

II. Business Associations

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A. *In Pari Delicto Defense*

This survey period¹ offered the interesting case of *Dan Purvis Drugs, Inc. v. Aetna Life Insurance Co.*² In *Purvis*, the court of appeals affirmed an order of the Dekalb Circuit Court dismissing on the basis of the in pari delicto defense Purvis' complaint alleging a violation of the Indiana Antitrust Statutes.³ Purvis was attempting to stop Aetna from terminating a third party provider agreement in which Aetna reimbursed him for the costs of prescription drugs provided to employees of International Harvester at a minimal dispensing fee. The nature of Purvis' antitrust claims against Aetna are not clear from the opinions. The court did not have to resolve this issue when it determined that the in pari delicto defense, which literally means "in equal fault,"⁴ was still good law in Indiana. Indiana courts have previously applied this doctrine to deny relief to an antitrust plaintiff who initiated legal action after cooperating with the defendant in an unlawful scheme.⁵

The thrust of Purvis' appeal was that the in pari delicto defense as applied to private antitrust cases was struck down by the United States Supreme Court's decision in *Perma Life Mufflers, Inc. v. In-*

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¹One decision worthy of at least passing reference in this section is *Downham v. Wagner*, 408 N.E.2d 606 (Ind. Ct. App. 1980). One of the issues in *Downham*, a workers' compensation case, was whether the defendant's husband was his wife's agent which would make her liable for the injury. The court recognized that marriage alone will not create an implied agency relationship. *Id.* at 613. *Heffner v. White*, 113 Ind. App. 296, 306, 45 N.E.2d 342, 346 (1942); *Roper v. Cannel City Oil Co.*, 68 Ind. App. 637, 640, 121 N.E. 96, 97 (1918). However, a person can be a spouse's agent, particularly if they are engaged in a joint enterprise, 408 N.E.2d at 613; see *Pierce v. Horvath*, 142 Ind. App. 278, 233 N.E.2d 811 (1968), or if the spouse ratifies an otherwise unauthorized act. *Lichtenberger v. Graham*, 50 Ind. 288 (1875); 408 N.E.2d at 613. The *Downham* court concluded there was sufficient evidence of agency to submit the question to the jury. *Id.*

²412 N.E.2d 129 (Ind. Ct. App. 1980).

³IND. CODE §§ 24-1-1-1 to -4-4 (1976 & Supp. 1981).

⁴BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

⁵*Moore v. Barrett Co.*, 75 Ind. App. 352, 130 N.E. 649 (1921). The defense is not limited to antitrust actions, and it was most recently applied in a 1975 Indiana Securities Act case. See *Theye v. Bates*, 166 Ind. App. 652, 337 N.E.2d 837 (1975), discussed in Galanti, *Business Associations, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 57, 76-79 (1976) [hereinafter cited as *1976 Survey*].

*ternational Parts Corp.*⁶ In *Perma Life*, the Court ruled that by discouraging private actions the doctrine was contrary to the public policy of fostering competition, which is the underlying basis for the federal antitrust laws.⁷ The *Purvis* court noted that *Perma Life* involved the Sherman Antitrust Act,⁸ not a state antitrust law, and concluded that the decision was not binding on Indiana courts.⁹ This treatment of the plaintiff's contention was somewhat cavalier because the Indiana antitrust statutes are patterned after the federal antitrust laws.¹⁰ Consequently, it is appropriate to give considerable weight to federal decisions in interpreting similar Indiana statutes,¹¹ particularly if the federal court is the United States Supreme Court.

It is possible that *Purvis* is not the last word on the in pari delicto issue. The plaintiff apparently simply asserted that *Moore v. Barrett Co.*¹² should be overruled on the basis of *Perma Life* without substantiating arguments.¹³ This was a fatal mistake because there are arguments in favor of the defense in certain situations,¹⁴ and even federal courts have differed on the actual scope of *Perma Life*.

⁶392 U.S. 134 (1968). *Perma Life* generated considerable law review commentary when it was decided. See, e.g., *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 260-66 (1968); Case Comment, 53 MINN. L. REV. 827 (1969); 6 SAN DIEGO L. REV. 117 (1969); 47 TEX. L. REV. 322 (1969); 21 VAND. L. REV. 1083 (1968).

⁷392 U.S. at 138-40. *Bishop v. American Preservers Co.*, 105 F. 845, 846 (N.D. Ill. 1900), was the first antitrust case applying the doctrine. For a general discussion of the in pari delicto defense and the related unclean hands defense see L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 250 (1977); [1980] 16N J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION § 109.02 (1969); A.B.A., ANTITRUST LAW DEVELOPMENTS 297-99 (1975). The unclean hands defense to an antitrust complaint was severely restricted in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

⁸15 U.S.C. §§ 1-7 (1976).

⁹412 N.E.2d at 131.

¹⁰See *Citizens Nat'l Bank v. First Nat'l Bank*, 165 Ind. App. 116, 128 nn.6 & 7, 331 N.E.2d 471, 478 nn.5 & 6 (1975). See also *Bell v. Speed Queen*, 407 F.2d 1022, 1027 (7th Cir. 1969); *Orion's Belt, Inc. v. Kayser-Roth Corp.*, 433 F. Supp. 301, 302-03 (S.D. Ind. 1977); *Sandidge v. Rogers*, 167 F. Supp. 553, 556 (S.D. Ind. 1958) *rev'd on other grounds*, 256 F.2d 269 (7th Cir. 1958); *Fort Wayne Cleaners & Dyers Ass'n v. Price*, 127 Ind. App. 13, 20, 137 N.E.2d 738, 742 (1956). Cf. *In re City Investing Co.*, 411 N.E.2d 420, 427 (Ind. Ct. App. 1980) (IND. CODE § 23-2-3.1-1(i) (1976) was substantially patterned on the Williams Act, 15 U.S.C. § 78n(d)(1) (1976), and the court looked to decisions interpreting the federal statute).

¹¹See 165 Ind. App. 116, 331 N.E.2d 471. "Due to the dearth of Indiana decisional law under § 24-1-2-7, the similarity between § 24-1-2-7 and 15 U.S.C.A. § 15, and the policy considerations identical to both provisions, federal decisional law enunciated under 15 U.S.C.A. § 15, is of substantial value." *Id.* at 128 n.7, 331 N.E.2d at 478 n.6.

¹²75 Ind. App. 352, 130 N.E. 649 (1921).

¹³412 N.E.2d at 131-32.

¹⁴*Id.* at 132 n.1.

Specifically, it is unclear whether the decision absolutely abolished the defense or whether it might yet be available to those without equal responsibility for creating or establishing an illegal scheme or who were required by economic pressures to accept such an arrangement.¹⁵

One distinguished commentator has observed that the *in pari delicto* defense should be available if it can be shown that the plaintiff voluntarily participated in an illegal scheme from the outset and was equally responsible for carrying out its objectives.¹⁶ The thrust of Professor von Kalinowski's position is that persons without choice should not be barred from antitrust recovery, but those who truly are of equal fault should not receive the fruits of the illegality coupled with treble damages for violation of the antitrust laws. Permitting the latter to recover would be detrimental to the efficient enforcement of and contrary to the underlying policy of the antitrust laws.¹⁷

Purvis does not flatly foreclose this position because, as the court noted, the plaintiff neither made allegations nor raised any inferences regarding the circumstances of the contract to support a conclusion that he was an unwilling participant in the scheme.¹⁸ The court did note that it was "not clear that the policy of encouraging private suits outweighs the public policy of denying relief to a person who is *equally* at fault with the defendant."¹⁹ Thus in an appropriate case a participant in a scheme prohibited by the Indiana Antitrust Statutes might not be barred under the *in pari delicto* doctrine.

Although the *Purvis* court did not discuss recent decisions from other states considering the *in pari delicto* defense to actions brought under state antitrust laws, the issue has arisen in other jurisdictions. In *Mailand v. Burckle*,²⁰ the California Supreme Court

¹⁵*Compare* Premier Elec. Constr. Co. v. Miller-Davis Co., 422 F.2d 1132, 1138-39 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970) and South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 784 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971) with *Memorex Corp. v. International Bus. Mach. Corp.*, 555 F.2d 1379, 1381 (9th Cir. 1977); *Semke v. Enid Auto. Dealers Ass'n*, 456 F.2d 1361, 1369-70 (10th Cir. 1972); and *Schokbeton Prods. Corp. v. Exposaic Indus., Inc.*, 308 F. Supp. 1366, 1369 (N.D. Ga. 1969). See generally authorities cited notes 6 & 7 *supra*.

¹⁶[1980] 16N J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION § 109.02 at 109-11.

¹⁷*Id.* at 109-11 to -12. However, as Professor Sullivan points out "there is a public as well as a private interest in having the unlawful arrangement challenged. . . . [and] the crucial thing is to assure that notions of fairness *inter se* do not reduce unduly the likelihood of competitive conditions being restored." L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST at 784 (1977).

¹⁸412 N.E.2d at 132.

¹⁹*Id.* at 132 n.1 (emphasis added).

²⁰20 Cal. 3d 367, 572 P.2d 1142, 143 Cal. Rptr. 1 (1978).

held that participants in a scheme illegal under the California Antitrust Act were not barred from recovery under the *in pari delicto* doctrine when they did not bear equal responsibility for establishing the scheme. Similarly, the Texas Court of Civil Appeals in *Berman v. City Products Corp.*²¹ held that under the Texas Antitrust Act the "defense would not bar recovery for damages incurred after Berman withdrew from the illegal arrangement."²²

There are many situations in which allowing a plaintiff to recover for damages resulting from some illegal activity in which he was a participant would be a mockery of justice.²³ On the other hand, there are many situations involving antitrust laws and other regulatory statutes²⁴ in which blanket application of the *in pari delicto* defense would be counter-productive. There is considerable flexibility in *Purvis*, and it is to be hoped that Indiana courts will follow the lead of the California and Texas courts, as well as the federal courts, and limit the defense to cases in which the antitrust plaintiff truly is at "equal fault" with the defendant or, as posited in another context, in which the fault of the parties is "clearly mutual, simultaneous and relatively equal."²⁵

B. Securities Fraud

Several issues pertaining to civil suits brought under the Indiana Securities Act²⁶ were resolved in *Kelsey v. Nagy*,²⁷ in which the court of appeals affirmed a judgment of the Porter County Superior Court in favor of the plaintiff Nagy.²⁸ The dispute arose under sec-

²¹579 S.W.2d 313 (Tex. Civ. App. 1979).

²²*Id.* at 319.

²³*See, e.g.*, *State v. Aammco Automatic Transmissions, Inc.*, 199 N.W.2d 444 (Minn. 1972).

²⁴*See, e.g.*, *Young v. Kwock*, 52 Hawaii 273, 276, 474 P.2d 285, 288 (1970) (State Securities Law).

²⁵*Xaphes v. Shearson, Hayden, Stone, Inc.*, FED. SEC. L. REP. (CCH) ¶ 98,028, at 91,316 (S.D. Fla. 1981).

²⁶IND. CODE §§ 23-2-1-1 to -24 (1976 & Supp. 1981). For discussion of the Indiana Securities Act see generally Boehm, *Federal Business Law and the Indiana Lawyer: The Impact of the Securities Law on the General Practitioner*, 48 IND. L.J. 216 (1973); Pamas, *Securities Issuance and Regulation: The New Indiana Securities Law*, 38 IND. L.J. 38 (1962); Note, *Securities Registration Requirements in Indiana*, 3 IND. LEGAL F. 270 (1969); Doxsee, *Securities Problems in Indiana*, 17 RES GESTAE No. 9, at 6 (1973).

²⁷410 N.E.2d 1333 (Ind. Ct. App. 1980).

²⁸The Nagys appealed from an order granting summary judgment in favor of certain defendants and from the trial court's failure to submit a question of punitive damages as against defendant Kelsey to the jury on a common law fraud count. The court concluded that they had failed to preserve the alleged errors and had forfeited the right to appeal. *Id.* at 1334-35, 1337-38 (Garrard, P.J. concurring).

tion 23-2-1-19(a) of the Securities Act before it was amended in 1975.²⁹

The Nagys had purchased corporate shares from Kelsey thinking they were unissued or treasury shares but which in fact belonged to him.³⁰ The court concluded that Kelsey's failure to inform the Nagys that they were purchasing his shares was an omission of a material fact to "which a reasonable investor would attach importance when deciding on his course of action."³¹ Failure to so inform warranted rescission of the transaction. The court observed that a purchaser of shares would be interested in knowing whether the

²⁹IND. CODE § 23-2-1-19(a) (1971) (currently codified at IND. CODE § 23-2-1-19(a) (1976)). Before the section was amended in 1975, it provided that:

(a) Any person who

(1) offers or sells a security in violation of sections 201, 204(d), 301(a) or 502(b); or

(2) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent (6%) per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security and any income received on it, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent (6%) per year from the date of disposition.

Section 23-2-1-19(a) was similar but not identical to Uniform Securities Act (U.L.A.) § 410(a) (Master ed. 1978).

IND. CODE § 23-2-1-19(a) (1976) now provides that:

Any person who offers, purchases or sells a security in violation of any of the provisions of this chapter, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the violation, is liable to any other party to the transaction, who did not knowingly participate in the violation or who did not have, at the time of the transaction, knowledge of the violation, who may sue either at law or in equity to rescind the transaction or to recover the consideration paid, together, in either case, with interest at eight percent (8%) per year from the date of payment, costs and reasonable attorneys' fees, upon the tender of the security or consideration received by the person bringing the action.

Although the specific language of §23-2-1-19(a) has changed, the same result would be reached if *Kelsey* were brought today.

³⁰410 N.E.2d at 1336.

³¹*Id.* See *Arnold v. Dirrim*, 398 N.E.2d 426 (Ind. Ct. App. 1979) *discussed in Galanti, Business Associations, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 91, 91-101 (1981) [hereinafter cited as *1980 Survey*].

proceeds would go to the corporation or to an individual and that if the true source of the shares had been known, the Nagys might have asked Kelsey why he was selling and would have put his representations in an entirely different perspective.³² There is certainly no reason to quarrel with that conclusion.

Kelsey, however, claimed that the Nagys knew or in the exercise of reasonable care and due diligence could have learned of the omitted fact. The court concluded that nothing in the record indicated they had actual knowledge of the omitted fact which would have barred rescission under section 23-2-1-19(a) which provided a cause of action only to a buyer "not knowing of the untruth or omission."³³

The court refused to impose an affirmative duty on purchasers of shares to make inquiries and to discover the actual circumstances underlying a securities transaction because if the legislature had intended to require such an investigation, it would have expressly imposed the duty in the Securities Act.³⁴ For a court to impose a duty of investigation on a buyer would frustrate the purpose of the Securities Act "of substituting a policy of full disclosure for that of caveat emptor."³⁵ The statutory reference to a buyer not knowing of the untruth or omission was a clear expression of legislative intent that the failure of a buyer to investigate would not bar a civil suit for rescission under section 23-2-1-19(a).³⁶

The *Kelsey* court is undoubtedly correct in this conclusion, but it may have overstated the proposition. As the Supreme Court of

³²410 N.E.2d at 1336.

³³IND. CODE § 23-2-1-19(a) (1971) (currently codified at IND. CODE § 23-2-1-19(a) (1976)).

³⁴410 N.E.2d at 1336. *See also* Bradley v. Hullander, 272 S.C. 6, 249 S.E.2d 486 (1978).

³⁵410 N.E.2d at 1336. The burden of proving a lack of knowledge of the untruth or omission probably is on the plaintiff. *See* S & F Supply Co. v. Hunter, 527 P.2d 217 (Utah 1974). The requirement is the same for rescission actions brought under section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2) (1976), which is the basis for civil liability provisions like section 23-2-1-19(a). *See generally* R. JENNINGS & H. MARSH, SECURITIES REGULATIONS 840 (4th ed. 1977). Knowledge of the untruth or omission is a defense to actions brought under section 11 of the Securities Act, 15 U.S.C. § 77k(a) (1976), but under section 11 the burden is on the defendant to prove knowledge. *See generally* 11 H. SOWARDS, BUSINESS ORGANIZATIONS, THE FEDERAL SECURITIES ACT § 9.02 (3) (rev. 1980).

³⁶The duty Kelsey was attempting to impose on the Nagys should be distinguished from the specific defense provided in section 23-2-1-19(a)(2) relieving of liability a defendant who "did not know, and in the exercise of reasonable care could not have known, of the untruth or omission . . ." IND. CODE § 23-2-1-19(a)(2) (1971) (currently codified at IND. CODE § 23-2-1-19(a) (1976)). *See* S & F Supply Co. v. Hunter, 527 P.2d 217 (Utah 1974).

Utah posited in *S & F Supply Co. v. Hunter*,³⁷ a similar securities act could not:

Fairly be understood as meaning that a buyer can naively or blindly purchase stocks without concern for the truth or reasonableness of representations made, [and] then if it later develops that it would serve his interests, assert a claim of falsity of a representation about which he previously had no concern, and upon which he had placed no reliance, as a basis for avoiding his contract. This is fairly deducible from the parenthetical clause in the statute quoted above (the buyer not knowing of the untruth or omission).³⁸

To be sure, the *Hunter* court was talking about misrepresentations, but the same observation would apply to omissions. A buyer should be barred from rescinding a transaction where an omitted fact was obvious to anyone other than a person who was deliberately seeking to avoid learning the true state of affairs. To construe the act otherwise would make a mockery of the judicial system.³⁹

It should be pointed out that the parenthetical emphasized by the *Kelsey* court was deleted in 1975 and that under the current section 23-2-1-19(a) liability runs to persons "who do not have, at the time of the transaction, knowledge of the violation . . ."⁴⁰ In part this change was necessitated by the extension of the provision to cover purchasers as well as sellers of securities who violate the Securities Act.⁴¹ There is, however, no indication that the General Assembly intended to impose a duty to investigate which would reduce liability at the same time it was extending the provision to cover purchasers. Presumably there is still no affirmative duty on a party to make inquiries and discover the actual circumstances of a securities transaction subject to the caveat about "none so blind as those that will not see."⁴²

³⁷527 P.2d 217 (Utah 1974).

³⁸*Id.* at 221.

³⁹It is interesting to note in this respect that *Kelsey* was decided by the third district court of appeals which also decided *Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co.*, 412 N.E.2d 129 (Ind. Ct. App. 1980), discussed in text accompanying notes 2-25 *supra*, applying the *in pari delictio* defense in an antitrust action in part on the authority of *Theye v. Bates*, 166 Ind. App. 652, 337 N.E.2d 837 (1975), where the defense was allowed in an action brought under the Indiana Securities Act. See generally 1976 *Survey*, *supra* note 5 at 76-79.

⁴⁰IND. CODE § 23-2-1-19(a) (1976).

⁴¹See generally Galanti, *Business Associations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 33, 60 (1975).

⁴²Henry, *Commentaries on The Book of the Prophet Jeremiah*, in FAMILIAR QUOTATIONS 386 (J. BARTLETT, 14th ed. 1968).

The *Kelsey* court also rejected the defendant's argument that the Nagys had waived their right to rescind the transaction.⁴³ No authority on waiver was cited. It is, however, settled that a party who does not promptly repudiate a securities transaction within a reasonable time after discovering facts entitling him to rescind may be barred by laches in an equity action.⁴⁴ Section 23-2-1-19(a) permits rescission "either at law or in equity" so the same basic diligence requirement would apply to a defense of waiver. The putative plaintiff must act in good faith. The Nagys satisfied this requirement because they initiated the law suit as soon as they learned of the facts entitling them to rescind the purchase.

Kelsey's contention that the Nagys had to show reliance on the omitted fact was also rejected. Relying on *Arnold v. Dirrim*,⁴⁵ the court held that "reliance" need not be shown in an action based on the omission of a material fact.⁴⁶ It is not settled if a plaintiff seeking rescission under the Indiana Securities Act because of misrepresentations must prove reliance but such proof is unnecessary in suits brought under section 12(2) of the Securities Act of 1933,⁴⁷ which is the prototype for civil liability provisions similar to section 23-2-1-19(a).⁴⁸ All a plaintiff must show is that the fact withheld or omitted was material.⁴⁹

Kelsey also contended that the Nagys were required to show that the omission affected the price of the stock and that they had failed to tender the shares as required by section 23-2-1-19(a). The first contention was correctly rejected by the court because the suit was not for damages but for rescission as authorized by section 23-2-1-19(a), and the second contention was properly disallowed because the record showed that the shares and dividends had been

⁴³410 N.E.2d at 1335.

⁴⁴*Schultz v. Rector-Phillips-Morse, Inc.*, 261 Ark. 4, 552 S.W.2d 4 (1977).

⁴⁵398 N.E.2d 426 (Ind. Ct. App. 1979). See generally 1980 Survey, *supra* note 31, at 91-101.

⁴⁶410 N.E.2d at 1337. See *Forrestal Village, Inc. v. Graham*, 551 F.2d 411 (D.C. Cir. 1977); *S & F Supply Co. v. Hunter*, 527 P.2d 217 (Utah 1974). See also *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). See generally 3A H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 8.23 (rev. 1980).

⁴⁷15 U.S.C. § 77i(2) (1976).

⁴⁸*Sanders v. John Nuveen & Co.*, 619 F.2d 1222 (7th Cir. 1980), *cert. denied*, 101 S.Ct. 1719 (1981). See also *John Hopkins Univ. v. Hutton*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974). See generally 3A H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 8.23 (rev. 1980); 11 H. SOWARDS, BUSINESS ORGANIZATIONS, THE FEDERAL SECURITIES ACTS § 9.04[1] (rev. 1980); Peterson, *Recent Developments in Civil Liability Under Section 12(2) of the Securities Act of 1933*, 5 HOUS. L. REV. 274 (1967).

⁴⁹*Associated Lathing & Plaster Co. v. Louis C. Dunn, Inc.*, 135 Cal. App. 2d 40, 286 P.2d 825 (1955); *E.E. Atkinson & Co. v. Neisner Bros.*, 193 Minn. 175, 258 N.W. 151 (1935); *Fawkes v. Knapp*, 138 Minn. 384, 165 N.W. 236 (1917).

tendered prior to the entry of judgment as permitted under the Act.⁵⁰

The court also held that the award of attorneys fees was proper. It construed the applicable language of section 23-1-2-19(a) pertaining to attorneys fees as "mandating" an award of attorneys fees, costs and interest when a plaintiff prevails.⁵¹ The court cited *Young v. Taylor*⁵² for this proposition although it is not clear this is correct because the *Young* court was merely upholding an award of attorneys fees.⁵³ Generally, courts treat the award as discretionary.⁵⁴

C. Indiana Business Takeover Act

The Indiana Business Takeover Offers Act⁵⁵ was an issue in two cases decided during the survey period.⁵⁶ In *City Investing Co. v. Simcox*,⁵⁷ the Seventh Circuit affirmed the dismissal of a complaint challenging the constitutionality of the Act under the supremacy⁵⁸ and commerce clauses⁵⁹ of the United States Constitution. The district court purportedly abstained from deciding the case on the merits because of a perceived question of state law which if resolved could dispose of the controversy and moot the constitutional claims. It then, somewhat inconsistently, went on to uphold the constitutionality of the Act as an alternative holding.⁶⁰

The Seventh Circuit in fact did not reach the merits of the complaint and affirmed on the ground that abstention was warranted under the circumstances of the case.⁶¹ However, on the same day *Simcox* was decided, the court also decided *Mite Corp. v. Dixon*⁶² declaring the Illinois Business Takeover Act invalid on grounds simi-

⁵⁰IND. CODE § 23-2-1-19(c) (1976).

⁵¹410 N.E.2d at 1337.

⁵²466 F.2d 1329 (10th Cir. 1972).

⁵³*Id.* at 1337.

⁵⁴*See Tremps v. Ascott Oils, Inc.*, 561 F.2d 41 (7th Cir. 1977); *Cola v. Terzano*, 129 N.J. Super. 47, 322 A.2d 195 (1974). *Cf. Melton v. Unterreiner*, 575 F.2d 204 (8th Cir. 1978) (award of attorney fees was improper because the plaintiff prevailed under a federal statute rather than state statute which would have permitted attorney fees).

⁵⁵IND. CODE §§ 23-2-3.1-1 to -11 (Supp. 1981).

⁵⁶*City Investing Co. v. Simcox*, 633 F.2d 56 (7th Cir. 1980). *In re City Investing Co.*, 411 N.E.2d 420 (Ind. Ct. App. 1980).

⁵⁷633 F.2d 56 (7th Cir. 1980) (aff'g 476 F. Supp. 112 (S.D. Ind. 1979)). *See generally 1980 Survey, supra* note 31, at 112-17.

⁵⁸U.S. CONST. art. VI, cl. 3.

⁵⁹*Id.* art. 1, § 8, cl. 3.

⁶⁰476 F. Supp. at 116.

⁶¹633 F.2d at 57.

⁶²633 F.2d 486 (7th Cir. 1980), *prob. juris. noted sub nom. Edgar v. Mite Corp.*, 101 S. Ct. 2043 (1981). *See generally 1980 Survey, supra* note 31, at 112-17; Galanti, *Corporations, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 133, 161-72 (1980) [hereinafter cited as *1979 Survey*].

lar to those raised by the plaintiffs. *Mite* is presently before the United States Supreme Court.

The dispute in *Simcox* involved the acquisition of shares of Stokely-VanCamp, Inc. (Stokely) by GDV, Inc., a subsidiary of City Investing Company (City). After GDV had acquired more than five percent of Stokely's shares, it filed a Schedule 13D as required by the Securities Exchange Act of 1934.⁶³ Stokely representatives then contacted the Indiana Securities Commissioner who subsequently issued a cease and desist order prohibiting City and GDV from purchasing any additional Stokely shares.⁶⁴ On the same day, the Commissioner brought suit in the Marion County Superior Court seeking to preliminarily and permanently enjoin City and GDV from acquiring any additional Stokely shares. City and GDV filed suit in the federal court seeking declaratory and injunctive relief. The plaintiffs alleged that the Business Takeover Offers Act was preempted by the Securities and Exchange Act of 1934 as amended by the Williams Act, that it imposed an unjustifiable burden on interstate commerce in violation of the commerce clause, and that the Commissioner was a prejudiced decision maker whose proceedings violated their due process rights.⁶⁵

City and GDV then answered and filed a counterclaim in the state court proceeding raising the same issues asserted in their federal action. The district court subsequently entered final judgment in *Simcox* denying the plaintiffs any relief on the basis of abstention and, alternatively, on the basis that the claims were without merit.⁶⁶

The abstention observed in *Simcox* was the so-called *Pullman* abstention originally articulated by Justice Frankfurter in *Railroad Commission v. Pullman*.⁶⁷ Under the *Pullman* doctrine, federal courts will refrain from prematurely deciding constitutional issues pending determination in state court of state law issues central to the constitutional dispute.⁶⁸

⁶³15 U.S.C. § 78m(d) (1976).

⁶⁴The order was issued without a hearing although the Act then required a hearing before orders could be issued. 633 F.2d at 58. See IND. CODE § 23-2-3.1-9(c) (Supp. 1980).

⁶⁵633 F.2d at 59. City and GDV originally sought damages but that claim was struck by the district court and they did not appeal. *Id.* n.7. The Takeover Offers Act has been amended to grant immunity to the Secretary of State, the Securities Commissioner and his staff. IND. CODE § 23-2-3.1-9(c) (Supp. 1981). See notes 258-59 *infra* and accompanying text.

⁶⁶633 F.2d at 59.

⁶⁷312 U.S. 496 (1941).

⁶⁸See *Moore v. Sims*, 442 U.S. 415 (1979). There are two other species of abstention in addition to the *Pullman* abstention: (1) the *Burford* abstention where federal courts relegate federal issues to state courts because those issues touch matters of

As the Supreme Court observed in *Colorado River Water Conservation District v. United States*,⁶⁹ federal court abstention from exercising federal jurisdiction is the exception, and the abdication of the obligation to decide cases is justified only where requiring the parties to repair to a state court would serve an important countervailing interest.⁷⁰ Notwithstanding the *Colorado River* caveat, abstention is appropriate where federal constitutional issues might be mooted or presented in a different posture depending on the determination of state law by a state court.

The *Simcox* court considered the case to fall within "the paradigm of special circumstances" that makes *Pullman* abstention appropriate. It concluded that Indiana courts were likely to find that City and GDV were not making a takeover offer as defined in the Act because GDV had made only unsolicited purchases of shares through a broker-dealer in the ordinary course of its business.⁷¹ The Seventh Circuit was not persuaded that the circulation given to GDV's Schedule 13D which indicated a possible interest in acquiring fifteen to twenty percent of Stokely's shares was a tender offer in disguise as the Securities Commissioner had decided. The court observed that the Commissioner's "construction of the Act has all the earmarks of a 'hometown call.' Indeed, were his interpretation to be sustained by the Indiana courts, the conflict with the Williams Act might well prove irreconcilable."⁷² Of course any determination by Indiana courts that the Takeover Act did not apply to GDV's activities would moot the constitutional claims.

The Seventh Circuit rejected the plaintiffs' argument that the *Pullman* abstention was inappropriate because there could not be a speedy and authoritative state adjudication to protect their federal rights. The existence of the two pending state proceedings that could moot the constitutional claims belied that contention.⁷³ Their argument that abstention would require them to pursue their

traditional state concern, see *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Bickham v. Lashof*, 620 F.2d 1238 (7th Cir. 1980); and (2) the *Younger* abstention where federal courts abstain from interfering with state criminal or akin prosecutions out of respect for state functions. See *Younger v. Harris*, 401 U.S. 37 (1971); *Bickham v. Lashof*, 620 F.2d 1238. See generally 1A, PT. 2 MOORE'S FEDERAL PRACTICE ¶ 0.203 (Supp. 1980-1981). C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4241-4246 (1978).

⁶⁹424 U.S. 800 (1976).

⁷⁰*Id.* at 813. See also *Babbitt v. United Farm Workers*, 442 U.S. 289 (1979); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

⁷¹633 F.2d at 61 nn.11 & 12.

⁷²*Id.* at 61-62.

⁷³*Id.* at 62. Furthermore, the cases City and GDV relied on involved civil rights which are "arguably more fundamental than the right to buy or sell stock." *Id.*

remedy to the Indiana Supreme Court was also rejected. As the *Simcox* court pointed out, if the Indiana Court of Appeals held that the Act did not apply to City and GDV, it could dissolve the cease and desist order and permit them to re-enter the market for Stokely shares even without a definitive statement from the Indiana Supreme Court.

In effect, City and GDV were arguing that abstention would be inequitable because the state proceedings would be "inadequate."⁷⁴ It appears that they may have been hurt by their strategy of not seeking an injunction in the federal proceeding against the hearing scheduled by the Securities Commissioner.⁷⁵ City and GDV had been precluded from purchasing Stokely shares, but this was not sufficiently serious to warrant action contravening that abstention doctrine.

The second argument that City and GDV advanced for rejecting the abstention doctrine was that the Securities Commissioner, who would decide initially if the Act applied, was a "biased and prejudiced decision maker" and that his presiding over the administrative proceedings would violate their due process rights.⁷⁶ They argued that no interpretation of the Takeover Offers Act by an Indiana court would resolve the due process claims so the federal courts should rule. This might well have been the case, but, as *Simcox* noted, a decision by an Indiana court would not necessarily "resolve" any of the three challenges but simply make their resolution unnecessary.⁷⁷ Furthermore, the district court had found that the Commissioner "held no bias or prejudice against plaintiffs at any time" and "did not prejudge the issues heard by him."⁷⁸ The Seventh Circuit did not determine if this finding was clearly erroneous because City's and GDV's due process arguments reduced to their essence were simply a disagreement on whether the state law applied.⁷⁹

Thus, the *Simcox* court concluded that abstention on *Pullman* grounds was not an abuse of discretion. There was, however, some reluctance because abstention could cause inordinate delay or administrative arbitrariness that might impair City's and GDV's rights.⁸⁰ Consequently, the court retained jurisdiction of the appeal to consider the merits of the constitutional challenges to the

⁷⁴*Id.* at 63.

⁷⁵*Id.* City and GDV only sought injunctive relief against the proceedings in the Indiana action. *Id.*

⁷⁶*Id.*

⁷⁷*Id.* at 63-64.

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

Takeover Offers Act so, if necessary, City and GDV could return for resolution of those issues after the state law issues had been decided.

The wisdom of the *Simcox* decision was borne out by the decision of the Indiana Court of Appeals in *In re City Investing Co.*⁸¹ reversing the Securities Commissioner's cease and desist order against City and GDV. As anticipated by the Seventh Circuit, the court concluded that GDV's purchase of Stokely shares was not a takeover offer within the meaning of the Act because the filing of GDV's Schedule 13D was not related to a rapid accumulation of Stokely shares and the language of the Schedule 13D discouraged shareholders from supposing that GDV was willing to pay a premium over market price for the shares.⁸² The court of appeals also concluded that the Securities Commissioner's finding that statements in GDV's Schedule 13D were false and in violation of section 23-2-1-12(2) of the Indiana Securities Act⁸³ was not supported by substantial evidence.⁸⁴ The court of appeals rejected the state's contention that the Takeover Offers Act was intended to regulate all shifts in corporate control through stock purchases, and not just tender offers, as being "overbroad and contrary to the plain language of the Act."⁸⁵ A "takeover offer" is not limited to conventional tender offers. However, the term has an established legal significance. The court presumed that the legislature intended the term to be given its customary legal meaning in the Act absent any indication to the contrary.⁸⁶ The definition of takeover offers in the Act contains language similar to that found in section 14(d) of the Securities Exchange Act of 1934 as amended by the Williams Act.⁸⁷ Consequently, the *City Investing* court concluded that takeover offers regulated by the Indiana Act are those offers to acquire the equity securities of "a company pursuant to that which is regulated by the Williams Act"⁸⁸

One commentator has stated that "a tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a

⁸¹411 N.E.2d 420 (Ind. Ct. App. 1980).

⁸²*Id.* at 431.

⁸³IND. CODE § 23-2-1-12(2) (1976).

⁸⁴411 N.E.2d at 433-34.

⁸⁵*Id.* at 426. Section 23-2-3-1(i) of the Act defines a "takeover offer," with some exceptions, to mean: An offer to acquire or an acquisition of any equity security of a target company which would result in the offeror owning more than ten percent of the target company.

⁸⁶411 N.E.2d at 427. *See Jensen v. Pritchard*, 12 Ind. App. 439, 90 N.E.2d 518 (1950).

⁸⁷15 U.S.C. § 78n(d)(1) (1976).

⁸⁸411 N.E.2d at 427.

specific price."⁸⁹ Congress did not define a tender offer in the Williams Act so the meaning of the term has developed on a case by case basis. The Securities and Exchange Commission, however, has suggested eight factors for determining if an acquisition is a tender offer under the Williams Act.⁹⁰ These factors "set a tender offer apart from open market purchases, privately negotiated transactions or other kinds of public solicitations."⁹¹

One proposed definition of a tender offer is whether an "offer to purchase securities [is] likely to pressure shareholders into making uninformed, ill-considered decisions to sell."⁹² The *City Investing* court, along with some other courts,⁹³ has found this definition generally persuasive. Other courts, however, have rejected it as being too broad,⁹⁴ and even the *City Investing* court recognized that an overly broad definition of tender offer that would encompass open market purchases would make the Williams Act unworkable.⁹⁵ This would reflect the statutory requirements that shareholders tendering shares be able to withdraw them and that shares be purchased at an equal price and pro rata under certain circumstances.⁹⁶ Consequently, if open market purchases or privately negotiated purchases of shares were treated as "tender offers," only conventional tender offers would be lawful under the Williams Act. Nothing in

⁸⁹Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973) [hereinafter cited as *Developing Meaning*].

⁹⁰See *Brascan Ltd. v. Edper Equities Ltd.*, 477 F. Supp. 773, 791 n.13 (S.D.N.Y. 1979). These factors are: (1) whether there has been "active and widespread solicitation of public shareholders;" (2) whether the "solicitation is 'for a substantial percentage of the issuer's stock;'" (3) whether the "offer to purchase is 'at a premium;'" (4) whether the "terms of the offer are 'firm rather than negotiable;'" (5) whether the "offer is 'contingent on the tender of a fixed minimum number of shares;'" (6) whether the "offer is 'open for only a limited period of time;'" (7) whether the shareholders are "subjected to pressure to sell their stock;" and (8) whether "public announcements of a purchasing program . . . precede or accompany a rapid accumulation." The SEC has proposed an amendment to rule 14d-1(b)(1) that would define an offer for purposes of the Williams Act. [1980] 3 FED. SEC. L. REP. (CCH) ¶ 24,281A.

⁹¹*Wellman v. Dickinson*, 475 F. Supp. 783, 824 (S.D.N.Y. 1979).

⁹²*Developing Meaning*, *supra* note 89, at 1281.

⁹³411 N.E.2d at 429-30. See also *Panter v. Marshall Field & Co.*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,299 at 97,056 (N.D. Ill. 1980); *Nachman Corp. v. Halfred, Inc.*, [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455 at 95,590 (N.D. Ill. 1973).

⁹⁴See 477 F. Supp. at 790; *D-Z Investment Co. v. Holloway*, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 at 96,563 (S.D.N.Y. 1974).

⁹⁵411 N.E.2d at 429. See generally *Einhorn & Blackburn, The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretations of the Term*, 23 N.Y.L. SCH. L. REV. 379 (1978).

⁹⁶15 U.S.C. §§ 78n(d)(5)-78n(d)(7) (1976). See *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1207 (2d Cir. 1978).

the legislative history or text of the Act suggests this was the congressional intent.⁹⁷

There is still considerable doubt that open market purchases with an impact on shareholders similar to that of conventional tender offers should be covered by section 14(d). There is authority for applying the Williams Act to nontraditional acquisitions which impose pressures on shareholders like those of conventional tender offers,⁹⁸ but assuming that regulation of such acquisitions is desirable, it may be better accomplished by specific legislation rather than by a questionable interpretation of "tender offer."⁹⁹

The *City Investing* court concluded that regardless of how open market purchases should be treated, GDV's acquisition did not warrant condemnation. GDV's Schedule 13D did not generate sound and fury in the market. The statement that they would purchase shares from time to time depending on market conditions would discourage shareholders from supposing City or GDV would pay a premium over the market price to acquire shares immediately. Thus Stokely shareholders were not pressured to sell quickly or lose the opportunity, which could induce hasty, ill-considered decisions.¹⁰⁰

The only one of the eight factors¹⁰¹ listed by the SEC for identifying a tender offer clearly present was GDV's expressed interest in a substantial percentage of outstanding Stokely shares. This statement, the Commissioner's finding to the contrary notwithstanding, was not a solicitation because no premium was offered for the shares.¹⁰² The court would not consider the natural rise in the market price caused by the presence of an eager buyer to be a premium because the language of the Schedule 13D directly negated such an inference.

The *City Investing* court in effect characterized the SEC's tender offer factors as conditions that impose undue pressures on shareholders to make hasty and possibly ill-advised decisions. When

⁹⁷411 N.E.2d at 429 quoting from *Brascan Ltd. v. Edper Equities Ltd.*, 477 F. Supp. 773, 790 (S.D.N.Y. 1979).

⁹⁸See *S-G Securities, Inc. v. Fuqua Inv. Co.*, 466 F. Supp. 1114 (D. Mass. 1978).

⁹⁹411 N.E.2d at 430. See generally *Einhorn & Blackburn, The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretations of the Term*, 23 N.Y.L. SCH. L. REV. 379 (1978). The SEC has taken an intermediate position—some open market purchases would and others would not be covered by the Williams Act. See proposed SEC Rule 14d-1(b)(1). [1980] 3 FED. SEC. L. REP. (CCH) ¶ 24,281A.

¹⁰⁰411 N.E.2d at 431-33. Compare *S-G Securities, Inc. v. Fuqua Inv. Co.*, 466 F. Supp. 1114 (D. Mass. 1978) and *Strode v. Esmark, Inc.*, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,538 (Franklin Cir. Ct. Ky. 1980) with *Chromalloy American Corp. v. Sun Chem. Corp.*, 474 F. Supp. 1341 (E.D. Mo. 1979).

¹⁰¹See note 90 *supra*.

¹⁰²411 N.E.2d at 432.

those conditions exist, treating the acquisition as a tender offer subject to the requirements of section 14(d) of the Securities Exchange Act is not improper.¹⁰³ In the absence of such pressure, the protection afforded shareholders by section 13(d)¹⁰⁴ and the information contained in the Schedule 13D is sufficient.¹⁰⁵

The Indiana Securities Commissioner found that City and GDV had violated section 23-2-1-12(2) of the Indiana Securities Act.¹⁰⁶ The court concluded that this finding was contrary to law and unsupported by the evidence.¹⁰⁷ It was bound to accept the facts as found by the Commissioner if supported by the evidence,¹⁰⁸ but the evidence simply did not support the conclusions that City and GDV had made false statements in the Schedule 13D.¹⁰⁹ The Commissioner was in effect drawing self-contradictory inferences from inconsistent findings of fact and attempting to use these inferences to support his conclusions of law.¹¹⁰ These improper findings and conclusions, with a cease and desist order which in part was meaningless and unenforceable,¹¹¹ required the court to set aside the order.¹¹²

The result in *City Investing* is clearly correct as a matter of law. Although lay persons may decry Indiana's supposed inability "to influence the buy-outs of Hoosier corporations by out-of-state firms—and the state's ability to protect shareholders in those buy-

¹⁰³15 U.S.C. § 78n(d) (1976).

¹⁰⁴*Id.* § 78m(d).

¹⁰⁵411 N.E.2d at 433. See *Rondeau v. Mosiner Paper Corp.*, 422 U.S. 49 (1975); *Chromalloy American Corp. v. Sun Chem. Corp.*, 474 F. Supp. 1341 (E.D. Mo. 1979); *Jewelcor, Inc. v. Pearlman*, 397 F. Supp. 221 (S.D.N.Y. 1975).

¹⁰⁶411 N.E.2d at 434.

¹⁰⁷*Id.*

¹⁰⁸See *Mishawaka v. Stewart*, 261 Ind. 670, 310 N.E.2d 65 (1974).

¹⁰⁹For example, the Commissioner found that GDV's statement that it had no current intent to seek control of Stokely was false although GDV could not acquire anywhere near the number of shares owned by incumbent management. 411 N.E.2d at 434.

¹¹⁰Perhaps this is the genesis of the remark in *City Investing Co. v. Simcox*, 633 F.2d 56 (7th Cir. 1980) that the Commissioner's decision had the "earmarks of a 'hometown call.'" *Id.* at 61.

¹¹¹411 N.E.2d at 434 n.9.

¹¹²*Id.* at 434. See generally *In re McDonald*, 241 Ind. 239, 171 N.E.2d 691 (1961); *Hatcher v. Smith*, 152 Ind. App. 299, 283 N.E.2d 582 (1972). A reviewing court cannot surmise an agency found facts necessary to support its order, *Wabash Valley Coach Co. v. Arrow Coach Lines, Inc.*, 228 Ind. 609, 94 N.E.2d 753 (1950), nor can it direct an agency to amend or change its findings because a court has no power to decide matters on the merits which are the legislatively decreed province of an agency, *Public Serv. Comm'n v. Chicago, I. & L. Ry.*, 235 Ind. 394, 134 N.E.2d 53 (1956); *Braschler v. Review Bd.*, 120 Ind. App. 294, 90 N.E.2d 362 (1950), or draw inferences counter to those drawn by the agency, *Indiana Bd. of Pharmacy v. Horner*, 241 Ind. 326, 172 N.E.2d 62 (1961). All it can do is reverse.

outs"¹¹³ or "to halt creeping tender offers,"¹¹⁴ the question is simply whether the Business Takeover Offers Act applies to the transaction. If it does not, the answer is different legislation—assuming, of course, that states have the constitutional power to legislate in this area.

D. Definition of Security

An unsuccessful condominium development in Connecticut was the genesis of a dispute involving Indiana law in *American Fletcher Mortgage Co. v. U.S. Steel Credit Corp.*¹¹⁵ In *American Fletcher*, the Seventh Circuit Court of Appeals affirmed a decision of the United States District Court for the Southern District of Indiana denying defendant U.S. Steel Credit Corporation's (Steel) motions for partial summary judgment on the plaintiffs' complaint, summary judgment on its counterclaim, and an order dismissing its securities fraud count.

The original action was brought by American Fletcher Mortgage Company (Mortgage) and American Fletcher National Bank & Trust Company (AFNB) to recover monies disbursed for Steel under a loan participation agreement entered into in connection with the condominium development. Mortgage had made two loans to the condominium developer. It also signed a loan participation agreement with Steel, AFNB, and American Fletcher Mortgage Investor Trust (Trust) for the loan funds.¹¹⁶ Subsequently, Mortgage proposed an increase in the loans to provide additional funds for the development. Because only AFNB and Trust agreed, the proposal could not be implemented, and the developer eventually defaulted on its obligations. Ultimately, Mortgage, the three loan participants, and the developer entered into a settlement agreement. Steel apparently refused to cooperate unless the other parties waived all claims against it.¹¹⁷

The plaintiffs refused to waive their rights. Instead, they filed suit seeking actual and punitive damages for Steel's alleged breach of its express and implied contractual obligations, interference with contractual relations, and breach of duty to its co-participants.¹¹⁸

¹¹³Indianapolis Star, Nov. 18, 1980, at 28, col. 1.

¹¹⁴*Id.* at col. 3. Interestingly, the "concerns" expressed by the author of this article, the Business Editor of the Indianapolis Star, are just the "concerns" that would justify declaring the Business Takeover Offers Act unconstitutional.

¹¹⁵635 F.2d 1247 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1982 (1981).

¹¹⁶*Id.* at 1248-49. Steel was to furnish 40% of the funds, AFNB 10%, and Trust 50%. The participants were to receive principal and interest payments proportional to their loan shares.

¹¹⁷*Id.* at 1249.

¹¹⁸*Id.* at 1249-50.

Steel counterclaimed against the plaintiffs and filed a complaint against American Fletcher Corporation, the plaintiffs' parent corporation, alleging that the loan participation offerings were securities¹¹⁹ sold in violation of the Securities Act of 1933,¹²⁰ the Securities Exchange Act of 1934,¹²¹ and the Indiana Securities Act.¹²² Steel's summary judgment motions were denied, the plaintiffs' motions to dismiss or for judgment on the pleadings on the security fraud counts were granted, and Steel's cross-motion for summary judgment declaring the loan participation a security was denied by the district court.¹²³

Steel had argued in its motion for summary judgment that neither AFNB nor Trust were third party beneficiaries of Steel's agreement with Mortgage. The *American Fletcher* court upheld the district court's conclusion that summary judgment was inappropriate because there was a genuine issue of fact whether the participation agreements were intended to benefit AFNB and Trust.¹²⁴ The court rejected the contention that under Indiana law an intent to benefit AFNB and Trust had to appear affirmatively from the language of the document. Steel was contractually obligated to reimburse Mortgage for costs and expenses incurred in protecting and preserving the security, to minimize losses in the project and impliedly obligated to act fairly and in good faith. Because these factors would produce a direct benefit to AFNB and Trust, the requirements of Indiana law appeared to have been satisfied.¹²⁵ Even if the contract was not clearly intended to benefit AFNB and Trust, it was sufficiently ambiguous for interpretation of the contractual language to be appropriate for trial.¹²⁶

The Seventh Circuit also held that Indiana courts would not require an actual breach of the agreement among Mortgage, AFNB, and Trust to make Steel liable for damages to Mortgage resulting from Steel's dilatoriness. It concluded that Indiana would recognize the somewhat loosely defined tort of interference with contractual

¹¹⁹*Id.* at 1250.

¹²⁰15 U.S.C. § 77q (1976).

¹²¹*Id.* § 78j(b).

¹²²IND. CODE §§ 23-2-1-12, -19(a) (1976).

¹²³635 F.2d at 1250-51. Counts in the complaint and counterclaim were dismissed by stipulation and counts in the counterclaim alleging common law fraud and breach of contract were not in issue. *Id.* at 1250 nn.2 & 3.

¹²⁴635 F.2d at 1251.

¹²⁵*Id.* See *Jackman Cigar Mfg. Co. v. John Berger & Son Co.*, 114 Ind. App. 437, 52 N.E.2d 363 (1944). See generally 4 A. CORBIN, CORBIN ON CONTRACTS §§ 772-773, 776-776 (1951); 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 347, 356, 356A (1959).

¹²⁶635 F.2d at 1251. Furthermore, even if AFNB and Trust were not intended beneficiaries, Mortgage still could sue for Steel's alleged breach of its duty of good faith. *Id.*

or business relations¹²⁷ and would not limit an actionable wrong to cases in which a breach of contract actually occurred. Decisions such as *Kiyose v. Trustees of Indiana University*¹²⁸ and *Martin v. Platt*¹²⁹ were of no help to Steel in standing for the proposition that only a third party and not a party to the contract may be liable for tortious interference. This particular aspect of the dispute was not over the contract between Mortgage and Steel, but the contract between Mortgage and AFNB and Trust to which Steel was a third party.

Steel's argument that it was entitled to summary judgment for breach of duty to AFNB and Trust floundered because it could not be taken as a matter of law that they were not third party beneficiaries of the agreement between Mortgage and Steel.¹³⁰ Furthermore, when Mortgage acquired title to the project, the loan participants became real estate developers, and Steel's actions delaying Mortgage's ability to implement its proposals for the project constituted a breach of the duty of a party engaged in a common enterprise to act in good faith toward co-venturers.¹³¹

The most important issue in *American Fletcher* was whether the loan participation was a security within the meaning of section 2(1) of the Securities Act of 1933,¹³² section 3(a)(10) of the Securities Exchange Act of 1934,¹³³ and section 23-2-1-1(k) of the Indiana Securities Act.¹³⁴ Steel's entire securities fraud case depended upon the status of the participation. It was undisputed that the meaning of "security" is the same under all three statutes.¹³⁵ The resolution of this issue depended on the effect of the qualifying phrase "unless the context otherwise requires" on the definition of security which

¹²⁷See *Spier v. Home Ins. Co.*, 404 F.2d 896 (7th Cir. 1968); *Martin v. Platt*, 386 N.E.2d 1026 (Ind. Ct. App. 1979); *Gibson v. Miami Valley Milk Producers, Inc.*, 157 Ind. App. 218, 299 N.E.2d 631 (1973). See generally RESTATEMENT (SECOND) OF TORTS § 766A (1979); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 129 (4th ed. 1971).

¹²⁸166 Ind. App. 35, 333 N.E.2d 886 (1975).

¹²⁹386 N.E.2d 1026 (Ind. Ct. App. 1979).

¹³⁰635 F.2d at 1252-53.

¹³¹See *Grover v. Marott*, 192 Ind. 552, 559, 136 N.E. 81, 83 (1922). See generally J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP §§ 35, 69 (1968); H. REUSCHLEIN & W. GREGORY, AGENCY AND PARTNERSHIP § 266 (1979).

¹³²15 U.S.C. § 77b(1) (1976).

¹³³*Id.* § 78c(a)(10).

¹³⁴IND. CODE § 23-2-1-1(k) (1976).

¹³⁵635 F.2d at 1253. However, some courts have given a broader meaning to "security" under state securities statutes than under the federal statutes. See, e.g., *Silver Hills Country Club v. Sobieski*, 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961); *State ex rel. Healy v. Consumer Business Systems, Inc.*, 5 Or. App. 19, 482 P.2d 549 (1971). Cf. *Wieboldt v. Metz*, 355 F. Supp. 255 (S.D.N.Y. 1973) (holding that the sale of franchises was not covered by the Securities Act of 1933).

included "any note . . . or participation in any profit-sharing agreement."¹³⁶

The court applied the *SEC v. W.J. Howey Co.*¹³⁷ test of a security as refined in *United Housing Foundation v. Forman*¹³⁸ and concluded that the loan participation was not a security. Under *Forman* four elements must be satisfied before a security exists: (1) an investment; (2) in a common venture; (3) premised upon a reasonable expectation of profit; (4) to be derived from the entrepreneurial or managerial efforts of others.¹³⁹ Here only the second element, a common venture, was present. Utilizing the increasingly conventional wisdom that the term "security" should be construed narrowly, the *American Fletcher* court considered the participation as merely a collateralized commercial loan. Although the loan was risky, it was no more than "the ordinary commercial risk taken by any secured lender"¹⁴⁰ and not an investment risk. Even Steel must have had some doubts as to how persuasive its argument was going to be because it drafted the participation agreements on typical lenders' forms. Its own loan officer who prepared the proposal recommended that the loans be made contingent on a first mortgage on the property and improvements. Apparently Steel considered the development to be a plain and simple real estate development until it was sued.

The fact that the loan paid interest did not make it a security because Steel did not participate in any profits from the project. Neither the repayment of the loan nor the rate of return was dependent on any profits.¹⁴¹ Rather, the interest was fixed at a rate

¹³⁶635 F.2d at 1253. Steel conceded the notes from the developer to Mortgage were not securities, and Mortgage and AFNB conceded that a loan participation could be a security even though the underlying note is not. See *C.N.S. Enterprises, Inc. v. G & G Enterprises, Inc.*, 508 F.2d 1354 (7th Cir.), cert. denied, 423 U.S. 825 (1975).

¹³⁷328 U.S. 293 (1946).

¹³⁸421 U.S. 837 (1975).

¹³⁹635 F.2d at 1253. See *International Bd. of Teamsters v. Daniel*, 439 U.S. 551 (1979); *Kirk v. Agri-Research Council, Inc.*, 561 F.2d 96 (7th Cir. 1977). See generally 3 H. BLOOMENTHAL, *SECURITIES AND FEDERAL CORPORATE LAW* §§ 2.02 & 2.19 to .19B (rev. 1980); 4B Z. CAVITCH, *BUSINESS ORGANIZATIONS* § 93.01[1][b] (rev. 1981); 11 H. SOWARD, *BUSINESS ORGANIZATIONS, THE FEDERAL SECURITIES ACT* § 2.01 (rev. 1980).

¹⁴⁰635 F.2d at 1254 (quoting *Lincoln Nat'l Bank v. Herber*, 604 F.2d 1038 (7th Cir. 1979)). Furthermore, Steel could not contend it was relying solely on Mortgage's entrepreneurial efforts in the venture, another hallmark of a security, because the interest came from the loan not Mortgage's efforts and Steel retained the rights of a creditor such as the right to foreclose. 635 F.2d at 1254.

¹⁴¹See *Canadian Imperial Bank of Commerce Trust Co. v. Fingland*, 615 F.2d 465 (7th Cir. 1980); *C.N.S. Enterprises, Inc. v. G & G Enterprises, Inc.*, 508 F.2d 1354 (7th Cir.), cert. denied, 423 U.S. 825 (1975).

above the prime rate which was a further indication of a commercial real estate loan transaction.¹⁴²

The Seventh Circuit reemphasized its recent *Lincoln Nebraska Bank v. Herber*¹⁴³ decision that Congress did not intend to regulate commercial loan transactions which would not have an impact on the securities market even if the literal wording of the definition of security might include a particular arrangement. The key is the qualifying phrase "unless the context requires otherwise" and the context here is that commercial loans were probably not intended to be encompassed by the securities laws. The *American Fletcher* court refused to follow decisions of the Second Circuit Court of Appeals¹⁴⁴ finding similar arrangements to be securities under the literal language of the statutes. In doing this the *American Fletcher* court seems correct. If the Supreme Court did anything in *Forman*, it rejected the literal language approach to the definition of security. To think that the current Supreme Court would consider an arrangement clearly smacking of a commercial real estate venture a security simply because of the literal language of the securities laws is to engage in wishful thinking.

E. Rights and Liability of a Promoter

The problems faced by a promoter of a corporation or one who renders services to promoters were brought out in *Kincaid v. Lazar*,¹⁴⁵ reversing a judgment of the Hendricks County Circuit Court in Lazar's quantum meruit suit for professional accounting services rendered in forming a corporation. The trial court's findings were in Lazar's favor, but the court of appeals concluded that the findings were clearly erroneous.

Lazar was engaged by Kincaid to form a corporation in which they and three others would be the principals. Kincaid and Lazar agreed that the latter would receive twenty percent of the corporate shares as compensation. There was no agreement that he would receive compensation for his services other than the shares. The parties did a rather poor job in reaching an understanding as to their rights and obligations. Subsequently, at a subscribers' meeting after the certificate of incorporation was issued, Lazar did not accept or demand his shares because he was concerned with possible

¹⁴²635 F.2d at 1254.

¹⁴³604 F.2d 1038 (7th Cir. 1979). See also *National Bank of Commerce v. All American Assurance Co.*, 583 F.2d 1295 (5th Cir. 1978); *Emisco Indus. Inc. v. Pro's Inc.*, 543 F.2d 38 (7th Cir. 1976).

¹⁴⁴See authorities cited 635 F.2d at 1254 n.8.

¹⁴⁵405 N.E.2d 615 (Ind. Ct. App. 1980).

liability stemming from the corporation's thin debt-equity ratio. He then resigned as a shareholder, director, and officer.¹⁴⁶

The incorporators continued discussions and eventually reached an "Agreement for the Release and Resignation of Alexander Lazar" under which the remaining subscribers and shareholders agreed to hold Lazar harmless from any liability he may have incurred and he in turn relinquished his interest in the corporation and resigned as an officer and director.¹⁴⁷

Lazar's quantum meruit action sought quasi-contractual relief for benefits rendered the defendants at their request under circumstances where equity demands compensation to prevent unjust enrichment.¹⁴⁸ The existence of an express contract for services would preclude implication of a contract,¹⁴⁹ and the rights of the parties would be controlled by the express contract. The *Kincaid* court concluded that two express contracts barred Lazar's action.¹⁵⁰ The first was the "understanding" that he would receive twenty percent of the shares for his accounting and consulting services in forming the corporation. He had signed a subscription agreement for these shares. The court upheld the validity of this agreement but, unfortunately, it did not consider the effect of section 23-1-2-6(e) of the Indiana General Corporation Act which provides that "consideration for the issuance of shares of any corporation may be paid, in whole or in part, in money, in other property, tangible or intangible, or in labor actually performed for, or services actually rendered to the corporation."¹⁵¹ Even if a corporation accepts liability for professional services involved in its formation, it is not clear that such services meet the statutory consideration requirement.

The corporation did not yet exist so it cannot be said the services were rendered "to" it. This problem is not unique to Indiana.¹⁵² Judicial legerdemain might validate such agreements by considering the shares to be issued for "property" and not "promotional services" or by construing the agreement as contemplating that the shares would be issued after the corporation was organized for ser-

¹⁴⁶*Id.* at 617.

¹⁴⁷*Id.* at 619.

¹⁴⁸*Id.* (citing *Kody Eng'r Co. v. Fox & Fox Ins. Agency, Inc.*, 158 Ind. App. 498, 303 N.E.2d 307 (1973)).

¹⁴⁹*Deck v. Jim Harris Chevrolet-Buick*, 386 N.E.2d 714 (Ind. Ct. App. 1979); *Myers v. Maris*, 164 Ind. App. 34, 326 N.E.2d 577 (1975); *Engelbrecht v. Property Developers, Inc.*, 156 Ind. App. 354, 296 N.E.2d 798 (1973).

¹⁵⁰405 N.E.2d at 619.

¹⁵¹IND. CODE § 23-1-2-6(e) (1976) (emphasis added).

¹⁵²*See* H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS § 113 at 188 (2d ed. 1970) [hereinafter cited as HENN].

vices rendered previously.¹⁵³ Permitting shares for promotional services can be an invitation for fraud because it is possible to form a corporation and issue all of its shares for promotional services which results in an entity with no assets other than its simple corporate existence.¹⁵⁴ This area is one rife with problems and it is only fortunate that few cases arise questioning the issuance of shares for promotional services.

The release agreement signed by Lazar also barred his action.¹⁵⁵ He argued that it did not prevent him from recovering the reasonable value of his services because it was not supported by consideration, the twenty percent interest in the corporation was inadequate consideration for his services, the agreement did not expressly mention release or satisfaction of a claim for services, and he did not intend to relinquish any claim in the agreement. The court correctly rejected these arguments.¹⁵⁶ The court was satisfied that Lazar did intend to relinquish his rights in an all-encompassing agreement and would not inquire into the admittedly indeterminate value of the consideration because that judgment had been made by the parties themselves.¹⁵⁷ Thus, Lazar's attempt to recover from the corporation failed because he expressly gave up his compensation in return for the release.

Lazar's attempt to hold Kincaid personally liable for his services also was unsuccessful. Although he won below, the court held the finding of liability clearly erroneous and reversed.¹⁵⁸ This aspect of the case put Lazar on the horns of a dilemma. In effect, Lazar argued that Kincaid was a corporate promoter who employed him,

¹⁵³*Id.* at nn.9 & 10. See generally Z. CAVITCH, BUSINESS ORGANIZATIONS § 55.02[1] (rev. 1981); 1 G. HORNSTEIN, CORPORATION LAW AND PRACTICE § 94 (1959) [hereinafter cited as HORNSTEIN].

A similar problem exists when proceeds for the shares are paid back to the organizers for services. At least technically the full consideration would not have been paid. This problem has been resolved in the Model Business Corporation Act by section 22 which permits the payment of reasonable charges and expenses of organization of a corporation out of the consideration received "by it in payment for its shares without thereby rendering such shares not fully paid or accessible." 1 ABA-ALI MOD. BUS. CORP. ACT ANN § 22 [hereinafter cited as Model Act].

¹⁵⁴An Indiana corporation cannot lawfully transact business until consideration of \$1000 has been paid for its shares, IND. CODE § 23-1-3-5 (1976), but the determination by the board of directors of the "value" of property or services received as consideration for shares is conclusive in the absence of "actual fraud" in the transaction. *Id.* § 23-1-2-6(e).

¹⁵⁵405 N.E.2d at 621.

¹⁵⁶*Id.* at 620-21.

¹⁵⁷*Id.* at 620. See *Cook v. American States Ins. Co.*, 150 Ind. App. 88, 275 N.E.2d 832 (1971).

¹⁵⁸405 N.E.2d at 621.

promising to pay with shares. This would bring the case within the general rule that a promoter is personally liable on contracts made on behalf and for the benefit of a not-yet-formed corporation even if the contract is subsequently adopted by the corporation.¹⁵⁹ The defendants countered that Lazar was a promoter and unlike a third party who contracts with a promoter on behalf of a projected corporation, a promoter is not entitled to compensation from co-promoters for services rendered in furthering the enterprise absent some agreement.¹⁶⁰ The mere relationship of promoters does not in and of itself imply a promise by some promoters to compensate others.¹⁶¹ Such an agreement can be implied, but it must be specific and definite enough to warrant enforcement.¹⁶²

Lazar was in a no-win situation. If he was a promoter, he was not entitled to compensation from co-promoters because there was no clear agreement to that effect. If he was a third party retained by a promoter, he could not recover because the presumption that the promoter, Kincaid, was personally liable¹⁶³ was effectively rebutted.¹⁶⁴

Kincaid is undoubtedly correct. However, it should be a warning to persons organizing a corporation of the importance of making the rights of the parties clear so the corporation can be organized as intended, or, failing that, making it clear as to what, if any, arrangements are to be made for compensating promoters for promotional services.

F. Retaliatory Discharge

*Campbell v. Eli Lilly & Co.*¹⁶⁵ re-enforces the ukase that at will employees of Indiana businesses "blow the whistle" at career peril. In *Campbell*, the court in a split decision affirmed the Marion County Circuit Court's summary judgment for Lilly against Campbell's claim that he was discharged in retaliation for disclosing practices

¹⁵⁹*Id.*; *Mount Pleasant Coal Co. v. Watts*, 91 Ind. App. 501, 506-07, 151 N.E. 7, 9 (1926). See generally HENN, *supra* note 152, § 111; HORNSTEIN, *supra* note 153, § 93.

¹⁶⁰*Hart v. Miller*, 49 Del. 477, 119 A.2d 751 (1955); *Bailey v. Interstate Airmotive, Inc.*, 358 Mo. 1121, 219 S.W.2d 333 (1949); *Babbitt v. Gibbs*, 150 N.Y. 281, 44 N.E. 952 (1896).

¹⁶¹*Hart v. Miller*, 49 Del. 477, 119 A.2d 751 (1955); *Bailey v. Interstate Airmotive, Inc.*, 358 Mo. 1121, 219 S.W.2d 333 (1949); *Babbitt v. Gibbs*, 150 N.Y. 281, 44 N.E. 952 (1896).

¹⁶²See *Turley v. Thomas*, 31 Nev. 181, 101 P. 568 (1909).

¹⁶³See *Stanley J. How & Assocs. v. Boss*, 222 F. Supp. 936 (S.D. Iowa 1963).

¹⁶⁴405 N.E.2d at 621. See *Quaker Hill, Inc. v. Parr*, 148 Colo. 45, 364 P.2d 1056 (1961).

¹⁶⁵413 N.E.2d 1054 (Ind. Ct. App. 1980), *transfer denied*, 421 N.E.2d 1099 (Ind. 1981). Hunter, J., dissented from the denial of transfer. *Id.*

allegedly contrary to the federal drug regulatory scheme as implemented by the Food and Drug Administration.¹⁶⁶

The majority in *Campbell* acknowledged that *Frampton v. Central Indiana Gas Co.*¹⁶⁷ recognizes an exception to the rule that an employer can fire an at will employee at any time.¹⁶⁸ Under *Frampton*, an at will employee discharged for exercising a right bestowed by statute has a cause of action against the former employer. Indiana courts, however, have refused to go beyond situations in which there is a statutory source for the right or duty the former employee was exercising¹⁶⁹ to protect the whistle-blowing employee.¹⁷⁰ Even though there may be a general duty to do that which public policy encourages or to refuse to do that which public policy forbids, this general duty is not sufficient to create an exception to the at will employment relationship.

This result is unfortunate. As Professor R. Bruce Townsend has observed, decisions such as *Martin v. Platt*,¹⁷¹ denying a cause of action for retaliatory discharge, "exhibit a lack of humanitarian considerations which make bankruptcy a way of life and unionization the main tool of employee protection."¹⁷² The employer also has rights in the employment relationship, and a large corporation should be accorded wide latitude in determining whom it will hire and fire,¹⁷³ but Indiana may go too far in protecting the interests of employers. Certainly the courts that have recognized a cause of action for retaliatory discharge apart from statutes,¹⁷⁴ and Judge Ratliff, who dissented in part on this issue,¹⁷⁵ would agree. Judge Ratliff disagreed with the view that a general public policy exception to the at will rule was a legislative matter¹⁷⁶ and urged the

¹⁶⁶*Id.* at 1063. The court rejected Campbell's contention that the trial court was "biased, prejudiced and hostile" toward Campbell because of the judge's supposed antipathy towards the FDA and the federal bureaucracy in general. The argument was rejected because the majority concluded the trial court correctly applied the law. From the opinion, however, it would seem the trial court was less than judicious at times. *Id.* at 1058-59.

¹⁶⁷260 Ind. 249, 297 N.E.2d 425 (1973).

¹⁶⁸413 N.E.2d at 1060.

¹⁶⁹The Indiana Workers Compensation Act, IND. CODE § 22-3-2-15 (1976), was the statutory basis for *Frampton*.

¹⁷⁰See *Martin v. Platt*, 386 N.E.2d 1026 (Ind. Ct. App. 1979).

¹⁷¹*Id.*

¹⁷²Townsend, *Secured Transactions, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369, 381 (1980).

¹⁷³See *Percival v. General Motors Corp.*, 539 F.2d 1126, 1130 (8th Cir. 1976).

¹⁷⁴See, e.g., *Petermann v. International Bd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

¹⁷⁵413 N.E.2d at 1063-68 (Ratliff, J., dissenting).

¹⁷⁶*Id.* at 1066. See *Martin v. Platt*, 386 N.E.2d 1026, 1028 (Ind. Ct. App. 1979).

court in the true common law tradition to depart from the general rule where strict adherence to "nineteenth century legal formalism and laissez faire labor policies which are not always valid in modern society"¹⁷⁷ creates harsh and unjust results.¹⁷⁸

Judge Ratliff appears willing to protect an employee discharged for acting in compliance with judicially created public policy, but he would not go so far as to require only good faith discharges of at will employees.¹⁷⁹ He clearly would extend the cause of action recognized in *Frampton* to cases in which a statute does not give a right or remedy to a discharged employee but does establish a public policy that has been breached by the employer.¹⁸⁰ He considered Campbell as falling in this category because he alleged that his discharge was for reporting violations of the Food, Drug, and Cosmetics Act.¹⁸¹ Ostensibly, at least, he was a responsible whistleblower entitled to protection for responding to his public duty.

Judge Ratliff would limit the remedy for retaliatory discharge to damages and would not order reinstatement of the discharged employee.¹⁸² Damages would be sufficient to deter such discharges and promote the public policy the discharge would violate. Of course, only responsible whistle-blowers could recover. One disadvantage of departing from the common law rule is that a discharged employee might contrive a "whistle-blowing" defense and at least get into court in a retaliatory discharge action. Judge Ratliff would extend the public policy exception to the at will rule, but he concurred in the result because the depositions and affidavits submitted in support of the motions for summary judgment show that Campbell was not a victim of a retaliatory discharge.¹⁸³

Although Judge Ratliff's view may be becoming more acceptable in other jurisdictions, it clearly does not prevail in Indiana. Thus, the at will employee who wishes to blow the whistle does so at the risk of having to find new employment with no protection available under Indiana law.

¹⁷⁷413 N.E.2d at 1063.

¹⁷⁸*Id.* at 1066.

¹⁷⁹*Id.* at 1066-67. See *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977).

¹⁸⁰413 N.E.2d at 1067. See generally Comment, *Protecting the Private Sector at Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777, 787-88.

¹⁸¹21 U.S.C. §§ 301-392 (1976).

¹⁸²413 N.E.2d at 1067 n.5.

¹⁸³*Id.* at 1067-68. In fact, Campbell's complaint smacked of the irresponsible whistle blower whom no court or commentator feels should be protected. He repeatedly suggested that he was entitled to a reward of \$200,000,000. *Id.* at 1068 n.6.

G. Intercorporate Relations

In *Ross v. Tavel*,¹⁸⁴ an officer-shareholder's involvement in winding up the affairs of two corporations precluded his attack on the transactions as a minority shareholder. *Ross* affirmed a judgment of the Marion County Superior Court denying the plaintiff's claim for profits of the enterprise and in funds transferred from one corporation to another where the ownership interests in the two corporations were the same.

As was the case in *Kincaid v. Lazar*,¹⁸⁵ the business arrangements were not well thought out although at least there was an agreement. As a consequence, *Ross* found himself with only a twenty percent share interest and the right to one-third of the profits of one corporation and only a twenty percent share interest in the second. He then unwisely agreed to change the arrangement to acquire one-third of the shares of both corporations. Unwisely because he gave up his right to one-third of the profits and now was attempting to recover profits earned while the business was financially healthy.¹⁸⁶ He was now unhappy, but unfortunately for him he had agreed to the changed relationship and so really could not complain when it turned out to his disadvantage.

Ross attacked the new arrangement for lack of consideration, alleging that neither the corporation nor one of the individual defendants had the authority to transfer shares that had been issued in his childrens' names. This argument fell before the provision of the Indiana Uniform Gifts to Minors Act which permitted the individual defendant as the custodian to transfer, sell, or dispose of the shares.¹⁸⁷ Only the children would have standing to complain if they were wrongfully divested of their shares.¹⁸⁸ He also argued that the transfer of the childrens' shares was not valid because the shares were not endorsed as required by the corporate bylaws. This attack was rejected because the shares were transferred to him upon delivery, and he had a right to have the necessary endorsement supplied under the Indiana Uniform Commercial Code.¹⁸⁹

Ross also complained, as a minority shareholder, that the controlling shareholders' diversion of the assets of one corporation to the other, and subsequently to a third corporation they controlled which had lent funds to the enterprise, was fraudulent and in

¹⁸⁴418 N.E.2d 297 (Ind. Ct. App. 1981).

¹⁸⁵405 N.E.2d 615 (Ind. Ct. App. 1980) *discussed in* text accompanying note 145 *supra*.

¹⁸⁶418 N.E.2d at 300-01.

¹⁸⁷IND. CODE § 30-2-8-4(f) (1976 & Supp. 1981).

¹⁸⁸418 N.E.2d at 302.

¹⁸⁹*Id.*; IND. CODE § 26-1-8-307 (1976).

derogation of their fiduciary duties of good faith and fair dealing.¹⁹⁰ This attack also failed. Even if the transfer of funds was a sham designed to channel funds to the third corporation, the court concluded that Ross had been president of the two corporations and privy to the arrangement which had been designed to maximize tax benefits. Again he could not rightly complain.¹⁹¹

It is well settled that improper manipulation of funds or wrongful diversion of corporate assets by controlling shareholders creates a cause of action in favor of the corporation which can be enforced in a derivative suit.¹⁹² It is also well settled that Indiana recognizes the principle of "incorporated partnerships" imposing on shareholders of closely held corporations fiduciary duties akin to those of partners.¹⁹³ Ross' complaint would have to sound in equity¹⁹⁴ and if he participated in the wrongful transfer, equity would not permit him to recover in a shareholder derivative action.¹⁹⁵ Of course, all this was much ado about nothing because the court concluded that the transfer of funds was proper.¹⁹⁶

H. Statutory Developments

The first statutory development during the survey period of particular interest to corporate officers and directors is Public Law 211¹⁹⁷ which amended the provisions in the Indiana General Corporation Act¹⁹⁸ and the Indiana Not-For-Profit Corporation Act¹⁹⁹ relating to the indemnification of corporate personnel against expenses incurred in defending liability claims. The new language authorizes for profit and not-for-profit corporations to advance the litigation ex-

¹⁹⁰418 N.E.2d at 303-04.

¹⁹¹*Id.* at 304.

¹⁹²13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5924 (rev. perm. ed. 1980); HENN, *supra* note 152 §§ 358, 360; HORNSTEIN, *supra* note 153, §§ 711, 716.

¹⁹³Cressy v. Shannon Continental Corp., 378 N.E.2d 941, 945 (Ind. Ct. App. 1978); Hartung v. Architects Hartung/Odle/Burke, Inc., 157 Ind. App. 546, 552, 301 N.E.2d 240, 243 (1973). See generally 1979 Survey, *supra* note 62, at 150-55; Galanti, *Business Associations, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 24, 42-46 (1974) [hereinafter cited as 1974 Survey].

¹⁹⁴418 N.E.2d at 304.

¹⁹⁵*Id.* Epperly v. E & P Brake Bonding, Inc., 169 Ind. App. 224, 236, 348 N.E.2d 75, 82 (1976). Even the corporation would be barred from suit if all the shareholders participated in the wrong. Gabhart v. Gabhart, 267 Ind. 370, 391, 370 N.E.2d 345, 357 (1977).

¹⁹⁶418 N.E.2d at 303. The court also refused to let Ross reassert claims that had been satisfied and settled when the parties wound up the affairs of the corporations. *Id.* at 305.

¹⁹⁷Act of April 15, 1981, Pub. L. No. 211, 1981 Ind. Acts 1610.

¹⁹⁸IND. CODE § 23-1-2-2(b)(9) (Supp. 1981).

¹⁹⁹*Id.* § 23-7-1.1-4(b)(9).

penses of corporate personnel before an action, suit, or proceeding is disposed of upon receipt of an undertaking by or on behalf of the defendant to repay the amount advanced if it is subsequently determined that he is not entitled to indemnification.²⁰⁰

It can be argued that broad corporate power to indemnify corporate personnel and to purchase director and officer insurance may reduce care in the exercise of the corporate office. However, when suits against corporate officers and directors are becoming more common, the areas of potential liability are expanding, and the costs of such litigation are escalating, most would agree that corporate personnel should have some protection against personal risk.²⁰¹ This need is emphasized by the now almost conventional wisdom that publicly held corporations should have broad-based boards of directors that include persons representing a variety of viewpoints.²⁰²

The most interesting thing about Public Law 211 is that once again the General Assembly apparently did not look beyond the immediate statutes involved to see if any other statute should be similarly amended. The General Assembly seems to have done the exact opposite of what was done in 1973 and 1974 when the indemnification of corporate personnel was last considered. In 1973, the General Assembly expanded the authority of Indiana general corporations and Indiana insurance companies to indemnify corporate personnel and authorized them to purchase and maintain liability insurance for their employees.²⁰³ The General Assembly, however, did not grant an indemnification power to Indiana not-for-profit corporations until 1974.²⁰⁴ Presumably this was just an oversight because if corporate personnel of general or insurance corporations are entitled to indemnification and liability insurance, so are their counterparts in not-for-profit corporations. In 1981, the General Assembly amended the Indiana General Corporation Act and the Indiana Not-For-Profit Corporation Act but not the Indiana insurance law. Certainly, if it is

²⁰⁰Unfortunately the general assembly did not specify who will make the ultimate determination. A court presumably could make the determination, but a decision by directors not a party to the actions, a litigation committee of the board of directors, special legal counsel or the shareholders would probably suffice. *See, e.g.*, Model Act, *supra* note 153, § 5.

²⁰¹*See generally* ABA Committee of Corporate Laws, *Changes in the Model Business Corporation Act Affecting Indemnification of Corporate Personnel*, 36 BUS. LAW. 99, 101-02 (1980).

²⁰²*Id.* at 102.

²⁰³IND. CODE §§ 23-1-2-2(b)(9) to -2(b)(10) (1976) (General Corporation Act); *id.* §§ 27-1-7-2(b)(8) to -2(b)(9) (Insurance Law). *See generally* Galanti, *Corporations, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 77, 103-09 (1973) [hereinafter cited as *1973 Survey*].

²⁰⁴IND. CODE §§ 23-7-1.1-4(b)(9) to -4(b)(10) (1976). *See generally* 1974 Survey, *supra* note 193, at 54-59.

appropriate to advance the expenses of corporate personnel of general or not-for-profit corporations, it is equally appropriate to advance the expenses of corporate personnel of insurance companies. Presumably, this oversight will be remedied in the next session of the General Assembly.

Surprisingly, the General Assembly does not seem to have considered the new indemnification provision contained in section 5 of the Model Business Corporation Act.²⁰⁵ Substantial changes to this provision of the Model Act were adopted by the American Bar Association Committee on Corporate Laws on June 20, 1980.²⁰⁶ The new Model Act provision appears very workable. It provides appropriate protection to corporate personnel in meritorious cases while limiting the potential for abuse. Thus, the 1981 session of the General Assembly would have been an appropriate time to consider a major revision of the three indemnification provisions in the Indiana Code.

Public Law 212²⁰⁷ is of interest to persons who practice as or who represent one-person professional corporations. The Act established procedures to be followed when the sole professional dies or is no longer qualified to be a shareholder. It added new sections to the four Indiana Professional Corporation Acts that provide that when a shareholder dies or becomes disqualified, "the disqualified shareholder or the personal representative of the deceased shareholder may: (1) exercise voting rights of the outstanding shares; (2) serve as a director of the corporation; and (3) serve as an officer of the corporation as appropriate for the sole purpose of dissolving the corporation . . ." ²⁰⁸ This power probably could have been implied under the Acts, but it is sensible to specify clearly that steps can be taken by an unqualified shareholder or a personal representative to dissolve a professional corporation. The alternative is for the corporation to cease filing annual reports and wait for the inevitable revocation of the articles of incorporation by the Secretary of State's office after the lapse of two years. This "informal dissolution" is certainly not a procedure to be encouraged.²⁰⁹

²⁰⁵Model Act, *supra* note 153, § 5.

²⁰⁶ABA Committee on Corporate Laws, *Changes in the Model Business Corporation Act Affecting Indemnification of Corporate Personnel*, 36 BUS. LAW. 99-118 (1980). The initial revision to section 5 was proposed in 1979. ABA Committee of Corporate Laws, *Changes in the Model Business Corporation Act Affecting Indemnification of Corporate Personnel*, 34 BUS. LAW. 1595 (1979).

²⁰⁷Act of May 5, 1981, Pub. L. No. 212, 1981 Ind. Acts 1615.

²⁰⁸IND. CODE § 23-1-13-12 (Supp. 1981) (General Professional Corporation Act); *id.* § 23-1-13.5-7 (Professional Accounting Corporation Act); *id.* § 23-1-14-22 (Professional Medical Corporation Act); *id.* § 23-1-15-22 (Professional Dental Corporation Act).

²⁰⁹The Secretary of State probably is authorized to certify such a corporation to the Attorney General for appropriate action to dissolve. IND. CODE §§ 23-1-13-11, -14-17, -15-17 (1976).

Public Law 212 also expanded the scope of the Indiana Medical Professional Corporation Act²¹⁰ by authorizing optometrists, dentists, podiatrists, and pharmacists as well as licensed physicians to organize such corporations. Because dentists have the statutory authority to form professional dental corporations under the Indiana Professional Dental Corporation Act,²¹¹ and the other health care professionals could form separate professional corporations under the Indiana General Professional Corporation Act,²¹² the General Assembly apparently intended that members of the different professions can incorporate and operate as one facility.

Another change effected by Public Law 212, and one of questionable wisdom, was the amendment of section 23-1-2-3 of the Indiana General Corporation Act²¹³ which authorizes a corporation to purchase or otherwise acquire its own shares. Before it was amended, section 23-1-2-3 was identical to the pre-1979 version of section 6 of the Model Business Corporation Act.²¹⁴ The provision permits the acquisition of shares only to the extent of unreserved and unrestricted earned surplus or, under some circumstances, unreserved and unrestricted capital surplus.²¹⁵ The purpose of these and other restrictions such as the last sentence of section 23-1-2-3 which provides that "no purchase of or payment for its own shares shall be made at a time when the corporation is insolvent or when such purchase or payment would make it insolvent" are generally intended to protect the interests of creditors. The final proviso is, in fact, inherent in the corporate form itself: The owner of a corporation should not prefer himself to the disadvantage of corporate creditors.²¹⁶

The protection afforded by this provision has been undercut by the amendment which added a new provision that nothing in the General Corporation Act shall "invalidate or otherwise affect a note, debenture or other obligation of a corporation" issued by it for a

²¹⁰IND. CODE §§ 23-1-14-1 to -22 (1976 & Supp. 1981).

²¹¹*Id.* §§ 23-1-15-1 to -22.

²¹²*Id.* §§ 23-1-13-1 to -12.

²¹³*Id.* § 23-1-2-3.

²¹⁴Model Act, *supra* note 153, § 6.

²¹⁵Shares can be purchased from capital surplus if permitted in the articles of incorporation or approved by a vote of at least a majority of the corporation's shares.

²¹⁶*See generally* Model Act, *supra* note 153, § 6, ¶ 2 at 253. The drafters of the Model Act apparently have now decided that creditors do not need any statutory protection and should fend for themselves. The current version of section 45 of the Model Act specifically provides that: "Indebtedness of a corporation incurred or issued to a shareholder in a distribution . . . [including a redemption] shall be on a parity with indebtedness of the corporation to its general unsecured creditors except to the extent subordinated by agreement." *See* ABA Committee on Corporate Laws, *Changes in the Model Business Corporation Act—Amendments to Financial Provisions*, 34 BUS. LAW. 1867, 1872, 1886 (1979).

share reacquisition if at the time the obligation was delivered the corporation's unreserved and unrestricted earned surplus, or the unreserved and unrestricted capital surplus as the case may be, equalled or exceeded "the amount of such note, debenture or obligation."²¹⁷

It is possible that the new language may prevent the subordination of claims of former shareholders to the legitimate claims of creditors. This will be unfortunate because unsecured corporate creditors who do not have subordination agreements have little enough protection as it is.²¹⁸ Courts have been reluctant to favor former shareholders over creditors²¹⁹ particularly if there has been fraud or overreaching. On its face, the new provision that a note to a former shareholder is not invalidated by a subsequent bankruptcy would seem to favor a dishonest former shareholder over innocent creditors. It is to be hoped that Indiana courts in construing amended section 23-1-2-3 will not reach such an unjust result and would still subordinate claims when there is evidence of fraud or overreaching.

Admittedly, the new provision will make it easier for small corporations to repurchase shares on an installment basis if shareholders no longer need fear inferior status. Of course, creditors might well become frustrated and either insist on subordination agreements or simply decline to extend extra credit.²²⁰

There is something commendable about efforts to simplify corporate procedures, particularly as to notices and other documents that must be filed with the Secretary of State, but Public Law 213²²¹ probably went too far. Among other things it amended numerous sections of the Indiana General Corporation Act and the Indiana Not-For-Profit Corporation Act by substituting the requirement that notices and other documents be "signed by any current officer of the corporation and verified and affirmed subject to penalties for injury," for the previous requirement that notices or documents be "signed and verified under oath by its president or a vice president and its secretary or an assistant secretary."

The traditional two signature requirement has the advantage of reducing the chance that an officer will exceed his or her authority.

²¹⁷IND. CODE § 23-1-2-3 (Supp. 1981). See also CONN. GEN. STAT. ANN. § 33-358 (West Supp. 1981); DEL. CODE ANN. tit. 8, §§ 610, 612 (1974).

²¹⁸See generally 10 LOY. L.A.L. REV. 254 (1976).

²¹⁹See, e.g., *Robinson v. Wangemann*, 75 F.2d 756, 757 (5th Cir. 1935); but see *Williams v. Nevelow*, 513 S.W.2d 535, 537-38 (Tex. 1974).

²²⁰See *In re National Tile & Terrazzo Co.*, 537 F.2d 329, 333 (9th Cir. 1976) (Goodwin, J., dissenting).

²²¹Act of April 16, 1981, Pub. L. No. 213, 1981 Ind. Acts 1620. Certain minor housekeeping amendments were made by Public Law 213. See, e.g., IND. CODE § 23-1-11-6 (Supp. 1981).

However, because it is now possible to have an Indiana corporation with one director regardless of the number of shareholders,²²² there is probably no reason for requiring the president and the secretary of a corporation to execute such routine forms as, for example, a certificate changing the resident agent or principal office of a corporation²²³ or even articles of amendment or amended articles of incorporation.²²⁴

It appears that the General Assembly got carried away with its simplifying bent. Even assuming that articles of merger or consolidation are routine documents that do not need two signatures as a practical matter,²²⁵ one may well question the wisdom of permitting any corporate officer to execute the *agreement* of merger or consolidation which is the document setting out the terms of the transaction. This is now permitted under the General Corporation and Not-For-Profit Corporation Acts as amended by Public Law 213.²²⁶ In fact it is no longer necessary to affix the corporate seals of the merging or consolidating corporations to the agreement.

This newly authorized procedure may not cause any problems with mergers or consolidations of Indiana corporations. It is conceivable, however, that officials in other jurisdictions where a copy of the agreement has to be filed might question the validity of an agreement of merger or consolidation which bears the signature of only one officer and no corporate seal. Cautious corporate attorneys will probably avoid potential problems by having merger or consolidation agreements attested to by the secretary or an assistant secretary and by affixing the corporate seal.

It is possible that the General Assembly did not really intend to change the long established procedure for executing corporate agreements but inadvertently amended the provisions because the language was similar to the language pertaining to executing forms filed with the Secretary of State. If the change was simply a case of legislative momentum, the relevant sections of the Acts²²⁷ should be amended again during the next session.

Public Law 213 made other changes to Indiana corporation statutes. Annual reports of all corporations, general or not-for-profit, domestic or foreign, must now contain "a statement of whether the

²²²IND. CODE § 23-1-2-11(b) (Supp. 1981).

²²³*Id.* § 23-1-2-5.

²²⁴*Id.* § 23-1-4-5. Delaware still requires two signatures. DEL. CODE ANN. tit. 8, § 103(a)(2) (1974).

²²⁵IND. CODE §§ 23-1-5-2(f), -3(3), -7-1.1-42(e) (Supp. 1981).

²²⁶*Id.* This procedure might make more sense for short form mergers where a parent can merge a ninety-five percent owned subsidiary into itself without shareholder approval. *Id.* § 23-1-5-8.

²²⁷*Id.* §§ 23-1-5-2(f), -3(e), -8, -7-1.1-42(e) (Supp. 1981).

corporation is the holder of any funds or other property, tangible or intangible, which may be presumed abandoned pursuant to the provisions"²²⁸ of the Indiana Uniform Disposition of Unclaimed Profits Act.²²⁹

Public Law 213 also clarified the procedures for forfeiting the articles of incorporation of domestic and certificates of admission of foreign corporations that have not filed annual reports for two consecutive years by requiring the Attorney General to proceed against them "upon certification of such fact by the Secretary of State."²³⁰ The procedures for the Secretary of State's administrative revocation of the rights and privileges of domestic²³¹ and foreign²³² corporations failing to file annual reports were also revised.

Finally, Public Law 213 made some changes in the Indiana Medical Professional Corporation and Dental Professional Corporation Acts by requiring the incorporators to obtain a certificate of registration from the applicable regulatory board and to present it to the Secretary of State before he can issue the certificate of incorporation.²³³ Unfortunately, the amendments to section 23-1-14-8 of the Medical Professional Corporation Act do not reflect the changes effected by Public Law 212 permitting optometrists, dentists, podia-

²²⁸*Id.* §§ 23-1-8-1(7), -11-7(14), -3-4-1(a)(7), -7-1.1-36(m).

²²⁹*Id.* §§ 32-9-1-1 to -45.

²³⁰*Id.* § 23-1-10-1(b).

²³¹*Id.* § 23-3-4-1(c)(1). For domestic corporations the Secretary of State must give 30 days notice by first class mail addressed to the resident agent at his last address on file, or to the last known address of the corporation if no address of the resident agent is on file. If the required filings are not made within 30 days, the Secretary of State must publish notice in a newspaper of general circulation in the county in which the corporation's principal office is located. The Secretary of State is required to revoke the rights and privileges and declare forfeited the articles of incorporation of a domestic corporation which fails to file the reports within the 30 days following the required publication. *Id.*

²³²*Id.* § 23-3-4-1(c)(2). For foreign corporations, the Secretary of State must give 30 days notice by first class mail addressed to the resident agent at his last address on file, or at the last known address of the corporation outside the state if no address of the resident agent is on file. If the required filings are not made within 30 days, a second notice must be sent by first class mail to the last known address of the corporation outside the state. If the required filings are not made within 30 days of the second mail notice then the Secretary of State is required to revoke the rights and privileges and declare forfeited the certificate of admission of the non-complying foreign corporation. *Id.*

²³³*Id.* § 23-1-14-8 (Medical Professional Corporations Act), § 23-1-15-8 (Dental Professional Corporations Act). A medical professional corporation must now file certified copies of its articles of incorporation, amendments to articles of incorporation, and all articles of mergers with the regulating board. *Id.* § 23-1-14-20. For some reason section 23-1-15-20 pertaining to dental professional corporations was not similarly amended. *Id.* § 23-1-15-20.

trists, and pharmacists to organize as medical professional corporations.²³⁴

The General Assembly in Public Law 214²³⁵ deleted as an *exception* from the definition of sales and purchases in the Indiana Securities Act "any act incident to a class vote by stockholders, pursuant to the articles of incorporation or the applicable corporation statute, on recapitalization or reclassification of securities"²³⁶ At the same time it added a new *exemption* from the registration requirements of the Act that covers basically the same type of transactions.²³⁷ The effect of this amendment is that instead of totally exempting such transactions from the Act because they are not within the definition of a sale or purchase, they are now subjected to the antifraud provisions and to the registration provision if the Securities Commissioner decides registration is appropriate. This was a worthwhile change.

The Indiana Business Takeover Offers Act²³⁸ adopted in 1979 was amended in several respects by Public Law 215.²³⁹ Most of the changes seem aimed at insulating the Act from constitutional challenge. The success of this tactic depends entirely on the Supreme Court's resolution of the challenge to the Illinois Takeover Act in *Mite Corp. v. Dixon*.²⁴⁰ If the Illinois statute is upheld, the Indiana Act is valid. If the Illinois Act falls, the Indiana effort will fail. This is true notwithstanding that a self-serving "intent and purpose section" was added to the Act.²⁴¹ The problem with most state takeover

²³⁴Act of May 5, 1981, Pub. L. No. 212, 1981 Ind. Acts 1615.

²³⁵Act of May 6, 1981, Pub. L. No. 214, 1981 Ind. Acts 1683. Certain housekeeping amendments were made to the Indiana Securities Act, IND. CODE §§ 23-2-1-1 to -24 (1976 & Supp. 1981), and certain filing fees were increased by Public Law 214. It also made the failure of a corporate officer or director to send a corporation's most recent annual financial statement to a shareholder within a reasonable time of a request for the statement a Class B infraction. *Id.* § 23-1-10-3(b)(3) (Supp. 1981).

²³⁶IND. CODE § 23-2-1-1(i)(8)(iii) (1976).

²³⁷*Id.* § 23-2-1-2(b)(16) (Supp. 1981). The new language exempts:

[A]ny issuance of securities to or for the benefit of stockholders incident to a vote by such stockholders pursuant to the articles of incorporation or applicable instrument, on a merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of the issuance of securities of the same or another corporation or trust; if the commissioner is notified in writing of all terms of the transaction and does not disallow the exemption with the next five (5) full business days.

²³⁸*Id.* §§ 23-2-3.1-1 to -11 (Supp. 1981). See generally 1979 Survey, *supra* note 62, at 161-72.

²³⁹Act of April 24, 1981, Pub. L. No. 215, 1981 Ind. Acts 1700.

²⁴⁰633 F.2d 486 (7th Cir. 1980), *prob. juris. noted sub nom.* Edgar v. Mite Corp., 101 S.Ct. 2043 (1981).

²⁴¹IND. CODE § 23-2-3.1-0.5 (Supp. 1981). The section provides:

(a) The general assembly finds that it is often difficult for corporate shareholders to obtain sufficient information to make an informed and

statutes is that they tend to display a pro-management tilt that conflicts with the balanced approach to takeovers reflected in the Williams Act.²⁴² This is not surprising because the motivating force behind the state statutes are potential targets of tender offers, not potential offerors. The latter group certainly does not want another layer of regulations applied to their acquisition efforts.

In some respects the amendments reduce the pro-management tilt of the Indiana Act. For example, a general requirement that a tender offer is proper unless after a hearing the Securities Commissioner finds "by a preponderance of the evidence that the takeover statement fails to provide full and fair disclosure to the offerees of all material information concerning the takeover offer" has been substituted for the previous language which authorized the Commissioner to bar a tender offer where he found it was "unfair or inequitable to the holders of the securities of the target company"²⁴³ Thus, the Indiana Act is now a "disclosure" statute that the drafters hope will be compatible with the disclosure philosophy of the Williams Act. Of course, if the philosophies are the same, one might wonder why Indiana has a Takeover Offers Act other than as a means of harassing offerees in order to protect "Hoosier corporations."²⁴⁴

To be fair, it must be noted that an antifraud provision has been added to the Takeover Offers Act²⁴⁵ which would apply to target company management as well as to offerees. In this respect, the Act may be a decided improvement over the Williams Act where a defeated tender offeree has no cause of action for damage against the target company which has made false and misleading statements

timely decision when faced with the questions of accepting or rejecting a takeover offer.

- (b) By enacting this chapter, it is the intent and purpose of the general assembly to provide for full and fair disclosure of all material information concerning takeover offers to shareholders of Indiana corporations, so that the opportunity of each shareholder to make an informed and well-reasoned investment decision may be secured. It is the purpose of the general assembly to provide for adequate disclosure in a manner consistent with the constitutions of the United States and of Indiana.

²⁴²See *Mite Corp. v. Dixon*, 633 F.2d 486, 493-94 (7th Cir. 1980), *prob. juris. noted sub nom. Edgar v. Mite Corp.*, 101 S.Ct. 2043 (1981); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1278-80 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979).

²⁴³IND. CODE. § 23-2-3.1-7(a) (Supp. 1981).

²⁴⁴See notes 117 & 118 *supra*.

²⁴⁵IND. CODE § 23-2-3.1-8.5 (Supp. 1981). This provision is similar to the antifraud provision in the pre-1979 takeover act. IND. CODE § 23-2-3-4 (1976) (repealed 1979).

during the contest.²⁴⁶ This assumes, of course, that a cause of action is implied by the courts. This may be assuming too much.

Certain transactions were excluded from the definitions of takeover offers when the Act was adopted in 1979.²⁴⁷ These exclusions included ordinary brokerage transactions, de minimis offers or acquisitions not exceeding two percent of the class within the preceding twelve months, acquisition of its own shares by a target company, and transactions determined by the Securities Commissioner to be takeover offers not having or intended to have the effect of changing or influencing the control of the target corporation. These exclusions were repealed by Public Law 215 and replaced, except for the brokerage exclusion, by a new provision that exempts the transactions from the substantive requirement of the Act but not the newly adopted antifraud provision.²⁴⁸ Interestingly, the brokerage exclusion which was the basis of the Indiana Court of Appeals decision of *In re City Investing Co.*²⁴⁹ was not carried over.

For a legislature that ostensibly is concerned with shareholder interests, it is somewhat surprising to see that the number of shareholders that will trigger the disclosure requirements of the Act has been increased from fifty to seventy-five.²⁵⁰ The antifraud provision is the only protection these shareholders have under the amended Act.

Tender offers for Indiana insurance companies have been discouraged. Previously such takeover efforts were not subject to the Act if the acquisition required the approval of the Insurance Commissioner. Now, approval by both the Insurance and the Securities Commissioners are required.²⁵¹ Procedures for hearings on a takeover offer were revised by Public Law 215.²⁵² The expenses of any hearings have been placed on the offeror, who may be required to post bond.²⁵³ Five days notice of the hearing on a takeover offer, which hearing must be held within twenty business days of the filing of a disclosure statement, is now required.²⁵⁴ However, the Commis-

²⁴⁶*Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1 (1977). Then again, it may be nothing more than an attempt to bring offerors like City Investing and GDV under the Takeover Offer Act. See text accompanying notes 101-14 *supra*.

²⁴⁷IND. CODE § 23-2-3.1-1(i)(1)-(4) (Supp. 1980) (repealed 1981).

²⁴⁸*Id.* § 23-2-3.1-8.6 (Supp. 1981).

²⁴⁹411 N.E.2d 420 (Ind. Ct. App. 1980). See text accompanying notes 55-114 *supra* for a discussion of *City Investing*.

²⁵⁰*Compare* IND. CODE § 23-2-3.1-1(j)(5) (Supp. 1980) (repealed 1981) *with id.* § 23-2-3.1-8.6(a)(3) (Supp. 1981).

²⁵¹*Compare id.* § 23-2-3.1-1(j)(1) (Supp. 1980) (repealed 1981) *with id.* § 23-2-3.1-7(e) (Supp. 1981).

²⁵²*Id.* §§ 23-2-3.1-7(b) to-7(e) (Supp. 1981).

²⁵³*Id.* § 23-2-3.1-7(c).

²⁵⁴*Id.* §§ 23-2-3.1-7(a) to-7(b).

sioner can now issue ex parte cease and desist orders without notice.²⁵⁵

At least one major problem with the Takeover Offers Act was eliminated by the repeal of section 23-2-3.1-6²⁵⁶ which prohibited takeover offers from becoming effective for at least fifteen business days after the filing of the offeror's statement. This provision was probably in direct conflict with SEC Rule 14d-2(b)²⁵⁷ which requires a tender offer to commence within five day of its public announcement.

The last significant amendment effected by Public Law 215 was the substitution of a new section 23-2-3.1-9(c)²⁵⁸ which now provides "that neither the secretary of state, nor the securities commissioner, nor any employee of the securities division shall be liable in their individual capacity, except to the state of Indiana, for any act done or omitted in connection with the performance of their respected duties" under the the Takeover Offers Act. This provision will take care of damage suits by unhappy tender offerors²⁵⁹ or Indiana shareholders if by some chance opposition by the Securities Commissioner causes an offeror to withdraw a lucrative tender offer.

²⁵⁵*Id.* § 23-2-3.1-10(a).

²⁵⁶IND. CODE § 23-2-3.1-6 (Supp. 1980) (repealed 1981).

²⁵⁷17 C.F.R. § 240.14d-2(b) (1981).

²⁵⁸IND. CODE § 23-2-3.1-9(c) (Supp. 1981).

²⁵⁹*See City Investing Co. v. Simcox*, 633 F.2d 56, 59 n.7 (7th Cir. 1980).