *See generally* Note, *Branch Banking,* 38 NOTRE DAME LAW. 315 (1963).

tional banking association[5] with a main office in Marion and a branch in Van Buren. The Comptroller solicited comments from the defendants, who, not surprisingly, objected to another bank in Marion. Their objections were to no avail, and the Comptroller granted preliminary approval of the application. The defendants then sought injunctive relief in the federal courts, contending that designating Marion as the "main office" was a ploy to circumvent the federal ban against branch banks where state banks are barred under state law.[6] The district court agreed and enjoined the Comptroller.[7] The Seventh Circuit modified and affirmed the injunction,[8] and eventually Citizens opened a Marion office in March 1970.

Citizens, however, was not satisfied and in early 1971 filed suit in the Grant Superior Court alleging that the defendants had conspired and schemed to restrain banking in Marion in violation of the Indiana Antitrust Act.[9] This alleged conspiracy primarily stemmed from the defendants' intervention in the Comptroller's proceeding and subsequent suit for injunctive relief, actions aimed at keeping Citizens from the Marion market and done with the intent and design to monopolize that market. Fortunately Citizens alleged in a "catchall" paragraph 6 of the complaint that the defendants did "other acts and things" to further their objective of keeping banking competition from Marion and its environs.[10]

---

[5]12 U.S.C. § 35 (1970) sets forth the requirements a state bank must meet to become a national banking association. *Id.* § 30 authorizes a national bank to relocate in certain circumstances with the Comptroller's approval. *See* Traverse City State Bank v. Empire Nat'l Bank, 228 F. Supp. 984 (W.D. Mich. 1964).

[6]12 U.S.C. § 36(c) (1970). *See* Union Savings Bank v. Saxon, 335 F.2d 718 (D.C. Cir. 1964). Federal law determines whether a banking facility of a national banking association is a branch. Virginia *ex rel.* State Corp. Comm'n v. Farmers & Merchants Nat'l Bank, 515 F.2d 154 (4th Cir. 1975). For a discussion of the history and purposes of the federal policy on branch banks, see First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252, 256-62 (1966).

[7]Marion Nat'l Bank v. Saxon, 261 F. Supp. 373 (N.D. Ind. 1966).

[8]Marion Nat'l Bank v. Van Buren Bank, 418 F.2d 121 (7th Cir. 1969). The modification authorized Citizens to drop the Van Buren "branch" request from the application, thus eliminating the section 36(c) issue raised by the defendants in their district court injunction suit, 261 F. Supp. 373. However, there appears to be a Van Buren branch. 331 N.E.2d at 474.

[9]IND. CODE § 24-1-2-1 (Burns 1974) prohibits combinations in restraint of trade or to prevent competition. *Id.* § 24-1-2-2 prohibits monopolization and attempts to monopolize. Dye v. Carmichael Produce Co., 64 Ind. App. 653, 116 N.E. 425 (1917). Services as well as commodities are covered by the Act. Fort Wayne Cleaners & Dyers Ass'n v. Price, 127 Ind. App. 13, 137 N.E.2d 738 (1956). *See generally* Note, *Price-Fixing Within the Barber Industry*, 34 IND. L.J. 621 (1959).

[10]331 N.E.2d at 474.

Citizens claimed defendants' acts caused it to lose the profits it would have earned during the interim between approval of its application and opening of the banking office, and prayed for treble damages, as provided by the Act,[11] of $2,850,000.

The defendants removed the suit to the United States District Court for the Northern District of Indiana, and Citizens moved to remand the cause to the state court. Subsequently, the defendants filed separate motions to dismiss for failure to state a claim. However, the court did not rule on them before remanding the suit to the Grant Superior Court. One defendant filed a supplemental brief in the state court in support of its motion to dismiss. Citizens then moved for a default judgment, claiming that no timely responsive pleadings had been filed since the motions to dismiss had not been refiled after remand. The venue of the case was changed to the Wells Circuit Court, which overruled Citizens' motion for default and granted defendants' motions to dismiss. One motion was granted by applying res judicata and the other on several substantive and procedural grounds, the most significant of which were that: (1) Citizens had not sustained injury to any legal right; (2) it had failed to allege any public injury or unreasonable restraint of trade; and (3) defendants' acts were constitutionally protected from antitrust challenge.[12]

The first issue decided by the appellate court was whether the motions to dismiss were properly before the trial court after remand. The court, relying on *Riehl v. National Mutual Insur-*

---

[11]IND. CODE § 24-1-2-7 (Burns 1974) authorizes treble damage actions plus costs of suit and reasonable attorneys' fees. There was an unexplained discrepancy in the figures for Citizens' anticipated yearly profits, the profits for the three and one-half year period covered by the suit, and the total damages claimed. However, in federal antitrust cases all a plaintiff must do is establish with reasonable probability a causal connection between defendant's act and a loss of anticipated revenue. Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). Once this is done, the trier of fact can fix damages by "a just and reasonable estimate . . . based on relevant data." Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946). Difficulty in determining damages is not an excuse for denying recovery. *Id.* at 265-66. The injury suffered, however, must be measurable in dollars. *See generally* ABA ANTITRUST LAW DEVELOPMENTS 285 (1975) [hereinafter cited as ABA 1975 DEVELOPMENTS]; 16N VON KALINOWSKI, *supra* note 3, at § 115.03.

[12]The court stated the appeal presented three issues: (1) whether the motions to dismiss were properly before the trial court; (2) whether the trial court erred in not entering a default judgment; and (3) whether it erred in granting the motions to dismiss. 331 N.E.2d at 476.

ance Co.,[13] concluded that the remand of the case was complete and included the filed but unresolved motions to dismiss. At most, the failure to refile was an inconsequential irregularity, and so defendants were not in default.[14] To "cover" itself the court also concluded that even if defendants were in technical default, Citizens was not entitled to a default judgment as a matter of law. Although the trial rule[15] then in effect seemed to mandate a default judgment, the court held the decision was within the trial court's discretion, as under present Trial Rule 55.[16]

On the merits, the court held the trial court erred in ruling that Citizens had sustained no injury to a legal right and therefore lacked standing to sue. The thrust of defendants' arguments was that the Act[17] protects only those whose "business or property" has been injured and Citizens had no such "business or property" until it opened the Marion office. The problem with this position was twofold: it assumed that the only anticompetitive acts alleged related to the Comptroller's proceeding, which fell before paragraph 6 of the complaint; and that there could not be an illegal conspiracy to keep someone from entering a business.

A threshold problem facing the appellate court was the dearth of cases construing the Indiana Antitrust Act. The court therefore relied upon federal decisions from cases involving violations of federal antitrust laws. Although the language of the Indiana Act

---

[13]374 F.2d 739 (7th Cir. 1967). *See also* Viles v. Sharp, 248 F. Supp. 271 (W.D. Mo. 1965). In fact, if the action has been remanded by the federal court pursuant to 28 U.S.C. § 1447(c) (1970), disposition of the motion to dismiss is properly for the state court. Doran v. Elgin Coop. Credit Ass'n, 95 F. Supp. 455 (D. Neb. 1950). *See generally* 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3738-39 (1976).

[14]331 N.E.2d at 476, *citing* Riehl v. National Mut. Ins. Co., 374 F.2d at 742. *Riehl* involved a removed action but the *Citizens* court could not see why the same rationale would not apply to a case that has been remanded.

[15]IND. ANN. STAT. § 2-1102 (Burns 1967 Repl.) (current version at IND. R. TR. P. 55).

[16]The court cited as authority Custer v. Mayfield, 138 Ind. App. 575, 205 N.E.2d 836 (1965) and 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2685 (1973) (discussing Federal Rule 55).

[17]The reference here is to IND. CODE §§ 24-1-2-1, -7 (Burns 1974). The court stated that section 24-1-2-1 was "substantially patterned" after section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1970). 331 N.E.2d at 478 n.5. Perhaps "influenced" would be more accurate since section 24-1-2-1 is far more specific than the Sherman Act provision which has been labeled a "charter of economic freedom," REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (1955), but characterized as a legislative command for a judicially developed common law of antitrust. P. AREEDA, ANTITRUST ANALYSIS ¶ 104, at 5 (2d ed. 1974). *See generally* 16 VON KALINOWSKI, *supra* note 3, § 2.01. IND. CODE § 24-1-2-7 (Burns 1972) authorizes treble damage suits by a person injured "in his business or property."

differs from the federal Sherman Antitrust Act,[18] there is sufficient similarity to section 4 of the Clayton Antitrust Act[19] authorizing federal treble damage suits to justify utilizing federal cases to resolve the issue of Citizens' standing. The standing requirement is to insure recovery only by those whose injury has been proximately caused by an antitrust violation.[20]

The defendants claimed the complaint failed to establish standing because Citizens did not allege any "public injury." At one time federal courts often required a showing of a general injury to the competitive process in an antitrust action.[21] However, as the appellate court pointed out, the United States Supreme Court has rejected this requirement.[22] At least in actions alleging per se violations of the Sherman Act, a conclusion that conduct

---

[18]15 U.S.C. §§ 1-11 (1970). *See* authorities cited at note 17 *supra*.

[19]15 U.S.C. § 15 (1970). The court's statement that section 24-1-2-7 is "substantially patterned" after section 4 is accurate. 331 N.E.2d at 478 n.6. This fact was noted in Sandidge v. Rogers, 167 F. Supp. 553, 556 (S.D. Ind. 1958).

[20]Some federal courts take the approach that the injury must be a "direct" result of defendant's violation. *See, e.g.*, Productive Inventions v. Trico Prods. Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956). Others take a more liberal approach and allow recovery to a plaintiff in a "target area" which defendants could reasonably foresee would be affected by a conspiracy. *See, e.g.*, Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362-64 (9th Cir. 1955). Although the Supreme Court has not directly passed on the issue, its pronouncements seem to support the broader approach. *See* Hospital Bldg. Co. v. Trustees of Rex Hosp., 423 U.S. 820 (1976); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (scope of jurisdiction cases). *But see* Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 (1972) (the general economy of a state is not "business or property"). *See generally* ABA 1975 DEVELOPMENTS, *supra* note 11, at 257-61; 16L VON KALINOWSKI, *supra* note 3, §§ 101.01-.02; Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964). The *Citizens* court took pains to emphasize that the standing element does not derogate the broad notice pleading rules of Indiana or in the federal courts. 331 N.E.2d at 479 n.8. *See* note 31 *infra* and accompanying text. A pleading is sufficient if it apprises defendants of facts from which injury accrued and upon which damages may be assessed. Farm Bureau Ins. Co. v. Clinton, 149 Ind. App. 36, 269 N.E.2d 780 (1971).

[21]*See, e.g.*, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 273 F.2d 196, 200 (7th Cir. 1959), *rev'd per curiam*, 364 U.S. 656 (1961); Kennear-Weed Corp. v. Humble Oil & Ref. Co., 214 F.2d 891 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955).

[22]The ruling occurred in Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), which was not cited in *Citizens*, and was reaffirmed in Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), which was cited.

violates the antitrust laws "is inherently a declaration that it offends the public interest."[23]

A more crucial aspect of the standing issue was whether Citizens sufficiently alleged a causal connection between its injury and the defendants' acts. The court concluded that the complaint was sufficient and rejected defendants' argument that persons holding only an expectancy of entering a business do not have a "business" interest under the antitrust laws. Although there is some authority to support the defendants' contention,[24] the sounder approach adopted by the court of appeals in *Citizens* rejects this myopic view of antitrust and recognizes that the aim of antitrust laws, to promote competition and prevent undue restraints of trade, can be thwarted as much by precluding a new entrant as by destroying an existing business.[25]

Of course, courts must take care to allow only those plaintiffs who, in the words of an early leading case, have the "intention and preparedness to engage in business."[26] One case relied on in *Citizens* to elaborate on this requirement is *Denver Petroleum Corp. v. Shell Oil Co.*,[27] which posited the elements to be considered in determining whether suit can be maintained by a prospective entrepreneur. Among these factors are the background and

---

[23]P. AREEDA, ANTITRUST ANALYSIS ¶ 159, at 69 (2d ed. 1974). There is, however, still some debate whether public injury must be alleged in rule of reason cases. *Compare* Syracuse Broadcasting Corp. v. Newhouse, 295 F.2d 269, 277 (2d Cir. 1961) *with* Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506, 517 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972) *and* Donlan v. Carvel, 209 F. Supp. 829, 831 (D. Md. 1962). Supreme Court dictum does seem to support the position that public injury is not an element in any section 1 case. *In re* McConnell, 370 U.S. 230, 231 (1962). *See generally* ABA 1975 DEVELOPMENTS, *supra* note 11, at 265-67; 16M VON KALINOWSKI, *supra* note 3, § 105.02[7]. A claim of public injury alone will not support a treble damage action and plaintiff must plead and prove injury to himself. Sam S. Goldstein Indus., Inc. v. Botany Indus., Inc., 301 F. Supp. 728, 734 (S.D. N.Y. 1969).

[24]*See* Duff v. Kansas City Star Co., 299 F.2d 320, 323 (8th Cir. 1962); LaRouche v. United Shoe Mach. Corp., 166 F. Supp. 633 (D. Mass. 1958).

[25]*See, e.g.*, Woods Exploration & Prod. Co. v. Aluminum Corp. of America, 438 F.2d 1286, 1310 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289 (D. Colo. 1969); Waldron v. British Petroleum Co., 231 F. Supp. 72, 81-82 (S.D. N.Y. 1964). *See generally* ABA 1975 DEVELOPMENTS, *supra* note 11, at 261-62. "Property" as used in section 4 is generally construed to include any interest protected by law and can be broader than "business." Waldron v. British Petroleum Co., 231 F. Supp. at 86-87; *see generally* 16L VON KALINOWSKI, *supra* note 3, § 101.02.

[26]American Banana Co. v. United Fruit Co., 166 F. 261, 264 (2d Cir. 1908), *aff'd on other grounds*, 213 U.S. 347 (1909).

[27]306 F. Supp. 289, 307-08 (D. Colo. 1969). *See also* Waldron v. British Petroleum Co., 231 F. Supp. at 81-82; *see generally* 16L VON KALINOWSKI, *supra* note 3, § 101.02.

experience of the persons involved, their successes or failures in related businesses, their financial capabilities and resources, and the affirmative actions taken towards entry into the new market.

Citizens easily sustained the "burden" imposed by *Denver Petroleum* because of its banking experience, the Comptroller's preliminary approval of the application, and the prior acquisition of a building in Marion. Although the appellate court cautioned that Citizens might not be able to prove its intent and preparedness to enter the banking business in Marion,[28] there is little doubt how the court viewed the situation. The court probably was influenced by the fact that Citizens did enter the Marion market once the challenges ended.

The appellate court next considered the argument that the complaint was insufficient because it emphasized the defendants' efforts to bar the Comptroller's authorization. There is no question that the complaint was mainly aimed at those particular actions; but Citizens advisedly, or perhaps fortuitously, had included its catchall allegation. Thus, even if the attack on the defendants' attempts to block governmental approval should fail, Citizens might still recover under other grounds; and it is conventional wisdom that a motion to dismiss is improper under Trial Rule 12(B)(6) unless it appears to a certainty that the plaintiff is not entitled to relief under any set of facts.[29] The court emphasized that a complaint need not state all elements of a cause of action and that other procedures are available to properly advise a defendant of the gravamen of a complaint, such as a motion for more definite statement under Trial Rule 12(E) or discovery procedures under Trial Rule 26.

The trial court had apparently followed federal antitrust doctrine of an earlier time requiring greater pleading specificity in antitrust cases than in other federal actions.[30] However, as the *Citizens* court rightly noted, this view no longer prevails. It is now well established that antitrust cases are not an exception to the liberal federal pleading rules,[31] and there is no reason why the

---

[28]331 N.E.2d at 480. The court also issued the customary caveat that it was not indicating views on other matters by reversing the judgment. *Id.* at 476.

[29]State v. Rankin, 260 Ind. 228, 230, 294 N.E.2d 604, 606 (1973). *See also* Sacks v. American Fletcher Nat'l Bank & Trust Co., 258 Ind. 189, 279 N.E.2d 807 (1972); Farm Bureau Ins. Co. v. Clinton, 149 Ind. App. 36, 269 N.E.2d 780 (1971); 1 W. HARVEY, INDIANA PRACTICE 601 (1969).

[30]*See, e.g.*, United Grocers' Co. v. Sau-Sea Foods, Inc., 150 F. Supp. 267, 269 (S.D. N.Y. 1957); Baim & Blank, Inc. v. Warren-Connelly Co., 19 F.R.D. 108, 109 (S.D. N.Y. 1956).

[31]*See* Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957), relied on in *Citizens*. *See also* Dailey v. Quality School Plan, Inc., 380 F.2d 484, 486 (5th

same approach should not apply under the Indiana Act. Since the catchall allegation paragraph 6 could cover circumstances justifying relief, the trial court's draconian step of dismissing the complaint was inappropriate.

Defendants also claimed the suit was barred by the statute of limitations. The trial court had agreed, applying the two year statute "for a forfeiture of penalty given by statute."[32] The appellate court did not decide whether that statute was the appropriate one but concluded dismissal was improper because the face of the complaint did not clearly show that the action was barred by that statute.[33] Again paragraph 6 saved Citizens. If the only overt acts were defendants' administrative and judicial efforts, the statute might have started to run in June 1968. The court, applying the rule that the statute does not commence to run until the completion of the last overt act in furtherance of the conspiracy,[34] reasoned that paragraph 6 permitted a showing of subsequent acts that would toll the statute. In fact, from the complaint's face the statute might not have started running until March 1970, when the Marion office was opened. The court recognized that the last overt act might have occurred earlier and conceivably the suit was time barred, but stated that this possibility did not justify granting a motion to dismiss. However, a motion for summary judgment might be appropriate at a later time.

The court then considered the key issue raised by Citizens' appeal, the contention that defendants' actions were protected under the *Noerr-Pennington-Trucking Unlimited*[35] doctrine con-

---

Cir. 1967). The Supreme Court has cautioned against summary procedures in antitrust litigation. Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969); Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962). *See generally* 16J, M VON KALINOWSKI, *supra* note 3, §§ 81.06[1], 105.07[2].

[32]IND. CODE § 34-1-2-2 (Burns 1973). The court in Sandidge v. Rogers, 167 F. Supp. 553, 555-56 (S.D. Ind. 1958), applied a predecessor statute to an antitrust complaint arising before the current four year Clayton Act statute of limitations, 15 U.S.C. § 15b (1970), became effective. The statute of limitation of the forum controlled prior to the adoption of section 4B of the Act. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906); Schiffman Bros. v. Texas Co., 196 F.2d 695 (7th Cir. 1952).

[33]331 N.E.2d at 483, *citing* American States Ins. Co. v. Williams, 151 Ind. App. 99, 278 N.E.2d 295 (1972).

[34]The court adopted the federal court approach here. *See* Hazeltine Research, Inc. v. Zenith Radio Corp., 418 F.2d 21 (7th Cir. 1969), *rev'd on other grounds*, 401 U.S. 321 (1971); Northern Ky. Tel. Co. v. Southern Bell Tel. & Tel. Co., 73 F.2d 333 (6th Cir. 1934). *See generally* 16J VON KALINOWSKI, *supra* note 3, § 81.04[2].

[35]California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); UMW v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). The doctrine

ferring antitrust immunity on concerted actions aimed at influencing governmental decisions even if reprehensible in nature and done with an anticompetitive intent. The rationale of the doctrine, as propounded in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[36] is that Congress did not intend to apply the antitrust laws to concerted efforts seeking legislative action because of constitutional considerations.[37] Although *Noerr* was a statutory construction case, the Supreme Court raised the doctrine to a constitutional level in *California Motor Transport Co. v. Trucking Unlimited,*[38] justifying it on first amendment grounds[39] and applying it to efforts to influence governmental actions through litigation as well as lobbying. *UMW v. Pennington*[40] furnished the other element appropriate to *Citizens* by immunizing joint actions undertaken to influence administrative decisions.

Even though *Noerr-Pennington-Trucking Unlimited* bars antitrust attacks on joint actions akin to defendants' efforts, the appellate court was correct in reversing the judgment since paragraph 6 was broad enough to cover "nongovernmental" aspects of the putative conspiracy. These aspects could justify antitrust recovery even if allegations of the attempt to influence the Comptroller and the subsequent litigation were disregarded.[41]

Furthermore, even if the complaint were limited to the efforts to bar governmental approval, Citizens might fall within the "sham exception" to the doctrine recognized in *Noerr* and developed in *Trucking Unlimited.* This exception to the immunity applies where a defendant's aim is not to influence government action but is merely a disguised anticompetitive effort.[42] The

---

has generated considerable academic comment. See authorities cited in Galanti, *Seventh Circuit Review—Antitrust,* 52 CHI.-KENT L. REV. 203, 208 n.15 (1975) [hereinafter cited as Galanti, *Antitrust*]. *See generally* ABA 1975 DEVELOPMENTS, *supra* note 11, at 410-11; 16F VON KALINOWSKI, *supra* note 3, §§ 45.08, 46.04.

[36]365 U.S. 127 (1961).

[37]*Id.* at 132 n.6, 139. *See* Galanti, *Antitrust, supra* note 35, at 209.

[38]404 U.S. 508 (1972). *See generally* 2 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 1023-24 (1973) [hereinafter cited as HANDLER].

[39]*See* 404 U.S. at 510-11.

[40]381 U.S. 657 (1965).

[41]An antitrust victim can recover for anticompetitive acts that do not involve governmental action even if some aspects of a conspiracy are protected. *See* Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972).

[42]331 N.E.2d at 484 n.10. The "sham exception" was raised in *Noerr* because of a fear that the Sherman Act would be eviscerated whenever some state activity is involved. *See* Galanti, *Antitrust, supra* note 35, at 210; *see generally* 16F VON KALINOWSKI, *supra* note 3, § 46.04[3]. There has been some debate on the question of whether *Trucking Unlimited* has narrowed the *Noerr* holding. *Compare* 2 HANDLER, *supra* note 37, at 1017-30 *with* ABA 1975 DEVELOPMENTS, *supra* note 11, at 410 *and* Oppenheim, *Antitrust Immunity for*

complaint in *Citizens* does not seem to fall within the sham exception, but it is not inconceivable that it might; and the court was therefore justified in holding the motion to dismiss improper. Of course, if the only anticompetitive acts were those aimed at government action, the suit would be inappropriate and a motion for summary judgment would be in order.

The final aspect of *Citizens* was whether the action was barred by the res judicata doctrine or as a collateral attack on the earlier federal decisions.[43] Once again the court turned to paragraph 6 and noted that Citizens could possibly prove facts subsequent to the federal litigation that would not be barred by either doctrine. The court also wisely acknowledged that the various defenses might preclude some of the issues even if they did not preclude the suit. However, the plethora of grounds raised at this pleading stage failed to justify a motion to dismiss. Citizens was entitled to present its case although it might not in fact make a case.[44]

B. Securities Law Fraud

In *Green v. Karol*[45] the Third District Court of Appeals reached the right result but, in one respect, on erroneous grounds. The suit alleged a violation of the Indiana Securities Act[46] (Blue Sky Act); the federal Securities Act of 1933[47] (1933 Act); the federal Securities Exchange Act of 1934[48] (1934 Act) and imple-

---

Joint Efforts to Influence Adjudications Before Administrative Agencies and Courts—From Noerr-Pennington *to* Trucking Unlimited, 29 WASH. & LEE L. REV. 209, 217-24 (1972). *See also* Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975), *discussed in* Galanti, *Antitrust, supra* note 35, at 205-16; Bob Layne Contractor, Inc. v. Bartel, 504 F.2d 1293 (7th Cir. 1974), *discussed in* Galanti, *Antitrust, supra*, at 204 n.1.

[43]Marion Nat'l Bank v. Van Buren Bank, 418 F.2d 121 (7th Cir. 1969); Marion Nat'l Bank v. Saxon, 261 F. Supp. 373 (N.D. Ind. 1966).

[44]The court could not resist the opportunity to take a probably well-deserved dig at the parties for not resolving the preliminary issues *before* the suit reached the appellate level. *See* 331 N.E.2d at 485.

[45]344 N.E.2d 106 (Ind. Ct. App. 1976) (Staton, J.), also discussed in Harvey, *Civil Procedure, infra* at 112.

[46]IND. CODE §§ 23-2-1-1 to -25 (Burns Supp. 1976). For a general discussion of Blue Sky Acts see 14 FLETCHER, *supra* note 1, §§ 6738-44; HENN, *supra* note 1, §§ 305-08; LATTIN, *supra* note 1, § 44. State securities legislation is extensively and critically treated in L. LOSS & E. COWETT, BLUE SKY LAWS (1958). *See also* Pasmas, *Securities Issuance and Regulation: The New Indiana Securities Law*, 38 IND L.J. 38 (1962).

[47]15 U.S.C. §§ 77a-77aa (1970). The commentary on federal regulation of securities is legion. The classic reference is L. LOSS, SECURITIES REGULATION (2d ed. 1961 & Supp. 1969), but other selected references can be found in D. RATNER, SECURITIES REGULATION 27 (1975).

[48]15 U.S.C. §§ 78a-78hh (1970).

menting rule 10b-5;[49] money had and received; and common law fraud.[50] It arose from Green's efforts to recover $30,000 paid in 1967 for securities of a Costa Rican sugar refinery. The securities had not been registered with the Indiana Securities Commissioner under the Blue Sky Act[51] or with the Securities and Exchange Commission under the 1933 Act.[52]

In an earlier case[53] involving Dr. Karol, the Third District had ruled that the sale of these securities to another doctor in Fort Wayne was not within either the small offering exemption[54] or the isolated non-issuer transaction exemption[55] of the Blue Sky Act. However, unlike the earlier plaintiff, who acted promptly when the fortunes of the company soured in 1969, Dr. Green did not sue until May 1972. The trial court initially defaulted Karol for failing to plead; however the entry was set aside and the directed verdict for Karol entered. Thus, the issues before the appellate court were: (1) whether the trial court abused its discretion in setting aside the default entry; and (2) whether it erred in directing a verdict on the state and federal securities issues and the count for money had and received.

On the first issue, the court concluded the trial court did not abuse its discretion in setting aside the default entry under Trial Rule 55(A).[56] Since no default judgment had been entered, the requirement of Trial Rule 55(C) that default judgments can only

---

[49]17 C.F.R. § 240.10b-5 (1975).

[50]The common law fraud count was submitted to the jury, and Green did not appeal an adverse verdict. 344 N.E. 2d at 109 n.3.

[51]IND. CODE § 23-2-1-3 (Burns Supp. 1976) prohibits the sale of securities unless registered in accordance with *id.* §§ 23-2-1-4 to -7 or the security or transaction is exempt under *id.* § 23-2-1-2. *See generally* Pasmas, *Securities Issuance and Regulation: The New Indiana Securities Law*, *supra* note 43.

[52]Section 5 of the 1933 Act, 15 U.S.C. § 77e (1970), prohibits the sale, offer to sell, or offer to buy unregistered securities unless the securities are exempt under section 3, *id.* § 77c, or the transactions are exempt under section 4, *id.* § 77d. *See* 11 H. SOWARDS, SECURITIES REGULATION § 2.01 (1975) [hereinafter cited as SOWARDS].

[53]Hippensteel v. Karol, 304 N.E.2d 796 (Ind. Ct. App. 1973), discussed in Galanti, *Business Associations, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 24, 29-35 (1974) [hereinafter cited as Galanti, *1974 Survey*].

[54]IND. CODE § 23-2-1-2(b)(10) (Burns Supp. 1976). For a general discussion of Blue Sky Act exemptions see Note, *Securities Registration Requirements in Indiana*, 3 IND. LEGAL F. 270, 285-94 (1969). *See generally* 14 FLETCHER, *supra* note 1, § 6754; Doxsee, *Securities Problems in Indiana*, 17 RES GESTAE 6 (Sept. 1973).

[55]IND. CODE § 23-2-1-1(b)(1) (Burns Supp. 1976).

[56]The court cited as authority Citizens Nat'l Bank v. First Nat'l Bank, 331 N.E.2d 471 (Ind. Ct. App. 1975), discussed at text accompanying notes 13-16 *supra*.

be set aside in accordance with the strict requirements of Trial Rule 60(B) did not apply.[57] The *Green* court did recognize the role of default judgments in enforcing rules of procedure, but tempered its application with the judicial preference for deciding a case on its merits. Although the defaulted party must establish that a default judgment would result in an injustice, any doubts in the propriety of entering the default judgment should be resolved against the moving party.[58] In affirming the trial court, the appellate court emphasized the amount of money and the importance of the issues involved. The court also noted that the delay was short; did not prejudice Green; was inadvertent, even if it did not satisfy the "excusable neglect" standard of Trial Rule 60(B);[59] and, in particular, that Karol had an apparently meritorious defense.

On the merits, the appellate court started from the premise that Trial Rule 50 permits a directed verdict only if there is no evidence, with all fair and rational inferences, to support a verdict for the nonmoving party.[60] In essence, there must be either no evidence on a crucial factual issue necessary to support a verdict or a clear defense supportable by the evidence. Karol prevailed on both points. The court concluded that the securities law violations were time barred and there was no evidence to support liability for money had and received.

The *Green* result seems correct but the discussion of the statute of limitations for the possible 1934 Act violation, although correct, really was irrelevant. What appears to have happened is that neither the courts nor the parties realized that Congress withheld from state courts jurisdiction to entertain 1934 Act claims. Section 27 of the Act[61] grants federal district courts the *exclusive jurisdiction* to enforce its provisions.[62] There is considerable au-

---

[57]*Green*, a Third District Court of Appeals decision, appears to conflict with the Second District Court of Appeals decisions in Henline, Inc. v. Martin, 348 N.E.2d 416 (Ind. Ct. App. 1976), and Glennar Mercury-Lincoln, Inc. v. Riley, 338 N.E.2d 670 (Ind. Ct. App. 1975) (discussed in Harvey, *Civil Procedure*, *infra* at 91), which seem to require compliance with Trial Rule 60(B) in attacking a default entry.

[58]*See* Clark County State Bank v. Bennett, 336 N.E.2d 663 (Ind. Ct. App. 1975); Duncan v. Binford, 151 Ind. App. 199, 278 N.E.2d 591 (1972).

[59]*See* Henline, Inc. v. Martin, 348 N.E.2d 416 (Ind. Ct. App. 1976); Continental Assurance Co. v. Sickels, 145 Ind. App. 671, 252 N.E.2d 439 (1969).

[60]*See* Miller v. Griesel, 308 N.E.2d 701, 707 (Ind. 1974); Jordanich v. Gerstbauer, 153 Ind. App. 416, 287 N.E.2d 784 (1972).

[61]15 U.S.C. § 78aa (1970). *See generally* 11A E. GADSBY, BUSINESS ORGANIZATIONS, *Securities Regulation* § 5.03[3] (1976). [hereinafter cited as GADSBY].

[62]Even though state courts lack 1934 Act jurisdiction, there is no preemption problem. Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) (1970),

thority construing the impact of section 27 on state courts. One leading case is *American Distilling Co. v. Brown*,[63] in which the New York Court of Appeals affirmed dismissal of a complaint filed under section 16(b) of the 1934 Act[64] in a stronger case for state jurisdiction than *Green*. Unlike section 10(b) and rule 10b-5, where the civil cause of action has been implied,[65] section 16(b) specifically authorizes a corporation or a shareholder in a derivative suit to recover "short swing" profits by a statutory insider in "any court of competent jurisdiction."[66] Notwithstanding the

---

provides that rights and remedies under the Act are cumulative, although recovery is limited to actual damages, and that the jurisdiction of state securities commissions is unaffected except where it conflicts with the Act or implementing rules. *See* People v. Birrell, 46 Misc. 2d 1053, 261 N.Y.S.2d 609 (Sup. Ct. 1965).

In Herron Northwest, Inc. v. Danskin, 1 Wash. App. 818, 464 P.2d 435 (1970), the trial court had exercised jurisdiction over a claim involving stock purchase margins allegedly violating Regulation T, promulgated under section 7(a) of the 1934 Act, 15 U.S.C. § 78g(a) (1970). On appeal the court rejected the possible Regulation T claim but remanded the case to see whether plaintiff had stated a claim under an alternatively pleaded state law count. Similarly, in Pierce v. Richard Ellis & Co., [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,579 (N.Y. Civil Ct. 1970), the court held that the 1934 Act barred a state court rule 10b-5 action but that the alleged stock "churning" could constitute common law fraud as well. Finally, in Goodbody & Co. v. Penjaska, 8 Mich. App. 64, 153 N.W.2d 665 (1967), the court allowed an action to recover on a margin account because it was a common law action for debt and not an action under Regulation T.

[63]295 N.Y. 36, 64 N.E.2d 347 (1945), *aff'g* 269 App. Div. 763, 54 N.Y.S.2d 855 (App. Div.), *aff'g* 184 Misc. 431, 51 N.Y.S.2d 614 (Sup. Ct. 1944).

[64]15 U.S.C. § 78p(b) (1970). *See generally* 11A GADSBY, *supra* note 61, § 8.02; Woodside, *Resumé of the Report of the Special Study of Securities Markets and the Commission's Legislative Proposals*, 19 BUS. LAW. 463, 476 (1964).

[65]The implied cause of action initially was recognized in Kardon v. National Gypsum Co., 73 F. Supp. 798, 802 (E.D. Pa. 1947), discussed in Note, *Implied Liability Under the Securities Exchange Act*, 61 HARV. L. REV. 858 (1948). The Supreme Court has confirmed the existence of the cause of action. Affiliated Ute Citizens v. United States, 406 U.S. 128, 150-54 (1972); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971). However, the majority of the Court today, with a demonstrated hostility toward an expansive reading of rule 10b-5, conceivably would rule otherwise if the existence of an implied cause of action were not so well established. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). *See generally* BUSINESS WEEK, Sept. 1, 1976, at 57. It is even possible to wonder if decisions such as J.I. Case Co. v. Borak, 377 U.S. 426 (1964), and Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), recognizing in general that private enforcement of SEC rules may supplement SEC action, would be decided the same way today. *Cf.* TSC Indus., Inc. v. Northway, Inc., 96 S. Ct. 2126 (1976). *See generally* 11A GADSBY, *supra* note 61, § 5.03.

[66]15 U.S.C. § 78p(b) (1970). The section 16(b) action is a sui generis proceeding aimed at discouraging insider trading by allowing the issuer to

superficial soundness of the argument that the specific language of section 16(b) gives a court with jurisdiction over the defendant jurisdiction over the cause of action, the New York court concluded section 27 controlled.[67] The rationale for the restrictive rule, according to the court in *Investment Associates, Inc. v. Standard Power & Light Corp.*, [68] was a Congressional intent to have consistent and efficient enforcement of the Act. State court jurisdiction is so inconsistent with the Congressional intent that a 1934 Act violation cannot be raised as a defense in a state court suit.[69]

The *Green* court, however, was correct in considering whether there had been a 1933 Act violation because section 22(a)[70] grants state and territorial courts concurrent jurisdiction to enforce any liability or duty.[71] The policies of the two Acts differ so much that the 1933 Act specifically bars removing cases from state to federal courts.[72] Apparently the 1933 Act jurisdiction was not thoroughly researched by the parties in *Green* because research might have disclosed *Schnall v. Loeb, Rhoades & Co.*,[73] a New York case rejecting jurisdiction of an action brought pursuant to the 1934 Act but upholding 1933 Act jurisdiction. Although Green's complaint was not specific, at least as restated by the appellate court, any 1933 Act relief could only be based on sections 12(1),

---

recover profits made by the insiders specified in section 16(a), 15 U.S.C. § 77p(a) (1970), in almost all situations even where the insider did not in fact make a profit in an ordinary financial sense. *See* Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943). *See generally* 11A GADSBY, *supra* note 61, § 8.02[1]. The Supreme Court's current hostility to a broad reading of the 1934 Act has carried over into the section 16(b) area. *See* Foremost-McKesson, Inc. v. Provident Securities Co., 423 U.S. 232 (1976).

[67] 295 N.Y. at 36, 64 N.E.2d at 348-49.

[68] 29 Del. Ch. 225, 48 A.2d 501 (1946). *See also* Standard Power & Light Corp. v. Investment Assocs., 29 Del. Ch. 593, 51 A.2d 572 (1947).

[69] Investment Assocs. v. Standard Power & Light Corp., 29 Del. Ch. 225, 48 A.2d 501 (1946). However, in McGregor v. Consolidated Airborne Sys., Inc., [1964-66 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,410 (N.Y. Co. Sup. Ct. 1964), a rule 10b-5 violation was allowed as a counterclaim but the court did not discuss section 27.

[70] 15 U.S.C. §77v(a) (1970).

[71] *See* Wilko v. Swan, 346 U.S. 427 (1953); American General Life Ins. Co. v. Miller, [1964-66 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,448 (Baltimore, Md. Super. Ct. 1964); Schnall v. Loeb, Rhoades & Co., [1970-71 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,104 (N.Y. Co. Sup. Ct. 1971); Negin v. Cico Oil & Gas Co., 46 Misc. 2d 367, 259 N.Y.S.2d 434 (N.Y. Co. Sup. Ct. 1965). *See generally* 11A GADSBY, *supra* note 61, § 10.07[1][b].

[72] 15 U.S.C. § 77v(a) (1970). *See* Wilko v. Swan, 346 U.S. 427, 431 (1953).

[73] [1970-71 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,104 (N.Y. Co. Sup. Ct. 1971).

12(2) and 17.[74] There was therefore no problem with an Indiana court exercising jurisdiction because all the transactions occurred in this state.[75]

Although the Indiana Court had jurisdiction, it is clear the statute of limitations of section 13[76] determined whether the section 12 actions were time barred. For a violation of section 12(2), involving untrue statements or omissions of material facts, suit must be brought within one year of discovery of the violation, or when it should have been discovered by the exercise of reasonable diligence, but no later than three years after the sale. Section 13 is more narrowly drawn than section 12(1), and suit must be brought within one year of the violation and three years from the bona fide offering of the security.[77]

The limitation provisions are exclusive, and the three year provision does not extend the one year provision, and vice versa.[78] In other words, a section 12(2) suit involving an untrue statement of a material fact brought the day after the violation is discovered, but over three years after the sale, is barred, as is a suit brought a year and a day from discovery of the violation but well within the three year period. The requirement that section 12(1) rescission suits, involving sales of securities in violation of section 5 of the

---

[74]15 U.S.C. §§ 771(1)-(2), 77q (1970). Since the securities had not been registered, liability on account of a false registration statement under section 11, *id.* § 77k (1970), was foreclosed. *See* 344 N.E.2d at 112 n.9; *see generally* 11 SOWARDS, *supra* note 52, § 9.02.

[75]It is settled that the personal jurisdiction requirements of state law must be met even for the federal cause of action. Negin v. Cico Oil & Gas Co., 259 N.Y.S.2d 434, 436 (N.Y. Co. Sup. Ct. 1965). The fact that a federal court in a state might have venue under section 22(a) does not automatically give a state court jurisdiction. *Id.* The restriction cuts both ways, and the broad federal process provisions cannot be used as a sham to obtain jurisdiction to enforce a pendent claim. Ratner v. Scientific Resources Corp., 53 F.R.D. 325 (S.D. Fla. 1971), *appeal dismissed*, 462 F.2d 616 (5th Cir. 1972). *See generally* Mills, *Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Laws*, 70 COLUM. L. REV. 423 (1970).

[76]15 U.S.C. § 77m (1970); *cf.* Herget v. Central Nat'l Bank & Trust Co., 324 U.S. 4 (1945). For a general discussion of the statute of limitations for 1933 Act violations, see 11 SOWARDS, *supra* note 52, § 9.05.

[77]The statutory period for a section 11 action on a false registration statement is one year from the discovery of the violation, or when it should have been discovered, with an outside limit of three years after the bona fide offering of the security to the public. Thus section 11 is treated in part like section 12(1) and in part like section 12(2).

[78]*See, e.g.*, Gallik v. Franklin, 145 F. Supp. 315, 316 (S.D. N.Y. 1956); Osborne v. Mallory, 86 F. Supp. 869, 874 (S.D. N.Y. 1949); Shonts v. Hirliman, 28 F. Supp. 478, 486 (S.D. Cal. 1939). The same rule applies to state Blue Sky statutes patterned on section 13. See Woodhull v. Minot Clinic, 259 F.2d 676 (8th Cir. 1958). *See generally* 11 SOWARDS, *supra* note 11, § 9.05 at 9-28.2.

1933 Act,[79] must be brought within one year of the violation and three years of the offering seems somewhat anomalous. However, the prospectus delivery requirements of section 5 are continuous, and a violation is possible even after a proper initial public offering.[80] The importance of section 13 cannot be overemphasized since compliance is an essential ingredient of a suit.[81] Failing to plead facts conforming to section 13 is fatal to a 1933 Act claim[82] and a plaintiff must allege both the date the fraud was discovered and that it could not have been discovered sooner through the exercise of reasonable diligence.[83]

Green's suit was not filed until May 1972, and it was clear to the court that Green's possible section 12(1) violation was barred in February 1968, one year after the transaction; and the possible section 12(2) violation was barred in February 1970, three years after the sale, regardless of when Green discovered or could have discovered any misstatements. Although the issue was raised in the context of the court's discussion of the 1934 Act, the appellate court was satisfied that Green was aware of Karol's misrepresentations as early as January 1968, and had indications of nondisclosure in the summer of 1968 and June 1971.

The appellate court also considered possible claims under the antifraud provisions, section 17 of the 1933 Act[84] and section

---

[79]15 U.S.C. § 77e (1970).

[80]*See, e.g.*, SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972). *See generally* 11 SOWARDS, *supra* note 52, §§ 7.06, 9.05.

[81]*See, e.g.*, Newburg v. American Dryer Corp., 195 F. Supp. 345 (E.D. Pa. 1961). *See generally* 11 SOWARDS, *supra* note 52, § 9.05, at 9-29 to -30.

[82]Premier Indus., Inc. v. Delaware Valley Fin. Corp., 185 F. Supp. 694, 696 (E.D. Pa. 1960).

[83]Dale v. Rosenfeld, 229 F.2d 855, 858 (2d Cir. 1956); Osborne v. Mallory, 86 F. Supp. 869, 876 (S.D. N.Y. 1949).

[84]The court apparently assumed that a violation of section 17 gives rise to an implied cause of action despite the express civil remedies of the 1933 Act. Although the consensus is that there is a cause of action, *see* 11 SOWARDS, *supra* note 52, § 10.01[i], it is more restricted than the implied action under the 1934 Act. It is available only where fraud and not mere negligence is alleged, *see* Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 787 n.2 (2d Cir. 1951); *cf.* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), and perhaps only where a plaintiff is a purchaser of securities who could sue under section 12, *see* Greater Iowa Corp. v. McLendon, 378 F.2d 783, 788-91 (8th Cir. 1967); *cf.* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). As Professor Loss points out, 3 L. LOSS, SECURITIES REGULATION 1785-86 (2d ed. 1961), too broad a reading of section 17 would undermine the carefully structured civil remedy of section 12(2). Of course, this might be the goal of a plaintiff running afoul of the statute of limitations of section 13. *See* Osborne v. Mallory, 86 F. Supp. 869 (S.D. N.Y. 1949). Unfortunately, the fact that the Supreme Court has not ruled on the existence of an implied cause of action under section 17 was noted by Justice Rehnquist in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. at 733 n.6, and there is contemporane-

10(b) and rule 10b-5 of the 1934 Act, but ultimately concluded that these actions also were time barred. Since these provisions merely imply a cause of action, there is no express statute of limitations applicable to suits under these provisions. In these situations federal courts look to the law of the forum[85] for an appropriate statute. However, this is not always a simple process, since there may be two possible statutes: the general fraud statute or the Blue Sky Act statute. In deciding which is appropriate, the courts choose the statute that best effectuates the remedial purposes of the security laws and closely tracks the express provisions of the 1933 Act.[86]

The court followed the current trend towards utilizing the Blue Sky rather than the fraud statute.[87] Consequently, the court held that the potential section 17[88] action and the putative 1934 Act actions are controlled by the two year period provided in the Blue

---

ous evidence that section 17 was limited to injunctive relief or, in appropriate cases, criminal prosecution. *See, e.g.*, Landis, *Liability Section of Securities Act*, 18 AM. ACCOUNTANT 330, 331 (1933). *See also* SEC v. Texas Gulf Sulphur Co., 402 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969).

[85]*See, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392 (1946). *See generally* 11A GADSBY, *supra* note 61, § 5.03[4][a]; 11 SOWARDS, *supra* note 52, § 9.05[1]. Suits to enforce liability under section 18 of the 1934 Act must be brought within one year of discovery of the facts constituting the cause of action but no later than three years from the date the action occurred, 15 U.S.C. § 78r (1970).

[86]344 N.E.2d at 113, *citing* Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972); Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970); Corey v. Bache & Co., 355 F. Supp. 1123 (S.D. W. Va. 1973). For a general discussion of the statutes of limitations issue, see Einhorn & Feldman, *Choosing a Statute of Limitations in Federal Securities Actions*, 25 MERCER L. REV. 497 (1974); Schulman, *Statutes of Limitations in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635 (1967).

[87]However, cases using the fraud statute still predominate numerically. *See* Einhorn & Feldman, *supra* note 86, at 500 n.21. The authors note that the Seventh Circuit's holding in *Parrent* now represents the view of federal courts applying Illinois law. *Id.* at 113. The *Green* court either ignored or was unaware of Morgan v. Koch, 419 F.2d 993 (7th Cir. 1969), in which the court applied the Indiana fraud statute in a rule 10b-5 action. However, the parties in *Morgan* had agreed that the six year statute applied. *Id.* at 997. In Corey v. Bache & Co., 355 F. Supp. 1123 (S.D. W. Va. 1973), transferred from the Southern District of Indiana pursuant to 28 U.S.C. § 1404(a) (1970), the court also applied the Indiana Blue Sky provision, citing *Parrent*.

[88]Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972), and Carey v. Bache & Co., 355 F. Supp. 1123 (S.D. W. Va. 1973), involved section 17 and rule 10b-5 claims. Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970) was a rule 10b-5 action. There are cases applying the general fraud statute of limitations to section 17 suits. *See, e.g.*, Osborne v. Mallory, 86 F. Supp. 869 (S.D. N.Y. 1949).

Sky Act in effect at the time of the transactions.[89] The six year general fraud statute of limitations[90] was rejected because the Blue Sky Act more closely tracks the federal law, even though the civil liability provisions of the Indiana Act and the two federal acts are not identical.[91]

The court in *Green* applied the doctrine that the statute commences for the federal actions when the fraud is discovered or should have been discovered through reasonable diligence.[92] As the court in *Parrent v. Midwest Rug Mills, Inc.*,[93] relied on in *Green*, stated, "[T]he statute does not begin to run until the fraud is discovered where a plaintiff injured by fraud 'remains in ignorance of it *without any fault or want of diligence or care on his part* . . . .'"[94] Consequently, it is possible that a 1934 Act claim in a federal court may be barred before a Blue Sky violation controlled by the same statute of limitations, because the violation could have

---

[89]That provision, Ch. 333, § 507(e), 1961 Ind. Acts 1024, required suits to be brought no later than two years after the contract of sale. In 1969, this was amended to two years after discovery of the violation, IND. CODE § 23-2-1-19(e) (Burns 1972), and in 1975 the period was increased to three years. IND. CODE § 23-2-1-19(e) (Burns Supp. 1976). *See* Galanti, *Business Associations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 33, 63 (1975) [hereinafter cited as Galanti, *1975 Survey*]. The *Green* court recognized that the legislature can alter the time within which suit must be brought, Meyers v. Hoover, 300 N.E.2d 110 (Ind. Ct. App. 1973), but applied the rule that a barred action cannot be revived by a lengthened limitations period. Oberg v. D. O. McComb & Sons, 127 Ind. App. 278, 141 N.E.2d 135 (1957).

One point mentioned in *Green* in adopting the Blue Sky statute was the "trend" toward applying rule 10b-5 to negligent as well as intentional misrepresentations. Of course, the "trend" was blunted by the Supreme Court's decision in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), requiring scienter in a rule 10b-5 action. The scienter requirement has since been imposed in an SEC action seeking injunctive relief under rule 10b-5. SEC v. Bausch & Lomb, Inc., 45 U.S.L.W. 2156 (S.D. N.Y. Sept. 16, 1976). Certainly, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), demonstrates hostility to an expansive reading of the rule. *See* discussion and authorities cited in note 65 *supra*.

[90]IND. CODE § 34-1-2-1 (Burns 1973).

[91]For a discussion of the rationales for selecting the appropriate statute, see Einhorn & Feldman, *supra* note 86; *see also* 11A GADSBY, *supra* note 61, § 5.03[4][a].

[92]*See, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392 (1946); Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123, 128 (7th Cir. 1972); Vanderboom v. Sexton, 422 F.2d 1233, 1240 (8th Cir. 1970); *see generally* 11A GADSBY, *supra* note 61, § 5.03[4][a]. This policy applies to both actions in law and equity-Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972).

[93]455 F.2d 123 (7th Cir. 1972).

[94]*Id.* at 128, *quoting from* Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348 (1874) (emphasis added).

been discovered sooner by the exercise of reasonable diligence.[95]

As previously discussed, the appellate court concluded Green had had indications of Karol's misdeeds as early as January 1968.[96] Therefore, the possible actions under sections 17 and 10(b) and rule 10b-5 were barred in 1970, or in 1971 if the three year period were to be applied. The possible Blue Sky action was clearly barred, because the then-effective statute started the period running at the formation of the contract of sale rather than from discovery of the fraud as presently provided.[97]

Green also contended that Karol had waived the limitations defenses. Karol's counsel had made some comments that there were no limitations defenses to the sections 17 and 10(b) actions, but the court found that the statement was not an unequivocal waiver. At most, the attorney had incorrectly stated the law. The court also concluded that the trial court had not erred in directing the verdict on the common law count of money had and received since Green had paid the funds to the corporation, rather than to Karol, and there was no evidence that Karol had requested Green to pay the corporation for Karol's benefit.[98]

C. Securities Act Exemptions and Defenses

The Second District Court of Appeals took an interesting approach in denying relief in *Theye v. Bates*,[99] a Blue Sky Act suit brought in Marion Superior Court to recover the purchase price[100] of stock of Development Corporation of America [DCA]. The stock had not been registered in compliance with the Act.[101] The appellate court affirmed a judgment for defendants.

---

[95]This assumes the statute of limitations for a possible Blue Sky claim commences with actual discovery of the violation rather than following the federal rule. Of course, laches might be a possibility. *See* Galanti, *1975 Survey*, *supra* note 89, at 63.

[96]*See* text accompanying notes 83-84 *supra*.

[97]*Compare* Ch. 333, § 507(e), 1961 Ind. Acts 1024 *with* IND. CODE § 23-2-1-19(e) (Burns Supp. 1976).

[98]*See* Conklin v. Smith, 3 Ind. 286 (1852).

[99]337 N.E.2d 837 (Ind. Ct. App. 1975) (Buchanan, J.), also discussed in Harvey, *Civil Procedure*, *infra* at 98.

[100]IND. CODE § 23-2-1-19(a)(1) (Burns 1972), then in effect, authorized purchasers of unregistered securities to recover the consideration paid. Subsection (b) imposed joint and several liability on officers and directors of sellers of unregistered securities unless a due diligence defense could be established . The current language of section 23-2-1-19(a) allows recovery by purchasers if they "did not knowingly participate in the violation or who did not have, at the time of the transaction knowledge of the violation . . . ." Consequently the result reached in *Theye* might well be mandated by the current civil penalty provision.

[101]See note 51 *supra*.

DCA was formed to assist in franchising a spaghetti restaurant based in Fort Wayne. Individual defendant, William Bates, was a promoter of DCA and chairman and chief executive officer of a number of satellite corporations designed to implement DCA's franchise development program. Before meeting with Theye and Elzey, as prospective investors, Bates had obtained financial information from the owners of the restaurant substantially overstating the restaurant's monthly gross income. He passed the information on, at least to Theye. Although other individuals and two corporations agreed to acquire DCA shares in a subscription agreement, only plaintiffs Theye and Elzey paid cash for their shares.[102] Plaintiffs became directors and officers of DCA when it was formed. The company eventually failed, and plaintiffs sued.

The appellate court determined there were two issues presented on appeal: (1) whether the failure to register the securities was a violation of section 23-2-1-3 of the Blue Sky Act; and (2) whether Bates' financial representations were fraudulent within the meaning of sections 23-2-1-1(d) and 12 of the Act. As to the first issue, defendants contended the securities were exempt from registration under the then-effective non-public offering exemption of section 23-2-1-2(b)(10).[103] As to the second, they simply contended the trial court correctly ruled there was no fraud.

The appellate court held the securities were not exempt as a private offering. The sales ostensibly fell within the exemption because the offers were made to no "more than 20 persons in this state." However, DCA did not comply with the statutory conditions

---

[102]Bates' consideration for his shares was "promotional services." 337 N.E.2d at 839. The Indiana General Corporation Act, IND. CODE § 23-1-2-6(e) (Burns Supp. 1976), provides that the consideration for shares may be money, property (which would include securities) and services actually rendered. Future services are not proper consideration for shares, but apparently this was not a problem with Bates' "promotional services." *See generally* 4A CAVITCH, *supra* note 1, § 90.01[3].

[103]The (b)(10) private offering exemption in effect at the time of the transaction exempted offers to sell securities directed at no more than 20 persons in Indiana provided that each buyer "represents in writing to the seller that he is purchasing such securities for investment." The (b)(10) exemption was in issue in Hippensteel v. Karol, 304 N.E.2d 796 (Ind. Ct. App. 1973), discussed in Galanti, *1974 Survey*, *supra* note 53, at 29-35. The current (b)(10) exemption, IND. CODE § 23-2-1-2(b)(10) (Burns Supp. 1976), exempts a security offer by the issuer if there are no more than 35 purchasers of the securities. The written representation is still required. *Id.* § 23-2-1-2(b)(10)(iii). *See generally* Galanti, *1975 Survey*, *supra* note 89, at 59-60; 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).

for exemption by getting "investment letters"[104] from each buyer, or by providing in the stock subscription agreement that the shares were purchased for investment purposes. Since the Act specifically imposes the burden of proof on a party claiming the benefit of an exemption,[105] the exemption claim failed.

Plaintiffs, however, could not rescind the transactions and recover their investment despite the non-exempt sales. The court barred them from recovery under the theory of *in pari delicto*, or equal fault, because they had cooperated with defendants' violation of the Act in not registering the shares. Although there is no Indiana authority on applying the doctrine of *in pari delicto* to the purchase of corporate stock,[106] the court chose to follow an *American Law Reports* annotation[107] positing that purchasers of stock who participate in organizing or managing a corporation are precluded from rescinding their purchases under securities laws.[108]

The annotation points out that under the maxim the defendant prevails when both parties are equally wrong. This accords with the position of Justice Harlan in *Perma Life Mufflers, Inc.*

---

[104]Defendant Karol lost on this issue in Hippensteel v. Karol, 304 N.E.2d 796 (Ind. Ct. App. 1973). *See generally* Doxsee, *supra* note 54, at 9; 11 Sowards, *supra* note 52, § 4.02[1][c].

[105]Ind. Code § 23-2-1-16(j) (Burns Supp. 1976) provides that the burden of proof of an exemption or classification "shall be upon the party claiming the benefits of such exemption or classification." *See* Worsley v. State, 317 N.E.2d 908 (Ind. Ct. App. 1974), discussed in Galanti, *1975 Survey*, *supra* note 89, at 50-52; Hippensteel v. Karol, 304 N.E.2d 796, 798 (Ind. Ct. App. 1973).

[106]The court did cite American Mut. Life Ins. Co. v. Bertram, 70 N.E. 258 (Ind. 1904), in which an insured who had participated in the issuance of illegal insurance contracts was precluded from recovering premiums paid.

[107]Annot., 84 A.L.R.2d 479 (1962). The case giving rise to the annotation, Popper v. Havana Publications, 122 So. 2d 247 (Fla. Ct. App. 1960), was actually decided on an estoppel ground. The annotation does discuss the *in pari delicto* doctrine, which appears to be primarily a California development. *See* cases cited 84 A.L.R.2d at 492. The California cases do make clear that mere knowledge of the illegality does not preclude a purchaser from asserting the invalidity of the contract. *See, e.g.*, Randall v. California Land Buyers Syndicate, 217 Cal. 594, 20 P.2d 331 (1933).

[108]Another approach was taken by an Illinois court in Stevens v. Crystal Lake Trans. Sales, Inc., 30 Ill. App. 3d 745, 332 N.E.2d 727 (1975), in which recovery was denied to the purchaser of corporate shares in violation of the Illinois Blue Sky Act, Ill. Rev. Stat. ch. 121½, §§ 137.1-.19 (1973). The plaintiff, who was president of the corporation, was barred from rescinding the purchase because of the provision in the Illinois Act, *id.* § 137.13, making officers and directors who participate or aid in illegal sales "jointly and severally liable" to the purchasers. This provision, which is similar to Ind. Code § 23-2-1-19(b) (Burns Supp. 1976), was construed to deny rescission to the corporate officer responsible for the violation. *See also* Nash v. Jones, 224 Ga. 372, 162 S.E.2d 392 (1968); Moore v. Manufacturers Sales Co., 335 Mich. 606, 56 N.W.2d 397 (1953). *Cf.* Ind. Code § 23-2-1-19(a) (Burns Supp. 1976).

v. International Parts Corp.[109] However, the *Theye* court overlooked the fact that this view did not prevail in *Perma Life.* Rather the Supreme Court decided the policy of the Sherman Antitrust Act could be best effectuated if parties to unlawful agreements were permitted to bring treble damage actions even though they themselves had incurred some legal liability. Although the *Perma Life* rationale might apply to the *Theye* situation, it does not seem unjust or inequitable to refuse relief to plaintiffs, who actively participated in forming and operating DCA and were not simply innocent purchasers of shares.[110]

On the fraud issue, plaintiffs ran into the inexorable difficulty of reversing the negative judgment that defendants had not committed fraud.[111] There was evidence that Bates had knowingly misrepresented the restaurant's gross income, but there was some unspecified evidence to the contrary. Consequently, there was no error in ruling for defendants.[112]

D. Preincorporation Contracts and the De Facto Doctrine

A somewhat opaque opinion which may or may not have properly applied corporate law doctrines is *Sunman-Dearborn Community School Corp. v. Kral-Zepf-Freitag & Associates,* [113] in which the First District Court of Appeals reversed a Franklin Circuit Court judgment for plaintiff K.Z.F. in a suit seeking the reasonable value of architectural and engineering services. One difficulty in resolving the issues presented by the case is that it is not easy to

[109]392 U.S. 134, 153 (1958) (Harlan, J., dissenting).

[110]A.C. Grost & Co. v. Coeur D'Alene Mines Corp., 312 U.S. 38 (1941), held that rescission may be denied where the 1933 Act has been violated, if granting relief would frustrate its purpose. However, Henderson v. Hayden, Stone, Inc., 461 F.2d 1069 (5th Cir. 1972), allowed rescission where recovery would fail to serve, but not frustrate, the purpose of the 1933 Act. *In pari delicto* was rejected in a sections 12 and 17 and rule 10b-5 action in Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50 (S.D. N.Y. 1971) on policy grounds. Waiver and estoppel, but not laches, were allowed as defenses to a section 12(1) suit in Straley v. Universal Uranium & Milling Corp., 289 F.2d 370 (9th Cir. 1961). *See also* Harrison v. Bloomfield Bldg. Indus. Inc., 435 F.2d 1192 (6th Cir. 1970); Kuehnert v. Texstar, Inc., 412 F.2d 700 (5th Cir. 1969). *See generally* 11 SOWARDS, *supra* note 52, § 9.04[2].

[111]*See, e.g.*, Hippensteel v. Karol, 304 N.E.2d 796, 798 (Ind. Ct. App. 1973); Engelbrecht v. Property Developers, Inc., 296 N.E.2d 798 (Ind. Ct. App. 1973).

[112]The trial court might not have used the same analysis as the appellate court, but the judgment was affirmed since it was sustainable for the reasons given. *See* Sheraton Corp. of America v. Kingsford Packing Co., 319 N.E.2d 852 (Ind. Ct. App. 1974).

[113]338 N.E.2d 707 (Ind. Ct. App. 1975) (Lybrook, J.).

"know the players," even with a scorecard. Another is that part of the case appears to have "fallen between the floorboards."

There were two contracts supposedly involved in the dispute: a 1963 contract for architectural and engineering services signed by the trustees of the three school townships involved, and a 1967 contract with a school building corporation signed by school trustees of different townships as officers of the building corporation. The corporation was formed three months *after* the contract was signed and was liquidated before K.Z.F.'s suit was filed. To complicate matters, the school townships had been absorbed by Sunman-Dearborn. At least it was clear Sunman-Dearborn was bound on the valid contracts and obligations of the predecessor school townships, and the issue was whether the predecessor townships had been bound by the contracts.

However, the court discussed only the 1967 contract, and much of the discussion is confusing. After struggling to find the building corporation was the bound entity, the court allowed reformation of the contract to bind the school townships as requested by K.Z.F.[114] The ignored 1963 contract had also been made with the school townships.

Although the battle was won, the war was lost when the court concluded that K.Z.F. had failed to show that the contracts, perhaps including the 1963 agreement, were executed in compliance with the procedures of the Township Reform Act.[115] Consequently the contracts were not enforceable. The court probably should have assumed the contracts were with the school townships and decided the case on the Reform Act ground.

Unfortunately the court seemed determined to find that K.Z.F. had contracted with the building corporation despite the eventual reformation. To bind the corporation, nonexistent when the contract was signed, the court relied primarily on the de facto doctrine, which treats a defectively incorporated enterprise as if all the formalities for de jure incorporation had been met.[116] The

---

[114]The court cited its decision in Pearson v. Winfield, 313 N.E.2d 95 (Ind. Ct. App. 1974), as developing the principles underlying reformation of contracts for mutual mistake. *See generally* 3 A. CORBIN, CONTRACTS § 540 (1960). Part of the confusion of the opinion is that the court at one point stated "absent evidence entitling Kral to reformation . . . [the] school townships were not bound by the agreement." 338 N.E.2d at 710. The court appeared to be stating a conclusion that reformation was not proper, while actually the court was indicating it would see if there was evidence justifying reformation.

[115]IND. CODE §§ 17-4-28-1 to -29-5 (Burns 1974).

[116]The court misstated the doctrine when it said "in an action on a contract with a *de facto* corporation, neither the purported corporate entity nor the party dealing with it as such may question its *de jure* existence." 338 N.E.2d at 709. Actually the doctrine can only apply where the entity *is not*

appellate court thought the doctrine was appropriate because the facts seemed to fit the standard formulation of the doctrine, that is, there was: (1) a valid law under which the corporation could have been validly formed; (2) a colorable attempt to organize thereunder; and (3) an actual exercise of corporate powers.[117]

The court may have had some doubts about the second element because the only effort to incorporate had been an abortive effort to incorporate as a not-for-profit corporation. Consequently, the court backstopped its argument with the separate, but related, principle of equitable estoppel. Under this approach, a person who deals with an entity held out as a corporation cannot assert the nonexistence of the corporation when a dispute arises.[118]

One problem with the court's approach is it ignores the possibility, albeit remote, that the de facto and estoppel concepts are no longer good law in Indiana. Cases[119] do support the doctrines, but they do not consider the impact and interaction of sections 23-1-3-4 and 23-1-10-5 of the Indiana General Corporation Act. The former provides that corporate existence commences when the certificate of incorporation is issued and that the certificate is "conclusive evidence of the fact that the corporation has been incorporated." It is therefore not inconceivable that corporate existence in any form is precluded unless the certificate has been issued. At this point the corporation's de jure status is presumed.[120] The legis-

---

a de jure corporation because of failure to comply substantially with all mandatory conditions precedent to incorporation. 3A CAVITCH, *supra* note 1, § 63.02[1]. Under the de facto doctrine, the defectively organized entity is regarded as a corporation for most purposes except direct attack on its existence by the state. HENN, *supra* note 1, § 140. *See generally* 3A CAVITCH, *supra* note 1, §§ 63.01-.04; 8 FLETCHER, *supra* note 1, §§ 3759-65; HENN, *supra* note 1, §§ 139-45; LATTIN, *supra* note 1, §§ 56-61.

[117]Some authorities require a fourth element, good faith, *see, e.g.*, United Sewing Mach. Distrib. Inc. v. Calhoun, 95 So. 2d 453 (Miss. 1957); *see also* Frey, *Legal Analysis and the "De Facto" Doctrine*, 100 U. PA. L. REV. 1153, 1156 (1952), but it is often omitted because "good faith" is encompassed by the colorable compliance element. HENN, *supra* note 1, § 140, at 240.

[118]*See* Jennings v. Dark, 175 Ind. 332, 92 N.E. 778 (1910) (de facto existence is generally not considered a prerequisite for the application of equitable estoppel). For a discussion of "corporation-by-estoppel", see 3A CAVITCH, *supra* note 1, § 63.04[2]; HENN, *supra* note 1, § 141; LATTIN, *supra* note 1, § 59; Comment, *Estoppel to Deny Corporate Existence*, 31 TENN. L. REV. 336 (1964).

[119]*See, e.g.*, Jennings v. Dark, 175 Ind. 332, 92 N.E. 778 (1910); Aetna Life Ins. Co. v. Weatherhogg, 103 Ind. App. 506, 4 N.E.2d 679 (1936).

[120]*See* Western Mach. Works v. Edwards Mach. & Tool Corp., 223 Ind. 655, 63 N.E.2d 535 (1945), holding that the statutory conditions before commencing business, now codified at IND. CODE § 23-1-3-5 (Burns Supp. 1976), had nothing to do with the formalities required for de jure existence. *See generally* 3A CAVITCH, *supra* note 1, § 63.02[2]; HENN, *supra* note 1, § 142.

lature obviously intended to discourage exercise of corporate powers without compliance with the Act by imposing, under section 23-1-10-5, criminal and civil liability on persons who knowingly, willfully and with intent to defraud use the name of or act on behalf of a corporation before it has been authorized to do business. Denying de facto corporateness would help accomplish this objective.

Furthermore, there is some authority that the two sections, which are similar to sections 56 and 146, respectively, of the Model Business Corporation Act,[121] taken together eliminate the de facto doctrine and estoppel. In *Robertson v. Levy*[122] the court construed two provisions of the District of Columbia corporation act based on the Model Act provisions[123] to eliminate the doctrines. According to *Robertson* all corporate attributes, including limited liability, commence when the certificate is issued. The concept of de facto incorporation has been criticized,[124] and the criticisms are probably well taken; but vengeance might not be "ours" and, under appropriate circumstances, perhaps a court should bind the purported corporation or the other party to a contract.[125] To a certain extent the *Robertson* approach was recognized in *Edward Shoes, Inc. v. Orenstein,*[126] in which section 23-1-10-5 was construed as

---

[121]2 ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 56, 146 (2d ed. 1971).

[122]197 A.2d 443 (D.C. Ct. App. 1964). *See* 3A CAVITCH, *supra* note 1, § 63.02[2]; HENN, *supra* note 1, §§ 140-42. *See also* Swindel v. Kelly, 499 P.2d 291 (Alas. 1972); Kiamesha Dev. Corp. v. Guild Property, Inc., 4 N.Y.2d 378, 151 N.E.2d 214, 175 N.Y.S.2d 63 (1958); Timberline Equip. Co. Inc. v. Davenport, 267 Ore. 64, 514 P.2d 1109 (1973); 3A CAVITCH, *supra* note 1, § 63.02[2] [a]. The comment to Model Act section 56 states that under its unequivocal provisions, any steps short of securing a certification of incorporation would not constitute apparent compliance. Therefore a de facto corporation cannot exist under the Model Act. 2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 56, ¶2 (2d ed. 1971). This is even stronger language than the comparable comment to former section 50. 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 50, ¶4 (1960). *But see* Cranson v. International Bus. Machs. Corp., 234 Md. 477, 200 A.2d 33 (1964); Vincent Drug Co. v. Utah State Tax Comm'n, 17 Utah 2d 202, 407 P.2d 683 (1965).

[123]The Model Act provisions were then numbered sections 50 and 139. *See* 1 ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 50, 139 (1960).

[124]*See, e.g.*, Frey, *Legal Analysis and the "De Facto" Doctrine*, 100 U. PA. L. REV. 1153, 1178-80 (1952).

[125]*See* Comment, 43 N.C. L. REV. 206, 210 (1964) criticizing *Robertson* for abolishing the estoppel concept as well as the de facto doctrine. The author points out that estoppel applies to a particular transaction, while the de facto doctrine imparts a general corporate status; and that the security of certain transactions should be protected. The author does recognize that estoppel should apply only where all the traditional elements have been satisfied. *Id.* at 208. Cavitch also acknowledges the tempering effect of estoppel. 3A CAVITCH, *supra* note 1, § 63.04[2] at 63-77.

[126]333 F. Supp. 39 (N.D. Ind. 1971).

eliminating common law liability for defective incorporation and requiring fraudulent conduct before a shareholder could be held liable to a creditor.

Admittedly, there are certain difficulties with construing the Act as abolishing the two doctrines. First, section 23-1-10-5 requires a fraudulent intent before personal liability will be imposed, unlike section 146 of the Model Act. This creates an obvious distinction.[127] Second, the Indiana provisions predate the Model Act provisions relied on in *Robertson*, and cases such as *Aetna Life Insurance Co. v. Weatherhogg*,[128] recognizing both doctrines, would have to be overruled. *Sunman-Dearborn* may be correct, but it would have been interesting if the court had analyzed the impact of the two provisions on the de facto doctrine.

Another intriguing aspect of *Sunman-Dearborn* is that the court, and perhaps the parties, apparently did not recognize that the 1967 contract was a preincorporation contract. The court could then have absolved the school townships by applying the settled rule that a corporation is not bound on promoter's contracts made on its behalf prior to incorporation unless it expressly, or perhaps impliedly, assumes responsibility.[129] However, the failure to discuss the preincorporation contract may be attributable to the fact that there was evidence tending to show that the townships had taken some steps which might have been deemed an adoption of the contract.

K.Z.F. might have been more successful if it had pursued the trustees as promoters. It is well settled that promoters who contract for nonexistent corporations are personally liable on the contracts unless it can be clearly shown the third party did not intend to bind them personally.[130] The trustees would have argued

---

[127]The court in Cranson v. International Bus. Machs. Corp., 234 Md. 477, 200 A.2d 33 (1964), implicitly assumed that section 56, specifying the effect of the certificate, did not by itself preclude an estoppel defense. *See* W. CARY, CASES AND MATERIALS ON CORPORATIONS 79 (4th ed. unabrid. 1969); Comment, 43 N.C. L. REV. 206 (1964).

[128]103 Ind. App. 506, 4 N.E.2d 679 (1936).

[129]*See* Speedway Realty Co. v. Grasshoff Realty Corp., 248 Ind. 6, 216 N.E.2d 845 (1966); Indianapolis Blue Print & Mfg. Co. v. Kennedy, 215 Ind. 409, 19 N.E.2d 554 (1939). *See also* McArthur v. Times Printing Co., 48 Minn. 319, 51 N.W. 216 (1892). *See generally* 3 CAVITCH, *supra* note 1, § 56.02; HENN, *supra* note 1, §§ 108-14; LATTIN, *supra* note 1, § 29-30.

[130]Stanley J. How & Assocs., Inc. v. Boss, 222 F. Supp. 936 (S.D. Iowa 1963); Decker v. Juzwick, 121 N.W.2d 652 (Iowa 1963); O'Rorke v. Geary, 207 Pa. 240, 56 A. 541 (1903). *See generally* 3 CAVITCH, *supra* note 1, § 56.01[2]; HENN, *supra* note 1, § 108, at 181; RESTATEMENT (SECOND) OF AGENCY §§ 326-27 (1958); Note, *Preincorporation Agreements*, 11 SW. L.J. 509 (1957). Generally, promoters are bound under a contract theory, but they can be bound for breach of an implied warranty of authority from a

that signing as officers of the building corporation expressed an intent not to be personally bound. This might have been so, but it is not certain that it would have overcome what amounts to a presumption in favor of the promoter's liability. For example, in the leading case of *Stanley J. How & Associates, Inc. v. Boss*[131] the court held that a contract signed by Boss as "agent for a Minnesota corporation to be formed who will be the obligor"[132] did not establish that How was to look only to the new corporation and not to Boss. The court noted the parties might have contemplated a novation whereby Boss would be liable only until the corporation was formed and became bound on the contract.[133]

Of course the third party can agree to look only to the contemplated corporation for performance of the contract, in effect making an offer and taking the risk that the corporation will be formed and assume liability.[134] A case on point here is *Quaker Hill, Inc. v. Parr*.[135] Defendants contemplated organizing a cemetery and ordered nursery stock, at plaintiff's urging, before the corporation was formed. The particular corporation was never formed, but the promoters were excused notwithstanding the general rule because clearly plaintiff did not intend to bind them personally. *Quaker Hill* may be particularly appropriate in a *Sunman-Dearborn* situation because the signers were not engaged in a true business venture. In fact, it is not impossible that the *Sunman-Dearborn* court used the de facto-estoppel issue just to

---

nonexistent principal. *See* HENN, *supra* note 1, § 108, at 181 n.13. Of course if the third party is aware that the corporation has not yet been formed the implied waranty would be negatived. Professor Henn discusses the various categories of promoter-third party contracts at *id.* §§ 108-614.

[131]222 F. Supp. 936 (S.D. Iowa 1963).

[132]*Id.* at 939.

[133]When a novation occurs the corporation is substituted for the promoter as the party bound on the contract in all respects, and the liability of the promoter ceases. *See* HENN, *supra* note 1, § 111, at 185. The same result occurs when a court permits a preincorporation contract to be "ratified", *see, e.g.*, Chartrand v. Barney's Club, Inc., 380 F.2d 97 (9th Cir. 1967), despite the theoretical difficulty presented by the nonexistent principal. *See* McArthur v. Times Printing Co., 48 Minn. 319, 51 N.W. 216 (1892); 1 RESTATEMENT (SECOND) OF AGENCY § 82 (1958); *see generally* HENN, *supra* at 184. Adoption of a contract by a newly formed corporation does not end the liability of the promoter to the third party. Stanley J. How & Assocs., Inc. v. Boss, 222 F. Supp. 936 (S.D. Iowa 1963); HENN, *supra* at 185.

[134]Stewart Realty Co. v. Keller, 118 Ohio App. 49, 193 N.E.2d 179 (1962). If the promoter is responsible for the corporation's not being formed, liability might be based on misrepresentation or a breach of an implied promise to form the corporation. *See* HENN, *supra* note 1, §§ 108 at 181 n.13, 110; *see generally* 3 CAVITCH, *supra* note 1, § 56.01[3].

[135]148 Colo. 45, 364 P.2d 1056 (1961). *See generally* HENN, *supra* note 1, § 109.

protect the trustees. The decision was equitable and fair,[136] but certainly not clear or explicit.

As noted above, Sunman-Dearborn ultimately escaped liability for the 1967 contract, and probably the 1963 contract, under the Township Reform Act.[137] The Act was construed as precluding contracts not made in accordance with its requirements because of the provision declaring noncomplying contracts "null and void."[138] Unlike the interpretation of some statutes, where "void" is construed as "voidable,"[139] the courts have applied the Township Reform Act in a rather draconian fashion, so that the Act appears to be an absolute bar to recovery under any theory including *quantum meruit*.[140]

E. Statutory Developments

The 1976 session of the Indiana General Assembly produced only two statutory developments of significance.[141] The first involved several amendments to the Indiana Business Takeover

---

[136]*See* Comment, 43 N.C. L. REV. 206, 211 (1964).

[137]IND. CODE §§ 17-4-28-1 to -29-6 (Burns 1974).

[138]*Id.* § 17-4-29-5. *See, e.g.*, State *ex rel.* Siebrase v. Meiser, 201 Ind. 337, 168 N.E. 185 (1929); Peck-Williamson Heating & Ventilating Co. v. Steen School Township, 30 Ind. App. 637, 66 N.E. 909 (1903). The *Sunman-Dearborn* court stated that the Act requires: (1) authorization and approval of trustee contracts by the township advisory board; (2) appropriation of funds for payment of contemplated services; and (3) a complete written record of authorization, approvals and appropriation. *See* Heeter v. Western Boone Co. Community School Corp., 147 Ind. App. 153, 259 N.E. 99 (1970).

[139]*See, e.g.*, Doney v. Laughlin, 50 Ind. App. 38, 41-43, 94 N.E. 1027, 1028 (1911); *see also* State *ex rel.* State Tax Comm'n v. Garcia, 77 N.M. 703, 705, 427 P.2d 230, 232 (1967).

[140]Miller v. Jackson Township, 178 Ind. 503, 99 N.E. 102 (1912); Heeter v. Western Boone Co. Community School Corp., 147 Ind. App. 153, 259 N.E.2d 99 (1970). To rub salt into K.Z.F.'s wounds, since it might have been an innocent victim acting in good faith, the *Sunman-Dearborn* court considered the township trustees as special agents with limited statutory authority, and K.Z.F. therefore had the burden of establishing their authority and compliance with the Act. Mitchelltree School Township v. Hall, 163 Ind. 667, 72 N.E. 641 (1904). Failure to sustain this burden required reversal.

[141]Other enactments worth noting are IND. CODE § 23-2-1-15(c) (Burns Supp. 1976), *amending id.* § 23-2-1-15(c) (Burns 1972) to provide that funds accruing from the operation of the Securities Division are to be placed in the Indiana general fund rather than a special account; and *id.* § 23-2-1-15(d) (Burns Supp. 1976) to provide that the expenses incurred by the Attorney General in assisting the Securities Division should be paid out of funds appropriated to the Attorney General for the administration of his office.

Act.[142] The amendment to Indiana Code section 23-2-3-1(i)(2) reduced the threshold of application, and hence increased the number of target companies protected by the Act. The Act originally was inapplicable to takeovers of target companies with less than 100 shareholders of record at the time of the offer.[143] This figure was reduced to 50. Consequently, companies with 50 to 100 shareholders are now covered.

The amendments to sections 23-2-3-12(b) and (c) clarified the application of the Act to certain types of regulated companies. The Act originally exempted acquisitions of financial institutions whose securities are subject to regulation by the Department of Financial Institutions.[144] The 1976 amendment limits the exemption to situations in which the takeover offer is subject to approval by the Department. A similar change was made for corporations subject to regulation by the Public Service Commission.[145] These changes make the Act internally consistent since the Act originally applied to other regulated industries only when the contemplated acquisition was subject to approval by another agency.[146]

The amendments also allow appeals from final orders of the Securities Commissioner to the appellate courts and application to the supreme court for a petition to transfer the cause, as with other civil cases.[147] Formerly, appeals were to the circuit or superior courts.[148] Amended section 23-2-3-11 now provides that an assignment of errors that the Commissioner's decision is contrary to law presents issues of both the sufficiency of the facts found to sustain the decision and the sufficiency of the evidence to sustain the findings of fact upon which it was rendered.

The other statutory development of significance was a change in the provisions of the General Corporation Act regulating the

---

[142]IND. CODE §§ 23-2-3-1(1), -11, -12(b), (c) (Burns Supp. 1976). The Business Takeover Act was adopted in 1975 and is discussed in Galanti, *1975 Survey*, *supra* note 89, at 52-59.

[143]Act of Apr. 29, 1975, Pub. L. No. 263, § 1, 1975 Ind. Acts 1471.

[144]*Id.* § 12, 1975 Ind. Acts 1481. The Financial Institutions Act, IND. CODE §§ 28-1-1-1 to -8-3 (Burns 1973) describes the institutions whose securities are regulated by the Department of Financial Institutions.

[145]IND. CODE §§ 8-1-1-1 to -9-37 (Burns 1973) describes corporations subject to Public Service Commission regulation.

[146]Takeovers of insurance companies were exempted from the outset where the offer is subject to the approval of the Insurance Commissioner or is exempt from such approval. *Id.* § 23-2-3-12(a) (Burns Supp. 1976). The authority of the Insurance Commissioner is found in *id.* §§ 27-1-1-1 to -5 (Burns 1975). Takeovers of corporations subject to federal regulation were exempted where the takeover is subject to approval by a particular agency. *Id.* § 23-2-3-12(d) (Burns Supp. 1976).

[147]IND. CODE § 23-2-3-11 (Burns Supp. 1976).

[148]Act of Apr. 29, 1975, Pub. L. No. 263, § 11, 1975 Ind. Acts 1480-81.

admission of foreign corporations.[149] A perennial problem for such corporations has been the requirement that no corporation may be admitted if its corporate name is the same as, or confusingly similar to, the name of an Indiana corporation or a foreign corporation already authorized to transact business in the state.[150] This might not be a problem for a corporation in a developmental stage, but an existing foreign corporation is faced with the choice of either changing its name in its home state or getting the consent of the other corporation. Often, neither alternative is practicable. The amendment solves the problem by permitting such corporations to qualify under an assumed business name. Thus, a corporation can select a name for use in Indiana without disturbing its operations in other jurisdictions.

Conceptually, this approach presents no problems because the Indiana Assumed Business Names Act[151] clearly permits a corporation to do business under a name other than its formal corporate name. In order to qualify under amended section 23-1-11-3, the corporation must have made a good faith, but unsuccessful, effort to obtain the written consent from the other corporation to use the name, documented by an affidavit signed by the two principal officers of the corporation. The admission application must reflect both the true corporate name and the assumed name; and the corporation must file the affidavit and the certificate of assumed business name[152] in addition to the other documentation a foreign corporation must file in order to be admitted.[153]

---

[149] IND. CODE § 23-1-11-3 (Burns Supp. 1976), *amending id.* § 23-1-11-3 (Burns 1972).

[150] *Id.* § 23-1-11-3(b) (Burns Supp. 1976). For a slightly different approach to this problem, *see* 2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 108, ¶ 2 (2d ed. 1971).

[151] IND. CODE § 23-15-1-1 (Burns Supp. 1976). Some jurisdictions apparently do not. *See* Kansas Milling Co. v. Ryan, 152 Kan. 137, 102 P.2d 970 (1940); People v. Ferdinand, 172 Misc. 595, 15 N.Y.S.2d 506 (Mag. Ct. 1939). See also Seagram Distillers Co. v. Foremost Sales Promotions, Inc., 13 Ill. App. 3d 166, 300 N.E.2d 490 (1973).

[152] IND. CODE § 23-15-1-1 (Burns 1972).

[153] *Id.* § 23-1-11-4.