II. Business Associations

PAUL J. GALANTI*

A. *Partnership Liability for Punitive Damages*

Two related cases decided during the survey period, *Husted v. McCloud*[1] and *Husted v. Gwin*,[2] should be of special interest to attorneys who represent partnerships and, even more so, to those who practice in partnerships. Both cases involved the propriety of awarding damages against a partnership and the estate of a deceased partner for the wrongful acts of the surviving partner,[3] an attorney guilty of converting client funds to his own use.[4]

The court of appeals' decision in *McCloud*,[5] affirming the award of compensatory and punitive damages against the defendant attorney and the partnership, has been the subject of some criticism.[6] Admittedly it was a close case, with the line between liability and nonliability a difficult one to draw. It is submitted, however, that the court of appeals' decision in *McCloud* properly construed the Indiana Uniform Partnership Act[7] and properly applied general principles of agency law.

There were three issues presented to the Indiana Supreme Court in *McCloud*. First, whether it was proper to award punitive damages against an individual defendant attorney for his admittedly criminal acts;[8] second, whether it was proper to award punitive damages against his partnership; and third, whether that partnership should be held liable for compensatory damages.[9]

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

[1]450 N.E.2d 491 (Ind. 1983) (vacating 436 N.E.2d 341 (Ind. Ct. App. 1982)).

[2]446 N.E.2d 1361 (Ind. Ct. App. 1983).

[3]It is not absolutely clear if the award in *Gwin* represented compensatory or punitive damages. However, in comparing the amount of the award, $80,000, to the amount wrongfully converted by the attorney, $59,295.56, it appears that the award was primarily compensatory. *Id.* at 1362. If the award did represent punitive damages, it would be in error in light of the subsequently decided *McCloud* case. *See* 450 N.E.2d 491 (Ind. 1983). *See also infra* notes 5-48 and accompanying text.

[4]The action in *McCloud* was brought by an executor alleging the conversion of estate funds. 450 N.E.2d at 492. The funds converted in *Gwin* were the balance of proceeds remaining from the sale of a farm in execution of a judgment. 446 N.E.2d at 1362.

[5]436 N.E.2d 341 (Ind. Ct. App. 1982).

[6]Jackson, *Professional Responsibility, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 265, 279-82 (1982).

[7]IND. CODE §§ 23-4-1-1 to -43 (1982).

[8]The individual defendant was convicted and imprisoned for his misconduct in handling clients' funds pursuant to a plea bargain. 450 N.E.2d at 493.

[9]*Id.* at 492. *See also* 436 N.E.2d at 344.

The first issue involved the application of the doctrine of *Taber v. Hutson*.[10] The *Taber* doctrine precludes punitive damages against a defendant who is, or may be, subject to criminal prosecution for the same act. Recognizing that "the awarding of punitive damages in Indiana is discretionary,"[11] the court of appeals in *McCloud* "resolved" the *Taber* issue by declining to rule that the award of punitive damages against the defendant was an abuse of the trial court's discretion.[12]

The supreme court did not discuss the *Taber* issue to any extent. Rather, it merely recited the details of the written plea agreement, and noted that in sentencing Husted, the McCloud matter had apparently been considered by the trial court.[13] The supreme court found punitive damages inappropriate because "[t]he public interest in punishing Husted and in deterring him from such misconduct was fully satisfied by the sentence [he] received."[14] Therefore, the court held punitive damages were inappropriate. The court manifested its unwillingness to reconsider the *Taber* doctrine by simply citing *Taber* without discussing the wisdom of its holding.[15]

It is possible that the court was exhibiting its reluctance to award punitive damages in a civil suit.[16] More convincing, however, is the possibility that the reference to "public interest" reflects the court's concern that tort defendants not be overpunished. Unlike many cases involving the *Taber* issue, Husted was in fact imprisoned. Arguably then, the court considered the quantum, rather than the number, of punishments, expressing concern that tort defendants not be punished to excess, particularly where they have been sentenced to prison.[17]

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[10]5 Ind. 322 (1854).

[11]436 N.E.2d at 346 (citation omitted).

[12]*Id.* Instead, the court of appeals relied on Smith v. Mills, 385 N.E.2d 1205 (Ind. Ct. App. 1979). *Smith* held that punitive damages were allowed where the defendant was not subject to criminal charges for that act. The defendant in *Smith*, similar to Husted, had entered a plea bargaining agreement with the prosecutor, which prevented the State from punishing Smith for the alleged act in question. *Id.* at 1207. Further, the court of appeals in *McCloud* declined to require a finding that an award of punitive damages would serve the public interest, and rejected Husted's contention that McCloud was estopped from recovering such damages. 436 N.E.2d at 345-46.

[13]450 N.E.2d at 493.

[14]*Id.*

[15]For a recent discussion of the *Taber* rule, see Note, *Double Jeopardy and the Rule Against Punitive Damages of* Taber v. Hutson, 13 IND. L. REV. 999 (1980).

[16]*See generally* Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. REV. 1158 (1966).

[17]Such an approach has been recommended as striking "the most equitable balance between the individual's interest in protection against multiple punishment and society's interest in regulating undesirable conduct." Note, *supra* note 15, at 1020.

The *Taber* issue was mooted to a substantial degree by legislation adopted during the 1984 session of the Indiana General Assembly. IND. CODE § 34-4-30-2 (Supp. 1984). This section provides that "[i]t is not a defense to an action for punitive damages that the

The second issue resolved by the *McCloud* court was the propriety of awarding punitive damages against the partnership. The court could have easily disposed of this issue by ruling that because Husted was not liable for punitive damages, the partnership itself could not be liable under section 13 of the Indiana Uniform Partnership Act (Act).[18] This section of the Act binds a partnership for the wrongful acts or omissions of a partner within the ordinary course of business of the partnership. Yet the court did not take this route. Rather, it held that Husted's receipt of the funds to settle the McCloud estate was within the course of the law firm's business.[19] Thus, pursuant to section 14 of the Act,[20] the firm was responsible to make good the loss suffered by McCloud, thus compelling the payment of compensatory damages.[21] The court did conclude, however, that the conversion of funds which would (or could but for *Taber*) justify punitive damages was outside of the *ordinary course* of the partnership's business; thus, no liability could attach to the partnership for punitive damages.[22]

It is superficially appealing to relieve an innocent partner of liability from punitive damages for another partner's wrongdoing.[23] The position

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defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action." *Id.* However, a plaintiff cannot recover both punitive damages *and* treble damages for damages to property pursuant to the section of that chapter. *Id.* § 34-4-30-1. Section 2 does not contain any restrictive language, and thus it does not appear to be limited to punitive damage suits for offenses against property, even though section 1 does relate solely to such offenses. Furthermore, a showing of clear and convincing evidence is now required to support punitive damages in any civil action. Ind. Code §§ 34-4-34-1 to -2 (Supp. 1984).

[18]Ind. Code § 23-4-1-13 (1982) (This section binds the partnership to a partner's wrongful act and holds the partnership liable to the same extent as the partner committing the wrongful acts.). *See generally* 2 Z. Cavitch, Business Organizations § 24.02 (1984); J. Crane & A. Bromberg, Law of Partnership § 54 (1968) [hereinafter cited as Crane & Bromberg]; H. Reuschlein & W. Gregory, Agency & Partnership § 203 (1979) [hereinafter cited as Reuschlein & Gregory].

[19]450 N.E.2d at 494.

[20]Ind. Code § 23-4-1-14 (1982) (binding a partnership for a partner's breach of trust).

[21]Thus, the *McCord* court rather summarily, but correctly, resolved the third issue by holding the partnership liable for the funds converted by Husted. 450 N.E.2d at 494.

[22]*Id.* at 494-95.

[23]A court may be reluctant to impose penal liability on partners for acts not expressly authorized by them, *see* Blau v. Lehman, 368 U.S. 403 (1962), but there is authority for imposing criminal and penal sanctions on a partnership and innocent copartners for the wrongful acts of a partner. *See, e.g., Ex parte* Casperson, 69 Cal. App. 2d 496, 159 P.2d 88 (1945); State v. O'Kelley, 258 Mo. 345, 167 S.W. 980 (1914). However, some courts require a showing of guilty knowledge on the part of partners before the conviction of a partnership for a criminal act can be used to punish the individual partners. *See* United States v. A. & P. Trucking Co., 358 U.S. 121 (1958). *See also* United States v. Ward, 168 F.2d 226 (3rd Cir. 1948); United States v. Quinn, 141 F. Supp. 622 (S.D.N.Y. 1956).

taken by the *McCloud* court, however, cuts against one of the major premises underlying vicarious liability and agency law principles: that the principal who is in a position to exercise some degree of control over an agent[24] can be liable to a third party if that agent commits a wrong while acting within the scope of his authority.[25] The key factor in determining the liability of a principal is the scope of the agent's authority; for a partnership, the corollary is the scope of the partnership's business. It goes without saying that intentional torts are more likely to be outside of an agent's authority, or outside the scope of a partnership's business, than are negligent torts.[26] However, this does not mean that intentional torts, including those that might result in punitive damages, can never be within the ordinary course of a partnership's business.

The line between what is within and what is without the ordinary course of business is not an easy one to draw. The primary factor appears to be the nexus between the questioned act and the purpose of the partnership.[27] Thus, it might be said that an attorney driving his own car from the office to the court is not involved in partnership business since the manner in which a partner gets about is his own affair.[28] The attorney in court, however, or the attorney handling an estate which the partnership was retained to probate, is engaged in partnership business. Therefore, the partnership should be liable for the misfeasance and malfeasance of the partner if a nexus exists between the wrongful act and the matter for which the firm was retained. If Husted had intentionally struck McCloud with his car out of a fit of pique, the firm should not be liable for punitive damages. But where, as here, funds belonging to a client are given to an attorney in connection with a matter which the firm is handling, and then later embezzled, the firm should be subject to punitive damages, depending of course on the

[24]Under the Indiana Uniform Partnership Act, partners are agents of the partnership with regard to partnership business, Ind. Code § 23-4-1-9(1) (1982). *See also* Crane & Bromberg, *supra* note 18, § 49.

[25]Restatement (Second) of Agency § 219 (1958). The "agent" in this context is generally that species of agents known as "servants." *Id.* However, a principal may be liable for the torts of nonservant agents, particularly when the element of deceit is involved. *Id.* §§ 256-61. *See* W. Prosser & W. Keeton, Handbook of the Law of Torts § 70, at 508 (5th ed. 1984).

[26]Restatement (Second) of Agency § 235 (1958). It is settled that in certain cases, particularly those involving servants in a managerial capacity, a principal can be subjected to punitive damages. *Id.* § 217C. The nature of the principal-agent relationship in a partnership would fit within this rule because partners are in effect principals and agents at the same time. Ind. Code §§ 23-4-1-9,-18 (1982). *See* Fitzgerald v. Edelen, 623 P.2d 418 (Colo. Ct. App. 1980); American Nat'l Bank & Trust Co. v. First Wisconsin Mortgage Trust, 577 S.W.2d 312 (Tex. Civ. App. 1979).

[27]*See* Crane & Bromberg, *supra* note 18, §§ 49, 54.

[28]Crane & Bromberg, *supra* note 18, § 54, at 309 n.92.

state of the *Taber* doctrine and the reprehensibleness of the attorney's conduct.

The common law was reluctant to impose liability on a partner who did not authorize, participate, or ratify the wrongful act giving rise to punitive damages.[29] Professors Crane and Bromberg, however, state that if, under section 13 of the Uniform Partnership Act,[30] "the partnership is liable to the same extent as the guilty partner, and punitive damages are recoverable against him, it would seem to follow that punitive damages would be recoverable against the partnership, regardless of the innocence of other partners."[31]

Following this line of reasoning, the court of appeals in *Husted* determined, that once an individual partner is held liable for conduct deemed within the ordinary course of the partnership business, the partnership is also liable for damages flowing from such conduct, regardless of the other partners' knowledge.[32] Furthermore, section 13 of the Indiana Act binds the partnership for any "loss or injury . . . caused . . ., or any penalty [that] is incurred, [by a partner]."[33] Therefore, the court of appeals' interpretation of the Act as imposing punitive damages on the law firm cannot fairly be deemed as "somewhat strained."[34] Indeed, a more reasonable interpretation of the provision would recognize

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[29]*See* CRANE & BROMBERG, *supra* note 18, § 54, at 317-18 nn. 42-45.

[30]Codified in Indiana at IND. CODE § 23-4-1-13 (1982).

[31]CRANE & BROMBERG, *supra* note 18, § 54, at 317 (footnote omitted). The author of an annotation on the derivative liability of partners for punitive damages footnotes section 13 after referring to the general rule of nonliability for punitive damages, but states that the applicability of the provision to liability of a partner for punitive damages has not been judicially determined. Annot., 14 A.L.R. 4TH 1315, 1336 n.6 (1982).

[32]Husted v. McCloud, 436 N.E.2d at 347.

[33]IND. CODE § 23-4-1-13 (1982).

[34]At least one author has, however, found the court of appeals' decision "somewhat strained." Jackson, *supra* note 6, at 281-82.

> The *Husted* court grasps the "any penalty" language as a basis for the imposition of punitive damages against the partnership. However, this language clearly does not refer to a penalty incurred by a *partner* due to his wrongful act or omission, but to a penalty incurred by any person, *not a partner in the partnership.*

Id. at 281.

If wrongful acts or omissions of a partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, cause "loss or injury . . . to any person, not being a partner in the partnership, or any penalty is incurred," IND. CODE § 23-4-1-13 (1982), section 13 imposes liability on a partnership . . . "to the same extent as the partner so acting or omitting to act." *Id.* The basis for Jackson's assertion is that the "any penalty" language in the statute refers to a penalty incurred by "any person, *not a partner in the partnership.*" Jackson, *supra* note 6, at 281.

Unfortunately, this is not a grammatical reading of section 13 because the qualifying phrase "not being a partner in the partnership" is between the "loss or injury" phrase and the "penalty" phrase. If the drafters of the Act had intended the provision to apply that it seems to contemplate that a partnership should be derivatively liable for the wrongs committed by a partner in the ordinary course of business.[35]

It is often argued, however, that the conversion of client's funds is not usually within the ordinary course of a law firm's "business." Courts recognize this and, instead, often look to the reason for which the funds were received.[36] For example, if the funds were received so that they might be invested by an attorney at his discretion, it would be unlikely that this could be termed as received in the ordinary course of business.[37] Whereas, if funds were received in the settlement of an estate, or as proceeds from a foreclosure sale, such receipts could properly be con-

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to penalties incurred by nonpartners, the provision would have been worded to impose liability for "loss or injury caused to or penalty incurred by any person not being a partner in the partnership." The phrasing of the section leads to the conclusion that the drafters contemplated the "penalty" would be incurred by the wrongfully acting partner rather than the victim. This interpretation of section 13 is supported by cases imposing statutory usury penalties on partnerships and individual partners. *See* Calimpco, Inc. v. Warden, 100 Cal. App. 2d 429, 224 P.2d 421 (195), *overruled*, Fazzi v. Peters, 68 Cal. 2d 590, 68 Cal. Rptr. 170, 440 P.2d 242, (1968). *See also* Wright v. E-Z Finance Co., 267 S.W.2d 602 (Tex. Civ. App. 1954). *See generally* Crane & Bromberg, *supra* note 18, § 54(f), at 318-19 (noting that the Uniform Partnership Act imposes liability on the partnership for " 'any penalty . . . incurred' by a partner acting in the ordinary course of business or with the authority of his co-partnerships").

The reference in section 13 to "injury . . . to any person, not being a partner," Ind. Code § 23-4-1-13 (1982), probably was intended to allow actions against a partnership even if the offending partner had a personal immunity, and to codify the partnership's nonliability when one partner injured another. Crane & Bromberg, *supra* note 18, § 54(d).

[35]The general rule at common law was that punitive damages were not recoverable from a partnership or an innocent partner. Yet some courts imposed liability in cases involving fraud in the conduct of the ordinary course of the partnership's business, wherein the copartners had neither ratified nor authorized the conduct. *See* Annot., 14 A.L.R. 4th 1315, 1336-38 (1982). In at least one jurisdiction that had adopted the Uniform Partnership Act, however, a partner who had neither participated in nor ratified an action was held not liable in exemplary damages for a conversion by a copartner. Broudy-Kantor Co. v. Levin, 135 Va. 283, 116 S.E. 677 (1923). That court's reliance on a pre-Act case denying punitive damages against an innocent partner, and its failure to mention the Act, which had been in effect for only a few years, suggests that the statute was simply overlooked. *Compare* Meleskr v. Pinero Int'l Restaurant, Inc., 47 Md. App. 526, 424 A.2d 784 (1981) (court imposed punitive damages on an innocent partner without even *discussing* the Uniform Partnership Act).

[36]*See* Riley v. Larocque, 163 Mis. 423, 297 N.Y.S. 756, 767 (N.Y. Sup. Ct. 1937). *See, e.g.*, Rouse v. Pollard, 130 N.J. Eq. 204, 209, 21 A.2d 801, 804 (N.J. 1941) ("it is [not] a characteristic function of the practice of law to accept clients' money for deposit and future investment in unspecified securities at the discretion of the attorney . . . ."); Cook v. Brundidge, Fountain, Elliott & Churchill, 533 S.W.2d 751 (Tex. 1976) (An attorney's acceptance of a check, payable to him "as Attorney for" his client, for the purpose of investing the money, presented a question of fact with respect to the required conditions for partnership liability.).

[37]Rouse v. Pollard, 130 N.J. Eq. 204, 209, 21 A.2d 801, 804 (N.J. 1941).

sidered within the scope of the ordinary course of business. In *McCloud*, the converted funds were received in connection with a legal matter being handled by the Husted firm,[38] and therefore the finding of the court of appeals that the partnership was liable for Husted's actions is not too unreasonable.

Of course where the wrongful acts are purely personal, and have no real nexus with the partnership's business, it is appropriate to absolve the innocent partners under general principles of agency law.[39] However, even in those instances another possible ground for imposing liability on the partnership exists. It has been held in other jurisdictions that even where the defendant partner's actions are not considered in the ordinary course of the partnership's business, the partnership might have a duty to the plaintiff to exercise care in operating its business.[40] That is, if the firm had in any way closed its eyes to Husted's wrongdoing, it should be held liable. In both Indiana cases, it appeared that the deceased partner was aware of Husted's misconduct before it was uncovered.[41] The deceased partner's failure to put an end to Husted's defalcations in *McCloud* may have justified partnership liability for punitive damages under section 13,[42] even if the conversion of funds were found not to be within the ordinary course of the law firm's business.

The supreme court in *McCloud* did uphold the award of compensatory damages against the partnership[43] under section 14 of the Indiana Act.[44] If the damages awarded in *Husted v. Gwin*[45] were in fact compensatory damages rather than punitive,[46] the result in *Gwin* should stand even after *McCloud*, since it is clear the misappropriated funds resulted from legal work performed by the law firm.[47]

The supreme court in *McCloud* emphasized that punitive damages

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[38]450 N.E.2d at 492.

[39]Restatement (Second) of Agency § 235 (1958).

[40]*See* Riley v. Larocque, 163 Misc. 423, 297 N.Y.S. 756 (N.Y. Sup. Ct. 1937) (dicta); McClay v. Kelsey Seybold Clinic, 456 S.W. 2d 229 (Tex. Civ. App. 1970), *aff'd*, 466 S.W.2d 716 (Tex. 1971). *But see* Richmond Guano Co. v. E.I. DuPont de Nemours & Co., 284 F. 803, 808, 809 (4th Cir. 1922).

[41]Husted v. Gwin, 446 N.E.2d at 1363 n.3.

[42]Ind. Code § 23-4-1-13 (1982).

[43]450 N.E.2d at 494.

[44]Ind. Code § 23-4-1-14 (1982). This provision binds a partnership to make good the loss when partners or the partnership receive funds which are misapplied by a partner.

[45]446 N.E.2d 1361 (Ind. Ct. App. 1983).

[46]*See supra* note 3.

[47]446 N.E.2d at 1362. *See* Douglas Reservoirs Water Users Ass'n v. Maurer & Garst, 398 P.2d 74, 77 (Wyo. 1965). The *Gwin* court relied on Ind. Code § 23-4-1-13 (1982). The supreme court's later construction of section 13, in *McCloud*, should not change the result in *Gwin* however, because in *McCloud*, the supreme court found the firm liable under Ind. Code § 23-4-1-14 (1982). 450 N.E.2d at 494.

are not meant to compensate a plaintiff, but are intended to punish a wrongdoer and to deter others.[48] This is undoubtedly true, but the court ignored an important point. By prohibiting punitive damages against a partnership and its innocent partners, the court is inviting partners to be unduly "innocent" if they have any inkling that a partner is engaged in wrongdoing. Partners would be much more inclined to police the conduct of copartners if they realized that failure to do so could result in a punitive damage judgment. As a result, such a sanction would be much more potent as a deterrent than simply subjecting the malefactor alone to punitive damage liability.

B. Appraisal Rights

One of the more interesting business cases decided during the survey period was *Perlman v. Permonite Manufacturing Co.*[49] Minority shareholders, dissenting from a corporate merger, brought this diversity action to have the value of their shares determined as of the effective date of a corporate merger.[50] One of the few reported cases[51] construing the appraisal provision of the Indiana General Corporation Act,[52] *Perlman* is an excellent primer on the factors a court will consider in appraising the shares of a closely held corporation involved in a merger or consolidation.

In *Perlman*, the plaintiffs owned 48 of the 145 issued and outstanding shares of Midland Enterprises (Midland), an Indiana corporation, which was merged along with its wholly owned subsidiary into Permonite, an Illinois corporation.[53] The court used the net asset value method of

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[48]450 N.E.2d at 495. The court observed "that the rationale behind punitive damages in Indiana prohibits awarding such damages against an individual who is personally innocent of any wrongdoing." *Id. But cf.* Guild v. Herrick, 51 N.Y.S.2d 326 (N.Y. Sup. Ct. 1944) (lack of knowledge is no defense when partner should have known securities were being manipulated in course of partnership business).

[49]568 F. Supp. 222 (N.D. Ind. 1983), *aff'd*, 734 F.2d 1283 (7th Cir. 1984).

[50]568 F. Supp. at 223.

[51]*See* Republic Finance & Inv. Co. v. Fenstermaker, 211 Ind. 251, 6 N.E.2d 541 (1937); General Grain, Inc. v. Goodrich, 140 Ind. App. 100, 221 N.E.2d 696 (1967).

[52]The right to appraisal is found at IND. CODE § 23-1-5-7 (1982). This provision applies both to mergers (one or more constituent corporations merge into another constituent corporation) and to consolidations (two or more constituent companies cease to exist and a new corporation emerges from the transaction). *Id.* § 23-1-5-1. *See generally* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 346 (3d ed. 1983) (discussing the differences and similarities between mergers and consolidations) [hereinafter cited as HENN & ALEXANDER]. Shareholders of a corporation selling all, or substantially all, of its assets for purposes of ending or changing the nature of its business are also entitled to have their shares appraised. IND. CODE §§ 23-1-6-1, -5 (1982).

[53]568 F. Supp. at 223. Apparently, plaintiffs followed proper procedures in exercising their right of appraisal because no issue was raised by the defendant corporation regarding the procedures followed. A dissenting shareholder who does not follow the proper pro-

valuing Midland's shares.[54] This method assumes that on the effective date of a merger, a corporation's value equals the fair market value of its assets less the fair market value of its liabilities. Consequently, the court substituted the fair market values of Midland's assets and liabilities for their stated book values to arrive at an adjusted balance sheet.[55]

The first adjustment, a downwards revision of the notes receivable held by the two companies, was made because the interest rates on the notes were substantially below the appropriate market rate. Thus, the notes' values on the date of the merger were adjusted to reflect the right to receive payment of the principal in 1985, along with an appropriate yield to maturity.[56]

The value of the property, plant, and land of both Midland and its subsidiary, as of the merger date, had to be adjusted upwards to reflect increased fair market value over book value.[57] The property of the subsidiary was subsequently sold, producing an undisputed capital gains tax liability on the part of the corporation. As a result, the fair market value of this property was reduced by an amount equal to the tax liability.[58] The end result of this entire process was an adjusted balance sheet.

However, the court did not award the plaintiffs their pro rata interest in this value. Instead, it discounted the value of the shares by thirty-five percent.[59] This figure included a fifteen percent discount to the

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cedures is presumed to have assented to the merger or consolidation. IND. CODE § 23-1-5-7 (1982). *See* Gabhart v. Gabhart, 267 Ind. 370, 370 N.E.2d 345 (1977).

[54]568 F. Supp. at 223. Both plaintiffs' and defendants' appraisal experts used this approach. *Id.* This is not the only method available for establishing the value of dissenting shares in a merger or consolidation. *See generally* HENN & ALEXANDER, *supra* note 52, § 349, at 1002-03. Unfortunately, "value" is not defined in the statute, nor is any clue given as to its meaning.

[55]568 F. Supp. at 223. The same process was used to determine the fair market value of Midland's wholly-owned subsidiary, a Midland asset. *Id.* Current assets and liabilities of the two corporations did not have to be adjusted. *Id.* at 224.

[56]*Id.* at 224.

[57]*Id.* The court considered the testimony of defendants' real estate expert to be more reliable than the testimony of plaintiffs' witness who, not surprisingly, placed a higher value on the land. *Id.* at 224-25.

[58]*Id.* at 224. Presumably the tax liability would not have been considered if the property had not been on the market at the date of the merger.

[59]*Id.* at 226. The court ignored the testimony of one of the plaintiffs on the value of the dissenting shares because it was contradicted by the plaintiffs' as well as defendants' experts. *Id.* The court also concluded that even if the value of the surviving corporation's shares were relevant, there was no reliable estimate as to their value. The only arm's length valuation involving these shares was an estate tax determination for one shareholder less than four months after the merger. This figure, using the merger exchange rate, resulted in a value for the Midland shares roughly the same as the value determined by the court (IRS value was $2,265.50 per share; court determined value was $2,849.85). *Id.* One other transaction involving shares of the surviving corporation which would have

reflect plaintiffs' minority shareholder status in a relatively small, closely held, nonpublic corporation. The value of the shares was reduced because as a minority, the dissenting shareholders did not possess the power to either force a dividend or a liquidation, or control corporate policy or operations.[60] The court then made an additional fifteen percent discount to reflect the virtual nonexistence of a market for the plaintiffs' shares.[61]

The court reasoned that, generally, minority shareholders are unable to sell their shares, except to the majority holders or unless the majority holders are also selling their shares. This lack of demand causes the price of shares to decrease. This factor seems questionable, however because the lack of a market should be reflected in the minority interest valuation. Finally, the court discounted the minority interest's shares an additional five percent to reflect the risk associated with holding Midland's shares because of its "size and lack of diversity."[62]

The *Perlman* court, in applying Indiana law, analyzed the two Indiana decisions involving appraisal rights: *Republic Finance & Investment Co. v. Fenstermaker*[63] and *General Grain, Inc. v. Goodrich.*[64] In *Republic Finance*, dissenting shareholders of a corporation brought an action to determine the value of their shares upon the consolidation of their corporation with a constituent corporation.[65] The company appealed,

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substantially increased the value of the shares was discounted by the court because: (1) it was not an arm's length transaction; and (2) it had occurred a year before the merger. *Id.* at 226, 233.

The latter transaction did help plaintiffs in one respect. One shareholder owned only one share, the value of which was substantially less than the $10,000 diversity jurisdiction requirement. 28 U.S.C. § 1332 (1982). The court was satisfied that her claim in the complaint was made in "good faith" because the value of her share derived from this sale exceeded $10,000. *See* Horton v. Liberty Mutual Ins. Co., 367 U.S. 348, 352-54 (1961) (allowing reference to the complaint to determine the amount in controversy, unless it appears the amount was not stated in good faith). The testimony was rejected in valuing the Midland shares, but it did satisfy the requirement of Zahn v. International Paper Co., 414 U.S. 291 (1973), that each plaintiff individually must satisfy the jurisdictional amount. 568 F. Supp. at 227-28.

[60]568 F. Supp. at 226. This is an overstatement as far as forcing dividends is concerned, as it is well settled in Indiana that a minority shareholder can force a dividend in an appropriate case. *See* Cole Real Estate Corp. v. Peoples Bank & Trust Co., 160 Ind. App. 88, 310 N.E.2d 275 (1974), *discussed in* Galanti, *Business Associations, 1974 Survey of Recent Developments in Indiana Law*, 8 Ind. L. Rev. 24, 35-42 (1974).

[61]568 F. Supp. at 226, 231-32.

[62]*Id.* at 226. Not surprisingly, the discounts were based on testimony of defendants' stock appraisal expert. Plaintiffs' expert neither computed nor recognized a discount. *Id.* He did concede on cross-examination that such a discount would have been appropriate had he not been asked to value Midland itself. *Id.* at 232.

[63]211 Ind. 251, 6 N.E.2d 541 (1937).

[64]140 Ind. App. 100, 221 N.E.2d 696 (1966).

[65]The appraisal procedures are the same for mergers and consolidations. Ind. Code § 23-1-5-7 (1982). *See supra* note 52.

arguing that the trial court had relied too heavily on the book value of the assets, ignoring the company's own estimates of value.

The supreme court held that in placing a value upon dissenting shares, a court must take into account all relevant factors and considerations. "[W]eight should be given to the following considerations: Market value of stock, actual evaluation of assets, book value of assets, going value, prospects of corporation, character of assets (frozen or liquid), earnings, and general economic conditions."[66] The *Republic Finance* court also held that the value of the dissenting shares should be determined immediately before the merger or consolidation. With that approach then, dissenting shareholders neither receive an increase in value resulting from the transaction nor are they charged with any expenses of bringing about the transaction.[67]

Like *Republic Finance, General Grain, Inc. v. Goodrich*[68] emphasized that the ultimate issue in an appraisal proceeding is to determine the fair market value of the dissenting shares.[69] This requires consideration of a number of elements of value:

> book value, liquidating value, stock market value, evidence of sales in the market, the type of market available, the condition of the issues [sic] financial, managerial, (and) past and their present, as well as future possibilities and probabilities together with all the other elements which tend to affect the fair market value, for cash . . . .[70]

The court of appeals in *General Grain* considered the financial

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[66]211 Ind. at 254, 6 N.E.2d at 542, *quoted in* Perlman v. Permonite Mfg. Co., 568 F. Supp. 222, 228. The *Republic Finance* court also indicated that appraisals of assets and liabilities could be of greater assistance than book value or "a statement based upon arbitrary figures, such as costs and arbitrary percentage reserves." 211 Ind. at 255, 6 N.E.2d at 542. The stock market value of shares of a publicly traded corporation was helpful but not necessarily conclusive in valuing shares; in addition, the value given to both tangible and intangible assets should have been going concern value and not liquidation value unless the corporation was in financial distress and liquidation inevitable. *Id.* at 254-55, 6 N.E.2d at 542.

[67]211 Ind. at 255, 6 N.E.2d at 543. In general, the approach taken in *Republic Finance* is similar to the approach other courts have taken in appraisal proceedings. *See generally* Henn & Alexander, *supra* note 52, § 349, at 1002-04 nn. 12-16.

[68]140 Ind. App. 100, 221 N.E.2d 696 (1966).

[69]*Id.* at 109-11, 221 N.E.2d at 701.

[70]*Id.* at 110, 221 N.E.2d at 701. The court was not willing to rely solely on the "market" price for valuing corporate shares, although such a price would be a factor. *Id.* at 111, 221 N.E.2d at 701-02. Departure from the market's price in determining the value of securities has occurred in other contexts. *See* Beecher v. Able, 435 F. Supp. 397, 407-09 (S.D.N.Y. 1977) (value of debentures adjusted upwards from the market price because of perceived overreaction by market to negative news in an action under § 11 of the Securities Act of 1933. 15 U.S.C. § 77k(e) (1976)). *But see* Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 585-86 (S.D.N.Y. 1971). *See generally* R. Jennings & H. Marsh, Securities Regulation 758-59 (5th ed. 1982).

condition of the constituent corporations, and reversed the trial court because it had overemphasized the book value of the shares when the corporation was in financial trouble.[71]

Republic Finance was helpful to the *Perlman* defendants. In *Perlman*, the plaintiffs' expert had considered the effect of the merger in valuing the plaintiffs' shares. Relying on *Republic Finance*,[72] the *Perlman* court deemed this improper, and deferred to the defendants' witness, who had not considered the merger agreement in his appraisal.[73]

At the time of the *Perlman* decision, no Indiana authority existed regarding the appropriateness of discounting the value of the plaintiffs' shares from their pro rata interest in the value of Midland.[74] The court considered and rejected the Iowa Supreme Court's decision in *Woodward v. Quigley*.[75] In *Woodward*, the Iowa court refused to apply a minority discount factor because a discount would permit a majority to force out a minority without paying them their proportionate share of the actual value of the corporation. Furthermore, *Woodward* declined to follow a line of tax cases in which the lack of a market for a minority interest was found to justify a discount.[76] The *Woodward* court reasoned that the purpose of the Iowa appraisal was to determine the "real" value of dissenting shares.[77] It was not clear what "real" value meant, but apparently the *Perlman* court was convinced that the Iowa statute reflected a policy not present in the Indiana appraisal statute.[78]

Rather, *Perlman* adopted the view of *Moore v. New Ammest, Inc.*,[79] which held that Kansas law valued dissenting shares based on all relevant factors, and thus the value of a dissenter's shares was his "proportionate interest in a going concern."[80] At least this is how the *Perlman* court characterized *Moore*, even though the reference to an interest in a going concern is arguably closer to the *Woodward* rationale. Yet in discounting the dissenting shares, the Kansas court reasoned that a minority's proportionate interest in a going concern is less than a pro rata share of its assets and, therefore, discounting was appropriate.[81]

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[71]140 Ind. App. at 112-13, 221 N.E.2d at 702-03.

[72]211 Ind. 251, 6 N.E.2d 541 (1937). *See supra* note 67 and accompanying text.

[73]568 F. Supp. at 230.

[74]The court could not resist taking a dig at the attorneys when it noted that it had located two cases on point while neither party had cited any relevant case law. 568 F. Supp. at 230 (citing Woodward v. Quigley, 257 Iowa 1077, 133 N.W.2d 38, *modified*, 257 Iowa 1160, 136 N.W.2d 281 (1965); Moore v. New Ammest, Inc., 6 Kan. App. 2d 461, 630 P.2d 167 (1981)).

[75]257 Iowa 1077, 133 N.W.2d 38, *modified*, 257 Iowa 1160, 136 N.W.2d 281 (1965).

[76]257 Iowa at 1087, 133 N.W.2d aat 42-44.

[77]*Id.* at 1087, 133 N.W.2d at 43-44.

[78]Ind. Code § 23-1-5-7 (1982).

[79]6 Kan. App. 2d 461, 630 P.2d 167 (1981).

[80]*Id.* at 467, 630 P.2d at 173 (quoting Tri-Continental v. Battye, 31 Del. Ch. 523, 526, 74 A.2d 71, 72 (1950)).

[81]6 Kan. App. 2d at 474-75, 630 P.2d at 177. The discount would not be appropriate

There was no real discussion of the propriety of the fifteen percent discount for the nonmarketability of the Midland shares. The *Moore* rationale would apply to this factor as well; and in actuality, the court did apply a thirty percent discount, reflecting all the negatives incumbent with minority status.[82] The defendants, however, did not prevail on all points: the court refused to allow an additional discount to reflect capital gains taxes that would become due if Midland's assets were sold.[83] This discount was rejected because it assumed Midland's assets would be liquidated. Such an assumption conflicted with the requirement of *Republic Finance* that assets be "valued in the context of the corporation as a going concern, unless the corporation is in distress and liquidation inevitable."[84]

The final issue presented to the *Perlman* court was whether prejudgment interest on the value of the shares was proper. The court concluded it was not.[85] The Indiana appraisal statute does not expressly provide for interest. The plaintiffs argued that denying interest would be unjust to dissenting shareholders since the statute itself precludes them from participating "in dividends or in corporate management from the date of the merger."[86] Furthermore, they argued that section 7 of the statute provides that the "'practice, procedure and judgment' in stock valuation cases 'shall be the same, so far as practicable, as that under eminent domain cases.'"[87]

Although the eminent domain statute now includes interest from the date of taking,[88] the court in *General Grain* found that it did not provide for interest when the General Corporation Act was adopted in 1929, and that the subsequent amendment to provide for interest was not retroactive.[89] The *General Grain* court questioned whether interest, even if authorized in case law, could be considered a part of the "practice, procedure and judgment" of the eminent domain laws, because the right was more substantive than procedural.[90] As a result, appraisal rights are

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if there were a market for the corporation's shares which would reflect the minority interest. That is to say, the market value could be less than the "enterprise value" of the shares. *See* Perlman v. Feldman, 154 F. Supp. 436 (D. Conn. 1957).

[82]Plaintiffs did not challenge the five percent discount for Midland's size and non-diverse business. 568 F. Supp. at 232.

[83]*Id.*

[84]*Id.* (citation omitted). The court did deduct the capital gains liability for the property of the Midland subsidiary which was in fact sold. *Id.* at 224.

[85]*Id.* at 233-35.

[86]*Id.* at 233.

[87]*Id.* at 233 (quoting Ind. Code § 23-1-5-7 (1982)).

[88]Ind. Code § 32-11-1-8 (1982).

[89]General Grain, Inc. v. Goodrich, 140 Ind. App. 100, 108-09, 221 N.E.2d 696, 700 (1966).

[90]*Id.* Apparently, interest had been awarded in eminent domain cases prior to the amendment to section 32-11-1-8 to satisfy just compensation requirements of the Indiana

considered like any other unliquidated claim, and dissenting shareholders are not entitled to interest until final judgment is entered.[91]

The *Perlman* court refused to distinguish *General Grain* on the ground that the merger there occurred before the eminent domain statute was amended.[92] It rejected the plaintiffs' contention, concurring with the doubts of the court in *General Grain* that interest is part of the "practice, procedure and judgment" of the eminent domain laws.[93] The *Perlman* court found that any inequity in denying interest was a matter properly addressed by the General Assembly.[94] The statute had been amended twice since *General Grain*, without providing for postmerger interest. Thus, the *Perlman* court was satisfied that the legislature intended to let the *General Grain* interpretation stand.[95] Consequently, dissenting shareholders are not entitled to interest until final judgment is entered.[96] The *Perlman* treatment of the interest issue, while no doubt correct as a matter of law, is narrow, unfortunate, and inequitable as far as dissenting shareholders are concerned.

There is a paucity of decisions interpreting the rights of dissenting shareholders in a merger or consolidation to have the value of their shares determined. The *Perlman* decision, although somewhat harsh on the interest issue, fills in some of the interstices left by *Republic Finance* and *General Grain*.

C. *"Informal" Corporate Dissolution*

Practitioners who are tempted to terminate a corporation's affairs by failing to file annual reports with the Secretary of State should take note of *Duncan v. Jones*.[97] In *Duncan*, the court of appeals reversed "a summary judgment of the Hancock Circuit Court awarding one-half of a corporate bank account to [Jones, the] plaintiff,"[98] who owned half of the particular corporation. Jones brought this action against a savings and loan to collect one-half of an account, opened by Duncan

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Constitution, art. I, § 21. *See* Schnull v. Indianapolis Union Ry. Co., 190 Ind. 572, 131 N.E. 51 (1921). The *Perlman* court summarily rejected a constitutional argument for interest. 568 F. Supp. at 235 n.6.

[91]140 Ind. App. at 109, 221 N.E.2d at 701.

[92]568 F. Supp. at 234.

[93]*Id.*

[94]*Id.* at 234-35.

[95]*Id.*

[96]140 Ind. App. at 109, 221 N.E.2d at 701.

[97]450 N.E.2d 1019 (Ind. Ct. App. 1983).

[98]*Id.* at 1020. The court also ordered the trial court to grant defendant financial institution's Rule 12(B)(7) motion, Ind. R. Tr. P. 12(B)(7), to join the corporation and the other shareholder as indispensable parties, and to grant the latter parties' petition to intervene. 450 N.E.2d at 1023.

without any corporate formalities. Only Duncan was authorized to withdraw funds from the account.[99]

Jones argued that the Secretary of State had revoked the rights and privileges of the corporation, and had declared the articles of the corporation forfeited for failure to file annual reports. The Secretary of State's action alone, he contended, terminated the corporation's existence so that the bank account became divisible between the two shareholders as tenants in common.[100]

The court of appeals, in reversing the judgment, held that under the Indiana General Corporation Act, when a corporation's articles have been forfeited for failing to file annual reports, an involuntary dissolution action by the Attorney General is required for a formal winding up of the corporation's affairs.[102] Until this procedure is complete, a corporation, although in limbo with a forfeited franchise and without corporate rights and privileges, maintains sufficient status as a separate entity to preclude a collateral challenge to its existence.[103] Therefore, Jones had no claim to the corporation's assets until they had been distributed to him through proper corporate or judicial action.[104]

The *Duncan* court appears to have reached the correct result. Yet, it is understandable how Jones could conclude, as did the trial court, that the corporation ceased to exist when the articles were administratively forfeited by the Secretary of State. The General Corporation Act provides that nothing in the corporate dissolution section is to limit the Secretary of State's authority "to revoke the rights and privileges of any corporation

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[99]450 N.E.2d at 1021.

[100]*Id.* at 1020-21. *See* IND. CODE § 23-1-8-1 (1982) (requiring corporations to file annual reports).

[101]IND. CODE §§ 23-1-1-1 to -3-8-1 (1982).

[102]450 N.E.2d at 1022. The court of appeals relied expressly on two sections of the Act to determine the existence of such a requirement. IND. CODE § 23-1-7-3 (1982) (providing for involuntary corporate dissolution by a circuit or superior court), IND. CODE § 23-1-10-1 (1982) (describing corporate forfeiture). Apparently, the forfeiture of the articles puts a corporation in some sort of purgatorial limbo. *See infra* note 103 and accompanying text.

Section 23-1-10-1(b) provides that when the Secretary of State certifies to the Attorney General that a corporation has failed to file annual reports for two consecutive years, and consequently has forfeited its corporate franchise, rights, and privileges, the Attorney General is to proceed by information against the corporation for the purpose of having the forfeiture declared. IND. CODE § 23-1-10-1(b) (1982). Section 23-1-7-3(d) provides that the existence of a corporation being involuntarily dissolved ceases when the clerk of the court causes a certified copy of the judgment or order of dissolution to be filed in the office of the Secretary of State. IND. CODE § 23-1-10-1(b) (1982).

[103]*See* Knotts v. Clark Constr. Co., 191 Ind. 354, 358, 131 N.E. 921, 922 (1921); Barren Creek Ditching Co. v. Beck, 99 Ind. 247, 249-50 (1884); Logan v. Vernon R.R., 90 Ind. 552, 556-57 (1883); President of Hartsville University v. Hamilton, 34 Ind. 506, 509 (1870).

[104]Department of Treasury v. Crowder, 214 Ind. 252, 15 N.E.2d 89 (1938).

to carry on and transact business, or to declare forfeit the articles of incorporation . . . for failure to file the annual report for two (2) successive years . . . ."[105] This provision was designed to ensure the right of the Secretary of State to act administratively against delinquent corporations. Arguably, this administrative forfeiture clause could be interpreted to mean that if the Secretary of State certifies a delinquent corporation to the Attorney General, who then brings an involuntary dissolution action, corporate existence ceases only when the court's judgment is filed with the Secretary of State; if, however, the Secretary of State does not certify the delinquency to the Attorney General, corporate existence ceases when the articles are delcared forfeited by the Secretary of State. Although plausible, this argument would tend to discourage following the proper procedures for dissolving corporations.[106] A more reasonable interpretation is that the administrative forfeiture clause triggers another section of the General Corporation Act.[107] That section imposes criminal and civil liability on persons who, with intent to defraud, exercise corporate powers after a corporation has been dissolved, or its articles of incorporation canceled.[108]

Arguably, another source of confusion is that Indiana has two separate corporate annual report statutes.[109] The purpose of the second statute is to require annual reports from corporations not required to file annual reports under any other Indiana act.[110] Thus, the reporting requirements of the second statute would not apply to corporations organized under the Indiana General Corporation Act. Moreover, the statute authorizes the Secretary of State to administratively revoke the corporate franchise of domestic corporations[111] failing to file annual reports for two years. This section applies to "any domestic corporation."[112] In addition, the procedure for reinstating a corporation whose franchise has been revoked for failure to file an annual report is set forth in the statute.[113] The statute specifies that when a corporation is reinstated, it "shall be deemed to have continuously existed since" its rights and privileges were revoked, and its articles forfeited.[114]

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[105]Ind. Code § 23-1-7-3(g) (1982).

[106]The General Assembly has recognized that a corporation will survive to some extent even after it is dissolved. *See, e.g.*, Ind. Code § 23-1-7-3(f) (1982) (General Corporation Act authorizes a receiver of a dissolved corporation to collect and otherwise realize upon and distribute assets of the corporation not distributed prior to the dissolution.).

[107]Ind. Code § 23-1-10-5(a) (1982).

[108]The word "canceled" is used in Ind. Code § 23-1-10-5(a), while "forfeited" is used in Ind. Code §§ 23-1-7-3,-10-1. Yet, in context, the terms appear to be synonymous.

[109]Ind. Code §§ 23-1-8-1; 23-3-4-1 to -2 (1982).

[110]*Id.* § 23-3-4-1.

[111]*Id.* § 23-3-4-1(c).

[112]*Id.*

[113]Ind. Code § 23-3-4-1.6 (1982).

[114]*Id.* § 23-3-4-1.6(c).

The provisions of this reinstatement clause suggest a legislative lack of concern for the niceties of following dissolution procedures. The provision permitting reinstatement undercuts the argument that the conduct of a business after its articles have been forfeited could be evidence of fraudulent intent under the General Corporation Act. As a result, anyone who, despite any fraudulent intent, operated a business as a corporation after forfeiture could undo the adverse consequences simply by filing the delinquent reports. This is a possible and an unfortunate result, as it would virtually turn the penalty provision into a dead letter. It is not necessarily an inevitable result; the reinstatement provisions are intended to help those who have not filed their annual reports in a timely manner, more through inadvertence than through improper or fraudulent motives. There is no reason why the two sections (reinstatement and annual report) cannot be "harmonized."

If people involved in a corporation settle its affairs by selling its assets, paying all creditors, and distributing the balance to themselves without complying with the statutory dissolution provisons, no one is truly harmed except the state, which has lost fees that would have been paid if the proper procedures had been followed. In such a case the informal dissolution approach would not be a subject of shame, although not to be encouraged. The problem with an informal approach is that claims against the corporation might be unknown or overlooked before assets are distributed. This could subject the directors to civil and even criminal liability.[115]

It is hoped that attorneys would not intentionally dissolve corporations informally if only out of a sense of professional pride. If they do, their clients might end up like the plaintiff in *Duncan*.[116] This is the most troublesome aspect of the case. The result in *Duncan* is correct, but a great deal of time, money, and effort was spent in the litigation which could have been avoided if the proper, *formal* procedures had been followed.

D. *Partnership Liability*

Often a partnership is formed when two people simply agree to enter into business together.[117] Once partnership status is established, partners become subject to unlimited personal liability.[118] To protect against such liability, business ventures are often carefully formed so that they do not appear to be partnerships.[119] In *J.M. Schultz Seed Co.*

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[115]Ind. Code § 23-1-10-2 (1982).

[116]450 N.E.2d 1019 (Ind. Ct. App. 1983).

[117]Ind. Code § 23-4-1-6. *See generally* Crane & Bromberg, *supra* note 18, ch. 2.

[118]Ind. Code § 23-4-1-15.

[119]*See, e.g.*, Martin v. Peyton, 246 N.Y. 213, 158 N.E. 77 (1927) (finding that the relationship defendants intended to form was, as a matter of law, a partnership.).

v. Robertson,[120] however, it was a matter of luck partnership status was not found.

The court of appeals in *Schultz* affirmed a negative judgment of the Boone County Circuit Court in a creditor's suit against a putative partner for a partnership debt.[121] In this case, defendant Robertson told the Schultz representative that he wanted to talk to "his partner" King before signing the note; he then signed the note as "partner."[122] When the note was not paid, Schultz sued both Robertson and King as partners. The trial court found that no partnership existed on the date of the note, and therefore judgment was entered against Robertson. Because King had neither signed nor agreed to pay the note, he was not liable for the debt.[123] On appeal, Schultz argued that the evidence compelled the conclusion that Robertson and King were partners and, thus, King should be individually liable for the debt.

The central issue in *Schultz* was whether or not King and Robertson were partners at the time of the transaction. Taking note that the common law in Indiana provides no clear cut definition of a partnership, the court of appeals first turned to the Indiana Uniform Partnership Act (Act).[124] The Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."[125] Although the statute provides some guidance,[126] whether the elements of a partnership have been established is a question of fact.[127] The court of appeals, noting its limited standard of review over questions of fact, held that the trial court could legitimately conclude that King and Robertson had no intent to form a partnership at the time in question, but rather, had a debtor-creditor relationship.[128] The evidence brought forth at trial revealed that before the Schultz note was signed King had cosigned bank notes for Robertson. King had met also with Schultz

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[120]451 N.E.2d 62 (Ind. Ct. App. 1983).

[121]*Id.* at 63.

[122]*Id.*

[123]*Id.*

[124]Ind. Code §§ 23-4-1-1 to -43. (1982). *See also* 451 N.E.2d at 64.

[125]Ind. Code § 23-4-1-6.

[126]Section 7 of the Act contains rules to be used in determining whether or not a partnership exists. Subsection 3 provides that the sharing of gross receipts does not "of itself" establish a partnership. Ind. Code § 23-4-1-7(3) (1982). Subsection 4 provides that receipt of a share of a business' profits is prima facie evidence of a partnership. However, this last inference is not to be drawn if the profits are received in payment of a debt, or as interest on a loan, even if payments vary with the profits of the business. Ind. Code § 23-4-1-7(4). *See also*, Crane & Bromberg, *supra* note 18 §§ 15, 19.

[127]Musgrave v. Madonna, 168 Ind. App. 145, 341 N.E.2d 789 (1976). *See* Vohland v. Sweet, 433 N.E.2d 860 (Ind. Ct. App. 1982). *See generally* Crane & Bromberg, *supra* note 18, §§ 4(c), at 35-36; 14A, at 77. Furthermore, the burden of persuasion is on the party asserting the partnership. *Id.* at 36.

[128]451 N.E.2d at 65.

representatives in an attempt to arrange a debt schedule for repaying Robertson's note. Finally, King gave Schultz his personal financial statement.[129] Robertson testified that he thought King was his partner at the time the note to Shultz was signed. King, however, considered himself a creditor until early 1980 when they filed a tax return stating they were partners.[130] King testified that "he had no voice in the management, but was consulted by Robertson on some major decisions."[131] No written or oral partnership agreement had been agreed to, nor was any agreement even discussed until 1980. Furthermore, no agreement to share profits had been entered into.

Regardless of the truth of King's statements, none of them actually precluded the existence of a partnership. Although King might have had no voice in the management of the business, there is no need to show daily involvement by a partner to establish a partnership.[132] The key is the objective intent of the parties, inferred from their actions.[133]

A partnership is a consensual relationship, but there is no need for an express contract, oral or written.[134] If an agreement is required, it may be express or implied.[135] It is even possible for a partnership relationship to exist when the parties believe that they are not partners.[136]

Profit sharing is a primary attribute of the co-ownership element of a partnership.[137] However, an express agreement between partners to share profits is unnecessary,[138] because silence as to how profits are to be shared simply leads to the conclusion that they are to be shared equally.[139] Presumably, in most partnerships, partners expect to make a profit, and have some thoughts as to how such profits are to be divided. Yet in a case such as *Schultz*, where the business was losing money when King became a putative partner, such a presumption might not

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[129]*Id.* at 63. All contact between Schultz and King occurred after the chemicals were sold, so Schultz did not rely on his credit in making the sale. *Id. See infra* text accompanying notes 144-47.

[130]451 N.E.2d at 64. Robertson borrowed money from King and placed it in a capital account on his books, but King carried the loans as notes receivable until they decided to treat the venture as a partnership for tax deduction purposes. *Id.*

[131]*Id.* at 64.

[132]*See* Vohland v. Sweet, 433 N.E.2d 860, 864 (Ind. Ct. App. 1982); Endsley v. Game-Show Placements, Ltd., 401 N.E.2d 768, 770-71 (Ind. Ct. App. 1980).

[133]*Cf.* RESTATEMENT (SECOND) OF AGENCY §§ 1, 15, 26 (1957).

[134]*See* CRANE & BROMBERG, *supra* note 18, § 5(b), at 42-43.

[135]Kavanaugh v. England, 232 Ind. 54, 58, 110 N.E.2d 329, 331 (1953); CRANE & BROMBERG, *supra* note 18, § 5(b).

[136]*See* CRANE & BROMBERG, *supra* note 18, § 5(a), at 41-42 n.46.

[137]IND. CODE § 23-4-1-7(4) (1982); *See generally* CRANE & BROMBERG, *supra* note 18, §§ 14, 14A.

[138]CRANE & BROMBERG, *supra* note 18, § 65(a), at 366.

[139]*Id.*

exist.[140] Thus, the fact that the defendants did not agree to share profits does not lead inevitably to the conclusion that no partnership existed.

However, as the court pointed out, it could reverse the decision below only if the evidence led solely to the conclusion that there was a partnership.[141] The court of appeals noted that the federal income tax return filed by King and Robertson could be evidence of a partnership,[142] but the trial court could just as easily have considered the return, and Robertson's treatment of King's loan as a capital account, as an effort "to credit losses against other income."[143] In other words, it was possible to conclude, as did the trial court, that Robertson and King had a debtor-creditor relationship and thus were not partners. Schultz' argument of a partnership by estoppel was also rejected by the court.[144] The Indiana Act provides that a person can be liable if he is simply held out as a partner.[145] If the representation is private, only the persons to whom it was made may benefit; if the representation is public, generally anyone can rely on it, even if it is not made or communicated to them.[146] Here, there was no evidence that Schultz was aware of King when the chemicals were sold or the note signed; thus, Schultz could not be said to have relied on the existence of King as a partner.[147] Because estoppel requires a holding out and a reliance, Schultz's argument was rejected.

Schultz reached an eminently reasonable result.[148] Because the burden of persuasion is on the party asserting the existence of the partnership, the decision should be that a partnership does not exist if the evidence of intent is evenly balanced, as was the case here. It is interesting to note, however, that arguably the judgment would have been affirmed, even if the trial court had found for Schultz.

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[140]Generally, there is no requirement that the parties agree to share losses; loss sharing is regarded as a consequence of partnership. CRANE & BROMBERG, *supra* note 18, § 14(e).

[141]Vohland v. Sweet, 433 N.E.2d 860, 865 (Ind. Ct. App. 1982).

[142]Guthrie v. Foster, 256 Ky. 753, 764, 76 S.W.2d 927, 931-32 (1934). *See also* CRANE & BROMBERG, *supra* note 18, § 14(a), at 66 n.95.

[143]451 N.E.2d at 65. The court did not opine as to how the Internal Revenue Service might react.

[144]*Id.* at 65.

[145]IND. CODE § 23-4-1-16 (1982). *See generally* CRANE & BROMBERG, *supra* note 18, § 36.

[146]*See* CRANE & BROMBERG, *supra* note 18, § 36, at 197-98. There is authority to the contrary, Brown & Begelow v. Roy, 132 N.E.2d 755, 756-57 (Ohio Ct. App. 1955), but it is generally recognized by authorities that there must be reliance in both situations. This means that the third person must know of the representation in some way. *See* CRANE & BROMBERG, *supra* note 18, § 36, at 197-98. Section 16 of the Indiana Act is ambiguous on this point. However, it does refer to acting on the "faith of such representation." IND. CODE § 23-4-1-16 (1982). The subsequent reference to "whether the representation has or has not been made or communicated" to the person extending credit, *id.*, just means it is irrelevant how he learned of the representation. CRANE & BROMBERG, *supra* note 18, § 36, at 198.

[147]451 N.E.2d at 65.

[148]It would have been unfair to treat King as a partner for what appears to have

F. Share Repurchase Agreements

Decided during the survey period, *Anacomp, Inc. v. Wright*[149] is a warning to attorneys to exercise care in drafting share sale and buy back agreements. In *Anacomp*, the court of appeals affirmed in part, and vacated in part, a judgment of the Hendricks County Circuit Court.[150] Wright, a stockholder, brought the action for an accounting arising out of an executive employment and stock sale agreement.

The preliminary agreement in dispute provided for Wright's purchase of Anacomp shares as an equity incentive arrangement: some immediately, and the balance over a five-year period. It also provided that Wright would sell and Anacomp would repurchase the shares at the initial purchase price, if the agreement were terminated before the end of five years. Efforts to arrive at a definitive employment agreement were unsuccessful and the relationship ended on December 15, 1978.[151]

A purported addendum to this preliminary agreement was drafted by Anacomp shortly after the agreement was signed. The addendum stated that cash dividends would become Wright's property, but that shares paid as stock dividends would be "'treated as a part of the originating shares, and . . . will be repurchased if the buy back arrangement is exercised along with the originating shares that are sold.'"[152] At the end of the employment negotiations, Wright had more shares, as a result of stock dividends and stock splits, than he had purchased initially. The ultimate issue was whether or not Wright had to return those shares along with his initial purchase. The court said he did not.[153]

One preliminary issue decided by the court was whether or not Wright was bound by the addendum. The court easily disposed of Anacomp's argument that by stipulating to the addendum's admission into evidence, Wright foreclosed any issue regarding the effect of the document.[154] Stipulations are agreements respecting business before a court, and are favored because litigation can be simplified and expedited if certain facts are admitted.[155] Although parties may be bound by stipulations, stipulations are not construed to admit facts which the

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been a very generous gesture to aid Robertson at considerable personal expense. To impose additional losses on King after the losses he already had suffered would have been particularly unfortunate.

[149]449 N.E.2d 610 (Ind. Ct. App. 1983), *reh'g denied*, July 6, 1983.

[150]*Id.* at 610. The court vacated an award of prejudgment interest on agreement by the parties. *Id.* at 617-18. Anacomp argued that awarding "both interest and dividends was so internally inconsistent and irreconcilable that [it] should be granted a new trial." *Id.* at 615. The court concluded any inconsistency was remedied by vacating the prejudgment interest. *Id.*

[151]*Id.* at 612-13.

[152]*Id.* at 614 n.2 (quoting the Record at 85).

[153]*See id.* at 612.

[154]*Id.* at 614-15. Wright testified that he had not seen the document until after he left Anacomp's employ. *Id.*

[155]Marshall County Redi-Mix, Inc. v. Matthew, 447 N.E.2d 1165, 1167 (Ind. Ct. App.

parties obviously intended to controvert.[156] It was clear to the court that Wright had stipulated to the admissiblity of the addendum to expedite the litigation, not as an assent to the assertion that it was part of the agreement. If Wright had agreed to the addendum, there would have been no reason to file suit.[157] It is likely that Wright was simply agreeing to admit the addendum into evidence for the trial court's consideration rather than admitting its purported effect. The court of appeals affirmed the lower court, agreeing that the addendum was not part of the original agreement.[158]

Anacomp also asserted that the failure to reach a definitive employment agreement constituted a failure of consideration. Thus, Anacomp argued, recission was the proper remedy whereby the original shares plus dividends should be returned to Anacomp, and Wright would receive the amount of his investment plus interest. The court of appeals rejected this argument, finding that the share transaction was actually a separate and distinct agreement, which was not affected by the parties' failure to reach a definitive employment agreement.[159]

The court also rejected Anacomp's argument that Wright would have to return all of the shares in his possession in order to return the parties to the status quo, that is, reconvey the same percentage of equity he had originally purchased.[160] The court noted that the total share package proposed by Anacomp might have supported an inference of proportionate ownership, but the argument could not prevail because Wright did not purchase all of the stock offered. The court reasoned that because "the stock issued to Wright was restricted, there [was] nothing to stop Anacomp from recovering that proportionate interest when it [bought] back those shares."[161]

This reference to the restrictions placed on the stock originally issued to Wright is misleading. The restrictions on those shares were needed to satisfy the requirements of the federal securities laws. Such restrictions simply limit the ability of certain shareholders to sell their securities on the open market; they do not obligate the issuer to repurchase them.

1983); Raper v. Union Fed. Sav. & Loan Ass'n, 166 Ind. App. 482, 488, 336 N.E.2d 840, 844 (1975).

[156]Marshall County Redi-Mix, Inc. v. Matthew, 447 N.E.2d 1165, 1167 (Ind. Ct. App. 1983); Raper v. Union Fed. Sav. & Loan Ass'n, 166 Ind. App. 482, 488, 336 N.E.2d 840, 844 (1975).

[157]449 N.E.2d at 615.

[158]*Id.*

[159]*Id.* at 615-16. Arguably, if Wright had been seeking to rescind, Anacomp's argument might have been more persuasive. Instead, Wright was merely seeking a determination of his rights under the repurchase agreement.

[160]*Id.* at 616.

[161]*Id.*

In fact, Wright would have been free to sell the shares on the open market once he satisfied the requirements of the federal securities laws. If the court meant that the restrictions required Wright to resell the shares to Anacomp, it is difficult to understand how it could hold that the additional shares were not part of the buy back agreement.

Arguably, the court misconstrued the restrictive nature of the additional shares received by Wright. However, the court did strike a rather interesting balance between the equities. The court noted that "Wright's ownership position was based on the investment of funds which he borrowed[,]"[162] and therefore, Wright had to pay interest while Anacomp had use of the principal. The court found that while permitting Wright to keep the shares issued as dividends might be a windfall to him, Anacomp benefited by repurchasing the shares at a price substantially below the market price. Thus, *Anacomp* makes it clear that if a company issues shares as part of an employee incentive program and wishes to obligate the employee to reconvey, not only the initial block but also any shares received as stock dividends or stock splits, it should make it explicit in the agreement.[163]

Without such an agreement, it is settled that dividends belong to the owner of the shares at the time the dividend is declared.[164] Anacomp argued that even if Wright were permitted to keep the stock dividends, he was not entitled to those shares received as a result of the stock splits. Although the court recognized a difference between the two,[165] it refused to treat the two differently. The court found that often the terms might be used interchangeably, the key being whether there was a transfer of accumulated earnings into capital or just a mere increase

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[162]*Id.*

[163]These agreements are generally upheld if they are not tainted with fraud. *Id. See* Shortridge v. Plates, 458 N.E.2d 301 (Ind. Ct. App. 1984); Steck v. Panel Mart, Inc., 434 N.E.2d 97 (Ind. Ct. App. 1983), *discussed in* Galanti, *Business Associations, 1983 Survey of Recent Developments in Indiana Law*, 17 Ind. L. Rev. 31, 38-40 (1984). *See also* Helms v. Duckworth, 249 F.2d 482 (D.C. Cir. 1957); *In re* Estate of Mather, 410 Pa. 361, 189 A.2d 586 (1963). *See generally* 18 Am. Jr. 2d *Corporations* § 314 (1965) (promises to repurchase by person other than corporation).

[164]*See Bright v. Lord*, 51 Ind. 272, 276 (1875). *See also* Henn & Alexander, *supra* note 52, § 332. Of course, this is an overstatement because there are different rules concerning allocation of dividends on shares in trusts. *See generally id.* § 333.

[165]"Stock dividends suggest a capitalization of earnings or profits together with a distribution of the added shares which evince those assets transformed into capital," 449 N.E.2d at 617 (citation omitted), while "stock splits" denote "a mere increase in the number of shares evincing ownership without altering the amount of capital, surplus, or segregated earnings." *Id.* (citing 19 Am. Jr. 2d *Corporations* § 808, at 284 (1965)). *See generally* Henn & Alexander, *supra* note 52, §§ 329-30. Although a share dividend affects the capital of a corporation and a split does not, neither changes a shareholder's proportional interest in the corporation.

in the number of shares.[166] Because additional earned or capital surplus was transferred to the capital stock account of Anacomp whenever stock splits were declared, the court of appeals rejected Anacomp's argument and upheld the lower court's treatment of the share splits and share dividend as the same.[167]

The result in *Anacomp* is correct. The propriety of Wright keeping the additional shares, although he had actually paid for less than half of his total holdings, is as irrelevant as Anacomp's possible windfall from repurchasing the shares at the purchase price, while having use of the funds upon which Wright was paying interest. Anacomp simply failed to provide in the agreement that Wright actually signed that Wright was obligated to reconvey not only the initial block of shares but any additional shares that might be issued as a dividend or as the result of a stock split.

G. *Principal-Agent Relationship*

Elements of the principal-agent relationship were at issue in *Hope Lutheran Church v. Chellew*.[168] In *Hope Lutheran*, the court of appeals reversed a judgment in favor of purchasers of life memberships in a retirement home project which failed; the judgment had been entered on a jury verdict.[169]

A retired Lutheran minister proposed the retirement home project to the Federation of Lutheran Churches of Indianapolis.[170] Interested, the federation appointed an ad hoc committee to consider the proposal; the federation then funded an option on a parcel of land where the home could be built.

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[166]449 N.E.2d at 617. The court stated:

> Courts have recognized, however, that what is demoninated [sic] by a corporation as a stock dividend may in truth be a stock split and vice versa. . . . Thus, while the corporation's denomination of an issue of stock to shareholders as a stock dividend or a stock split may be useful and definitive for certain purposes, courts, where necessary, will look behind that denomination to the essence of the corporate transaction to determine whether the dividend was in actuality issued as a result of a transfer of accumulated earnings into capital or as a mere increase in the number of shares of stock.

449 N.E.2d at 617 (citations omitted). *See* In re Tealdis Trust, 16 Misc. 2d 685, 182 N.Y.S.2d 68 (N.Y. Sup. Ct. 1958).

[167]449 N.E.2d at 617. Outside of the trust context however, there is no reason why shares issued in a split would not belong to the record owner—at least in the absence of a separate agreement.

[168]460 N.E.2d 1244 (Ind. Ct. App. 1984).

[169]*Id.* at 1245. Plaintiffs did not appeal a directed verdict in favor of defendants that rejected their efforts to pierce the corporate veil and hold the directors personally liable. *Id.* at 1252 n.11.

[170]460 N.E.2d at 1245. The Federation is made up of several Lutheran churches in the Indianapolis area. However, not all defendant churches were members of the Federation. *Id.* at 1245 n.3.

Soon thereafter, bylaws and articles of incorporation were drafted for an Indiana not-for-profit corporation that would operate the home. The articles stated that the corporation was to be "a joint agency" of the participating congregations and that control would be vested in a board of directors made up of laypersons and ministers divided equally among the four national Lutheran bodies.[171] Copies of the corporate documents were sent to all Lutheran churches in central Indiana along with application forms stating that membership in the corporation would "'in no way or manner financially obligate'"[172] the congregations.

Directors were elected by the member congregations to manage the corporation's affairs when it was organized. Among other things, the board of directors "approved the contracts to be used in selling life memberships to prospective residents of the retirement home."[173] Although a substantial number of memberships were sold, eventually the project failed as a result of zoning and financing problems. The plaintiffs, who had purchased memberships, then sued for the return of their downpayments.

The question confronting the court of appeals in *Hope Lutheran* was whether the participation of the churches "in the creation and operation of [the corporation gave] rise to an actual or apparent agency or agency by estoppel relationship."[174] The court's analysis of the actual agency theory started out correctly with the premise that agency is a relationship "resulting from the manifestation of consent by one party to another that the latter will act as an agent for the former. Additionally, the agent must acquiesce to the arrangement and *be subject to* the principal's control."[175] However, when the court summarized the required

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[171]*Id.* at 1246.

[172]*Id.* (quoting the Record at 2034).

[173]460 N.E.2d at 1247. The actual sales were made by representatives of a sales agency retained by the corporation. *Id.*

[174]*Id.* The court might have been more accurate if it had used the term "authority" rather than "agency" in stating the issue. For if the churches had been held liable, it would have been because the corporation had actual or apparent authority to act for them or because they were estopped. *See generally* W. Seavey, Agency § 8 (1964) ("An agent may have power to create relations between the principal and a third person because of authority, apparent authority, estoppel, or inherent agency power.") [hereinafter cited as Seavey]. Imprecision is not uncommon in agency cases, and it probably would not have made any difference in the outcome of the case if the word "authority" had been used.

[175]460 N.E.2d at 1247 (emphasis added) citing Lafayette Bank & Trust Co. v. Price, 440 N.E.2d 759, 761 (Ind. Ct. App. 1982); Lewis v. Davis, 410 N.E.2d 1363, 1366 (Ind. Ct. App. 1980); Mooney-Mueller-Ward, Inc. v. Woods, 175 Ind. App. 302, 307, 371 N.E.2d 400, 403 (1978)). *See generally* Seavey, *supra* note 174, § 2 ("Agency deals with the rules applicable to the legal relations which arise when two persons agree that one is to act for the benefit of the other in accordance with the other's directions."). This definition closely parallels the definition of agency in Restatement (Second) of Agency § 1 (1958).

elements of an actual agency relationship, it seemed to require that the principal have exerted control over the agent *in fact*.[176] This is an unduly narrow reading of the control element in the actual agency relationship. It is generally accepted that the right to control is essential, but a principal's failure or disinclination to actually exercise control does not negate the relationship.[177]

Next, the *Hope Lutheran* court relied on *Mooney-Mueller-Ward,* Inc. v. Woods.[178] In *Mooney-Mueller-Ward*, the court found that where the putative principal exerted absolutely no control over the operation of the business, the evidence was insufficient to support a finding of an actual agency relationship.[179] Yet, it does not follow from the nonexercise of and apparent nonexistence of control in *Mooney-Mueller-Ward* that the churches in *Hope Lutheran* did not possess the right to control the retirement home.

The plaintiffs argued that the "joint agency" statement in the articles of incorporation was a manifestation of the churches' wish that the retirement home corporation act as their agent. They argued that the control element of the relationship was satisfied because the defendants had sent delegates to annual meetings, and had ministers or laypersons serving on the board of directors.[180]

These arguments were rejected as the court concluded that any involvement of the churches in organizing the corporation ended when the corporation was formed and became a distinct and separate entity.[181] The court characterized the "joint agency" statement as simply referring to the retirement home as an agency in itself,[182] finding support from testimony of the attorney who had drafted the incorporation documents. Although the attorney's testimony was uncontradicted, it appeared to be inconsistent with the document itself. Yet the court of appeals ignored this fact. The articles did not say the *home* was to be a joint agency; rather, it said the *corporation* was to be a joint agency. It is established that a corporation can be an agent, and its acts will bind the principal even if the corporate fiction is maintained.[183]

Hope Lutheran correctly recognized that the retirement home project was controlled by its board of directors.[184] From this proposition, the

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[176]460 N.E.2d at 1247-48.

[177]*See generally* SEAVEY, *supra* note 174, §§ 3E, 84C, 145.

[178]175 Ind. App. 302, 371 N.E.2d 400 (1978).

[179]460 N.E.2d at 1248. *Cf.* Courtney v. G.A. Linaker Co., 173 Ark. 777, 293 S.W. 723 (1927) (Although principal no longer exercised control over agent, court required notice of revocation before power to bind principal expired.).

[180]460 N.E.2d at 1248.

[181]*Id.*

[182]*Id.* at 1248-49.

[183]*See*, May v. Ken-Rad Corp., 279 Ky. 601, 131 S.W.2d 490 (1939).

[184]460 N.E.2d at 1249.

court concluded that the corporation's actions were the result of the board of directors acting as a board. This is possible, yet it is not the only conclusion. It is just as possible that the "joint agency" reference was an objective manifestation that the corporation would be the agent of the member congregations, with control being exercised by the members and ministers serving on the board as their representatives.[185] At least there appeared to be enough evidence below to sustain this proposition. Furthermore, this last result would have been possible without doing violence to another general proposition: that members of a not-for-profit corporation are not liable for acts of the entity unless they participate in those acts. Thus, an actual agency relationship in *Hope Lutheran* could have been found.

An apparent agency relationship or more accurately, apparent authority, requires a manifestation by the principal to a third party that an agent has authority, along with the third party reasonably relying on the manifestation.[186] This general proposition was recognized in *Hope Lutheran*,[187] as was the proposition that the manifestations or statements made by the agent are not sufficient to create an apparent agency relationship.[188] The court agreed with the defendants' assertion that no representations were made to the plaintiffs that the home was the churches' agent or that they exercised control over the corporation.[189] The plaintiffs argued that the churches, by permitting the corporation to use the word Lutheran in the name of the home and in promotional literature, led

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[185]*Cf.* Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947).

[186]*See* Seavey, *supra* note 174, § 8D.

[187]460 N.E.2d at 1248.

[188]*Id.* (citing Storm v. Marsischke, 159 Ind. App. 136, 138, 304 N.E.2d 840, 842 (1973)).

It is interesting to note that another district of the court of appeals, in Hartke v. Moore-Langen Printing & Publishing Co., 459 N.E.2d 430 (Ind. Ct. App. 1984), affirmed a judgment against former Senator Vance Hartke for campaign printing expenses because, in part, plaintiff acted reasonably in relying on the representation by Hartke's campaign manager (the agent) that he was "Hartke's agent." *Id.* at 432. *Hartke*, like *Hope Lutheran*, cited Stuteville v. Downing, 181 Ind. App. 197, 391 N.E.2d 629 (1979), as establishing the elements of an apparent agency relationship. 459 N.E.2d at 432. *See also Hope Lutheran*, 460 N.E.2d at 1248. However, the court in *Hartke* did not note the proposition made in Storm v. Marsischke, 159 Ind. App. 136, 304 N.E.2d 840 (1973), that representations made by a putative agent but rather will not create the apparent agency relationship, but rather representation must be from the principal to the third party. It is possible that the *Hartke* court just mentioned the campaign manager's statements in passing, as there was sufficient evidence that Hartke had held out his well-known campaign manager as his agent. *See* Seavey, *supra* note 174, § 21 (general rules for interpreting consensual agreements.). Of course, if this is true, the *Hartke* court can be faulted for careless use of language by making it at least "appear" that an agent's statements might establish the apparent agency relationship.

[189]460 N.E.2d at 1249. Of course, there is no need to manifest "control" over the corporation if the churches manifested that the corporation was their agent. It would just follow.

them to believe that the home was supported by both Lutheran churches in general, and the participating congregations in particular.[190]

For support, the plaintiffs looked to *Purcell v. Summers*,[191] which enjoined a dissident group from using the name, "Methodist Episcopal Church, South," after a merger of three Methodist churches, because the name gave the impression that the group was the successor to one of the constituent churches. The *Hope Lutheran* court was not persuaded by this use of "trade name law."[192] It concluded that the *Purcell* defendants were not using the terms in a generic sense, unlike the defendants in *Hope Lutheran*. Here, the word "Lutheran" was used in a generic sense as a broad reference to a particular Protestant denomination.[193] Arguably however, it was not unreasonable for the members of the Lutheran congregations to perceive that their church was affiliated with a corporation that had "Lutheran" in its name, especially when the corporation had the blessing of the congregations.[194]

The court found that the individual congregations could have inserted their individual congregational names in the name of the home if they had wished to convey affiliation with the home.[195] Yet this is not a very practical suggestion, as nineteen separate congregations were involved. In fact, the number of congregations involved might have been the reason why the term "Lutheran" was used. That is, the term was used to convey the involvement of the defendant churches in the affairs of the retirement home without listing every congregation in the corporate name; or at least, it would seem that a jury might so conclude.[196]

The plaintiffs' agency by estoppel argument also failed. The court stated that equitable estoppel requires a defendant to have made false representations or to have concealed material facts with knowledge of, or ability to learn, the true facts; the represenations must have been made to the plaintiffs with the intent to induce reliance on those statements; and, the plaintiffs must have changed their position in reliance

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[190] *Id.*

[191] 145 F.2d 979 (4th Cir. 1944).

[192] 460 N.E.2d at 1250.

[193] *Id.* at 1250, n.8.

[194] The court did not discuss the statement in the application sent out to individual churches, that membership would not financially obligate the congregation. This is understandable because such a restriction would not be effective against third parties, at least as far as apparent authority is concerned. *See generally* SEAVEY, *supra* note 174, §§ 8A, 75E (placing limitations on an agent's authority).

[195] 460 N.E.2d at 1250-51.

[196] The court also stated that the term "Lutheran" in the home's name "did not exhibit the degree of control . . . necessary to create an apparent agency." *Id.* at 1251. The relevance of this assertion is questionable, as apparent authority depends on the *manifestation of authority to act*, not necessarily actual control over the putative agent. See SEAVEY, supra note 174, § 8D.

on the statements.[197] The plaintiffs argued that these elements were satisfied when the defendants permitted the use of "Lutheran" in the home's name without disclosing that the individual congregations would not be financially responsible for the home's operations. The court rejected this argument because the representations in question were made by the corporation rather than the churches.[198] Although this is facially true, it was a very narrow reading of the trial court record. The churches were involved in organizing the home, and were also members of the corporation. They could be deemed to have represented their involvement to their parishioners to at least that extent.[199]

It is easy to sympathize with the defendant churches if they had been subjected to substantial financial liability for the failed venture. Such a liability would presumably had to have been satisfied from contributions by parishioners. The plaintiffs who lost their downpayments for the home are also deserving of sympathy, particularly because the opinion in *Hope Lutheran* does not preclude a finding that the plaintiffs could reasonably rely on their perceptions that the individual congregations were involved. If this is the case, then a jury presented with the evidence could also have so concluded.

H. Statutory Developments

There were several statutory developments during the survey period which are of interest to those practicing in the business law area. None, however, effected major changes.

1. Corporation Name.—One such development was an amendment to the corporate name provision of the Indiana General Corporation Act.[200] The prior statutory provision[201] contained numerous restrictions on the use of a corporate name that was the same as, or confusingly similar to, the name of a corporation that had ceased to exist as a

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[197]460 N.E.2d at 1251 (quoting Kokomo Veterans, Inc. v. Schick, 439 N.E.2d 639, 643 (Ind. Ct. App. 1982)).

[198]460 N.E.2d at 1252. The court stated that *Kokomo Veterans*, 439 N.E.2d 639 (Ind. Ct. App. 1982), did not adopt the RESTATEMENT (SECOND) OF AGENCY § 8B (1958) definition of "estoppel," although the elements in § 8B are similar to those considered in *Kokomo Veterans* 460 N.E.2d at 1251 n.10. It is not clear why the court, in *Hope Lutheran*, was reluctant to adopt § 8B.

[199]Judge Neal filed a concurring opinion emphasizing that corporations are organized to conduct business with limited liability. 460 N.E.2d at 1252 (J., Neal, concurring). This certainly is true, as is his further statement that interested persons participating in a corporation's business are not subject to residual liability as long as the corporate entity is respected. *Id.* It is possible to disagree, however, with his conclusion to the extent that the churches' involvement might well have gone beyond mere interest, particpation, and support.

[200]IND. CODE § 23-1-2-4 (Supp. 1984). A similar change was made to the Indiana Not-For-Profit Corporation Act. IND. CODE § 23-7-1.1-5(b) (Supp. 1984).

[201]IND. CODE § 23-1-2-4(b) (1982).

result of a merger, consolidation, or a special corporate transaction, without the consent of any successor corporations. Indiana Code section 23-1-2-4(b), as amended,[202] now permits a corporation to take a name that is not distinguishable from the name of another corporation that has ceased to exist, or a corporation that is changing its corporate name or withdrawing from transacting business in Indiana.[203]

The amendment of this section is commendable. Changing the requirement that a corporation not "[t]ake or assume a corporate name the same as, or confusingly similar to," the name of other corporations,[204] to a requirement that the name be "distinguishable" from the name of other corporations or reserved corporate names, is a worthwhile statutory simplification. The one word "distinguishable" says as much as the prior phrase, yet is not subject to a charge of legalese.

The amount of time for which a proposed corporation name can be reserved was increased from 30 to 120 days.[205] In many cases the 30 day period simply was not long enough to complete the organization of a domestic corporation or a foreign corporation intending to apply for a certificate of admission.[206] The 30 day reservation was renewable, but extending the period probably will reduce substantially the need for renewing the right to a name.

Furthermore, the 120 day period parallels section 9 of the Model Business Corporation Act,[207] although there are dissimilarities between the two. The Model Act specifically directs the Secretary of State to determine if the reserved name is available for corporate use, while section 23-1-2-4(c) of the Indiana Act does this by implication. Additionally, the Model Act permits the transfer of a right to a reserved name, while section (c) does not.[208] A similar provision probably should have been included in section (c). As it now stands, that section might preclude or at least hinder someone from forming a corporation with

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[202]Ind. Code § 23-1-2-4(b) (1982 & Supp. 1984).

[203]Use of corporate names not distinguishable from the name of domestic or qualified foreign corporations with written consent is still permitted. Ind. Code § 23-1-2-4(b)(2)(B) (Supp. 1984).

The Act also repealed Ind. Code § 23-1-2-4(c)(1982), which had given the shareholders of dissolved corporations or corporations whose terms had expired "preemptive" rights in the corporation's name under certain circumstances.

[204]Ind. Code § 23-1-2-4(b) (1982) (amended 1984).

[205]Ind. Code § 23-1-2-4(c) (Supp. 1984). Additionally, the filing fee for preempting a corporate name was raised to $20.00. Ind. Code § 23-3-2-2-(O) (Supp. 1984).

[206]Presumably, there would be less of a problem for a corporation changing its name, or an existing foreign corporation intending to qualify, but there still could be problems for publicly held corporations that might have to schedule a shareholders meeting. Ind. Code § 23-1-2-4(c)(2)-(4) (Supp. 1984).

[207]Model Business Corp. Act § 9 (1971).

[208]*Compare* Model Business Corp. Act § 9 (1971) *with* Ind. Code § 23-1-2-4(c) (Supp. 1984).

a name reserved by another person, or a corporation intending to change its name, even if there were no objection.

Section 23-1-2-4(b)(2) prohibits the taking of a corporate name not distinguishable from a reserved name, except that the section permits the taking of a name of "another corporation" with its written consent.[209] This written "consent" provision is limited by its terms to existing corporations, and does not refer to a person intending to form a corporation, or an existing corporation intending to change its name. Although the Secretary of State's office might permit the use of a reserved name with the consent of the person entitled to the exclusive right to the name, the authority to do so probably should have been included in section (b)(2)(B), or the Model Act should have been followed more closely.

Another simplification was brought about in the corporate name area. Also simplified were the procedures to be followed by a foreign corporation applying for admission to do business in Indiana under an assumed name, when the requirements of section (b) preclude admission under its true corporate name.[210]

2. *Resident Agents.*—Sections 23-1-2-5(b), (c)[211] and 23-1-11-6(b), (c)[212] were added to the General Corporation Act.[213] These provisions, respectively, specify procedures to be followed when a resident agent of one or more domestic or one or more foreign corporations changes address. The Act now permits one filing to cover all corporations represented by the agent, provided that each corporation has been notified in writing of the change. Admittedly, this reduces paperwork, but it does not reduce fees. The Indiana General Corporation Fee Act was amended so that the fee is four dollars for each corporation represented.[214]

3. *Shareholder Meetings.*—Boards of directors or director committees have been allowed to conduct meetings "by means of a conference telephone or similar communications equipment by which all persons participating in the meeting can communicate with each other" since 1982.[215] The section of the General Corporation Act relating to shareholder meetings has now been amended to permit corporations with no more than ten shareholders to hold shareholder meetings in a similar

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[209] IND. CODE § 23-1-2-4(b)(2)(B) (Supp. 1984).

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[211] IND. CODE § 23-1-11-3(b)-(c) (Supp. 1981). The Model Act uses a different approach to solve this problem. *See* MODEL BUSINESS CORP. ACT § 108(c) (1971).

[212] IND. CODE § 23-1-2-5(b), (c) (Supp. 1984).

[213] IND. CODE § 23-1-11-6(b), (c) (Supp. 1984). Parallel provisions were added to the Indiana Not-For-Profit Corporation Act. IND. CODE §§ 23-7-1.1-6(b)(c), 23-7-1.1-53(b)(c)(Supp. 1984).

[214] IND. CODE § 23-3-2-2(j) (Supp. 1984).

[215] IND. CODE § 23-1-2-11(h) (1982).

fashion.[216] This change, recognizing the miracles of modern telecommunications and how much of the ordinary business of corporations is carried on by such means, is as worthwhile for shareholder meetings as the 1982 change was for directors. There is nothing magical about the number ten but limiting the provision was certainly not unreasonable. It is possible to have a substantial number of persons communicating by a telecommunication system, but there comes a point of diminishing returns where confusion and a lack of clear communication might become a problem.[217]

The only question that can be raised about section 23-1-2-9(b) is that it does not track the comparable director meeting provision.[218] That provision authorizes the telephonic meeting "unless otherwise provided" in the articles of incorporation or bylaws. Section 9(b) specifies that such meetings are authorized if "expressly *permitted* by its articles of incorporation or bylaws."[219] The approach taken in the section dealing with directors' meetings is preferable. If there is some reason shareholders of closely held corporations would not wish to have such meetings, they could so provide. However, unless they have taken anticipatory steps to amend the articles or the bylaws, it is distinctly possible that a situation might arise where there is a need and a desire to have a telephonic shareholder meeting which would not be permitted.[220] Attorneys representing small corporations should seriously consider taking steps to permit telephonic meetings before the need arises, or face the frustration of having a procedure available by law but not available to the particular corporation.

4. Corporate Dissolutions.—Minor changes were made to the corporate dissolution procedures. The board of directors of a dissolving corporation must now notify the unclaimed property section of the Attorney General's office, the Department of Revenue, and the Indiana Employment Security Division of its dissolution, to request any clearances required by law.[221] The dissolution of shell corporations was also sim-

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[216]Ind. Code § 23-1-2-9(b) (Supp. 1984). Participation by these means constitutes presence in person at the meeting. *Id.*

The Indiana Not-For-Profit Corporation Act was also amended to permit conference call meetings for corporations with no more than ten members. Ind. Code § 23-7-1.1-9(b) (Supp. 1984).

[217]There is no comparable limit on the size of boards of directors or director committees that may have conference call meetings. Ind. Code § 23-1-2-11(h) (1982).

[218]*Id.*

[219]Ind. Code § 23-1-2-9(b) (Supp. 1984) (emphasis added).

[220]It must be remembered that the shareholder consent mechanism might not be available in such a case because the consents must be signed prior to the action. Ind. Code § 23-1-2-9(p) (Supp. 1984). Also, all shareholders must sign the consent; this requirement might preclude using the mechanism.

[221]Act of Mar. 7, 1984, Pub. L. No. 130-1984, § 4, 1984 Ind. Acts 1125 (codified as amended at Ind. Code § 23-1-7-1(b)(3) (Supp. 1984)). The clearances and notices are

plified. Publication of notices of dissolution for corporations that have no assets or liabilities is no longer required; in conjunction, a statement that the corporation has no assets is now permitted in lieu of filing a copy of the published notice that the corporation is being dissolved.[222]

5. *Delinquent Annual Reports.*—The rather cumbersome statutory provisions for revoking the rights and privileges of domestic and foreign corporations delinquent in filing annual reports for two years was recast and simplified by amending section 23-3-4-1(c) of the Indiana Annual Report Act.[223] The new provision increases the time in which corporations can rectify their delinquent status from 30 days to 90 days, and specifies the time frame for administrative revocation by the Secretary of State. The changes would not appear to have any effect on the holding of *Duncan v. Jones.*[224]

6. *The Indiana Uniform Trade Secrets Act.*[225]—The General Assembly also made some changes to the Indiana Uniform Trade Secrets Act.[226] One change was moving the provision authorizing a court to order payment of a reasonable royalty for no longer than the period during which a misappropriated trade secret could have been barred from the injunctive relief section[227] to the section authorizing damages for trade secret misappropriations.[228] This change is noted because there is no counterpart in the Uniform Trade Secrets Act,[229] upon which the Indiana Act is based.

It is not clear what this section adds to the Trade Secrets Act. If neither damages, which represent the actual losses suffered by the owner of a trade secret, nor the unjust benefit obtained by the misappropriator can be established, and injunctive relief is not appropriate, it is hard

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not required when incorporators surrender a certificate of incorporation before commencing business. IND. CODE § 23-1-7-1(a) (Supp. 1984).

The procedure for surrendering the certificate of a not-for-profit corporation was also simplified. Act of Mar. 7, 1984, Pub. L. No. 130-1984 § 17, 1984 Ind. Acts 1125 (codified at IND. CODE § 23-7-1.1-33(a) (Supp. 1984)).

[222]IND. CODE § 23-1-7-1(b)(3), 1(b)(4)(F) (Supp. 1984).

[223]IND. CODE § 23-3-4-1(c) (Supp. 1984).

[224]450 N.E.2d 1019 (Ind. Ct. App. 1983), discussed at *supra* at notes 97-116.

[225]IND. CODE §§ 24-2-3-1 to -8 (1982) *discussed in* Galanti, *Business Associations, 1982 Survey of Recent Developments Indiana Law*, 16 IND. L. REV. 25, 50-56 (1983).

[226]IND. CODE §§ 24-2-3-1 to -8 (1982).

[227]Act of Feb. 29, 1984, Pub. L. No. 50-1984, § 3, 1984 Ind. Acts 625 (codified as amended at IND. CODE § 24-2-3-3(b) (Supp. 1984)).

[228]IND. CODE § 24-2-3-4(b) (Supp. 1984).

[229]UNIF. TRADE SECRETS ACT §§ 1-12, 14 U.L.A. 541 (1980). The Indiana Act continues to authorize an imposed royalty if a court determines that it would be unreasonable to prohibit future use of the misappropriated trade secret, but for no longer than the period of use could have been prohibited. IND. CODE § 24-2-3-3(b) (1982 & Supp. 1984). Unlike the comparable provision of the Uniform Act, UNIF. TRADE SECRETS, ACT § 2, 14 U.L.A. 542 (1980), this authority is limited to "exceptional circumstances," indicating a legislative intent that the enforced royalty provision is to be used sparingly.

to see what basis there is for imposing any monetary sanction on a misappropriator. In fact, it is questionable whether there has been a misappropriation of a trade secret other than in a metaphysical sense, under these circumstances. Perhaps it is an attempt to impose some monetary sanction where the exemplary damages provision permitting double damages for a willful and malicious misappropriation would not be available.[230]

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[230] Ind. Code § 24-2-3-4(a) (1982).