

II. Business Associations

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A. *Liability of Successor Corporations*¹

The impact of a judgment against a predecessor corporation was partially avoided in *Mishawaka Brass Manufacturing, Inc. v. Milwaukee Valve Co.*² *Mishawaka* was a split decision affirming in part and reversing in part a judgment of the St. Joseph County Circuit Court. In proceedings supplemental, the circuit court enforced a Wisconsin judgment obtained by Milwaukee Valve against Mishawaka Brass by holding liable both the Michiana Brass Manufacturing Company and the individual defendant who was the sole shareholder of both Mishawaka and Michiana.³

Mishawaka and the individual defendant entered into a sale and leaseback arrangement after the jury returned a verdict in the Wisconsin suit but before the entry of judgment.⁴ Mishawaka ceased operations and sold its inventory and leasehold improvements to Michiana after the entry of the judgment. Michiana assumed Mishawaka's obligations under the lease with the individual defendant and paid some but not all of its debts.⁵ The trial court concluded that the transfers of assets were not fraudulent, but held both the individual defendant and Michiana liable to the extent that they acquired Mishawaka's assets, because Michiana was a direct continuation of Mishawaka's operation.⁶

The court of appeals affirmed as to Michiana because the record was replete with evidence indicating that Michiana was formed to avoid Mishawaka's "bad name"; consequently, to the court, the two corporations were essentially the same. Although Mishawaka's name was changed

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¹Although technically outside the scope of this survey period, it is worthy to note that the case of *Husted v. McCloud*, 436 N.E.2d 341 (Ind. Ct. App. 1982) was vacated by the Indiana Supreme Court in 450 N.E.2d 491 (Ind. 1983). The Supreme Court held that punitive damages could not be awarded against a partnership for the misconduct of one of its partners. For a full discussion of the supreme court opinion, see Galanti, *Business Associations, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. No. 1 (1985). For a discussion of the vacated court of appeals decision, see Jackson, *Professional Responsibility, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 279 (1982).

²444 N.E.2d 855 (Ind. Ct. App. 1983).

³*Id.* at 858.

⁴*Id.* at 856.

⁵*Id.* at 857.

⁶*Id.* The trial court found insufficient indicia of fraud to show that the transactions were made with the intent to defraud Milwaukee because the individual defendant had testified that he arranged the transactions for business purposes. *Id.* at n.2. A transfer of assets with an intent to defraud is void as to creditors. IND. CODE § 32-2-1-14 (1982).

to Michiana, this change would not relieve Michiana of Mishawaka's debts where the same business was being conducted by the same people in the same offices.⁷ Affirming the judgment against the successor corporation is clearly correct; any other result would permit the easy circumvention of a judgment as long as there was enough evidence to persuade a court that the transfer was not "fraudulent."

In contrast, the court reversed as to the individual defendant.⁸ The reversal was based upon two considerations: (1) the substantial protection against liability for corporate debts accorded shareholders by the Indiana General Corporation Act⁹ and (2) the finding that there was no intent to defraud by the transfer of assets to the individual defendant. The absence of fraudulent intent precluded piercing the "corporate veil" which would clearly be justified with a fraudulent transfer.¹⁰

One member of the court concurred as to the corporation but dissented as to the individual defendant.¹¹ Judge Garrard felt bound by the trial court's findings that Michiana was a duly created separate corporation and that there were insufficient indicia of fraud.¹² This would appear to exonerate the corporation from Mishawaka's liabilities. Judge Garrard, however, used a different theory than the majority and found both defendants liable. He concluded that Indiana Code section 32-2-1-14, which provides that conveyances or assignments "made or suffered with the intent to hinder, delay or defraud creditors or other persons of their lawful damages . . . shall be void as to the persons sought to be defrauded,"¹³ justified holding Michiana and the individual defendant liable. Judge Garrard opined that the evidence clearly supported the inference that the transfer of assets to Michiana and the sale and leaseback arrangement with the individual defendant was done with an intent to hinder and delay Milwaukee Valve, a creditor, in collecting its lawful debt.¹⁴

⁷The court did not cite any direct authority for this proposition. It did cite Annot., 49 A.L.R.3d 881 (1973) and 19 AM. JUR. 2D *Corporations* § 1150 (1965), which support imposing liability on a successor corporation, and referred to the Kentucky case of Payne-Baker Coal Co. v. Butler, 276 Ky. 211, 123 S.W.2d 273 (1938), where the transferor was held liable for the debts of the old corporation, despite some evidence that the transferor had acted in good faith and had paid just and adequate consideration, because the new corporation was for all intents and purposes the old enterprise with a slight name change.

⁸444 N.E.2d at 858.

⁹IND. CODE § 23-1-2-6(h) (1982). See *Bowling v. Holdeman*, 413 N.E.2d 1010 (Ind. Ct. App. 1980); *Birt v. St. Mary Mercy Hosp.*, 175 Ind. App. 32, 370 N.E.2d 379 (1977). See generally H. HENN, *LAW OF CORPORATIONS* § 146 (3d ed. 1983) [hereinafter cited as HENN].

¹⁰IND. CODE § 32-2-1-14 (1982). See *Coak v. Rebber*, 425 N.E.2d 197, 199 (Ind. Ct. App. 1981).

¹¹444 N.E.2d at 858 (Garrard, J., concurring and dissenting).

¹²*Id.*

¹³IND. CODE § 32-2-1-14 (1982).

¹⁴444 N.E.2d at 859 (Garrard, J., concurring and dissenting). The burden is clearly on the person challenging a conveyance as being fraudulent. *Kourlias v. Hawkins*, 153 Ind. App. 411, 287 N.E.2d 764 (1972).

The problem with this approach is that section 32-2-1-14 as a whole seems to require more than just an intent to hinder or delay the collection of a lawful debt if for no other reason than the final reference to the "persons sought to be *defrauded*." This reference would seem to require a greater showing than if the statutory reference was to "the creditors or other persons" or to "the persons sought to be hindered, delayed or defrauded." An effort to hinder or delay not amounting to fraud would not seem to justify voiding an otherwise lawful conveyance.¹⁵ The majority's approach, however, protects a judgment creditor against most efforts to avoid a judgment when the debtor business is carried on by a nearly identical operation. At the same time, the limited liability status of shareholders is still honored.

Perhaps the problem with *Mishawaka* is the findings. The finding that there were insufficient indicia of fraud surrounding the transactions precludes the circuit court's judgment that the individual defendant was liable.¹⁶ It is possible that the majority questioned the finding concerning fraud but could not conclude it was clearly erroneous. Thus, recourse to the "successor" business theory was made by the court in order to hold Michiana liable. The dissenting judge, on the other hand, might have been willing to read section 32-2-1-14 too broadly with the consequence of holding both Michiana *and* the individual defendant liable despite insufficient evidence to support a finding that both transactions were fraudulent conveyances.

B. Appointment of Receivers

The propriety of appointing a receiver for a corporation suffering internal dissension was raised in *Crippin Printing Corp. v. Abel*.¹⁷ The *Abel* court reversed and vacated an order of the Marion County Superior Court appointing a receiver pendente lite in a shareholder's suit to dissolve the corporation.¹⁸ The complaining shareholder requested the appointment of a receiver on two grounds: (1) "an irreconcilable stockholder deadlock causing irreparable injury and damage to the corporation," and (2) "the corporation's actual, or imminent danger of, insolvency."¹⁹ The trial court made several findings of fact to the effect that an irreconcilable dispute among the shareholders was deadlocking management of the business and producing the prospect of irreparable harm to the corporation, and, con-

¹⁵The question of fraudulent intent is, by statute, deemed to be a question of fact. IND. CODE § 32-2-1-18 (1982).

¹⁶There is no question that a shareholder stripping a corporation of assets may be held personally liable on a judgment against the corporation, *see generally* HENN, *supra* note 9, § 151, at 268, but the situation in *Mishawaka* would not seem to be an effort that could be characterized as a fraudulent stripping of assets.

¹⁷441 N.E.2d 1002 (Ind. Ct. App. 1982).

¹⁸*Id.* at 1008.

¹⁹*Id.* at 1003.

sequently, that a receiver was necessary to protect the corporation's assets and the shareholders' interests.²⁰

On appeal, the corporation sought to overturn the appointment of the receiver on two grounds. The first ground was that the complaining shareholder lacked standing to seek relief.²¹ The essence of the argument was that Abel, as a party to a share purchase agreement obligating him to sell his shares upon the termination of his employment with Crippin, lost his shareholder status and resultant standing as soon as he was discharged by the corporation.²² The court, in rejecting this contention, held that Abel had standing because he was a shareholder of record.²³ Challenging Abel's standing might appear specious, but the corporation's argument was actually rather ingenious. Of course, ingenuity does not necessarily carry the day and the *Abel* court was correct in rejecting the contention.

The corporation argued that *State ex rel. Breger v. Rusche*²⁴ and *Doss v. Yingling*²⁵ supported its contention that Abel lacked standing.²⁶ As the court pointed out, however, *Breger* actually aided Abel because the *Breger* court noted that, as a general rule, corporate officers " 'can look no further than the legal title, as disclosed by the records of the corporation, in determining who is entitled to vote' " at a shareholder meeting.²⁷ This rule is codified in the Indiana General Corporation Act provision which states that a voting shareholder is entitled to "one (1) vote for each share of stock standing in his name on the books of the corporation."²⁸ The rule is also well settled in other jurisdictions.²⁹ The wisdom of the rule is self-evident. If a corporation is forced to look behind record ownership and determine, for example, beneficial ownership of securities, chaos could well reign at shareholder meetings.³⁰ Nor does *Doss v. Yingling* support

²⁰*Id.* at 1003-04.

²¹*Id.* at 1004.

²²*Id.*

²³*Id.* at 1005. See IND. CODE § 23-1-1-1(f) (1982), providing that "[t]he term 'shareholder' means one who is a holder of record of shares of stock in a corporation, unless the context otherwise requires."

²⁴219 Ind. 559, 39 N.E.2d 433 (1942).

²⁵95 Ind. App. 494, 172 N.E. 801 (1930).

²⁶441 N.E.2d at 1004.

²⁷*Id.* (quoting *State ex rel. Breger v. Rusche*, 219 Ind. 559, 562, 39 N.E.2d 433, 435 (1942)).

²⁸IND. CODE § 23-1-2-9(e) (1982). See also *Grothe v. Herschbach*, 153 Ind. App. 224, 286 N.E.2d 868 (1972).

²⁹See, e.g., *Salgo v. Matthews*, 497 S.W.2d 620, 628-30 (Tex. Civ. App. 1973). See generally HENN, *supra* note 9, § 191, at 374; 2 G. HORNSTEIN, CORPORATION LAW & PRACTICE §§ 543-44 (1959) [hereinafter cited as HORNSTEIN].

³⁰Of course, a beneficial owner does have rights against the record owner vis-a-vis voting. For example, the Indiana General Corporation Act specifically provides that a person acquiring title to shares after the record date set for a meeting is "entitled to receive from the shareholder of record a proxy, with power of substitution, to vote" the shares. IND. CODE § 23-1-2-9(e) (1982).

the corporation's attack on Abel's standing. As the *Abel* court indicated, *Doss* involved the propriety of injunctive relief to prevent a shareholder from selling stock in violation of a share purchase agreement; it did not involve the standing of a shareholder of record to bring suit against the corporation.³¹

Crippin's second ground for attacking the appointment of the receiver was that the trial court's action was an abuse of discretion.³² This contention was successful. The court of appeals recognized that the scope of review of an interlocutory order appointing a receiver was limited,³³ that the appropriate standard of review is for "abuse of discretion,"³⁴ and that a reversal is warranted only upon a clear abuse of discretion to the prejudice of the complaining party.³⁵ On the other hand, the court observed that the appointment of a receiver is "an extraordinary and drastic remedy"³⁶ in that it affects property rights. Consequently, receivership statutes are strictly construed.³⁷ With these two somewhat contradictory standards in mind, the *Abel* court held that the trial court erred in appointing the receiver.³⁸ Abel sought the receiver, in part, on the basis of section 34-1-12-1(5) of the Indiana Code of Civil Procedure, which authorizes the appointment of a receiver pendente lite when a corporation "is insolvent, or is in imminent danger of insolvency."³⁹ Insolvency has been defined as "the 'state of a person who is unable to pay his debts as they fall due in the usual course of trade or business.'"⁴⁰ Although the trial court found that without a proposed loan the corporation "would have difficulty continuing its normal operations,"⁴¹ this could not and did not constitute a finding that the corporation was insolvent or in imminent danger of insolvency.⁴²

The trial court demonstrated doubt about the sufficiency of the general receivership statute by acknowledging it was appointing the receiver pursuant to section 23-1-7-3(a)(5) of the Indiana General Corporation Act.⁴³

³¹441 N.E.2d at 1004. The defendant in *Doss* attempted to moot the case by transferring some of his shares. This ploy was unsuccessful because he retained the majority of his shares. 95 Ind. App. at 505, 172 N.E. at 804.

³²441 N.E.2d at 1004.

³³*Id.* at 1005 (citing *McKinley v. Long*, 227 Ind. 639, 88 N.E.2d 382 (1949)).

³⁴441 N.E. 2d at 1005 (citing *United States Aircraft Financing, Inc. v. Jankovich*, 173 Ind. App. 644, 365 N.E.2d 783 (1977)).

³⁵441 N.E.2d at 1005 (citing *Mead v. Burk*, 156 Ind. 577, 60 N.E. 338 (1901)).

³⁶441 N.E.2d at 1005.

³⁷*See State ex rel. Makar v. St. Joseph County Cir. Ct.*, 242 Ind. 339, 347, 179 N.E.2d 285, 289-90 (1962).

³⁸441 N.E.2d at 1005.

³⁹IND. CODE § 34-1-12-1(5) (1982).

⁴⁰441 N.E.2d at 1005 (quoting *Chicago & S.E. Ry. v. Kenney*, 159 Ind. 72, 80, 62 N.E. 26, 28 (1901)).

⁴¹441 N.E.2d at 1005.

⁴²*Id.* at 1005-06.

⁴³IND. CODE § 23-1-7-3(a)(5) (1982).

This section permits the involuntary dissolution of a corporation where the "shareholders or directors are deadlocked in the management of the corporate affairs and the corporation is suffering, or is about to suffer, irreparable injury by reason thereof."⁴⁴ The statute further provides that the court having jurisdiction over an involuntary dissolution proceeding has "full power to appoint a receiver or receivers,"⁴⁵ and that the receiver "shall, under the supervision of the court, proceed with the liquidation of the affairs of the corporation in the same manner required of directors in liquidating the affairs of a corporation being voluntarily dissolved."⁴⁶

The *Abel* court construed the dissolution statute to require a trial on the merits to determine whether an involuntary dissolution is justified before a receiver can be appointed.⁴⁷ That is not an unreasonable construction of the provision, but it might be too narrow. It is equally possible that the Legislature intended to give the courts authority to appoint receivers once the petition for dissolution has been filed. Admittedly, the Act is not as clear as section 98 of the Model Business Corporation Act which specifies that a receiver pendente lite can be appointed during a liquidation proceeding.⁴⁸ The Indiana Supreme Court, however, has recognized a judicial power to appoint a receiver to temporarily suspend activities of corporate officers where necessary to protect the corporation and minority shareholders.⁴⁹ Even the cases holding that mere dissension will not justify appointing a receiver where the corporation was solvent and prosperous do not appear to preclude a receiver pendente lite before a trial on the merits.⁵⁰ Further, in *Dynamite Drugs, Inc. v. Kerch*,⁵¹ the Indiana Supreme Court upheld an order appointing a temporary receiver to manage and conserve assets of a closely held corporation because of the shareholders' irreconcilable differences even though there was no indication that the corporation was to be dissolved.

As Professor Hornstein asserts, a liquidating receiver is one appointed to effect a final decree dissolving a corporation and is to be "distinguished from a 'temporary receiver' who may be appointed at any stage in a proceeding under every court's inherent power to grant any provisional remedy deemed desirable to preserve property *sub judice*."⁵² Appointing a receiver

⁴⁴*Id.*

⁴⁵*Id.* § 23-1-7-3(b).

⁴⁶*Id.* For the appropriate procedures see *id.* § 23-1-7-1(b)(3).

⁴⁷441 N.E.2d at 1006. In *Abel*, the appropriateness of dissolution would depend upon the court's evaluation of the effect of the alleged deadlock in the corporate management.

⁴⁸MODEL BUSINESS CORP. ACT § 98 (1971).

⁴⁹*Tri-City Elec. Serv. Co. v. Jarvis*, 206 Ind. 5, 185 N.E. 136 (1933).

⁵⁰*See, e.g., Indianapolis Dairymen's Coop. v. Bottema*, 226 Ind. 237, 79 N.E.2d 399 (1948).

⁵¹212 Ind. 568, 10 N.E.2d 624 (1937).

⁵²HORNSTEIN, *supra* note 29, § 826, at 374. *See also* *Wollman v. Littman*, 35 A.D.2d 935, 316 N.Y.S.2d 526 (1970) (appointment of receiver to run a business until two shareholders suits resolved on merits).

before a determination of deadlock is actually desirable, assuming that the authority is exercised sparingly,⁵³ because it might prevent a corporation that is suffering internal disputes from in fact becoming insolvent or in imminent danger of insolvency. This would protect the interests of creditors⁵⁴ as well as shareholders.

It is possible, of course, that the *Abel* court was simply deciding the case on the merits; that is, that there was no deadlock threatening the business of the corporation.⁵⁵ Although the trial court found an irreconcilable dispute among the shareholders that constituted a present danger to the business, the court of appeals found that this dispute did not constitute a deadlock because three of the four directors' votes were against Abel.⁵⁶ Similarly, the court of appeals could not find a shareholder deadlock because there were no difficulties at the last annual meeting of the corporation and the time for the next annual meeting had not yet arrived. Furthermore, although Abel had attempted to call a special shareholder meeting, no meeting actually occurred where there had been a shareholder deadlock on any issue.⁵⁷ Nevertheless, Abel did own fifty percent of the shares of the corporation, which could support an inference that a shareholder deadlock was in the making.⁵⁸ The court concluded that a potential or even probable shareholder deadlock does not support the appointment of a receiver *pendente lite*. A receiver should be appointed only when there is dissension between equal shareholders creating a present danger of dissipation of corporate assets.⁵⁹

It is possible to wonder why the court did not perceive both dissension between two sets of shareholders and a present danger to the corporation. It was distinctly possible that the next annual meeting of the shareholders would result in a deadlock on the election of directors. Abel

⁵³*Compare* Indianapolis Brewing Co. v. Bingham, 226 Ind. 137, 78 N.E.2d 432 (1948) (affirming as within trial court discretion the appointment of a receiver before a trial on the issue of whether the defendant corporation was in imminent danger of insolvency) *with* Lafayette Realty Corp. v. Moller, 247 Ind. 433, 438, 215 N.E.2d 859, 861 (1966) (reversing appointment of receiver and stating appointment of receiver is only appropriate if no other remedy is available because "[a] receivership as a rule results in a disruption of the business, if not a termination of the same").

⁵⁴It is appropriate to appoint a receiver for a dissolved corporation under the fifth paragraph of section 34-1-12-1 of the Indiana Code until the merits of an asserted creditor's claim can be judicially resolved. *Seaney v. Ayres*, 135 Ind. App. 585, 595, 189 N.E.2d 826, 830 (1963).

⁵⁵The court also examined, but rejected, the third and seventh paragraphs of section 34-1-12-1 of the Indiana Code, the receiver statute, in making its conclusion. 441 N.E.2d at 1006. The third paragraph authorizes the appointment of a receiver when property, funds, etc. may be materially injured. The seventh paragraph authorizes the appointment when necessary to secure ample justice to the parties.

⁵⁶441 N.E.2d at 1006.

⁵⁷*Id.*

⁵⁸*Id.* at 1006-07.

⁵⁹*Id.* at 1007.

presumably would not vote the fifty percent of the shares he owned for the re-election of the three directors who removed him from office. Under the Indiana General Corporation Act, the existing board would continue in office if no successor board was elected.⁶⁰ Technically there would never be a "director" deadlock but ignoring the most likely result of the dispute seems to give short shrift to Abel's interest as a shareholder. Admittedly, the circumstances in *Abel* were not as "dire" as in other cases where a receiver has been appointed,⁶¹ but the corporation did have severe problems because of the internal dispute. The General Corporation Act requires irreparable harm before a corporation can be involuntarily dissolved,⁶² but there is no truly legitimate reason to maintain a corporation simply because it is paying its bills.⁶³ Although Abel might have an action at law or be able to seek a less extreme equitable remedy than the appointment of a receiver if the corporation should deny him his rights,⁶⁴ it is unduly myopic to subject the parties to further conflict and the likely prospect of another lawsuit if and when a successor board cannot be elected.

C. Share Purchase Agreements

Stech v. Panel Mart, Inc.,⁶⁵ decided during the survey period, warrants a brief mention as a reminder to attorneys of the importance of careful drafting of share purchase agreements. In *Stech*, the court of appeals affirmed in part, reversed in part, and remanded a judgment of the Allen County Superior Court.⁶⁶ The action was filed by the corporation against the estate of a shareholder and his widow to establish the terms of a share purchase agreement and to require her to sell the shares involved to the corporation.⁶⁷

⁶⁰IND. CODE § 23-1-2-11(d) (1982).

⁶¹The *Abel* court pointed to *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 292, 61 N.E. 666 (1901) and *Dynamite Drugs, Inc. v. Kerch*, 212 Ind. 568, 10 N.E.2d 624 (1937), as demonstrating "the dire circumstances which justify a receiver." 441 N.E.2d at 1007.

⁶²IND. CODE § 23-1-7-3(a)(5) (1982).

⁶³See generally Chayes, *Madame Wagner and the Close Corporation*, 73 HARV. L. REV. 1532 (1960); Recent Developments, *Corporations*, 68 HARV. L. REV. 714 (1955).

⁶⁴The Indiana Supreme Court has stated that it is "axiomatic that a receiver should not be appointed if the plaintiff has an adequate remedy at law or by way of temporary injunction." *Ziffrin Truck Lines, Inc. v. Ziffrin*, 242 Ind. 544, 547, 180 N.E.2d 370, 372 (1962).

⁶⁵434 N.E.2d 97 (Ind. Ct. App. 1982).

⁶⁶*Id.* at 104.

⁶⁷*Id.* at 99. The wife and the estate counterclaimed for attorney fees based on the corporation's refusal to pay sums owed them. The court of appeals held that the trial court did not abuse its discretion in denying this claim because the corporation had not acted with the bad faith or obstreperousness which would justify the awarding of attorney fees. *Id.* at 104. See *Cox v. Ubik*, 424 N.E.2d 127 (Ind. Ct. App. 1981); *St. Joseph's College v. Morrison, Inc.*, 158 Ind. App. 272, 302 N.E.2d 865 (1973).

In *Stech*, the shareholders probably contemplated that the estate of a deceased principal in the business would sell all shares owned at the time of his death to the corporation, but the shares in question had been issued to the shareholder and his wife as joint tenants. The trial court found the agreement ambiguous because the printed word “survivors” in a whereas clause had been crossed out and the word “company” interlined in handwriting.⁶⁸ Consequently, parol evidence was admitted to show that the agreement was intended to prevent the wives from becoming active participants in the business. The trial court then ordered the widow and the estate to sell the disputed shares to the corporation for the agreed-upon purchase price.⁶⁹

The court of appeals concluded that the whereas clause was not contractual and could not control the express provisions of the agreement.⁷⁰ A preliminary recital can, however, aid in determining the intention of the parties when the express language of the contract is uncertain.⁷¹ Unfortunately for the corporation, the court of appeals did not agree that the handwritten substitution of “company” for “survivors” created an ambiguity. Rather, it concluded that the recital eliminated an ambiguity in the operative portions of the stock purchase agreement. The only purchase referred to in the operative portions of the agreement concerned the sale of shares during the lifetime of a shareholder; however, reading the agreement as a whole clarified the fact that the estate of the deceased shareholder was to sell the shares back to the corporation.⁷² In other words, the signers of the agreement intended the company, not the surviving shareholders, to have an option to purchase the shares upon the death of one of the shareholders.

⁶⁸434 N.E.2d at 100.

⁶⁹The wife and the estate argued the agreement was unconscionable because it provided a purchase price of \$250 per share whereas the market value of the shares was at least \$1,250. *Id.* at 103. The court rejected this contention because there was neither a gross disparity in the bargaining powers of the parties involved nor was it an agreement that a sensible person would not enter except under delusion, duress, or distress or one that no honest and fair person would accept. *Id.* See *Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co.*, 412 N.E.2d 129, 131 (Ind. Ct. App. 1980) (citing *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971)). As the *Stech* court noted, each shareholder was wagering that one of the others would be the first to die. The result reached on this issue was clearly correct. Courts are very reluctant to intercede where the parties to a share purchase agreement have set a price or a formula for determining the value of the shares. *Helms v. Duckworth*, 249 F.2d 482 (D.C. Cir. 1957) (remanding case to trial court with instructions to find whether a party to the agreement had committed extreme overreaching); *In re Estate of Mather*, 410 Pa. 361, 189 A.2d 586 (1963) (upholding a stock purchase agreement which required estate to sell stock to the remaining shareholders for \$1 per share, even though the market value of the stock was \$1,600 per share).

⁷⁰434 N.E.2d at 100. See *Kerfoot v. Kessener*, 227 Ind. 58, 84 N.E.2d 190 (1949); *Irwin's Bank v. Fletcher Savings & Trust Co.*, 195 Ind. 669, 145 N.E. 869 (1924).

⁷¹434 N.E.2d at 100.

⁷²*Id.* at 101.

The terms of the agreement controlled because there was no ambiguity. It was still necessary, however, to determine the obligation of the widow, who was also the personal representative of the estate, with respect to the shares. The whereas clause referred to the shares "owned by the decedent at the time of his death" and because as a joint owner Stech had only an undivided one-half interest in the shares at the time of his death, that was all the estate was obligated to sell.⁷³

The result reached in *Stech* appears to be correct.⁷⁴ There really is no ambiguity in the agreement to justify departing from the terms through the introduction of parol evidence. However, it is very likely the parties did expect the corporation to get all of Stech's shares when he died, even though the shares were issued jointly to Stech and his wife.⁷⁵ That might be what the parties intended, but it is not what the agreement provided. The court of appeals was right in not requiring the widow to sell her undivided one-half interest.

The message of *Stech* is clear. Whenever share purchase agreements are being drafted, the drafter must make certain that what is specified in the agreement is in fact what the parties intend and wish. Failure to exercise care and to contemplate the possible ramifications is a sure invitation for litigation.

D. Imputing Knowledge to Corporate Officers

*Merchants National Bank & Trust Co. v. H.L.C. Enterprises, Inc.*⁷⁶ is another case that should be noted by attorneys representing closely held corporations. In *H.L.C.*, the court of appeals reversed and remanded a judgment of the Johnson County Superior Court⁷⁷ which had limited the liability of one mortgagor in a mortgage foreclosure suit.⁷⁸ It is possible that the busy corporate practitioner could overlook *H.L.C.* because the case was primarily concerned with the effect of a "dragnet" clause in a residential mortgage signed by a husband and wife which provided that the mortgage would "also secure the payment of any other liabilities, joint, several, direct, indirect, or otherwise, of Mortgagors"⁷⁹ to the mortgagee. The issue was whether this clause made the wife liable for the debts of

⁷³*Id.* at 103.

⁷⁴Share transfer restrictions are strictly construed. *See generally* W. CARY & M. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 477 (5th ed. unabr. 1980).

⁷⁵This conclusion, and the conclusion of the trial court for that matter, may be questioned. It appears that 50 shares were registered outright in the name of one of the wives, lending support to the argument that the parties contemplated that a shareholder's wife would retain an undivided one-half interest in shares held jointly with her husband. 434 N.E.2d at 99.

⁷⁶441 N.E.2d 509 (Ind. Ct. App. 1982).

⁷⁷*Id.* at 514.

⁷⁸*Id.* at 511.

⁷⁹*Id.* at 512.

a corporation of which she was the secretary and joint shareholder.⁸⁰

The trial court treated her as a collateral guarantor and limited her liability because she had neither received nor waived "notice" of the corporation's default in paying its obligations or of renewals of the corporation's notes.⁸¹ However, the court of appeals held that the circumstances surrounding the signing of the mortgage and the owner's consent authorizing the corporation to pledge the residential real estate as collateral for its debts dictated that she was bound on advances made by Merchants after the signing of the documents.⁸²

Of interest to the corporate practitioner is the court's treatment of the wife as the secretary and shareholder of the corporation. It acknowledged that a dragnet clause in a joint residential mortgage would not by itself secure subsequent business loans made to the husband individually where the business loans were not part of the original transaction and the wife was not connected with the business.⁸³ The clause, however, did apply in the *H.L.C.* situation because she was an officer and shareholder of the corporation and was aware of its ailing financial condition.

Furthermore, the court was willing to impute the husband's knowledge of the corporation's condition to the wife. The court recognized, of course, the presumption that a corporation is a separate and distinct legal entity from its shareholders, officers, and directors,⁸⁴ but further recognized that the corporate fiction can be disregarded or the corporate veil pierced in the interest of justice and equity.⁸⁵ The court technically was not disregarding the corporate fiction because the issue was whether she would be obligated on her mortgage guaranty. The issue, however, is the same: Would it be equitable to impute the husband's knowledge of the corporation's financial ill health to her?⁸⁶

⁸⁰She previously had executed a continuing guaranty of the venture when Merchants had provided the corporation with a capital loan and line of credit. *Id.* at 511.

⁸¹*Id.*

⁸²*Id.* at 514.

⁸³*Id.* at 513-14. See *Security Bank v. First Nat'l Bank*, 263 Ark. 525, 565 S.W.2d 623 (1978). The wording of the dragnet clause may also be a factor in deciding whether an individual is severally liable. See *Holiday Inns, Inc. v. Susher-Schaefer Investment Co.*, 77 Mich. App. 658, 259 N.W.2d 179 (1977).

⁸⁴441 N.E. 2d at 514. See *Bowling v. Holdeman*, 413 N.E.2d 1010 (Ind. Ct. App. 1980); *Birt v. St. Mary Mercy Hosp., Inc.*, 175 Ind. App. 32, 370 N.E.2d 379 (1977).

⁸⁵441 N.E.2d at 514. The court cited *Forester & Jerue, Inc. v. Daniels*, 409 So.2d 830 (Ala. 1982), for this proposition, but it is clearly the law in Indiana. See *Merriman v. Standard Grocery Co.*, 143 Ind. App. 654, 242 N.E.2d 128 (1968). See generally HENN, *supra* note 9, § 146; HORNSTEIN, *supra* note 29, § 756.

⁸⁶441 N.E.2d at 514. The court found authority for imputing the husband's knowledge to the wife in 19 AM. JUR. 2d *Corporations* § 1287, at 694 (1965) and the Connecticut case of *Lettieri v. American Sav. Bank*, 182 Conn. 1, 437 A.2d 822 (1980). It should be noted, however, that in *Lettieri* and in *H.L.C.* it appears that the persons charged with notice had in effect delegated all responsibility for running the corporation to one person. 441 N.E.2d at 514. It is appropriate to treat this delegation as an acquiescence in the refi-

The result in *H.L.C.* is appropriate under the circumstances. Not only was the wife an officer and shareholder of the corporation, but it is also inconceivable that she did not know the business was still in trouble after the initial advance by Merchants even if she did not in fact know of the particular advances made subsequent to the mortgage. The situation in *H.L.C.* may not be unusual considering the recent increase in business failures, but the conventional presumption of separateness will still protect most shareholders, officers, or directors. However, the case is a reminder to the attorney that under some circumstances the courts will not allow the corporate entity to be a shield against personal liability, particularly when the party involved is a spouse who has some, albeit tenuous, connection with the operation of the business, and where the refusal to impute knowledge would work an injustice.

E. Securities Act Standing

Zack Co. v. Sims,⁸⁷ a decision of the Appellate Court of Illinois, should be mentioned in this survey because, among other issues, it construes the standing element of Indiana Code section 23-2-1-19, the civil liability provision of the Indiana Securities Act. The issue before the court in *Zack* was whether the former wife of defendant Sims was a "purchaser" within the meaning of section 23-2-1-19, thus entitling her to rescind Sims' purchase, with his former wife's money, of shares of an Indiana corporation.⁸⁸ This court decided she was not.⁸⁹ The shares were registered in Sims' name although Mrs. Sims apparently thought she would be a joint shareholder with the venture being for their mutual benefit. She was not disabused of this notion until they divorced.⁹⁰

Plaintiffs contended that Sims' failure to disclose his intentions with respect to the shares was an omission of a "material fact" in contravention of the antifraud provision of both the Indiana⁹¹ and Illinois⁹² Securities Acts. A material fact is one that a reasonable investor would take into account in making an investment decision.⁹³ There can be little doubt that

nancing of the business, but this factor clearly indicates that courts will exercise considerable discretion in imputing knowledge to corporate officers and shareholders.

⁸⁷438 N.E.2d 663 (Ill. App. Ct. 1982).

⁸⁸*Id.* at 674.

⁸⁹*Id.* at 675.

⁹⁰*Id.* at 667-68. *Zack* is a classic example of a somewhat casually run family enterprise which operated successfully until the relationship collapsed. An attorney was involved with the transaction, but it is not clear to what extent. *Id.* at 667. For example, it appears that some of the corporate documents were revised by a non-attorney. *Id.* at 667-68. It might be difficult for an attorney dealing with family members to suggest the advisability of clear and unequivocal agreements setting forth each person's rights, but the suggestion should be made, if at all possible, to avoid time-consuming and expensive litigation such as *Zack*.

⁹¹IND. CODE § 23-2-1-12 (1982).

⁹²ILL. REV. STAT. ch. 121½, par. 137.12(G) (1979).

⁹³See *Arnold v. Dirrim*, 398 N.E.2d 426 (Ind. Ct. App. 1979), discussed in Galanti,

a reasonable investor would consider important the manner in which shares were to be registered on the books of a corporation; therefore, Sims' failure to disclose his plans to register the shares in only his name would clearly reach the threshold of materiality within the meaning of the antifraud provisions.

However, the question before the court was not the materiality of the nondisclosure but whether the plaintiff was entitled to the rescission remedy provided by the Securities Act because she financed the purchase of the shares. The court answered this question in the negative, relying on the Illinois case of *Gowdy v. Richter*,⁹⁴ which defined purchaser as used in the Illinois Securities Act as "a party to a transaction wherein he assumes ownership in exchange for valuable consideration."⁹⁵ The wife in *Gowdy*, who had furnished the money so that the husband could purchase the securities, was not a "purchaser" within the meaning of the statute because she was *outside* the actual contract negotiations for the purchase of the shares. In fact, the result in *Gowdy* was harsher than that in *Zack* because, as the *Zack* court noted, in *Gowdy* the shares had been issued to the husband and wife as joint tenants.⁹⁶

The *Zack* result seems unduly harsh on a person who finances a securities transaction. However, it appears to be the correct result. It should be noted that the civil liability provision of the Illinois and Indiana Securities Acts are not identical. The Illinois statute provides that a sale of securities made in violation of the Act is "voidable at the election of the purchaser,"⁹⁷ whereas the Indiana statute gives a remedy "to any other party to the transaction" who did not know of or participate in the violation of the Act.⁹⁸ The difference in the language should be of no moment because the drafters of the two statutes, as well as those of the Uniform Act, apparently contemplated that rescission would be limited to actual parties to the transaction, be that a "purchaser" or "buyer" where relief is available only to purchasers,⁹⁹ or a "party to the transac-

Business Associations, 1980 Survey of Recent Developments in Indiana Law, 14 IND. L. REV. 91 (1981); see also *Kelsey v. Nagy*, 410 N.E.2d 1333 (Ind. Ct. App. 1980).

⁹⁴20 Ill. App. 3d 514, 314 N.E.2d 549 (1974).

⁹⁵*Id.* at 522, 314 N.E.2d at 555. See also *Williamson v. Berry*, 49 U.S. 495 (1850).

⁹⁶438 N.E.2d at 675.

⁹⁷ILL. REV. STAT. ch. 121½, par. 127.13A (1979).

⁹⁸IND. CODE § 23-2-1-19(a) (1982). The Indiana Act refers to the "transaction" because section 23-2-1-19 was amended in 1975 to give a cause of action to the seller as well as to the purchaser of securities. See generally Galanti, *Business Associations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 33, 63 (1975). Before the amendment, section 23-2-1-19 provided that the seller of a security in violation of the act was "liable to the person buying the security from him." Identical language is used in the civil remedy provision of the Uniform Securities Act, UNIF. SEC. ACT § 410, 7A U.L.A. 670 (Master ed. 1978). from which section 23-2-1-19 was derived.

⁹⁹See *Financial Programs, Inc. v. Falcon Financial Services, Inc.*, 371 F.Supp. 770 (D. Ore. 1974).

tion" where relief is available, as it is under the Indiana Act, to both purchasers and sellers.¹⁰⁰

State securities acts are to be liberally construed,¹⁰¹ but there must be limits to the scope of the civil liability provisions. Limiting the rescission remedy to only those who are actual parties to the questioned transaction and those who clearly can be deemed "purchasers" is appropriate and comports with the language of the statutes.¹⁰² Furthermore, although not cited in *Zack*, a similar result was reached in *Rucker v. La-Co., Inc.*¹⁰³ where the court, in applying the Arkansas Securities Act, declined to hold a bank liable where it "was not a seller nor a participant in the sale, but only a lender on the securities purchased."¹⁰⁴ *Rucker* is actually the converse of *Zack* and *Gowdy* because the issue was the liability, rather than the standing, of a non-participant, but the effect is the same, that is, the civil remedy is available only to a participant to the transaction.¹⁰⁵

The former Mrs. Sims was not without recourse, however. The *Zack* court concluded that she was entitled to a resulting trust in one-half of a block of shares constituting ninety percent of the outstanding shares of the Indiana corporation,¹⁰⁶ even though the trial court had refused to impose such a trust.¹⁰⁷ Thus, an aggrieved financier of a securities transaction is likely to have appropriate relief without unduly stretching the term "purchaser" as used in securities acts. Of course, it might very well be that someone in the position of the former Mrs. Sims should have recourse under a state securities act, but that is an argument for the legislature, not the court.

Zack was primarily concerned with Illinois law and it does not specifically state that the term "purchaser" as used in section 23-2-1-19(a) of the Indiana Securities Act¹⁰⁸ excludes a party outside the actual transaction who has furnished funds. However, that is the clear holding of *Zack* which denied Mrs. Sims relief under the Indiana Act. It is a result that should be followed if the issue ever arises in an Indiana court.

¹⁰⁰Of course, Indiana Code section 23-2-1-19(b) does provide for vicarious liability for persons who might not actually be involved in the transaction. See *Arnold v. Dirrim*, 398 N.E.2d 426 (Ind. Ct. App. 1979).

¹⁰¹See *Norville v. Alton Bigtop Restaurant, Inc.*, 22 Ill. App. 3d 273, 317 N.E.2d 384 (1974); see also *Labenz v. Labenz*, 198 Neb. 548, 253 N.W.2d 855 (1977).

¹⁰²*Cf.* *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (only purchasers or sellers have standing to sue for violations of SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1982)).

¹⁰³496 F.2d 850 (8th Cir. 1974).

¹⁰⁴*Id.* at 853.

¹⁰⁵It has been held in Indiana that a transferee of stock from the original purchaser was not entitled to recover damages resulting from false representations made by the issuer even if the shares were issued in violation of the Securities Act. *Elliott v. Kern*, 90 Ind. App. 453, 161 N.E. 662 (1928).

¹⁰⁶438 N.E.2d at 672.

¹⁰⁷*Id.* at 666.

¹⁰⁸IND. CODE § 23-2-1-19(a) (1982).

F. Statutory Developments

1. *Subchapter S Corporations.*—There were several significant statutory developments during the survey period. One such enactment¹⁰⁹ added section 6-2.1-3-24.5¹¹⁰ to the Indiana Gross Income Tax Act. This provision, the so-called “free lunch bill,”¹¹¹ exempts gross income received by a Subchapter S corporation from the Indiana Gross Income Tax if the corporation opts to pay standard Indiana corporate taxes. Although it would appear strange to call a bill that gives corporations the option to pay more taxes a free lunch bill, it is a free lunch because the total tax liability of the electing Subchapter S corporation and its shareholders can be reduced. Indiana is benefited because it would receive taxes that were previously not being paid by Subchapter S corporations. There is, of course, no such thing as a free lunch and the net effect of the benefit would be at the expense of the federal treasury.¹¹²

2. *Small Claims Rules.*—During the survey period the Indiana Supreme Court added rule 8(c) to the rules for small claims court.¹¹³ Rule 8(c) permits a corporation to designate a full-time employee to appear for the corporation in the prosecution or defense of unassigned claims not exceeding \$300 arising out of the corporation’s business. The new rule prohibits persons who have been disbarred or suspended from the practice of law in Indiana or any other jurisdiction from appearing for a corporation. It also specifies that the corporation will be bound by any and all agreements relating to the proceeding made by the representative and that it will be liable for any and all costs, including those assessed by reason of contempt, levied by a court. The corporation is also required to file with the court exercising jurisdiction a certificate of compliance with the rule. This certificate must indicate that the corporation will be bound by the employee’s acts and will be liable for assessments and costs.¹¹⁴

The effect of this rule was to counter the Indiana Supreme Court’s decision in *State ex rel. Western Parks, Inc. v. Bartholomew County Court*.¹¹⁵ *Western Parks* struck down section 34-1-60-1 of the Indiana Code,¹¹⁶ which authorized corporations to appear in small claims proceedings other than by an attorney, and held that a corporation had to

¹⁰⁹Act of Mar. 23, 1983, Pub. L. No. 78-1983, § 1, 1983 Ind. Acts 662, 662. This Act takes effect January 1, 1984 for tax years beginning after December 31, 1983.

¹¹⁰IND. CODE § 6-2.1-3-24.5 (1982 & Supp. 1983).

¹¹¹Indpls. Bus. J., Feb. 14-20, 1983, at 7.

¹¹²For further discussion of the tax consequences of this enactment, see Smith & Hetzner, *To Incorporate or Not to Incorporate—After ‘Indiana SBC Act’*, 27 RES GESTAE 270 (1983).

¹¹³IND. R. TR. P. SM. CL. 8(c).

¹¹⁴*Id.* The employee must file an affidavit stating that he or she has not been disbarred or suspended from the practice of law in Indiana or any other jurisdiction.

¹¹⁵383 N.E.2d 290 (Ind. 1978), discussed in Galanti, *Corporations, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 133, 145-50 (1980).

¹¹⁶IND. CODE § 34-1-60-1 (1976).

“be represented by legal counsel in a small claims court proceeding.”¹¹⁷ The new rule is a reasonable compromise between the interest of business in reducing legal expenses and the interest of the Indiana Supreme Court in maintaining control over the practice of law in this state. Requiring the corporation to file a certificate of compliance and prohibiting disbarred or suspended attorneys from representing corporations adequately protects the legal system by prohibiting disbarred attorneys from being hired by corporations with a substantial number of small claims.¹¹⁸ Corporations, on the other hand, are benefited by the right to have an employee handle claims not exceeding \$300 where the expense of an attorney might far exceed the value of the claim.¹¹⁹

3. *Professional Corporations.*—One of the most significant legislative developments was the adoption of a single comprehensive Professional Corporation Act¹²⁰ to replace the four separate Indiana Professional Corporation Acts.¹²¹ The development is important because the prior law was, to be charitable, somewhat of a mish-mash.¹²²

There is some irony in the new Indiana Professional Corporation Act. The development of professional corporations was prompted because pro-

¹¹⁷383 N.E.2d at 293.

¹¹⁸The “full-time employee” requirement eliminates the possibility of a disbarred attorney working “part time” for a number of corporations with small claims.

¹¹⁹Of course, corporations must still appear by counsel if the claim is between \$300 and the maximum jurisdictional amount for small claims court of \$2,000. IND. CODE § 33-11.6-4-2 (1982).

¹²⁰Act of Mar. 28, 1983, Pub. L. No. 239-1983, § 1, 1983 Ind. Acts 1542, 1542-56 (codified at IND. CODE §§ 23-1.5-1-1 to -5-2 (Supp. 1983)). The new Act is patterned, with refinements, on the Professional Corporation Supplement to the Model Business Corporation Act adopted by the Committee on Corporate Laws of the American Bar Association. 32 BUS. LAW. 289 (1976).

¹²¹General Professional Corporation Act, IND. CODE §§ 23-1-13-1 to -12 (1982) (repealed 1983); Professional Accounting Corporation Act, IND. CODE §§ 23-1-13.5-1 to -7 (1982) (repealed 1983); Professional Medical Corporation Act, IND. CODE §§ 23-1-14-1 to -22 (1982) (repealed 1983); Professional Dental Corporation Act, IND. CODE §§ 23-1-15-1 to -22 (1982) (repealed 1983).

¹²²For example, the Indiana Medical Professional Corporation Act, the first professional corporation act to be enacted, provided that portions of the General Corporation Act apply to professional medical corporations “except where inconsistent with the provisions and purpose of this act.” IND. CODE § 23-1-14-5 (1982). In other words, the General Corporation Act was incorporated by reference. A similar approach was taken when the Professional Dental Corporation Act was adopted in 1965. *Id.* § 23-1-15-5. However, in the General Professional Corporation Act, also adopted in 1965, the legislature adopted by reference the provisions of the Medical Professional Corporation Act relating to the applicability of the General Corporation Act. *Id.* § 23-1-13-11. In other words, a provision incorporating by reference, was incorporated by reference. The Professional Accounting Corporation Act was not so much a professional corporation act as statutory authority for general corporations to practice public accounting. *Id.* § 23-1-13.5-1. Of course, the new Act still provides that the Indiana General Corporation Act applies to professional corporations. In the event of a conflict between the two, the Professional Corporation Act controls. *Id.* § 23-1.5-2-1 (Supp. 1983).

professionals practicing on their own or in traditional partnerships could not enjoy the tax benefits, particularly with respect to pension plans, available to persons engaging in the corporate form of business.¹²³ However, the Tax Equity and Fiscal Responsibility Act of 1982¹²⁴ made substantial changes to the laws governing private pensions, reducing the impetus for professionals to incorporate for tax purposes. Thus, when the General Assembly was remedying the haphazard statutes enacted to give professionals tax breaks, the tax breaks were being reduced. This is not to say, however, that professionals would not wish to incorporate for non-tax reasons.¹²⁵ Furthermore, the Act even assists professionals currently incorporated who wish to dissolve the corporation by authorizing the conversion of a professional corporation into a general business corporation.¹²⁶

It is only possible to briefly summarize the provisions of the new Act.¹²⁷ The Act has an extensive definition section including a description of professionals who may incorporate.¹²⁸ One significant feature of the new Act is that it permits various related professionals to join in one corporation. This does not mean that an attorney, an architect, and a doctor can form one professional corporation, but it does permit different types of health care professionals or architects and licensed land surveyors to incorporate.¹²⁹

The new Act definitely improves the manner in which professional corporations may be run. For example, the Act now provides that the corporate secretary and treasurer need not be licensed.¹³⁰ This makes it easier for a sole practitioner to incorporate. A professional can now have his or her office manager or the corporation's regular attorney or accountant serve as the secretary and treasurer.

The Act also specifies in some detail the liability aspects of a cor-

¹²³See generally Kalish & Lewis, *Professional Corporations Revisited*, 28 TAX LAW. 471 (1975); Siegel, *The Utility of the Professional Corporation: A Rejoinder*, 29 TAX LAW. 265 (1976); Jones, *The Professional Corporation*, 27 FORDHAM L. REV. 353 (1958).

¹²⁴Pub. L. No. 97-248, 96 Stat. 324 (1982).

¹²⁵Existing professional corporations may accept the new Act to benefit from the rights and privileges by complying with specified requirements. IND. CODE § 23-1.5-4-4 to -7 (Supp. 1983).

¹²⁶*Id.* § 23-1.5-4-2.

¹²⁷See generally Simcox, *Update: Corporation, Securities Law*, 26 RES GESTAE, 600, 603-05 (1983).

¹²⁸IND. CODE §§ 23-1.5-1-1 to -14 (Supp. 1983). There are basically five types of professionals who may incorporate: 1) accounting professionals; 2) architectural or engineering professionals, including licensed architects, landscape architects, and professional engineers or land surveyors (these professionals can incorporate under the Indiana General Professional Corporation Act, 31 Op. Att'y Gen. 96 (1973)); 3) attorneys; 4) health care professionals, including chiropractors, dentists, nurses, optometrists, pharmacists, physicians, podiatrists, psychologists and speech pathologists and audiologists; and 5) veterinarians.

¹²⁹IND. CODE § 23-1.5-2-3(a) (Supp. 1983). This concept first appeared in the 1981 amendments to the Professional Medical Corporation Act. Act of May 5, 1981, Pub. L. No. 212, § 5, 1981 Ind. Acts 1615, 1616 (formerly codified at IND. CODE § 23-1-14-3 (1982)).

¹³⁰IND. CODE § 23-1.5-2-4 (Supp. 1983).

porate professional practice. The negligent professional who provided the service is liable to the same extent as would be a sole practitioner,¹³¹ and he or she is also liable for the conduct of employees of the corporation under his or her direction or control.¹³² The corporation itself is liable for the negligence of its employees performing professional services within the scope of their employment or apparent authority.¹³³ *Birt v. St. Mary Mercy Hospital, Inc.*,¹³⁴ which held that members of a medical professional corporation were not liable for the malpractice of one of their colleagues, has been codified by Indiana Code section 23-1.5-2-6(d).¹³⁵ Under this provision, except as otherwise provided by statute or by rule of the licensing authority, the personal liability of a shareholder of a professional corporation is no greater than the liability of a shareholder of a general corporation. The relationship between the individual performing the professional services as an employee of a professional corporation and the client or patient is the same as if the individual performed such services as a sole practitioner.¹³⁶ The above relationship, as well as any privilege which may be obtained, is expressly extended to the corporation.¹³⁷

The organizational structure of professional corporations has been changed by the new Act. Under the prior statute, all shareholders had to be licensed professionals, but now shares may be held by individuals who are licensed professionals, general partnerships in which partners are licensed professionals, professional corporations authorized to render professional services, and qualified trusts in which the trustees and beneficiaries are licensed professionals.¹³⁸ This will ease estate planning for professionals by permitting the formation of professional corporations where some shareholders are sole practitioners and others are employees of their own professional corporations.

One troublesome question for professional corporations is how to dispose of the shares of deceased or disqualified shareholders. The Act has detailed provisions relating to the repurchase of such shares and even establishes a judicial procedure for determining the price of the shares when not set by the articles, bylaws, or private agreement among the parties.¹³⁹ Proxies and voting trusts can now be utilized in professional

¹³¹*Id.* § 23-1.5-2-6(a).

¹³²*Id.* § 23-1.5-2-6(b).

¹³³*Id.* § 23-1.5-2-6(c).

¹³⁴175 Ind. App. 32, 370 N.E.2d 379 (1977). *See also* Ross v. Schubert, 388 N.E.2d 623 (Ind. Ct. App. 1979).

¹³⁵IND. CODE § 23-1.5-2-6(d) (Supp. 1983). This provision reflects awareness of *Western Parks, Inc. v. Bartholomew County Court*, 383 N.E.2d 290 (Ind. 1978) and the Supreme Court's control over the practice of law. The Supreme Court imposes partnership liability on the shareholders of professional corporations formed to practice law. IND. R. ADMISS. & DISCP. 27(c).

¹³⁷*Id.* § 23-1.5-2-7(b).

¹³⁸*Id.* § 23-1.5-3-1.

¹³⁹*Id.* §§ 23-1.5-3-2, -3.

corporations as long as the voting powers will be exercised by licensed professionals.¹⁴⁰

The new Professional Corporation Act also contains numerous provisions relating to the names of professional corporations,¹⁴¹ registration with the appropriate licensing authority,¹⁴² annual reports,¹⁴³ changes in ownership,¹⁴⁴ and mergers and consolidations of professional corporations.¹⁴⁵ The Act even contains procedures under which a foreign professional corporation may be admitted to render professional services in Indiana.¹⁴⁶

4. Telephone Conference Calls.—Another enactment worth noting is Public Law 244¹⁴⁷ which clarifies an ambiguity previously existing in Indiana Code section 23-1-2-11(h). In 1982, the General Assembly amended the General Corporation Act to permit directors of a corporation to attend board meetings by the use of telephone conference calls.¹⁴⁸ Apparently, however, the statute did not specify whether this type of call could substitute for an actual meeting. Public Law 244 amends the Act¹⁴⁹ to make it clear that a telephone conference call can be used in lieu of an actual meeting. Also, the General Assembly apparently determined that not authorizing telephone conference calls by directors of Indiana not-for-profit corporations was an oversight and amended another section of the Act¹⁵⁰ to authorize such calls among any or all of the directors or committees of not-for-profit corporations.

5. Private Placement Exemption.—Section two of Public Law 240¹⁵¹ is important to an attorney with a securities practice. This law substan-

¹⁴⁰*Id.* § 23-1.5-3-4. Non-professionals who are the personal representatives of shareholders owning all the outstanding shares of a professional corporation are authorized to exercise voting rights and serve as directors and officers for purposes of dissolving the corporation or amending the articles to become a general corporation. *Id.* § 23-1.5-3-5. The prior professional corporation acts permitted non-professional personal representatives to dissolve such corporations. IND. CODE §§ 23-1-13-12, 23-1-14-22, 23-1-15-22 (1982) (repealed 1983).

¹⁴¹IND. CODE § 23-1.5-2-8 (Supp. 1983).

¹⁴²*Id.* §§ 23-1.5-2-9, -10.

¹⁴³*Id.* § 23-1.5-2-11.

¹⁴⁴*Id.* § 23-1.5-3-6(b).

¹⁴⁵*Id.* § 23-1.5-4-1.

¹⁴⁶*Id.* §§ 23-1.5-5-1, -2.

¹⁴⁷Act of Mar. 23, 1983, Pub. L. No. 244-1983, § 3, 1983 Ind. Acts 1599, 1606 (codified at IND. CODE § 23-1-2-11(h) (Supp. 1983)).

¹⁴⁸Act of Feb. 24, 1982, Pub. L. No. 142, § 1, 1982 Ind. Acts 1050, 1054 (codified at IND. CODE § 23-1-2-11(h) (1982)). See generally Galanti, *Business Associations, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 25, 46-48 (1983).

¹⁵⁰Act of Mar. 23, 1983 Pub. L. No. 244-1983, § 2, 1983 Ind. Acts 1599, 1602 (codified at IND. CODE § 23-7-1.1-10(g) (Supp. 1983)). Public Law 244 also defines a director of a not-for-profit corporation as a member of the managing board whether designated a director, trustee, manager, governor, or any other title. See IND. CODE § 23-7.1-1-2(1) (Supp. 1983). The purpose of this amendment was to make clear that the rights, duties, and responsibilities of directors under the Not-For-Profit Corporation Act apply to the individuals who manage the entity regardless of how they are designated.

¹⁵¹Act of Apr. 22, 1983, Pub. L. No. 240-1983, § 2, 1983 Ind. Acts 1559, 1565 (codified

tially changed the private placement registration exemption available under Indiana Code section 23-2-1-2(b).¹⁵² Because of space constraints, only a brief summary of Public Law 240 is possible. Previously, the offer or sale of securities by the issuer was exempt from the registration requirements of the Indiana Securities Act¹⁵³ if there were no more than thirty-five purchasers; no general advertisements or solicitations were made; each purchaser gave a written representation that the securities were being acquired for investment purposes; and no commission or remuneration was paid or given for soliciting prospective buyers.¹⁵⁴

The new private placement exemption basically follows the approach taken by the SEC in its recently promulgated Regulation D¹⁵⁵ and utilizes the concept of the "accredited investor." The Act defines accredited investors as persons who, because of their substantial personal income, net worth, or connection with the issuer, do not need or are less in need of the protections afforded by the registration requirements of the Securities Act, or are institutional investors well able to take care of themselves.¹⁵⁶

Under the new section 23-2-1-2(b), no filing with the Indiana Securities Division is required for offerings where there are not more than thirty-five purchasers, including non-residents but excluding accredited investors, who are knowledgeable insiders, promoters, or family members of insiders or promoters; or not more than fifteen purchasers in Indiana who are accredited investors or knowledgeable purchasers; or not more than fifteen knowledgeable investors and the aggregate offering does not exceed \$250,000.¹⁵⁷ There are two other forms of private placements under section 23-2-1-2(b)(10). These placements require shortened notification of the Securities Commissioner. These exemptions apply to offerings between

at IND. CODE § 23-2-1-2 (Supp. 1983)). See generally Simcox, *supra* note 127, at 600-01.

¹⁵²IND. CODE § 23-2-1-2(b)(10) (Supp. 1983).

¹⁵³*Id.* § 23-2-1-2 (1982).

¹⁵⁴*Id.* § 23-2-1-2(b)(10). The payment of commissions or representations did not automatically preclude the availability of the exemption, but it could be disallowed by the Securities Commissioner. *Id.* § 23-2-1-2(b)(10)(iv).

¹⁵⁵17 C.F.R. § 230.501—.506 (1983).

¹⁵⁶IND. CODE § 23-2-1-1(r) (Supp. 1983).

¹⁵⁷*Id.* § 23-2-1-2(b)(10)(G). In order for this exemption to apply, no advertising or general solicitation is permitted and the issuer must reasonably believe the investor is purchasing the securities for investment purposes. *Id.* § 23-2-1-2(b)(10)(B). Also, the exemption is available only if the purchasers have access to all material facts with respect to the securities by reason of their status. *Id.* § 23-2-1-2(b)(10)(C).

With respect to whether the issuer has a reasonable belief that an investor is purchasing the securities for investment purposes, section 23-2-1-2(b)(10)(C)(i), (ii) specifies that the basis for the belief may include a written representation signed by the purchaser that the acquisition is for investment purposes and that he is aware of any restrictions imposed on the transferability of the securities, and the placement of a legend on the securities that they have not been registered under the Indiana Securities Act and setting forth or referring to any restrictions on the transferability and sale of securities.

\$250,000 and \$500,000¹⁵⁸ and offerings in excess of \$500,000.¹⁵⁹ In both cases the prohibition against advertising or general solicitation and the investment purpose condition apply, and there must be no more than thirty-five purchasers plus any number of accredited investors.¹⁶⁰ The purchasers must be sophisticated and capable of evaluating the merits and risks of the prospective investment.¹⁶¹

For offerings that do not exceed \$500,000, a brief summary of the offering, including copies of any written materials and information on the issuer and persons involved with the issuer, and a consent to service of process must be filed with the Secretary of State.¹⁶² This information also must be furnished to the purchasers. For offerings that exceed \$500,000, a written offering statement, and a consent to service of process must be filed.¹⁶³ This offering statement must set forth all material facts with respect to the securities.

The Securities Commissioner can disallow the exemption within ten days of a filing of a summary or an offering statement.¹⁶⁴ The issuer may make offers but not sales before and during this ten-day period if prospective purchasers are advised in writing that the offer is preliminary and subject to material change.¹⁶⁵ No enforceable offer to purchase the securities may be made by a prospective purchaser, and no consideration may be accepted or received from the purchaser, before the ten-day period expires or before any order disallowing the exemption is vacated.¹⁶⁶

The approach taken by the General Assembly tracks SEC Regulation D to a considerable extent. It may be argued that it should have tracked the federal rule more closely. The approach taken, however, does lessen the registration requirements for many security offerings made in Indiana while still protecting the interests of Indiana residents. The bar can be thankful for this.¹⁶⁷

6. *Indiana Business Takeover Offers Act.*—Hope springs eternal, and once again the Indiana Business Takeover Offers Act has been amended.¹⁶⁸ The General Assembly amended the introductory provision of the Act,

¹⁵⁸*Id.* § 23-2-1-2(b)(10)(E).

¹⁵⁹*Id.* § 23-2-1-2(b)(10)(D).

¹⁶⁰*Id.* § 23-2-1-2(b)(10)(A), (B).

¹⁶¹*Id.* § 23-2-1-2(b)(10)(C).

¹⁶²*Id.* § 23-2-1-2(b)(10)(E).

¹⁶³*Id.* § 23-2-1-2(b)(10)(D).

¹⁶⁴*Id.* § 23-2-1-2(b)(10)(F).

¹⁶⁵*Id.* § 23-2-1-2(b)(10)(F)(i).

¹⁶⁶*Id.* § 23-2-1-2(b)(10)(F)(ii).

¹⁶⁷Public Law 240 also repealed exemption for oil and gas leases formerly available under section 23-2-1-2(b)(13). Act of Apr. 22, 1983, Pub. L. No. 240-1983, § 2, 1983 Ind. Acts 1559, 1565 (repealing IND. CODE § 23-2-1-2(b)(13) (1982)). It also made some additional technical amendments clarifying certain definitions and administrative procedures and, not surprisingly, increasing certain fees. See IND. CODE §§ 23-2-1-2(c) to -2(e) (Supp. 1983).

¹⁶⁸Act of Apr. 11, 1983, Pub. L. No. 242-1983, 1983 Ind. Acts 1592 (codified at IND. CODE § 23-2-3.1-0.5 (Supp. 1983)). See generally Simcox, *supra* note 127, at 602-03.

added in 1981, to "acknowledge" the emergence of a number of practices such as multiple proration pools and two-step transactions which are designed to make shareholders move quickly once a tender offer has been made lest they risk losing out on the offer, and to protect shareholders of Indiana corporations who allegedly have lost the benefit of takeover offers because they lack the sophistication and ability to secure those benefits.¹⁶⁹ The purpose clause was also amended to provide that the full disclosure and protection provided by the Act would be consistent with the United States and Indiana Constitutions.¹⁷⁰

In a "multiple proration pool" all tendered shares are placed in a pool and a prorated number of shares are purchased from all tendering shareholders. Unfortunately, the small shareholder is often unaware of the offering until after early pools are filled and may be thrust in pools which offer a lower price or from which fewer shares are purchased. In a "two-step transaction," a lucrative offer may be made for a certain number of shares and then in a "second step" a lower price is offered to remaining shareholders. This device permits an offeror to acquire a controlling interest in a target company after which minority shareholders can be forced out at a substantially lower price.

The Takeover Offers Act was amended in an attempt to address these practices by introducing the term "substantially equivalent terms." This term is defined to mean the "terms under which the fair market value of the consideration offered [to] any offeree . . . are equal to the highest consideration offered in connection with a takeover offer to any other offeree."¹⁷¹ The Act prohibits an offeror from making a takeover offer unless it complies with the Act's requirements.¹⁷² Two new requirements have been added: section 23-2-3.1-6-5 prohibits takeover offers not made to all offerees holding the same class of equity securities on substantially equivalent terms,¹⁷³ and section 23-2-3.1-8.4 prohibits an offeror from acquiring equity securities of a class of a target company within two years of a takeover offer unless on substantially equivalent terms.¹⁷⁴

Public Law 242 also amended the Act to define "offeror" as including the target company with respect to acquisition of its own equity securities and when it is controlled by or under common control with the offeror.¹⁷⁵ Although eliminating the exemption for a corporation purchasing its own securities is a decided improvement, the Act may still constitute an undue burden on interstate commerce which was the basis of the Supreme Court's

¹⁶⁹IND. CODE § 23-2-3.1-0.5(a) (1982 & Supp. 1983).

¹⁷⁰*Id.* § 23-2-3.1-0.5(b).

¹⁷¹*Id.* § 23-2-3.1-1.

¹⁷²*Id.* § 23-2-3.1-2.

¹⁷³*Id.* § 23-2-3.1-6.5.

¹⁷⁴*Id.* § 23-2-3.1-8.4.

¹⁷⁵*Id.* § 23-2-3.1-1 (Supp. 1983). *See also* IND. CODE § 23-2-3.1-8.6(2) (1982) (amended 1983) (previously exempted target company's acquisition of its own shares).

decision in *Edgar v. MITE Corp.*,¹⁷⁶ striking down the Illinois Business Takeovers Act.

Courts, however, have ruled that neither a two-tier tender offer¹⁷⁷ nor a first-come, first-served tender offer¹⁷⁸ was in violation of federal tender offer regulations. It is possible that the Act may pass muster as a permissible indirect burden on interstate commerce to protect legitimate state interests.¹⁷⁹

The prospects for the Act, however, are somewhat dimmed because prohibiting takeover offers in Indiana which do not comply with the Act may defeat a tender offer to residents of other states if the Indiana shares are needed to provide sufficient tendered shares. This was the basis of recent decisions striking down Oklahoma's takeover act.¹⁸⁰ Also, the provision barring acquisition of additional shares for a two-year period except on substantially equivalent terms might cause problems.¹⁸¹ Virginia's takeover act,¹⁸² attempting to regulate "creeping tender offers," was held to impose an undue burden on interstate commerce and hence was unconstitutional.¹⁸³ Shareholders would be benefited by the new Indiana provisions, but it is questionable if the benefit to Indiana shareholders would outweigh the negative impact on potential tender offers any more than Virginia's unsuccessful attempt to regulate open market purchases by an offeror did.

¹⁷⁶457 U.S. 624 (1982).

¹⁷⁷*Radol v. Thomas*, 556 F. Supp. 586 (S.D. Ohio 1983).

¹⁷⁸*Union Commerce Corp. v. Huntington Bancshares*, 556 F. Supp. 374 (N.D. Ohio 1982).

¹⁷⁹See *City Investing Co. v. Simcox*, 476 F. Supp. 112 (S.D. Ind. 1979), *aff'd* 633 F.2d 56 (7th Cir. 1980). See generally Note, *Edgar v. MITE Corp.: The Death Knell for the Indiana Takeover Offers Act*, 16 IND. L. REV. 517 (1983) (analysis of the impact of *Edgar* on the Indiana Act).

¹⁸⁰*Mesa Petroleum Co. v. Cities Servs. Co.*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,064 (W.D. Okla. 1982), *aff'd*, 715 F.2d 1425 (10th Cir. 1983); *Occidental Petroleum Corp. v. Cities Services Co.*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,063 (W.D. Okla. 1982).

¹⁸¹Section 23-2-3.1-8.4 does not seem to permit a modification of the terms of an offer to reflect any changed circumstances within the two-year period.

¹⁸²VA. CODE § 13.1-528 to -541 (1978 and Supp. 1983).

¹⁸³*Telvest, Inc. v. Bradshaw*, 697 F.2d 576 (4th Cir. 1983).

