CORPORATE LAW: A YEAR IN THE LIFE OF INDIANA CORPORATE LAW

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INTRODUCTION

The area of corporate law is a broad area, as it can expansively be defined as the law that affects incorporated businesses. Within this definition, other areas of law such as contract, agency and tort law are included because corporations are affected by these laws in one form or other. However, this Article will address only a narrow slice of corporate law, including issues of shareholder lawsuits, the well-established corporate doctrine of piercing the corporate veil, sections of the Indiana Business Corporation Law and sections of the Indiana Securities Act.

I. SHAREHOLDER ACTIONS

One of the more dynamic issues in corporate law is the area of shareholder actions. In 1995 and again in 1998, Congress passed legislation intending to reform the area of securities litigation, with the goal of protecting defendant-corporations from their overly litigious shareholders (and their equally overly-eager lawyers).[1] These reforms, although they apply to both public and closed corporations, were aimed at curbing frivolous lawsuits brought against public corporations.[2] The focus in Indiana for the past few years, however, has been on closed corporations and defining the ways in which the shareholders of such corporations may bring suit.

In general, a shareholder is required to file a derivative action when actions taken by the corporation itself, or taken by the officers or directors on behalf of the corporation, resulted in harm to the corporation. The reasoning behind the derivative action is that the cause of action the shareholder is alleging is one that belongs to the corporation, not to the shareholder individually.[3] This separation of rights can become confusing, especially if the rights seemingly arise from violations of both shareholders' rights and corporation rights.

There are special procedural steps a shareholder must take to perfect the derivative action.[4] One of these steps requires the shareholder to make a demand on the board of directors to bring suit. The shareholder must allege that she has

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1. *See* 15 U.S.C. § 78u-4 (2001); *see also* Dominic Bencivenga, *Appeal Reveals Reform Act's Tortured History*, N.Y.L.J., June 11, 1998, at 5; Elizabeth Strong, *How the Courts & Congress Are Changing Securities Litigation*, N.Y.L.J., Mar. 4, 1999, at 1.

2. Bencivenga, *supra* note 1, at 5.

3. G & N Aircraft, Inc. v. Boehm, 743 N.E.2d 227, 234 (Ind. 2001).

4. *See* IND. R. TRIAL P. 23.1.

made this demand in her complaint.[5] In addition, should the corporation establish a committee of disinterested directors or persons to investigate the corporation's rights and remedies,[6] the court may suspend proceedings on the underlying derivative action until the investigation is completed.[7] If the committee finds that there have been no violations, or finds that the lawsuit is not in the best interest of the corporation, the court "shall" presume these findings conclusive as to the suing shareholders.[8] Unless the shareholder can prove that the committee members were either not disinterested or the investigation was not conducted in good faith, the shareholder will find herself without recourse.[9]

Compliance with these procedures is appropriate when the corporation is a public company, with its shares traded on a national market. After all, if the shareholder is dissatisfied at any point in the process, the shareholder can simply sell her shares on the market. However, withdrawal is not so easy for an unhappy shareholder in a closed corporation. The Indiana Supreme Court gave recognition to this aspect of closed corporations in its 1995 decision, *Barth v. Barth*.[10]

The court in *Barth* held that there are certain situations when a shareholder of a closed corporation should be allowed to bring a direct action, instead of a derivative one.[11] In deciding to do this, the court followed a nationwide trend and a path also suggested by the American Law Institute.[12] *Barth* stated that in a closed corporation, shareholders are "more realistically viewed as partners, and the formalities of corporate litigation may be bypassed."[13] There are three situations in which a direct action can proceed, instead of a derivative one. A direct action will be allowed when (1) such an action will not unfairly expose the corporation or other defendants to several lawsuits; (2) the direct action will not "materially prejudice the interests" of the corporation's creditors; or (3) the action will not interfere with a "fair distribution" of any recovery "among all interested persons."[14] It appears from the case law applying the rule of *Barth* that a finding of any one of these situations can preclude a direct action.[15] In this survey period, there have been three cases that have dealt with this issue and

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5. *Id.*; *see also* IND. CODE § 23-1-32-2 (1998).

6. IND. CODE § 23-1-32-4 (1998).

7. *Id.* § 23-1-32-2.

8. *Id.* § 23-1-32-4(c).

9. *Id.* The official comments cite the business judgment rule as the underlying rationale for presuming the disinterested committee's findings as conclusive, analogizing the decision to pursue legal claims to "other questions of corporate policy and management." *Id.* at official cmt.

10. 659 N.E.2d 559 (Ind. 1995).

11. *Id.* at 561.

12. *Id.* at 562; *see also* G & N Aircraft, Inc. v. Boehm, 743 N.E.2d 227, 236 (Ind. 2001).

13. *Barth*, 659 N.E.2d at 561.

14. *Id.* at 562.

15. *See, e.g.*, Riggin v. Rea Riggin & Sons, Inc., 738 N.E.2d 292, 308 (Ind. Ct. App. 2000) (applying the multiplicity of lawsuits situation).

Barth.[16]

A. A Reaffirmation of Barth *and Available Remedies:* G & N Aircraft, Inc. v. Boehm

In the early 1990s, G & N Aircraft was a closely held Indiana corporation with five shareholders.[17] Paul Goldsmith, the founder, and his son, owned about thirty-two percent; Eric Boehm owned thirty-four percent and Richard Gilliland and James McCoy each owned 16 2/3%.[18] The five shareholders served as the board of directors for G & N, and Goldsmith, Boehm and Gilliland served as officers, with Goldsmith and Boehm as employees of G & N.[19] Goldsmith was also the sole-owner of other corporations that dealt with G & N, in addition to being G & N's landlord.[20]

In the mid 1990s, Goldsmith's other corporations, and himself personally, were in financial difficulty.[21] Goldsmith attempted to consolidate his corporations with G & N as a way to lighten his financial burden.[22] Goldsmith had G & N appraised, and its value was approximated at $961, 000.[23] His initial attempt to consolidate failed because a bank rejected his application for a loan to buy out the other shareholders.[24] A year later, Goldsmith again initiated a consolidation effort.[25] In 1995, Goldsmith took coercive steps to force Gilliland, McCoy and Boehm to sell their shares to Goldsmith.[26] One of these tactics included an eviction threat from Goldsmith, as landlord of G & N, to evict them from this hangar.[27] This persuaded Gilliland and McCoy to sell their shares to Goldsmith, but they remained on the board.[28]

Goldsmith had become the majority shareholder of G & N, but he could not get Boehm to sell his shares. Goldsmith then tried other methods to force Boehm to sell his shares by threatening Boehm with the fact that when G & N consolidated with Goldsmith's other companies, G & N would suffer a financial loss.[29] Goldsmith also cut off cash distributions from G & N and ultimately fired

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16. *G & N Aircraft, Inc.*, 743 N.E.2d at 227; Hubbard v. Tomlinson, 747 N.E.2d 69 (Ind. Ct. App. 2001); *Riggin*, 738 N.E.2d at 292.

17. *G & N Aircraft, Inc.*, 743 N.E.2d at 232.

18. *Id.*

19. *Id.*

20. *Id.* at 232.

21. *See id.* at 232-33.

22. *Id.*

23. *Id.* at 232.

24. *Id.* at 232-33.

25. *Id.* at 233.

26. *Id.*

27. *Id.*

28. *Id.* at 232-33.

29. *Id.*

Boehm and changed Boehm's office locks.[30]

Boehm filed an action against Goldsmith and G & N for both direct and shareholder derivative claims.[31] The trial court found for Boehm in a four-day bench trial and awarded Boehm a variety of remedies, including a forced sale of Boehm's shares to Goldsmith, interest on back dividends, punitive damages, and attorney's fees.[32] In a unanimous decision, the supreme court affirmed in part and reversed in part.[33]

As an initial matter, the court clarified the rights held by the corporation and those held by an individual shareholder in the contexts of direct and derivative actions. The court, adopting a New York-type definition, found that the rights held by each dictate the type of action to bring.[34] A direct action should be based on the rights the shareholder finds in the corporation's articles of incorporation, bylaws or in state corporate law.[35] In contrast, a derivative action should be brought by the shareholder on behalf of the corporation for a right that the corporation has failed to act upon.[36] The court then reaffirmed *Barth*, restating the three situations where a direct action was not appropriate in a closed corporation.[37]

The court divided Boehm's claims into three categories,[38] the division of which center around Goldsmith in his different capacities at G & N and the alleged breach in his fiduciary duties to G & N and/or Boehm. The first of the three are Boehm's claims that Goldsmith as an officer and director breached his fiduciary duties to G & N.[39] These claims are derivative because G & N itself could have brought action against Goldsmith.[40] Goldsmith argued that the trial court erred by allowing Boehm to proceed on a direct action that was based on derivative claims.[41] However, because G & N was a closed corporation controlled by Goldsmith, such a lawsuit would be unrealistic.[42] But Goldsmith argued that each of the situations outlined in *Barth* apply so that Boehm's direct action should be dismissed.[43] The court analyzed each of these, finding that none of the situations were present and the *Barth* exception applied to Boehm's

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30. *Id.* at 233.

31. *Id.*

32. *Id.* at 234.

33. *Id.* at 246.

34. *Id.* at 235 (citing Schreiber v. Butte Copper & Zinc Co., 98 F. Supp. 106, 112 (S.D.N.Y. 1951)).

35. *Id.*

36. *Id.*

37. *Id.* at 236.

38. *Id.*

39. *Id.*

40. *Id.* at 237.

41. *Id.*

42. *Id.*

43. *Id.*

lawsuit.[44] The second and third categories of Boehm's claims alleged that Goldsmith breached his fiduciary duty to Boehm as an officer and director and also as a majority shareholder.[45]

The court found no merit in Boehm's allegation that Goldsmith breached his duties to G & N as an officer and director.[46] Although his transactions taken with respect to G & N were self-interested transactions, these actions were not concealed and there was no evidence to suggest that these actions harmed G & N.[47] This finding comports with Indiana's highly deferential business judgment rule.[48]

The second and third categories alleged breaches of fiduciary duty by Goldsmith, in his capacities of officer, director, and majority shareholder, to Boehm as a minority shareholder.[49] The court recognized that Goldsmith's actions were taken wearing his different hats—as landlord, majority shareholder, and officer and director.[50] But the court clumped together Goldsmith's roles and addressed his actions in two parts—the first, before Goldsmith became a controlling shareholder and the second, actions taken as a majority shareholder.[51]

Prior to gaining control of G & N, Goldsmith made an offer for Boehm's shares, and Boehm alleged that this price was significantly less than the appraised value of Boehm's shares and less than what Boehm originally paid to purchase the shares.[52] In and of itself, the court found that there is no duty to purchase shares at a fair price.[53] If, on the other hand, there were nondisclosure, fraud or oppression, then Boehm would have a claim based on the low price Goldsmith offered for Boehm's shares.[54] Even though Goldsmith did not actually succeed in forcing Boehm out of G & N, Goldsmith did succeed in gaining control of the corporation, and the actions taken to force Gilliland and McCoy to sell their shares were wrongs to Boehm.[55]

The court agreed with the trial court that the eviction notice after Goldsmith resigned as president of G & N was a sham.[56] This eviction threat and Goldsmith's entire plan to gain total ownership of G & N was an abuse of Goldsmith's office.[57] The actions taken by Goldsmith as an officer and director

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44. *Id.* at 237-38.

45. *Id.* at 236.

46. *See id.* at 238-40.

47. *Id.* at 239.

48. *Id.* at 240. As discussed in Part IV, *infra*, directors can be held liable in very limited situations.

49. *G & N Aircraft, Inc.*, 743 N.E.2d at 236.

50. *Id.* at 241.

51. *Id.* at 241-44.

52. *Id.* at 241.

53. *Id.*

54. *Id.*

55. *Id.* at 242.

56. *Id.*

57. *Id.*

were not for any "proper business purpose" designed to benefit the corporation, but rather to force Boehm out so that Goldsmith could finalize his consolidation plans.[58] As a result, Boehm had a valid claim with respect to these actions. Goldsmith's actions taken after he became a majority shareholder were to render Boehm's shares worthless.[59] Therefore, Goldsmith had breached his fiduciary duty by subordinating the corporation's interests to his own.[60]

Finally, the court discussed the remedies available to Boehm. As the "shareholder derivative action is a creature of equity"[61] in Indiana, the court saw no reason why trial courts cannot be flexible when fashioning remedies for close corporation wrong-doings.[62] Therefore, the court upheld the forced sale of Boehm's shares to Goldsmith that the trial court ordered.[63] But the court cautioned future application of this remedy, as "[t]his remedy should be exercised only after careful thought. It amounts to a forced withdrawal of capital from the enterprise if the enterprise itself is the only realistic source of funding the buyout."[64]

Judicially ordered dissolution is a drastic remedy, and one commentator describes this holding as "sweeping change to established law regarding shareholder disputes."[65] Prior to *G & N Aircraft, Inc.*, the proper remedy was damages, and in cases of mergers and take-overs, the only remedy was under the dissenters' rights statute.[66] This same commentator predicts that this decision might have a "drastic impact" on future dealings between shareholders in a closed corporation.[67]

The court also upheld the punitive damages awarded because of Goldsmith's deliberate actions which were also found to be malicious and oppressive.[68] In addition, Boehm was awarded attorney's fees but only as to the frivolous counterclaim asserted by Goldsmith.[69] However, Boehm was not entitled to attorney's fees for the derivative claims because the court upheld Boehm's

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58. *Id.*

59. *Id.* at 242-43.

60. *Id.*

61. *Id.* at 243-44.

62. *Id.* at 244.

63. *Id.* at 243.

64. *Id.* at 244.

65. Leanne Garbers, *One Bad Apple: How One Evil Actor Can Rewrite Corporate Law*, IND. LAW., Aug. 29, 2001, at 25.

66. *Id.*

67. *Id.* This prognosis seems a bit pessimistic. Situations analogous to the facts of this case are few and far between. It is rare to see a corporate officer, director and shareholder act in such a coercive manner and with a disregard for corporate formality like Goldsmith did in this case. For other situations where there is no malicious intent, the business judgment rule will generally apply to deny a remedy to unhappy shareholders.

68. *G & N Aircraft, Inc.*, 743 N.E.2d at 245.

69. *Id.*

actions as direct claims, not derivative ones.[70]

B. When Barth *Does Not Apply:* Hubbard v. Tomlinson[71]

This is a straight-forward case involving the application of *Barth* and *G & N Aircraft, Inc*. Eli Tomlinson was a shareholder of Multimedia, a closely-held bankrupt corporation, consisting of five shareholders.[72] Tomlinson filed suit against Joseph Hubbard, another shareholder, and S & A, an accounting firm that had provided the corporation services.[73] Tomlinson alleged that Hubbard had breached fiduciary duties, and had conspired with S & A to "'loot' the corporation."[74] The trial court denied S & A's motion for summary judgment, and the court of appeals accepted jurisdiction of S & A's interlocutory appeal of this denial.

The court of appeals reversed, holding that Tomlinson had to bring his claims as a derivative action, as he was alleging harms to the corporation from an outside party, namely S & A.[75] Furthermore, the court conducted a *Barth* analysis and found that all three situations existed in Tomlinson's case—(1) there were three other shareholders who could conceivably bring suit against Multimedia, subjecting it to several lawsuits; (2) Multimedia had more than fifty creditors, and their interests would be harmed by a direct action since Multimedia was insolvent; and (3) Tomlinson requested that the recovery be directly awarded to him, and not the corporation or shareholders.[76]

C. When Does a Class Action Plaintiff in a Derivative Suit Fairly and Adequately Represent Similarly Situated Shareholders?: Riggin v. Rea Riggin & Sons, Inc.[77]

Riggin addressed several issues, many procedural, in the context of a shareholder derivative and direct action. Although a procedural matter, one of the important parts of this case was the discussion of when a shareholder, bringing a derivative action on behalf of the corporation and all other similarly situated shareholders, can be deemed to fairly and adequately represent the class.[78] This was a matter of first impression for the Indiana Court of Appeals and is fairly relevant to corporate litigation.[79]

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70. The court briefly discusses Boehm's vicarious liability claims against G & N for Goldsmith's actions. The court did not hold G & N liable under this theory, finding that the logic behind it became circular. *Id.* at 245-46.

71. 747 N.E.2d 69 (Ind. Ct. App. 2001).

72. *Id.* at 70.

73. *Id.*

74. *Id.*

75. *Id.* at 72.

76. *Id.*

77. 738 N.E.2d 292 (Ind. Ct. App. 2000).

78. *See id.* at 302-04.

79. The other procedural issues raised in the case, such as contempt, paying witness fees, and

Rea Riggin & Sons, Inc. was formed in 1927 by Rea and Nellie Riggin.[80] Since that time, the board of directors has always consisted of Riggin family members.[81] In 1997, there were twenty-nine shareholders, including Richard Riggin.[82] Richard, unhappy with the actions of the board and other shareholders, filed both a derivative action and a direct action against Rea Riggin & Sons, Inc. and the board members individually.[83] After Richard suffered a series of mishaps involving attorneys wishing to withdraw from representation, the trial court finally granted summary judgment in favor of the corporation. Richard was also found in contempt of court for not paying deposition fees of the corporation's accountant and was in the custody of the Delaware County Sheriff until he paid the fee.[84] On appeal, Richard contended that the grant of summary judgment in favor of the corporation was improper.[85]

As a preliminary matter, the court of appeals considered the burden of proof required of Trial Rule 23.1, which governs derivative shareholder actions, as opposed to Trial Rule 23, which governs class actions.[86] Relying on an interpretation of the Federal Rules of Civil Procedure by the Fifth Circuit,[87] the court of appeals held that in a derivative shareholder action, the burden of proof was on the defendants to show that the plaintiff-shareholder did not fairly and adequately address the interests of similarly situated shareholders.[88]

Next, the court divided its inquiry of this issue into two parts—first, the court defined what constituted similarly situated shareholders, and second, the court set out factors to consider whether the plaintiff fairly and adequately represented the class. As to the first prong of the inquiry, the court rejected both the corporation's suggested meaning (all the shareholders of the corporation should be similarly situated in order to have a proper class) as well as Richard's proposed meaning (those shareholders who support the lawsuit).[89] The court instead adopted several factors used by federal courts in similar situations.[90]

The court instructed trial court judges, when defining the class of similarly situated plaintiffs, to exclude two types of shareholders: those named as

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motions for continuance will not be discussed in this Article.

80. *Riggin*, 738 N.E.2d at 299.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id*.

86. *Id.* at 299-301.

87. The court of appeals, explaining its reason for relying heavily on the interpretation of the Federal Rules of Civil Procedure, stated that "[d]ue to the similarity between T.R. 23.1 and the corresponding Federal Rule, we will utilize federal law in interpreting T.R. 23.1." *Id.* at 300.

88. *Id.* at 301.

89. *Id.* at 302.

90. *Id.* at 303. In his analysis, Judge Sullivan relies heavily on a 1995 article, Mary Elizabeth Matthews, *Derivative Suits and the Similarly Situated Shareholder Requirement*, 8 DEPAUL BUS. L.J. 1 (1995).

defendants in the suit, and those in financial or personal conflict with the corporation.[91] In considering the opposition to the plaintiff-shareholder, the trial court judge should merely look at that as a factor in determining the adequacy of the representation, not in defining the class itself.[92] The shareholders not excluded were then considered the class of similarly situated shareholders.

After defining the class, the court instructed trial court judges to then look at the adequacy of the plaintiff-shareholder representation.[93] As set forth by Trial Rule 23.1, the plaintiff-shareholder must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."[94] The court elected to adopt the eight factor test set forth by the Ninth Circuit in *Larson v. Dumke*.[95] However, the court cautioned that, as with any multi-factor test, the trial court judge should not focus in on one factor to the exclusion of others.[96] The overall goal of the inquiry was to determine adequacy of the representation so that the plaintiff-shareholder's suit may proceed.[97]

The eight factors that the trial court judge should consider were: (1) whether the plaintiff is the true party in interest; (2) whether the plaintiff is familiar with the lawsuit or exhibits unwillingness to become familiar; (3) the degree of control the plaintiff's attorney exercises over the lawsuit; (4) the degree of support the plaintiff receives from the other shareholders; (5) whether the plaintiff is personally committed to the lawsuit; (6) the remedy sought by the plaintiff; (7) the "relative magnitude of the plaintiff's personal interest in the suit as compared to his interest in the derivative action;" and (8) whether there is any vindictiveness on the part of the plaintiff toward defendants. As with any multi-factor test, several factors overlap.[98]

The court applied this test, in light of the evidence presented by both parties in the summary judgment motion. The court eventually concluded that summary judgment was inappropriate because the corporation did not meet its burden of proof in showing that there were no material issues in dispute.[99] The court found that there was an unresolved question of whether Richard was a fair and adequate representative of the putative class of Rea Riggin & Sons' shareholders.[100] Although the corporation had presented evidence that there were some shareholders in the court-defined class who opposed Richard's claims, the court

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91. *Riggin*, 738 N.E.2d at 304.

92. *Id.*

93. *Id.*

94. IND. T. RULE P. 23.1.

95. *Riggin*, 738 N.E.2d at 304 (referencing Larson v. Dumke, 900 F.2d 1363, 1367 (9th Cir. 1990)).

96. *Id.* at 305.

97. *Id.*

98. *Id.* For example, factors (1) and (3) go to the same point—is this the plaintiff's action or another person's action? Factors (2) and (5) are essentially the same questions.

99. *Id.* at 312.

100. *Id.* at 307.

found that this was not sufficient evidence to satisfy whether Richard should proceed as the class representative.[101]

As to Richard's direct claims, the court applied the *Barth* factors after concluding that Rea Riggin & Sons was a closed corporation.[102] The court held that to allow Richard to proceed with his direct claims would unfairly expose the corporation to more than several lawsuits.[103] There were seven named defendants, all of whom were shareholders.[104] Aside from Richard, that left twenty-one shareholders as potential plaintiffs in suits against the corporation. Therefore, the court held that the trial court's grant of summary judgment on this issue was appropriate.[105]

II. DISSENTERS' RIGHTS AND CONTROL SHARE ACQUISITION STATUTES

The Indiana Business Corporation Law ("IBCL") includes several provisions that limit the liability of directors for their transactions taken on behalf of the corporation.[106] These same provisions limit the ability of a shareholder in a publicly traded corporation to object to certain actions taken by their corporation. Two such provisions of the IBCL that have generally been the subject of litigation are the Dissenters' Rights Statute ("DRS"), Indiana Code sections 23-1-44-1 to -20, and the Control Share Acquisitions statute ("CSAS"), Indiana Code sections 23-1-42-1 to -11.

The DRS, and in particular, Indiana Code section 23-1-44-8, is the sole remedy for shareholders in a closed corporation who are unhappy with the corporation's merger, share exchange, a substantial sale of all the corporation's assets, or a control share acquisition under section 23-1-42 (as discussed below). The remedy available to the unhappy shareholder is the right to demand the corporation buy back her shares and to demand an appraisal proceeding if the shareholder does not agree with the valuation of her shares made by the corporation.[107]

Subsection (c) of section 23-1-44-8, the heart of the DRS, makes patently clear that the remedy provided for in the statute is an exclusive one. The shareholder cannot protest the merger or other action in a separate proceeding, and should the shareholder bring such a separate suit, the suit will be barred by operation of the DRS.[108] In addition, any allegations of wrong-doing during the

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101. *Id.*

102. *Id.* at 308.

103. *Id.*

104. *Id.*

105. *Id.*

106. The IBCL, passed by the legislature in 1986, was a wholesale revision of the former General Corporation Act. The official comments, recognized as authoritative, reflect an overall desire to limit director liability. *See* Fleming v. Int'l Pizza Supply Corp., 676 N.E.2d 1051, 1054 (Ind. 1997).

107. IND. CODE § 23-1-44-19 (1998).

108. *See* Young v. Gen. Acceptance Corp., 738 N.E.2d 1079 (Ind. Ct. App. 2000).

execution of the corporation's plan, such as breach of fiduciary duty, must be brought up in the appraisal proceeding.[109] If the shareholder does not bring up these issues in the appraisal proceeding, there will be no other venue for them.[110]

Moreover, shareholders in a publicly traded corporation are not entitled to this remedy. As the official comments state, "the policy reason for this exception is that the market itself establishes both a fair price for the shares and a means by which a 'dissenting' shareholder can sell his shares for that price."[111] An interesting consequence of this preclusion is that since allegations of wrongdoing during the merger must be brought up in the appraisal proceeding, these shareholders might not get their day in court at all on these claims.[112]

The CSAS's purpose is to provide shareholders of a corporation with more than 100 shareholders (and other "substantial ties" to Indiana) a right to vote on an acquisition of stock that would give an entity a controlling portion of the corporation.[113] Control shares are defined in Indiana Code section 23-1-42-1 as shares that would give the acquirer certain voting power in the election of the board of directors in three percentage ranges.[114] The idea behind this right to vote is premised on the traditional right of shareholders to vote on fundamental corporate changes.[115]

However, this statute applies only to just that—a fundamental change. The statute does not apply to shifts in ownership blocks, rather it applies to shifts from a multi-shareholder control of a corporation to a single-shareholder domination.[116] The disinterested shareholders (those not involved in the controlling share acquisition) are permitted to vote on whether the new controlling shareholder will be given those voting rights, that but for the statute, the new controlling shareholder would have. This statute was upheld by the United States Supreme Court in *CTS Corp. v. Dynamics Corp. of America*.[117]

A. Failing to Follow DRS Procedures: Galligan v. Galligan[118]

In late 1996, Irish Park, a family-owned Indiana construction business, was having financial difficulties.[119] To solve these financial troubles, the majority shareholder, Thomas Galligan, who had previously been a director and president

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109. *See id.*; *Fleming*, 676 N.E.2d at 1058; Settles v. Leslie, 701 N.E.2d 849, 853-54 (Ind. Ct. App. 1998).

110. *Fleming*, 676 N.E.2d at 1058.

111. IND. CODE § 23-1-44-8(c) official cmt. (1998).

112. *See* Am. Union Ins. v. Meridian Ins. Group, 137 F. Supp. 2d 1096, 1102-03 (S.D. Ind. 2001).

113. IND. CODE § 23-1-42, official cmt. (1998).

114. *Id.* § 23-1-42-1.

115. *Id.*

116. *See id.*; *see also* Galligan v. Galligan, 741 N.E.2d 1217 (Ind. 2001).

117. 481 U.S. 69, 94 (1987).

118. 741 N.E.2d 1217 (Ind. 2001).

119. *Id.* at 1220.

of Irish Park, decided to sell all of Irish Park's assets to Golden Shamrock, a corporation owned by Larry Rice.[120] Although the court was not entirely sure of Rice's role in Irish Park at the time of the lawsuit, it appeared that Rice had been a long-time employee and member of Irish Park board of directors and possibly the president at the time of the sale. In conducting its sale to Golden Shamrock, Irish Park did not comply with any of Indiana's statutory requirements for a corporation's sale of substantially of all its assets.[121]

Four of Galligan's children were minority shareholders in Irish Park, and three objected to the sale based on a variety of claims, including fraud and breach of fiduciary duty.[122] In response, Galligan sent a notice to all the shareholders indicating that a meeting would be held on March 11, 1998, at which time a new board was to be elected and the sale discussed.[123] On March 11, Galligan was the only shareholder present at this meeting, although the three dissenting minority shareholders had served a "Shareholders' Notice Asserting Dissenters' Right" on all the potential members of the board of directors, including Galligan.[124] At this meeting, Galligan elected himself the sole director of Irish Park, acting as the majority shareholder. Galligan subsequently elected himself as president and secretary of Irish Park, acting as a director.[125] Finally, as the majority shareholder, Galligan voted to ratify the sale of Irish Park to Golden Shamrock.[126]

The court found that although Irish Park's initial actions with respect to the sale of its assets were defective, the ratification of the sale by Galligan as majority shareholder in the March 11 meeting was sufficient to render the sale proper.[127] However, the court went on to find that Irish Park had subsequently failed to follow any of the procedures with respect to its dissenting shareholders.[128] More specifically, Irish Park had failed to send out a notice detailing the steps that the dissenting shareholders needed to take in order to receive payment for their shares, as befitted their only remedy under Indiana's DRS.[129]

This situation was a novel one for the court to consider. The DRS outlines specifically the remedy when dissenters fail to follow procedures: they forfeit their right to receive payment for their shares. However, the statute is silent on remedies when a corporation fails to follow the procedures.[130] The court found that it would be inequitable to keep the dissenters from being paid for their shares as "[t]hey cannot be held to have forfeited their rights by reason of the

120. *Id.*
121. *Id*.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 1222.
128. *Id.* at 1224.
129. *Id.*
130. *Id.* at 1225; IND. CODE § 23-1-44-13(c) (1998).

corporation's ineptitude."[131]

However, the court was concerned that a consequence of holding that the remedy for the corporation's failure to follow DRS was to allow dissenters to bring an action to compel the corporation to follow DRS procedures. First, this remedy could create a disincentive for the corporation to follow DRS procedures initially. And, as bringing an action to compel the corporation to act incurs legal expenses and fees, the remedy might even be a possible barrier for dissenters to ever receive payment. In order to stop such a fallout from this decision, the court held that should a corporation breach the statutory duty to follow procedures under DRS, like Irish Park did in this case, another cause of action arises from that failure because it is "an independent wrong that is not itself subject to the dissenters' rights provisions."[132]

This cause of action, the court was quick to point out, was not a "new" cause of action, but "[r]ather, we simply apply the commonly accepted principle that the directors may be liable for disregarding a statutory mandate to these unusual facts, where the directors failed to take the steps necessary to enjoy the safe harbor provided by the dissenters' rights statute."[133] In further explanation of its holding, the court stated that the dissenting shareholders in this case could bring an action to force Irish Park to comply with the DRS.[134] As to other remedies the plaintiffs could recover against Irish Park, the court found that if the plaintiffs could show that Irish Park's failure to comply with the DRS caused attorney's fees and other expenses, these could be recovered, including interest.[135] And in the appraisal proceeding, the shareholders could bring up the alleged wrong-doings of Irish Park, but those claims were bound to only the appraisal proceeding, as per *Fleming*.[136] "Finally, if damages can be shown to have been caused by a breach of a statutory duty with respect to the dissenters' rights proceedings, the plaintiffs may bring a separate claim against the persons responsible."[137]

This final suggestion provoked a concurrence by Justice Sullivan who wrote merely to state that majority's recognition of a private cause of action for a breach of statutory duty was not necessary.[138] Instead, Justice Sullivan pointed to common law agency and contract principles cited by the official comments to Indiana Code section 23-1-36-2, which should be sufficient to remedy any breach of a statutory duty in situations such as these.[139]

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131. *Galligan*, 741 N.E.2d at 1225.
132. *Id.* at 1226-27.
133. *Id.* at 1226.
134. *Id.* at 1227.
135. *Id*.
136. *Id.*
137. *Id.*
138. *Id.* at 1228 (Sullivan, J., concurring).
139. *Id.*

B. CSAS and DRS Applicability: Young v. General Acceptance Corp.[140]

The plaintiffs in *Young* brought their action under the CSAS and the DRS.[141] General Acceptance Corp. ("GAC") was a publicly traded corporation, with thirty percent of its outstanding stock publicly held.[142] The rest of the stock was held by the two founding members, Malvin and Russell Algood, and six other Algood family members.[143] In April 1997, GAC and the Algoods entered into a Stockholders' Agreement and Securities Purchase Agreement with Conseco and Capital American Life Insurance Company.[144] The primary purpose of the two agreements was to provide a financing arrangement, and as long as there were debentures outstanding, Conseco would be guaranteed two positions on the GAC board of directors.[145]

This plan was carried out in July 1997. In September 1997 and March 1998, GAC entered into additional financing agreements with Conseco.[146] Sometime after March 1998, Conseco presented a merger proposal to GAC's board, proposing a merger between GAC and a wholly-owned subsidiary of Conseco, CIHC.[147] Shareholders, other than Conseco, would be bought out for thirty cents per share.[148] The common shareholders filed for a preliminary injunction, which was denied, and also filed actions under the CSAS and DRS.[149] The merger was consummated and plaintiffs continued with this suit.[150]

The trial court granted defendant's summary judgment motion on plaintiffs' claims based on breach of fiduciary duty, finding them barred by the DRS.[151] The trial court also granted defendant's motion to dismiss plaintiffs' claims based on the CSAS.[152] The court of appeals affirmed the trial court on all grounds.[153]

The first issue dealt with was the CSAS claim. After reviewing the purposes behind the statute, the court of appeals discussed its applicability. Through a reading of the official comments, and *CTS Corp.*, the court of appeals held that the CSAS was meant to apply in hostile takeover situations.[154] The court found that the transactions between GAC and Conseco were not hostile.[155]

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140. 738 N.E.2d 1079 (Ind. Ct. App. 2000).
141. *Id.* at 1082.
142. *Id.* at 1083.
143. *Id.*
144. *Id.*
145. *Id.* at 1083-84. CALI was a wholly-owned subsidiary of Conseco. *Id*.
146. *Id.*
147. *Id.* at 1084.
148. *Id.* The stock had been trading at $3.25 per share on April 10, 1997. *Id.* at 1083.
149. *Id.* at 1084.
150. *Id.*
151. *Id.* at 1085.
152. *Id.*
153. *Id.* at 1083.
154. *Id.* at 1087.
155. *Id.* at 1088.

Alternatively, the court found that even assuming hostility, there was no fundamental change in GAC's shareholder make-up.[156] The common shareholders had always been a minority in the corporation, whether the majority shareholders were the Algoods or Conseco.[157] In addition, the court reasoned that the acquisition of shares by Conseco did not harm the common shareholders, because the common shareholders were always at a disadvantage in the decision making process of GAC, as the Algoods had been majority shareholders until the 1997 and 1998 transactions.[158]

Interestingly, the court of appeals did not look to the language of the statute to support its holding that the CSAS did not apply. The CSAS provides several exceptions to the applicability of the statute in section 23-1-42-2. Arguably, several of the exceptions could apply to the Conseco-GAC securities purchase agreement, depending on a reading of the agreement and the statute.[159]

The second issue the court of appeals reviewed was the trial court's grant of summary judgment in favor of defendant on plaintiffs' breach of fiduciary duty claims. The trial court found that all ten of plaintiff's contentions were barred by the DRS.[160] Summary judgment was also granted on the basis that plaintiffs' claims were derivative and their direct actions against GAC could not proceed.[161]

Plaintiffs alleged that the DRS should not apply to them for three reasons: the violation of the CSAS voided the merger; the merger was void because of fraudulent statements in the proxy statement; and application of the DRS violated public policy considerations.[162] The court of appeals upheld the application of the DRS to bar plaintiffs' breach of fiduciary duty claims, notwithstanding plaintiffs' three reasons to the contrary.[163] Since the CSAS was addressed in part one of the opinion and was found to have not been violated, the court did not further discuss it in part two.[164] As to fraudulent statements in the proxy statement, the court held that even assuming the statements were fraudulent (as the court could find no support for plaintiffs' contentions that the statements were, in fact, fraudulent or misleading), fraud did not necessarily void a merger, but provided an additional matter to litigate within the DRS proceedings.[165]

Lastly, the court discussed plaintiffs' public policy argument as a basis for the decision not to apply the DRS in plaintiffs' situation.[166] Plaintiffs argued that the actions of GAC and Conseco were so "heinous" that by applying the DRS,

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156. *Id.*

157. *Id.*

158. *Id.*

159. The securities purchase agreement was apparently not made part of the record. *Id.* at 1083.

160. *Id.* at 1089-93.

161. *Id*. at 1089.

162. *Id.* at 1090.

163. *Id.* at 1091-93.

164. *Id.* at 1091.

165. *Id.* at 1091-92.

166. *Id.* at 1092-93.

the court would be sanctioning such heinous behavior.[167] In dismissing this argument, the court provided a lengthy discussion of the public policy behind the statute, the discussion of which did not really reach plaintiffs' contention.[168]

The court correctly acknowledged that the corporation, as the party that must initiate an appraisal proceeding under the statute, was also the party most interested in not paying dissenters anything for their shares.[169] Although this works as a disincentive to hold up the corporation's responsibilities under the statute, the court pointed out that the penalty for not complying with the appraisal proceedings was for the corporation to pay the amount the dissenters demand.[170]

This was all very interesting, but the court seemed to have missed the point of plaintiffs' argument, which was that the statute should not apply at all, and their claims of breach of fiduciary duty by GAC should not be barred. The appraisal portion of the DRS that the court spent time talking about did not answer plaintiffs' argument because the plaintiffs were shareholders in a publicly traded corporation.[171] The right of appraisal is available only for shareholders in a closed corporation, because the ability to withdraw from a close corporation is more difficult to do than in a public company.[172]

In addition, the Indiana General Assembly amended the statute to extend coverage of the sole remedy of dissenting and demanding payment to shareholders of a publicly traded corporation. The official comments to section 23-1-44-8(c) state that the publicly traded company's shareholders were added because the public market was an available outlet for their shares. Therefore, plaintiffs had no right to a direct action at all, only a derivative one, a conclusion that the court finally reached and properly affirmed the trial court's dismissal of plaintiffs' claims.[173]

III. PIERCING THE CORPORATE VEIL

One of the basic premises of business law is that by forming a corporation, it has limited liability for actions taken in furtherance of the corporation's business. The concept of limited liability in the corporate entity has been a part of the United States for over a century.[174] Even if there is only one shareholder, that one person will generally be immune from liability that the corporation may incur during its normal course of business. In Indiana, this rule is codified in the

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167. *Id.* at 1092.

168. *Id.* at 1092-93.

169. *See id.* at 1092.

170. *Id.*; *see* IND. CODE § 23-1-44-19(a) (1998).

171. Unless there is another, undisclosed reason that dissenters' rights would be available to plaintiffs.

172. IND. CODE § 23-1-44-8(b) (1998); Am. Union Ins. v. Meridian Ins. Group, 137 F. Supp. 2d 1096, 1101 (S.D. Ind. 2001).

173. *Young*, 738 N.E.2d at 1093.

174. William J. Rands, *Domination of a Subsidiary by a Parent*, 32 IND. L. REV. 421, 423 (1999).

IBCL.[175] This rule also holds true when a corporation is a wholly-owned subsidiary of another corporation.

The IBCL, unlike the Revised Model Business Code upon which it was based, limits liability of a corporation's directors to situations where directors have willfully or recklessly breached their duties to their corporation.[176] And, officers and employees are subject to common law agency and contract doctrines and do not have a separate standard of conduct to which to conform.[177]

However, there are situations where the corporate entity is used wrongfully as a shield by parent corporations or shareholders against prosecutions from third parties or even its own shareholders. In these situations, courts will pierce the corporate veil and hold the individual shareholder or corporation liable for actions taken by them in furtherance of the corporation's business.[178] Indiana courts, unlike other jurisdictions that generally apply a two or three factor "alter ego test,"[179] apply an eight factor test[180] which was articulated by the Indiana Supreme Court in *Aronson v. Price*.[181] These factors focus on whether "the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice."[182]

Since September 2000, one supreme court case and two court of appeals cases dealt with piercing the corporate veil ("PCV"). Although the supreme court case, *Commissioner v. RLG, Inc.*,[183] is not really a PCV case because it handles individual liability under environmental statutory law, it is still relevant to corporate law. The two court of appeals cases, *Smith v. McLeod Distributing*,

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175. IND. CODE § 23-1-26-2(d) (1998).

176. *Id.* § 23-1-36-2.

177. *Id.* at official cmt.

178. For a more in-depth analysis of this issue, see Rands, *supra* note 174.

179. *See* Cynthia Nance, *Affiliated Corporation Liability Under the WARN Act*, 52 RUTGERS L. REV. 495, 507 (2000).

180. The eight factors are:

> (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.

Aronson v. Price, 644 N.E.2d 864, 867 (Ind. 1994). These eight factors are a combination of the two-factor and three-factor tests used in other jurisdictions. *See* Nance, *supra* note 179, at 507 (noting that the two-factor test focusing on "unity of ownership and interest" and fraud or inequity would be a fallout of holding the corporations as separate entities; the three-factor test consists of (1) exercise of excessive control; (2) inequitable or wrongful conduct; and (3) causation).

181. 644 N.E.2d 864, 867 (Ind. 1994).

182. *Id.*

183. 755 N.E.2d 556 (Ind. 2001).

Inc.,[184] and *Apollo Plaza Ltd. v. Antietam Corp.*,[185] are more run-of-the-mill PCV cases.

A. Responsible Corporate Officer Doctrine v. Veil-Piercing: Commissioner v. RLG, Inc.

RLG, Inc. was a corporation in the business of operating a landfill in Wabash, Indiana.[186] Lawrence Roseman was RLG's sole shareholder, director, president, secretary, and treasurer.[187] In 1993, the Indiana Department of Environmental Management ("IDEM") brought suit against both RLG and Roseman for violations at the landfill.[188] RLG negotiated agreements whereby RLG would remedy the wrong done at the landfill, and in return IDEM would drop the lawsuit.[189] Remedial steps were not taken and in 1994, IDEM reinitiated its proceedings. RLG failed to answer the complaint so the court entered a default judgment against RLG for three million dollars.[190] RLG was insolvent at this point.[191] In 1999, Roseman was found to not be personally liable for RLG's debt to IDEM by the trial court, and the court of appeals affirmed this judgment.[192]

The supreme court granted transfer,[193] and Justice Boehm wrote for the unanimous court, holding that Roseman was indeed personally liable for RLG's default judgment award under the doctrine of responsible corporate officer.[194] This doctrine, which is substantively different from the piercing the corporate veil doctrine, has the same effect as veil-piercing in that an individual shareholder is held liable for the actions of the corporation.[195]

The responsible corporate officer doctrine arose out of a 1943 U.S. Supreme Court case and the Court's interpretation of a section of the Federal Food, Drug and Cosmetic Act.[196] The doctrine was upheld and expanded upon by another U.S. Supreme Court case in 1975.[197] The thrust of the responsible corporate officer doctrine was to hold a corporate officer liable, if that officer directed the actions of the corporation, and those actions constituted a public welfare

184. 744 N.E.2d 459 (Ind. Ct. App. 2000).
185. 751 N.E.2d 336 (Ind. Ct. App. 2001).
186. *RLG*, 755 N.E.2d at 558.
187. *Id.* at 561.
188. *Id.* at 558.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 558-59.
193. Commissioner v. RLG, Inc., 753 N.E.2d 5 (Ind. 2001).
194. *RLG*, 755 N.E.2d at 561-62.
195. *Id*. at 558.
196. *Id.* (citing United States v. Dotterweich, 320 U.S. 277 (1943)).
197. *Id.* (citing United States v. Park, 421 U.S. 658 (1975)).

offense.[198] The *RLG* court adopted this doctrine, as well as the three factors forming the standard to find a corporate officer responsible for the corporation's actions.[199] The court found Roseman liable, in both his capacities as corporate officer and in an individual capacity under the Indiana environmental management laws, finding that Roseman acted in a direct capacity to violate the landfill laws.[200]

RLG mainly deals with a type of corporate liability where public welfare offenses are at issue, whereas PCV cases are not "dependent on the nature of the liability."[201] Therefore, this case will probably not have major consequences for corporations who are not in lines of business similar to RLG. The court draws a distinction between public welfare offense cases where a corporate officer would be held individually responsible and PCV cases, noting that the responsible corporate officer doctrine was more expansive in holding the corporate officer liable.[202] If this were not the case, it would be rare that an officer could be held liable for public welfare offenses, where, as here, there was no wrongful use of the corporate entity.[203]

B. Two Corporations in One: Smith v. McLeod Distributing, Inc.[204]

McLeod Distributing was a corporation in the business of wholesale distribution of carpets and other floor coverings.[205] Michael Smith was the president of Colonial Industrial and Colonial Mat Corporations.[206] Colonial Industrial was incorporated in 1981, and Colonial Mat was incorporated in 1987.[207] Colonial Mat and McLeod began doing business a few months after Colonial Mat was incorporated. In order to obtain a line of credit for Colonial Mat with McLeod, Smith signed a personal guarantee that he would be liable for any debts Colonial Mat would incur.[208]

In 1989, Smith sent McLeod a letter indicating that it would be doing its carpeting business under a different name, Colonial Carpets.[209] McLeod changed Colonial Mat's account name to Colonial Carpets in its internal invoice system, but the original account opened by Smith under the Colonial Mat name was never closed by either Smith or McLeod.[210] Business between the two companies

198. *Id.* at 560-61.
199. *Id.* at 561.
200. *Id.* at 559-60.
201. *Id.* at 563.
202. *Id.*
203. *Id.*
204. 744 N.E.2d 459 (Ind. Ct. App. 2000).
205. *Id.* at 461.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*

remained smooth until 1990, when McLeod stopped deliveries to Colonial Carpets because several invoices sent to Colonial Carpets had not been paid, the total amount coming to over $6000.[211] After several demands for payment went unanswered, McLeod filed a lawsuit against Colonial Mat and Smith in September 1990.[212] In November 1990, Colonial Mat was administratively dissolved by the Secretary of State because Colonial Mat had failed to file an annual report.[213]

The case between McLeod and Smith remained pending in the trial court for ten years, and, finally, McLeod was awarded a judgment for the debt, plus interest of eighteen percent before the judgment and eight percent for after the judgment.[214] Smith and Colonial Mat appealed to the court of appeals on two issues: that Colonial Mat was not the corporation to which McLeod's invoices were addressed and therefore not liable for the judgment, and that Smith himself should not be held personally liable for Colonial Mat's debt because the guarantee agreement was invalid.[215]

As to the first issue, the court of appeals affirmed the long-held principle that piercing the corporate veil is a "fact-sensitive inquiry."[216] As such, the reviewing court should give great deference to the trial court's determination to hold one corporation liable for the debt of a related corporation.[217] Here, the court of appeals took into account several factors, other than the ones listed in *Aronson* by the Indiana Supreme Court,[218] as the court of appeals stated, "[w]e do not believe the eight *Aronson* factors were intended to be exclusive . . . ."[219] The court of appeals distinguished *Aronson* from *McLeod* because in *Aronson*, the court was asked to hold a shareholder liable for the debts of a corporation, whereas in *McLeod*, the court here was being asked to hold a corporation accountable for another corporation's debts.[220]

The additional factors considered by the court of appeals were (1) whether similar names were used by the two corporations; (2) whether the two corporations had similar management personnel (i.e., officers, directors and employees); (3) whether the two corporations were pursuing similar lines of business; and (4) whether the internal office structure and premises were identical (i.e., office phone numbers, business cards, etc.).[221] The court of appeals then applied these additional factors, finding that although McLeod (who as plaintiff had the burden to prove the *Aronson* factors) had not produced much

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211. *Id.*
212. *Id.*
213. *Id.* at 462.
214. *Id.*
215. *Id.*
216. *Id.* (quoting Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1232 (Ind. 1994)).
217. *Id.*
218. *See supra* note 180.
219. *McLeod*, 744 N.E.2d at 463.
220. *Id.* at 464.
221. *Id.* at 463.

evidence, there was sufficient evidence in the record to find that holding Colonial Mat liable for the debts owed to McLeod was equitable.[222] Most notable to the court of appeals was that the Colonial corporations (Colonial Mat and Colonial Industrial) were run from the same office, had the same office manager as the sole employee of both corporations, and had comingled financial accounts.[223]

The second issue on appeal concerned the validity of Smith's personal guarantee to McLeod and dealt with the protocol needed to create an enforceable continuing guarantee agreement in Indiana.[224] This issue is beyond the scope of this Article, as it is better discussed as a contracts issue.

C. "Outside Reverse Piercing": Apollo Plaza Ltd. v. Antietam Corp.[225]

This was not the first time the parties to this dispute had been before the court of appeals. On their first occasion, the court, in a memorandum opinion, affirmed the judgment of the trial court in the litigation matter between Antietam and Alex Shiriaev.[226] In the present matter, the court was called upon to analyze whether Apollo, a corporation wholly owned by Shiriaev, should be pierced to have Antietam's judgment satisfied.[227]

Although not necessarily relevant to the issue of PCV, the background litigation provides an amusing story. Antietam Corporation was a construction business and had borrowed money from Alex Shiriaev, giving as collateral a security interest in a Bobcat that the corporation owned.[228] The Bobcat was ostensibly "stolen" from Antietam in October 1994 and Shiriaev locked Antietam out of its offices and demanded Antietam assign the insurance proceeds from the stolen Bobcat to him.[229] Antietam filed suit against Shiriaev, alleging conversion, and Shiriaev countered with a negligence action with respect to the lost Bobcat.[230] Surprisingly, once the Bobcat was found at the residence of Shiriaev's brother by a private detective, Shiriaev dropped his claims regarding the Bobcat. However, Antietam proceeded to trial with its claims against Shiriaev and was awarded over $130,000, plus legal fees.[231]

Antietam attempted to enforce this judgment and obtain payment by freezing a bank account titled, "Alex Shiriaev d/b/a Apollo Plaza Limited."[232] The trial

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222. *Id.* at 464.

223. *Id.*

224. *Id.* at 465-66.

225. 751 N.E.2d 336 (Ind. Ct. App. 2001).

226. Shiriaev v. Antietam Corp., 733 N.E.2d 542 (Ind. Ct. App. 2000), *trans. denied*.

227. *Apollo Plaza*, 751 N.E.2d at 337.

228. Actually, the corporation was formed a few months after the loan and security interest were given, but after the corporation was formed, all assets of the former sole proprietorship were conveyed to the corporation. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* The court of appeals affirmed this award. *Shiriaev*, 733 N.E.2d at 542.

232. *Apollo Plaza*, 751 N.E.2d at 338.

court conducted a hearing to decide whether Apollo's corporate veil should be pierced to satisfy Antietam's judgment against Shiriaev. The trial court found for Antietam.[233] Apollo appealed, arguing that the trial court conducted an "outside reverse piercing" of Apollo's corporate identity because Apollo never had any dealings with Antietam.[234] In addition, Apollo claimed that Shiriaev was just a minority shareholder.[235] Shiriaev also unsuccessfully tried to convince the judge that he was not involved in Apollo, having recently resigned as president of Apollo in favor of his brother.[236] The court of appeals affirmed the trial court's findings, holding that "a contrary decision by the trial court would have allowed Shiriaev to further a fraud by using Apollo as the means to hide assets in order to avoid paying the legal judgment rendered against him."[237]

IV. INDIANA SECURITIES ACT—FRAUDULENT OR DECEITFUL ACTS

Most securities cases are litigated under the numerous federal securities statutes dealing with fraudulent sales and the like. It is surprising, therefore, to see a case like *Carroll v. J.J.B. Hilliard*,[238] brought solely under Indiana securities law. One of the claims in *Carroll* was premised on Indiana Code section 23-2-1-12,[239] which is almost identical in wording to the Securities Exchange and Commission Rule 10b-5.[240] However, Gertrude Carroll filed a lawsuit against R. Dale Cassiday and his brokerage firm, Hilliard Lyons, under the Indiana Securities Act and not premised on any violations of federal

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233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 339.

237. *Id.* at 340.

238. 738 N.E.2d 1069 (Ind. Ct. App. 2000).

239. Section 12 reads,

> It is unlawful for any person in connection with the offer, sale or purchase of any security, either directly or indirectly, (1) to employ any device, scheme or artifice to defraud, or (2) to make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of circumstances under which they are made, not misleading, or (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

IND. CODE § 23-2-1-12 (2001).

240. It is identical except for the federal jurisdiction requirement in Rule 10b-5: "use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange . . . ." 15 U.S.C. § 78j (1998). As will be discussed below, although Cassiday's presentation to Gertrude was done in person, and therefore the "instrumentality of interstate commerce" requirement might have been in question, there were subsequent phone calls made between Cassiday and Gertrude concerning the investments that might have qualified. But as Gertrude brought her lawsuit solely under Indiana law, this is mere speculation.

securities law.[241]

Carroll was a seventy-five year old woman with the goal of increasing her annual income by changing her stock portfolio.[242] She contacted Cassiday in July 1986 on the recommendation of a friend. Cassiday met with Carroll at her home in August 1986 and discussed her options. After the meeting, Cassiday prepared a detailed memo which summarized his conversations with Carroll.[243] Cassiday met with Carroll on another occasion in late August 1986, and at this meeting, Cassiday proposed a plan to Carroll to meet her goal of increased income.[244] Cassiday suggested she invest in two mutual funds which had histories of having fairly high yearly yields, and each month Carroll would make withdrawals.[245] The overall plan was for the mutual funds to yield a yearly percentage higher than that of Carroll's yearly withdrawals.[246]

Carroll decided to take Cassiday's suggestion.[247] In order to raise the money needed to invest in these mutual funds, Cassiday suggested Carroll sell eight of the stocks in her existing portfolio.[248] Cassiday warned Carroll that she would incur tax liability from the sale of her stocks, but also warned her that he was not an expert on taxes.[249] Carroll gave her authorization to sell on September 2, 1986. All went according to plan. Cassiday sold the eight stocks, which netted Carroll approximately $127,000.[250] Carroll purchased a new portfolio with the two mutual funds suggested by Cassiday and seven common stocks. However, in December 1986, one of Carroll's sons told Carroll that she should no longer conduct business with Cassiday.[251] Carroll terminated Cassiday's and his brokerage firm's services. It was not until Carroll discovered that her tax liability was going to be fifty percent higher than Cassiday had estimated did Carroll look into filing a lawsuit for fraud and violation of securities laws.[252] Carroll filed her lawsuit on February 2, 1990, and died on February 9, 1998. Her sons proceeded with the lawsuit as representatives of Carroll's estate.[253]

Carroll sold her shares in one of the mutual funds that Cassiday suggested in 1991 and, ironically, had Carroll retained these shares, the total return of the fund would have covered Carroll's withdrawals and her investment would have appreciated in value.[254] Carroll retained her shares in the second mutual fund

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241. *Carroll*, 738 N.E.2d at 1071.
242. *Id.* at 1071-72.
243. *Id.* at 1072.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 1073.
248. *Id.* at 1072.
249. *Id.*
250. *Id.* at 1073.
251. *Id.*
252. *Id.*
253. *Id.* at 1072-73.
254. *Id.* at 1074.

suggested by Cassiday and that fund, as well, had a total return that covered Carroll's withdrawals in addition to appreciating in value.[255] Both mutual funds were appropriate vehicles for Carroll to meet her stated goals of increasing her monthly cash flow.[256]

In her lawsuit, Carroll alleged that Cassiday committed fraud and violated the Securities Act with respect to his presentation to her and the sale and purchases of her portfolios.[257] The trial court made several specific findings of fact, and concluded that neither Cassiday nor his brokerage firm were liable to Carroll (now her estate) under any theory alleged.[258] The court of appeals, through Judge Friedlander, affirmed.[259]

The first issue was Carroll's allegations that Cassiday's recommendations and presentation at their second meeting violated 710 Indiana Administrative Code section 1-17-1(d), which defines the unethical practices of broker-dealers or investment advisors in Indiana Code section 23-2-11(a)(6). More specifically, Carroll contended that Cassiday did not sufficiently inform her that the withdrawals from the two mutual funds might consist of principal and interest.[260] This failure, Carroll further contended, violates 710 Indiana Administrative Code section 1-17-1(d), which prohibits an investment advisor from presenting an investment scheme, the return on which would consist of "income and distributions from capital, or any other source."[261] The court found that Cassiday did not violate this section, and furthermore, that this section did not even apply to Cassiday's presentation.[262]

The court pointed to Cassiday's testimony at trial where he described his conversation with Carroll at their second meeting.[263] Cassiday testified that he warned Carroll that should the mutual funds not give a yearly return higher than ten percent, Carroll's withdrawals might include both interest and principal, thereby dwindling the amount left in the fund.[264] However, had Cassiday not given this warning, subsection (d) did not reach Cassiday's actions.[265] The court limits subsection (d) to "Ponzi schemes."[266] As the court described, "the primary purpose of subsection (d) is to prohibit brokers from representing a return on an investment that includes an infusion of capital supplied by later investors in the program in question."[267] And if subsection (d) were to apply to the type of

255. *Id.* at 1075.
256. *Id.* at 1074-75.
257. *Id.* at 1073.
258. *Id.* at 1075.
259. *Id.* at 1071.
260. *Id.* at 1076.
261. IND. ADMIN. CODE tit. 710 r. 1-17-1(d) (1998).
262. *Carroll*, 738 N.E.2d at 1076.
263. *Id.*
264. *Id.* at 1073.
265. *Id.* at 1076 (referencing IND. ADMIN. CODE tit. 70 r. 1-17-1(d) (1998)).
266. *Id.* at 1077.
267. *Id.* Or in other words, subsection (d) prohibited a pyramid scheme, where one investor

investment vehicle Cassiday suggested, the court added, subsection (e) of the same section would be nullified.[268] Subsection (e) clearly states that an investment advisor must point out to the client that distributions from investments might reduce the value of that investment, the very thing Cassiday had warned Carroll about.[269]

Carroll's second contention was that Cassiday violated section 23-2-1-12 because he failed to inform her of the time period needed to recover her transactional costs.[270] Due to Carroll's age, the time to recover her costs would have been approximately her remaining life expectancy at age seventy-five.[271] Under this section, Cassiday was required to inform Carroll of all material facts about the investment portfolio that he was suggesting so as to not make his presentation misleading.[272] Had Cassiday omitted a fact which would have been "relevant to the investment decision," then Cassiday would have violated the Securities Act.[273]

However, the court found that no material fact was omitted and upheld the trial court's determination by looking at two pieces of evidence.[274] First, the court pointed to Carroll's undisputed goal of meeting with Cassiday and obtaining his advice—to increase her monthly income.[275] Second, the court noted the expert testimony given by a president of a local broker dealer. This expert witness testified that had he been presented with Carroll's stated goal of increase in income, and not investment growth, he would not have made a time-to-recover-costs analysis.[276] The witness also pointed out the fact that there was no regulation, either state or federal, or any industry custom to give such an analysis at all, regardless of the client's stated purpose for her investments.[277] Based on these two factors, the court declined to include within the duties of the broker-dealer a requirement to provide such an analysis.[278]

Lastly, Carroll contended that Cassiday violated subsection (x) of 710 Indiana Administrative Code section 1-17-1 by not conducting a reasonable inquiry into her tax liability.[279] Carroll alleged that Cassiday indicated to her that her tax liability would be approximately $10,000, when she actually had to pay

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brings in two investors, and then those two investors bring in three investors. The creator of the scheme uses the later investors' money to pay "dividends" or distributions on the investment, but there has not really been any investing or growth.

268. *Id.* at 1076.
269. *Id.* at 1076-77.
270. *Id.* at 1077.
271. *Id.*
272. *Id.* (referencing IND. CODE § 23-2-1-12(2) (1998)).
273. *Id.* at 1077.
274. *Id.* at 1077-78.
275. *Id.* at 1077.
276. *Id.*
277. *Id.* at 1078.
278. *Id.*
279. *Id.* (citing IND. ADMIN. CODE tit. 710 r. 1-14-1(x) (1998)).

approximately $17,000.[280] The court held that subsection (x) "requires brokers to conduct a reasonable inquiry into a customer's individual circumstances."[281] The court looked to the testimony of Cassiday and Carroll's accountant, Jim Winemiller. Cassiday testified that during his presentation, he informed Carroll that she would incur tax liability on her sales of stock, but that he was not an accountant and could not be sure whether $10,000 was an accurate figure. Carroll authorized the sale nonetheless.[282] On the day after the sale, she called Winemiller to inform him of the sales and to ask about her tax liability. The court found it to be telling that Carroll continued to sell additional stocks even after her phone call with Winemiller.[283] In short, the court determined that Cassiday conducted a reasonable investigation into Carroll's situation in order to consider all relevant information before suggesting an investment vehicle to Carroll.[284]

Looking at the opinion as a whole, it seems that the court was taken with the fact that Carroll was not an elderly woman who had fallen prey to Cassiday. Throughout the opinion, the court mentions the fact that prior to her dealings with Cassiday, Carroll had contact with other brokers.[285] She had managed her portfolio and although she was not on the level of a stockbroker, Carroll had more than an average understanding of her investments.[286] It was just an unfortunate happenstance that she felt she had been defrauded, although one wonders how she could have felt that way, looking at the returns her investments eventually did yield. But perhaps this is the benefit of hindsight.

CONCLUSION

One survey article cannot come close to discussing all the changes to Indiana corporate law in the past year. This Article has attempted to discuss case law in four different areas of corporate law in an attempt to provide a partial analysis of any shifts in the landscape. The two major shifts this year have been in the area of shareholder suits in closed corporations and suits brought under the DRS. Both *G & N Aircraft, Inc.* and *Galligan* outline remedies to which shareholders can be entitled, which was a slight expansion of the statutory remedies provided for by the IBCL. However, as the majority of the cases discussed in this article were court of appeals cases, the supreme court might decide to grant transfer and change the landscape even further.

280. *Id.*
281. *Id.* at 1078.
282. *Id.* at 1079.
283. *Id.*
284. *Id.* at 1077.
285. *Id.* at 1072, 1075.
286. *Id.* at 1071-72.