

Ohio Securities Bulletin



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Governor

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Director of Commerce

KENNETH E. KROUSE
Commissioner of Securities

Issue 3 - 1980

JURISDICTION UNDER THE OHIO SECURITIES ACT AFTER MARTIN vs. STEUBNER

By David G. LeGrand**

Attention has recently been drawn to the definition of "sale"¹ as used in the Ohio Securities Act, Chapter 1707 of the Ohio Revised Code.² As reported in the last issue of the Ohio Securities Bulletin, an unreported decision, Howard v. Rowley & Brown Petroleum Corp.³ involved sales of securities by an Ohio corporation doing business in Ohio with two Mississippi residents. The converse situation was the subject of litigation in a recently reported Federal District Court decision, Martin v. Steubner.⁴

Martin arose in May, 1976 when an Ohio resident, Russell Martin, filed suit in federal court seeking damages for alleged violations of federal and state securities laws. Martin had purchased an interest in a Minnesota partnership organized for the purpose of developing an ice-skating arena near Minneapolis, Minnesota.⁵

In September, 1974, defendant James Steubner advertised in the Wall Street Journal for partners to finance expansion of office-arena facilities owned and operated by a corporation and partnership. Steubner was both president of the corporation and general partner of the partnership.

When Martin responded to the advertisement, Steubner mailed him a letter briefly describing the proposed investment opportunity. Martin later visited Steubner in Minneapolis, toured the arena, reviewed financial statements, and discussed the investment.

On October 3, 1974, Steubner forwarded to Martin a letter from an accounting firm confirming the availability of tax losses from the ice-arena investment. In addition, Steubner mailed Martin a separate letter responding to Martin's concern that the tax losses occur in his 1974 tax year.

Martin decided to invest \$100,000 and ordered his Ohio broker to wire the same to Steubner on or about October 12, 1974. Five days later, Steubner mailed to Martin in

Ohio a subscription agreement which Martin read, signed, and mailed back to Steubner in Minnesota.

Construction commenced on the ice arena expansion. However, due to a lengthy disruption caused by contamination of a freon cooling system, the new facilities were delayed and goodwill with the community was lost. Re-financing was not successfully achieved.

Martin sought the return of his money, and after negotiations failed, sued for relief.

The court concluded that Steubner was not liable under common law or the federal securities acts because of the lack of intent to defraud. However, the court reluctantly granted judgment for plaintiff under the rescission provision of Section 1707.43 O.R.C.

As in Howard,⁶ the primary issue of state law, was the applicability of the Ohio Securities Act to the transaction. The defendant contended that the "sale" of the security⁷ did not take place in Ohio.

The trial court explicitly analyzed the breadth of the "sale" concept in the context of the constitutional considerations of due process. Although the court had "difficulty justifying the application of Ohio blue sky law . . . based on the minimal contacts listed . . ." they were sufficient when, "viewed together with the State's interest in protecting its citizens."⁸

In reaching its conclusion, the court adopted a traditional approach to due process, by balancing competing interests on a fairness scale.⁹ In doing so, the Court considered whether Martin's investment was a reasonably foreseeable consequence of the defendant's actions. It also considered Ohio's interest in protecting its citizens with regard to investment opportunities.¹⁰

**David G. LeGrand is staff attorney for the Ohio Division of Securities.

OHIO SECURITIES BULLETIN

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Other state courts have concluded that "sales" of securities occurred within their jurisdiction when the facts showed even fewer "contacts." For example, in Parvin v. Davis Oil Co.,¹¹ "the Ninth Circuit Court of Appeals addressed the following situation: Plaintiff, a California resident had negotiated in Colorado with the seller, a Colorado resident, to purchase securities. After negotiation, seller mailed a contract of sale to plaintiff at his California residence. Plaintiff signed the contract and mailed it with his payment back to Colorado.

The court observed that, "where any statutory element of a sale takes place in California, . . . its courts have been willing to apply injunctive relief or criminal penalties for failure to obtain a permit.¹² The court concluded that the "sale" of the security took place at least in part in California, and granted rescission.

Equally broad statements concerning the scope of Blue Sky regulations can be found in several Texas decisions. In Rio Grande Oil Co. v. State,¹³ and Enntex Oil and Gas Co. (of Nevada) v. State,¹⁴ two Texas Courts of Civil Appeals have agreed that, "the Texas Securities Act applies if any act in the selling process . . . occurs in Texas."¹⁵

In Rio Grande and Enntex, the State of Texas sought injunctive relief against Texas corporations selling securities not registered in Texas to persons not residing in Texas.¹⁶ Respondent corporations contended the Texas Securities Act did not apply to the "sales" made to residents of other states.¹⁷ The court in Rio Grande noted that the telephone calls and mailings originated from Texas and that the investors' subscriptions were accepted in Texas (acts in the selling process); therefore, "the sales were Texas ones".¹⁸

The court in Enntex further ruled that the burden on interstate commerce imposed by the application of Texas law was only incidental, insubstantial, and not unreasonable.¹⁹

As noted by the court in Martin, "The law concerning the applicability of Blue Sky Law on interstate transactions and foreign defendants is far from clear."²⁰ For example, one state court may refuse on policy grounds to enforce the law of another state.²¹

Several courts have considered the question of whether a sale occurs in one state when a client orders securities through his agent-broker located in a second state. Generally, the courts have ruled that when the broker acts as agent for the purchaser, he is not a "seller" and the "sale" occurs at the point where the agent-broker purchases.²²

Another problem arises when the only contact between purchaser and seller is telephonic, followed by mail delivery of the securities for acceptance. The most recent cases are in accord that a "sale" in such circumstances does occur in the purchaser's state of residence.²³

Given the strict application of Blue Sky law in most state courts, the potential liability for sellers of securities in interstate transactions should be of great concern to sellers

(continued on page 3)

(Continued from page 2)

as well as the legal practitioner advising them. Careful consideration should be given to the broker-dealer/salesman licensing provisions, registration provisions, and exemptions in all states wherein "sales" may be deemed to have occurred.

Since the "sale" concept is intrinsic to the civil and criminal liability both within²⁴ and outside²⁵ the State of Ohio, the importance of considering the laws of all situs states is manifest.

1 "Sale" is defined in OHIO REV. CODE ANN. Sec. 1707.01(C) (Page).

2 See LeGrand and Neuman, Howard vs. Rowley and Brown Petroleum Corp., An Ohio Unreported Decision, Ohio Sec. Bull., Issue 2, Page 1 (1980).

3 Howard vs. Rowley and Brown Petroleum, No. 78 AP 113 (Ct. App. Franklin Co. January 30, 1978), cert. denied, appeal dismissed (Sup. Ct., Dec. 4, 1978).

4 Martin vs. Steubner, 485 F. Supp. 88 (S.D. Ohio 1979).

5 Id. at 90.

6 Howard vs. Rowley, supra note 3.

7 Martin vs. Steubner, supra note 4, at 98. The parties did not controvert that the interest acquired by Martin was a "security" as defined in OHIO REV. CODE ANN. Sec. 1707.01(B).

8 Martin vs. Steubner, supra, at 100.

9 International Shoe Co. vs. State of Washington, 326 U.S. 310 (1945); Traveler's Health Assoc. vs. Virginia 339 U.S. 643 (1950).
10 Martin vs. Steubner, supra note 4, at 100. Also, the Seventh Circuit Court of Appeals stated in Aldens, Inc. vs. LaFollette, 552 F.2d 745, 751 n. 12 (1977), "Police power requires less of a nexus than the state's power to regulate interstate commerce." This statement was included in a discussion of the applicability of the Wisconsin Consumer Act along with a citation to Freeman v. Hewitt, 329 U.S. 249 (1946).

11 Parvin vs. Davis Oil, 524 F.2d 112 (9th Cir. 1975).

12 Id. at 117.

13 Rio Grande Oil vs. State, 339 S.W. 2d 917 (Houston Ct. Civ. App. 1976).

14 Enntex Oil and Gas vs. State, 560 S.W. 2d 494 (Texarkana Ct. Civ. App. 1977).

15 Rio Grande Oil vs. State, supra, note 13, at 921, 922; Enntex, supra note 14 at 497.

16 The facts of the Rio Grande and Enntex cases parallel those under which the Ohio Division of Securities issued an Order to cease and desist in the matter of O/G Energy Investments, Inc. on June 14, 1980.

17 Rio Grande Oil vs. State, supra note 13, at 921.

18 Id. at 921.

19 Enntex Oil and Gas vs. State, supra note 14, at 497.

20 Martin vs. Steubner, supra note 4, at 98.

21 Gaillard vs. Field, 381 F.2d 25 (10th Cir. 1967); rehearing denied, Sept. 18, 1967; cert. denied 389 U.S. 1044 (1967).

22 Lane vs. Griswold, 273 N.C. 1, 159 S.E. 2d 338 (1968); Fine vs. Bradford, 109 Ga. App. 380, 136 S.E. 2d 147 (1964).

23 Shappley vs. State, 320 S.W. 2d 766 (Tex. Crim. 1974). Piantes vs. Hayden-Stone, 514 P.2d 529 (Utah 1973). Murlas Brothers Commodities vs. Klaus. [1971-78 Transfer Binder] Blue Sky L.Rep. (CCH) Sec. 71,346 (Wis. Cir. Ct. 1977). See Long, "The Conflict of Laws Provisions of the Uniform Securities Act, or When Does a Transaction 'Take Place in this State'," 31 Okla. L. Rev. 781 (1978).

24 E.g., The Ohio Revised Code definition of "Sale" is critical to the liability and violation provisions of Sections 1707.25-.27 and Section 1707.44 O.R.C.

There is still time to register for the Ohio Securities Conference to be held on November 14, 1980 in Columbus. See page 5 for more information.

----- Detach and Return -----

----- Detach and Return -----

OHIO SECURITIES CONFERENCE APPLICATION

MAIL TO: Ohio Division of Securities
ATTN: Patricia Dye
180 East Broad Street
Columbus, Ohio 43215
(614) 466-3440

Enclosed is my check for \$_____ for _____ Person(s), at \$15 per person, payable to the Ohio Division of Securities.

NAME(S) _____

Please check one:

- () Conference Only
- () Committee Meetings & Conference

FIRM ADDRESS _____

OIL & GAS CIRCULARS
By James C. Warneka

Information concerning the previous program experience of a sponsor and its affiliates is an important item for inclusion in oil and gas offering circulars. A summary of program activities over the previous five year period assists investors in making informed investment decisions.

Such a summary should include:

1. Name of the program or well, including the type of legal entity or organization.
2. Effective date of the offering and the date it commenced operations.
3. Gross amount of capital raised by the program, the number of participants, and the amount of investment of the sponsor, if any.
4. Drilling results of the program, including the number of wells drilled, both oil and gas, both successful and unsuccessful.
5. Total dollar amounts of federal tax deductible items passed on to participants.
6. Income credited and cash distributed to participants and the sponsor.
7. Compensation and fees to the sponsor and its affiliates, segregated as to type.
8. Brief description of any legal proceedings to which the program, the sponsor, or any affiliate of the sponsor or has been, a party during the previous ten year period and which may be material to this program.
9. Description of any transactions (including dollar amount) which have been or may be entered into between the sponsor or program and any affiliate.
10. Such additional or different disclosures of the success or failure of the programs as may be permitted or required by the Division.

The foregoing information should be supported by an affidavit of the sponsor that the summary is a fair representation of the information contained in the audited financial statement of the federal income tax returns of the programs or in other reports or data of the program or sponsor.

The following statement should also be prominently included in the circular: "It should not be assumed that participants in the offering covered by this Prospectus will experience returns, if any, comparable to those experienced by investors in prior programs."

James C. Warneka is an examiner for the Ohio Division of Securities, dealing with oil and gas registrations.

WELL STATUS REPORT OF ABC CORPORATION

ABC Corp. has organized and presently serves as general partner in one previous oil and gas drilling limited partnership, organized under Ohio law for drilling wells in Ohio. The following tables summarize the experience of ABC Corp.'s previous limited partnership. It should not be assumed that participants in the offering covered by this Prospectus will experience returns, if any, comparable to those experienced by investors in prior programs.

OFFERING	Well (also indicates if dry or abandoned)	# of investors	Offering Date	Date Commenced	Production	Months in Production	Oil-bbls	Gas-mcf	Minimum Unit Investment	Net Production Disbursement Per Unit	Salvage & Other Payments Per Unit	Total Offering	Promoter Carried Interest	Non-recurring Promoter & Affiliate Fees	Total Revenue	Operating Costs	Promoter Revenue	Total Cash Distributed to Investors
(Ltd. Partnership)	Retter #1	15	2/3/77	7/28/77	19	1,745	65,804	\$3,100	\$1,035.95	\$117.66	\$310,000	12-1/22	\$62,000	\$182,616	\$5,900	\$26,355	\$150,361	
	Scheidt #2 (plugged)				3					\$350.00				\$650				
	Test #1 (dry)																	

(Footnote should be used in situations where figures alone might be misleading.)
(Other material information such as available federal tax deductions, legal proceedings affecting the program and transactions between the sponsor and any affiliates could be described in paragraph form below.)

This chart is offered as one method in which previous program experience might be presented. Other methods may be equally acceptable.
Your questions and comments are encouraged. Contact Jim Warneka, Ohio Division of Securities, 130 East Broad Street, 11th Floor, Columbus, Ohio 43215, (614) 466-3440.

ANNOUNCEMENTS

DIVISION SPONSORS CONFERENCE

The Ohio Securities Conference to be held on Friday, November 14, 1980, will commence with a luncheon at noon. During the morning hours, the six advisory committees to the Division will meet in closed sessions.

Seminar materials will be distributed during the registration period which begins at 11:30 a.m. John J. Huber, of the Securities & Exchange Commission, Washington, D.C., will speak during the luncheon. Thomas Krebs, President of the North American Securities Administrators Associations, Inc., and Director of the Alabama Securities Commission, will be attending the Conference. The Conference program will commence at 1:30 p.m. and will center on two areas of securities law — Federal regulation and Ohio regulation.

In the area of Federal regulation, Dennis O'Boyle, of the Registration Section of the SEC in Chicago, will discuss SEC involvement in transactions exempted from the Securities Act of 1933, Sections 3(a)(11), 3(b) & 4(2); Ronald Kane, of the Enforcement Section of the SEC in Chicago, will discuss SEC enforcement investigations; and James M. Tobin, of Squire, Sanders & Dempsey in Columbus, will discuss tender offers.

In the area of Ohio regulation, Morgan Shipman, Professor of Law at Ohio State University, will present an overview of exempt securities and exempt transactions under Ohio law; Karl May, of Kadish & Krantz in Cleveland, will discuss real estate programs; Jerry D. Jordan, of Vorys, Sater, Seymour & Pease in Columbus, will discuss oil and gas programs; Harry E. Tutwiler, of the National Association of Securities Dealers in Washington, D.C., will discuss broker-dealer developments; and Gary P. Kreider, of Keating, Meuthing & Klekamp in Cincinnati, will discuss mergers.

A program announcing the speakers and topics, and including an application form, has been mailed to all subscribers of the Ohio Securities Bulletin. Additional programs will be mailed upon request. Space is limited at the Conference! Therefore, please submit your application by noon, Wednesday, November 12, to reserve your seminar materials, desk and luncheon. The cost is \$15 per person.

Guest rooms can be reserved on an "availability only" basis for registrants of the conference at The Neil House, 41 So. High St., Columbus, Ohio 43215. Tele.: (614) 221-5221. Special rates are: Single-\$36; Double-\$40; and Twin-\$43. Please correspond directly with the hotel and identify yourself as a registrant for the conference.

For further information concerning the conference, contact Patricia Dye at (614) 466-3440.

NASAA Committee Assignments.

Several employees of the Ohio Division of Securities have recently been assigned to standing committees of the North American Securities Administrators Association.

Commissioner Kenneth E. Krouse has been appointed to serve on the Merit Regulation Committee as well as its Merit Standards Advisory Subcommittee. Commissioner Krouse was also assigned to the Uniformity and Tender Offer Committees.

Assistant Commissioner Nodine Miller was appointed to the Tender Offer Committee. Attorney Inspector Richard Slavin was assigned to both the Enforcement Committee and its Continuing Legal Education Projects Subcommittee.

Examiner James C. Warneka was appointed to the Oil, Gas and Mineral Interests Subcommittee where he will serve as vice-chairman, and Andrew Federico, Attorney Examiner, was appointed to the Subcommittee on Small Business Financing.

STAFF CHANGES

Robert Lindwall left the Division of Securities to enter private practice in September. Mr. Lindwall had served over four years as attorney for the Division, working in both the enforcement and registration sections. Mr. Lindwall joined the firm of D. C. Schultz, Co., L.P.A. in Cincinnati.

Marc N. Segel left the Division of Securities in September. Mr. Segel served as Attorney Assigned to the Commissioner and will enter private practice in Las Vegas, Nevada.

After serving four years, Gregory Neuman has left the Division to join BancOhio. Mr. Neuman was employed for three years as an investigator for the enforcement section and one year as an examiner of private offerings and oil and gas registrations.

William Sturkey joined the Division staff in September, and will be working as an investigator in the Enforcement Section. Mr. Sturkey was formerly employed in the pharmaceutical business.

LICENSE RENEWAL UNDERWAY

The 1981 license renewal forms were mailed to all licensed brokers on October 22, 1980. This package included a broker's renewal card, salesman's renewal card, a questionnaire, fee work sheet and envelope.

Deadline for return of the license renewal forms is December 15, 1980.

NASAA OPPOSES SEA AMENDMENTS

On September 17, 1980, the North American Securities Administrators Association (NASAA) passed a resolution opposing proposed amendments to Section 28(a) of the Securities Exchange Act of 1934. The amendments would effectively preempt the state regulation of tender offers.

Under the amendments, Sections 13(d) and 14(d) of the Securities Exchange Act of 1934 would be plenary and exclusive with respect to any state law which purports to regulate tender offers or acquisitions of beneficial ownership. An exception is created under the proposal, for state laws which apply to a tender offer for, or an acquisition of, equity securities of a state, where more than 50% of the outstanding voting shares of the target are held by shareholders who are residents of the state attempting regulation, and where those resident shareholders own 50% or more of the target's outstanding securities.

The NASAA resolution also urges its member states to take appropriate actions in opposing the amendment.

STATE BAR ASSOCIATION SPONSORS SECURITIES SEMINAR

On December 12, 1980, the Ohio State Bar Association will sponsor a one day program entitled, "How to comply with the SEC's New Integrated Disclosure Rules". The program is in response to recent rule revisions which closely integrate the Securities Act of 1933 and the Securities Exchange Act of 1934.

The seminar will be held on December 12, 1980 at the Carousel Inn, 4900 Sinclair Road in Columbus. Attendance is open to the public and the \$65.00 fee includes lunch, materials and a copy of the new rules.

For more information contact: Denny L. Ramey, Ohio State Bar Association, 33 West 11st Ave., Columbus, Ohio 43201. Phone (614) 421-2121.

INQUIRIES

INQUIRIES

The Division of Securities receives a number of inquiries relating to the operation of Chapter 1707., O.R.C. In this section of the Bulletin, we will print responses to some of the most frequently asked questions.

Q. Most securities issued by governmental authorities are exempt from registration under Revised Code Section 1707.02(B). Unless the securities are payable out of the proceeds of a general tax, a form 2(B) must be filed prior to their sale in Ohio in order to perfect the exemption. Are there any exceptions?

A. Certain governmental securities may also qualify for exemption under Revised Code Section 1707.02(K). In such case, no filings are required to perfect the exemption from registration. Those issues qualifying for exemption under Section 1707.02(K) include most Ohio Industrial Development Bonds, Industrial and Economic Development Revenue Bonds issued by Ohio Municipalities, and Ohio Port Authority Revenue Bonds.

Q. After filing a form 3-O, how long must I wait before receiving a certificate of acknowledgement?

A. In July, 1978, the Division discontinued its policy of issuing certificates for form 3-O's. Receipts can be obtained by sending your forms by certified mail or by sending an extra copy of the cover letter along with a standard self-addressed envelope. Upon receipt, we will date stamp and return the copy to you.

Furthermore, your cancelled check serves as an indication that we received your mailing. The six digit number stamped on the top of your check is your file number.

Q. What responsibilities does a broker-dealer have when a salesman's employment is terminated?

A. The broker-dealer must notify the Division within 10 calendar days of the termination of a salesman's employment, regardless of the reason. The information may be submitted on form 16-B or form U-5. The information required is the effective date of the termination and whether or not the salesman's services were satisfactory. See rule 1301:6-3-15(L) of the Ohio Administrative Code.

Q. Are there any penalties for failing to properly report a salesman's termination?

A. Yes. The broker-dealer's license may be suspended or even revoked for failure to make the termination report within 10 calendar days as required. (Usually a broker-dealer's license is suspended until the termination report is properly filed).

Any questions for the "Inquiries" section or other comments concerning the contents or format of the Ohio Securities Bulletin, should be addressed to:

Nancy Ivers Ferguson
Editor, Ohio Securities Bulletin
Ohio Division of Securities
180 East Broad Street
13th Floor
Columbus, Ohio 43215

ENFORCEMENT

DIVISION ORDERS

10/3/80 – On this date, the Division issued two orders affecting Buckeye Crude Exploration, Inc.

The first Division Order suspended the Registration by Qualification for 122 fractional non-producing working interests in M.N. & S. No. 2, 3 and 4 Wells and scheduled a hearing on said suspension. The second, ordered Buckeye Crude Explorations, Inc. to Cease & Desist from certain activities "constituting fraudulent and deceptive acts and practices in Ohio." Both orders arose out of an examination and investigation conducted by the Division.

10/20/80 – On this date, the Division terminated the two orders reported above, based on Buckeye Crude Exploration, Inc.'s consent to the following:

1) to segregate the proceeds and disbursements of investor's drilling funds through the use of separate savings accounts and a multiple deposit Field Drilling Account;

2) to furnish the Ohio Division of Securities with a monthly balance sheet, quarterly financial statements, and certified annual financial statements;

3) to deposit sufficient funds in the Field Drilling Account for the drilling, hydrofracture, and completion of certain wells on or before December 31, 1980;

4) to mail to investors letters stating the above commitment to remedy shortages of liquid funds in the wells drilling accounts;

5) to make payment, before December 31, 1980, for the drilling of all wells sold to investors who may reasonably infer from the circumstances that the intangible drilling expense will be a 1980 calendar year tax item in such fashion as will afford reasonable protection to the investors owning interests in the wells to be drilled; and,

6) to amend its Form 90G, by inclusion of an Exhibit D stating the segregation of receipts and disbursements of investor's drilling funds as described above, and mailing to previous recipients, the same Exhibit D.

PLEASE HELP US UPDATE OUR MAILING LIST

Please detach and return the following slip to us in order that we might update our present mailing list. If your address is correctly listed and you wish to continue receiving the Bulletin, it is not necessary to return this slip.

- My address has been incorrectly recorded by the Bulletin. Corrections are written below.
- My address has changed. My new address is written below.
- I no longer wish to receive the Ohio Securities Bulletin.

Address as now listed:

Name(s) _____

Firm Address _____

New Address:

Name(s) _____

New Address _____

Please return to: Ohio Division of Securities, Attn: Debra Chafin, 180 E. Broad St., Columbus, Ohio 43215 - (614) 466-7602.

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF SECURITIES
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