

OHIO SECURITIES BULLETIN

A QUARTERLY PUBLICATION OF THE OHIO DIVISION OF SECURITIES

George V. Voinovich
Governor of Ohio

Donna Owens
Director of Commerce

Thomas E. Geyer
Commissioner of Securities

Reason To Know: When Investors' Knowledge of Facts Giving Rise to Violations of the Ohio Securities Act Limits the Right to Recission

By Desiree T. Shannon

Like most states, Ohio allows investors a private right of action to reclaim money invested in securities that are the subject matter of sales made in violation of the Ohio Securities Act. R.C. 1707.43 states that sales made in violation of Chapter 1707 are voidable at the election of the purchaser and that the seller, along with those participating in sales or aiding the seller, is jointly and severally liable to the purchaser in an action at law. However, the statute goes on to say that

(n)o action for the recovery of the purchase price as provided for in this section, and no other action for any recovery based upon or arising out of a sale or contract for

sale made in violation of Chapter 1707 of the Revised Code, *shall be brought more than two years after the plaintiff knew, or had reason to know, of the facts by reason of which the actions of the person or director were unlawful*, or more than four years from the date of such sale or contract for sale, whichever is the shorter period. (Emphasis added).

The time restrictions outlined above serve as a statute of limitations for bringing recission actions based on R.C. 1707.43. Investors seeking recission either have two or four years to file claims against the securities sellers who wronged them, depending upon the plaintiff-investor's

Continued on page 2

Investment Adviser Oversight Proposal Introduced

On January 31, 1998, Representative Dennis Stapleton (R-Washington Court House) introduced into the Ohio General Assembly House Bill 695, which proposes to establish state level oversight of investment advisers and investment adviser representatives operating in Ohio. The bill responds to the National Securities Markets Improvement Act of 1996 ("NSMIA"), which amended federal law to provide that "larger" investment advisers (with over \$25 million in assets under management) be regulated exclusively by the federal Securities and Exchange Commission, and that "smaller" investment advisers (with under \$25 million in assets under management) be regulated exclusively by state authorities. Since Ohio does not currently have state level oversight in place, the legislation is needed to establish the statutory authority.

H.B. 695 consists of a series of amendments to the Ohio Securities Act that would be administered by the Division. The bill is based on a proposal developed by the Ohio Division of Securities with input from an industry working group, which consisted of the Investment Company Institute, the Institute of Certified Financial Planners, the Certified Financial Planner Board of Standards and the Investment Counsel Association of America, among others. The substance of the bill is based on the federal Investment Advisers Act of 1940, which is the law that currently governs the operations of investment advisers in Ohio. H.B. 695 suggests a three part approach to oversight: establishing definitions, establishing licensing standards, and establishing anti-fraud standards.

Continued on page 4

OHIO DEPARTMENT OF COMMERCE DIVISION OF SECURITIES



Ohio Securities Bulletin

Issue 98:1

Table of Contents

Reason To Know: When Investors' Knowledge of Facts Giving Rise to Violations of the Ohio Securities Act Limits the Right to Recission	1
Investment Adviser Oversight Proposal Introduced	1
Public Notice	5
Investor Protection and Education	6
Federal Court Issues Permanent Injunction against The Infinity Group Company	7
Division Enforcement Section Reports	8
Capital Formation Statistics	10
Registration and Licensing Statistics	11

Reason to Know

Continued from page 1

knowledge of facts that should have alerted him or her to unlawful activity.

The two-year statutory time limit is most problematic, because its calculation is predicated upon the plaintiff-investor discovering the facts that gave rise to the unlawful sales. If the investor fails to bring a rescission action against the seller within two years of obtaining knowledge of factual circumstances giving rise to unlawful acts, or, more significantly, had reason to know of them, he loses his right to invoke the remedy. Ohio's state courts, as well as federal courts attempting to interpret similar time limits found in analogous federal statutes, have generated case law addressing this issue. These cases outline what types of factual situations might put a reasonable investor on notice when a seller has incurred a violation of securities laws.

Knowledge of Facts Indicating Unregistered or Unlicensed Sale of Securities

Individuals and entities who violate securities laws, both at the state or federal level, frequently incur these violations because they are either selling securities without benefit of licensure, or have not registered their securities in accordance with state or federal laws. Indeed, many sellers are emboldened enough to disclose the fact that the securities they sell are not registered in accordance with state or federal law. Would so blatant an admission of sales not conforming to requirements set down by the law be enough to alert the reasonable investor that unlawful activity is afoot? An Ohio appellate court ruled in J.J. Enterprises v. Hawk Energy Co., (January 28, 1987) Ninth Appellate District Case No. CA-12589, that where a prospectus notes that the securities being sold are not registered, an investor is henceforth on notice of the existence of facts surrounding the transaction indicating the unlawful sale of securities. In this case, the plaintiff received a prospectus that noted on its cover page that the offered securities were not registered. The court noted that the two-year statute began to run when the investor received the prospectus shortly

after the sale. Id. at pp.5,6. The case also applied the two-year limitation to the issue as to when the investor was charged with knowing the seller was unlicensed. The court treated this issue as a separate violation in which the investor might have qualified for the R.C. 1707.43 rescission remedy (the court ultimately decided that the investor missed the two-year statute of limitation on both the registration and the unlicensed sales issues). Id.

Again, it should be noted that J.J. Enterprises v. Hawk Energy Co. treated unlicensed sales and unregistered sales as separate grounds for applying the two-year statute of limitations. An investor's knowledge of facts surrounding the sale of securities that might alert him or her to the seller's unlawful activity relating to either of these issues could trigger the running of the two-year time limit. But an investor's knowledge of facts regarding unlawful activity surrounding one violation will not give rise to the assumption that he or she has knowledge of another violation. In Crater v. International Resources, Inc., 92 Ohio App. 3d 18 (1993), the court noted that, where a rescission action involved two distinct causes of action—unregistered sales and unlicensed sales in violation of R.C. 1707.44 (C)(1) and R.C. 1707.44 (A)—their limitations periods run separately.

Therefore, information in a prospectus alerting the investor that she was purchasing unregistered securities would not necessarily have alerted her to the fact that the seller was not licensed to sell securities. Thus, she met the statutory deadline for filing a claim on that issue, regardless of whether a claim for unregistered sales would have met the deadline. Id. at p. 24. The separate cause of action/separate statute of limitations rule could also apply in cases where there are individual claims of unregistered securities and fraud. In Seuffert v. Mobile Health Scan, Inc., 1989 Ohio App. Lexis 3586, Ohio's Eighth Appellate District noted that "knowledge of possible fraud with regard to the security in question does not provide the plaintiff with reason to know that the security is unregistered..."

Courts have addressed other factual situations dealing with the issue of unregistered securities (and the unlicensed sales thereof) pursuant to the Ohio Securities Act that impact the application of the statute of limitations for purposes of rescission. Official action by the Division declaring a seller's activities as unlawful can give an investor reason to know of facts that would indicate unlawful acts. This occurs in situations where the Ohio Division of

OHIO SECURITIES BULLETIN

Desiree T. Shannon, Esq., Editor

The *Ohio Securities Bulletin* is a quarterly publication of the Ohio Department of Commerce, Division of Securities. The primary purpose of the *Bulletin* is to (i) provide commentary on timely or timeless issues pertaining to securities law and regulation in Ohio, (ii) provide legislative updates, (iii) report the activities of the enforcement section, (iv) set forth registration and licensing statistics and (v) provide public notice of various proceedings.

The Division encourages members of the securities community to submit for publication articles on timely or timeless issues pertaining to securities law and regulation in Ohio. If you are interested in submitting an article, contact the Editor for editorial guidelines and publication deadlines. The Division reserves the right to edit articles submitted for publication.

Portions of the *Ohio Securities Bulletin* may be reproduced without permission if proper acknowledgement is given.

Ohio Division of Securities

77 South High Street, 22nd Floor • Columbus, Ohio 43215

<http://www.securities.state.oh.us>

All listings are area code (614)

Receptionist	644-7381	Enforcement	466-6140
Broker-Dealer	466-3466	Examination	644-7467
Records	466-3001	Registration	466-3440

Securities has issued a Cease and Desist Order and requires an issuer who has violated the Ohio Securities Act to send a letter offering investors rescission. The letter operates as notice of unlawful acts and will impute knowledge of such to an investor seeking rescission, thus commencing the two-year run of the statute of limitations. St. Clair v. Structured Shelters, 1985 Ohio App. Lexis 9469. Ohio's Tenth Appellate District has ruled that a shareholder who also serves as an officer of an issuing corporation will not automatically be assumed to possess knowledge of facts that would alert him or her to unlawful acts regarding the sale of securities. Eastman v. Benchmark Materials, Inc., 34 Ohio App. 3d 255 (1986).

Knowledge of Facts Involving Fraud

Cases involving fraud, misrepresentation and omission are much dicier to analyze in respect to the types of fact patterns that would charge an investor with enough knowledge that would commence the running of the statute of limitations. Investors in Ohio's Eighth Appellate District should particularly beware when they buy securities which are accompanied by investment literature warning of the securities' high risks. The court in Kondrat v. Morris, (January 16, 1997) 8th Appellate Dist. Case No.69812, held that the plaintiff-investors' rescission claim based partially on misrepresentation in the sale of securities was time-barred under R.C. 1707.43. The court noted that the plaintiffs were basing their misrepresentation claim mostly on the fact that they had been told they would receive a 2-to-1 ratio of return on their investment. Id. at p.9. The court noted that, despite these representations, the plaintiff was given written materials that clearly outlined the risky nature of the investment at the time of purchase, and that this notice was enough to commence the statute's two-year run. Id. (Since the court determined that the plaintiffs had purchased the securities more than four years before filing their claim, they could not have recovered anyway). Id. at p. 12.

A review of federal court cases, which involve statutes that impose time limits similar to the one found in R.C. 1707.43, shows courts' difficulty in deciding what

kinds of factual situations constitute reasonable notice to investors that fraud was present when they purchased their securities. Many federal actions relating to fraud are brought under the SEC's Rule 10b-5, which has a corresponding statute of limitations of one year, with a three-year statute of repose. A review of these cases is useful even in instances where courts have used federal statutes of limitations instead of borrowing state statutes such as R.C. 1707.43. Generally, in cases where plaintiffs bring a cause of action that is implied under a federal statute which has its own statute of limitations, the federal time limit should be used. Otherwise, it is allowable for federal courts to invoke the well-established practice of "borrowing" the analogous local state statute in applying a statute of limitations for such claims. Lampf, Pleva, Lipkind, Purpis & Petigrow v. Gilbertson, 501 U.S. 350 (1991). Whether a federal court is using a state statute of limitations such as the one found in Ohio's Chapter 1707, or a similar federal statute, it is useful to consider guidelines set down by federal courts regarding what may be deemed notice of unlawful activity. Since the federal statutes of limitation are so similar to that of Ohio, and federal courts may need to "borrow" Ohio's statute because an analogous federal statute is unavailable, outcomes in federal courts could be highly indicative of future interpretations of Ohio's statute of limitations found in R.C. 1707.43.

Despite the difficulty of defining when an investor has reason to know of unlawful violations, federal courts have managed to set down some general rules. In analyzing a federal statute that places a one-year time limit on filing claims from the time fraud is discovered, Ohio's Southern District, in considering a motion for summary judgment for plaintiff-investors, has held that "(g)enerally the question of when a party discovered fraudulent conduct or when he should have discovered it by exercising diligence is a factual inquiry." Roger v. Lehman Brothers Kuhn Loeb, Inc., 604 F. Supp. 222 (S.D. Ohio 1984).

Despite this, other federal courts have not been reticent to pass on the facts surrounding investors' claims. The U.S. Court of Appeals, Second Circuit did so in the case of In re Ames Department Stores, Inc. Note Litigation, 991 F. 2d 968 (2nd Cir.

1993). The court held that the one-year federal statute of limitations under consideration in the case would begin running when the investor received constructive notice of possible fraud: "where the circumstances are such to suggest to a person of ordinary intelligence the probability that he has been defrauded." (Here the court was quoting another federal case, Armstrong v. McAlpin, 699 F.2d 79 (2nd Cir. 1983)). The suit was based on misleading financial projections that were included in investors' prospectuses. The court decided that the plaintiff-investors would not have known the information they received was misleading until it was announced that the company had sustained significant losses for the previous year (the defendant allegedly had internal data that would have shown it was losing money at the time the plaintiff-investors purchased notes issued by the company). The court noted mere "storm warnings" that the company was in trouble, such as media speculation about the company's position or negative assessments by analysts of the acquisition underpinning the offering, were not enough to alert investors of possible fraud. The Seventh Circuit also weighed in with an opinion regarding the significance of "storm warnings" found in prospectuses. In utilizing California's statute of limitations in deciding the case of Eckstein v. Balcor Film Investors, 8 F.3d 1121 (7th Cir. 1993) the court noted that such warnings only put investors on notice that "things may not go as hoped in the future; they do not put investors on notice that statements made in the prospectus are untrue at the time, or that important facts have been left out." Id. at 1127.

The Second Circuit in another case considered inherent investment knowledge possessed by "sophisticated" or accredited investors. In this case, the court held that such investors were on constructive notice that the limited partnerships they purchased were high risk and designed more as tax shelters rather than investments for profit. The court noted that the prospectuses provided to the investors, along with their knowledge and sophistication, would have disclosed as much. Block v. First Blood Associates, 988 F. 2d 344 (2nd Cir. 1993).

Continued on page 4

Reason to Know

Continued from page 3

A line of Seventh Circuit cases has adopted the concept of “inquiry notice” in evaluating federal statutes of limitations applicable to securities claims which assume notice of a violation on the part of investors. This doctrine holds that the federal statute of limitations applicable to Rule 10b-5 actions “begins to run not when the fraud occurs, and not when the fraud is discovered, but when....the plaintiff learns, or should have learned through the exercise of ordinary diligence in the protection of one’s legal rights, enough facts to enable him by such further investigation as the facts would induce in a reasonable person to sue within a year.” Law v. Medco Research, Inc., 113 F. 3d 781, 785 (7th Cir. 1997). Thus in the case of Whirlpool Financial Corporation v. GN Holdings, Inc., 67 F. 3d 605 (7th Cir. 1995), the court determined that the plaintiff-investor’s fraud claim was time-barred because it failed to act earlier in investigating significant discrepancies between financial reports and the private placement memorandum initially pro-

vided by the issuer. The court noted that a “reasonable investor would have believed fraud was a possible explanation” for the discrepancies. Id. at p. 610.

A fine-tuning of the doctrine of “inquiry notice” necessitates that courts take into consideration the timing of investors’ notice that they might be victims of fraud. In the case of Fujisawa Pharmaceutical Company, Ltd. v. Kapoor, 115 F. 3d 1332 (7th Cir. 1997), the court noted that a fraud victim’s status in regard to possessing inquiry notice “may depend on the victim’s access to the information that he will need in order to be able to plead a reasonably well substantiated and adequately particularized case of securities fraud...the better his access, the less time he needs.” Id. at p. 1335. Thus, the court deemed the plaintiff, which argued that it had no notice of fraud until the FDA began to investigate the defendant regarding matters relating to the fraud, was on inquiry notice even before the FDA’s inquiry. The court reasoned that the plaintiff had “better access to the relevant documents than the FDA and a greater incentive...to find in them

evidence that (defendant) had concealed information...” Id.

Conclusion

In conclusion, an investor considering bringing an action under R.C. 1707.43 for rescission must take care that their claim is not doomed because they did not file their claim within the two-year statute of limitations, assuming the investor is in a situation where it is triggered in the first place (as opposed to the longer four-year period of repose). Of course, investors should carefully review offering materials for red flags before they purchase securities. If an investor has knowledge of any facts that would indicate unlawful activity, he or she should immediately investigate and evaluate them as evidence that might support a rescission claim. Otherwise, a court could impose the time-honored “you snooze, you lose” doctrine on the unfortunate investor.

Ms. Shannon is an Enforcement Staff Attorney with the Ohio Division of Securities and Editor of the Ohio Securities Bulletin.

Investment Adviser Oversight

Continued from page 1

The definitions of “investment adviser” and “investment adviser representative” contained in H.B. 695 track the definitions contained in federal law. Thus, if a person or an entity is an “investment adviser” or “investment adviser representative” under federal law, the person or entity will have the same outcome under state law.

With respect to licensing, as set out by NSMIA, “smaller” investment advisers operating in Ohio would be required to be licensed by the Division. The license would be renewed each December. The proposed fee for the license and each renewal thereof is \$200. “Larger” investment advisers operating in Ohio would be required to make an initial and annual notice filing with the Division. The proposed notice filing fee is also \$200.

As permitted by NSMIA, H.B. 695 also proposes that all investment adviser representatives of Division-licensed firms, and all investment adviser representatives of notice filing firms who have a place of business in Ohio, be licensed annually by the Division. In order to be licensed, investment adviser representatives will have to pass (or have passed) a designated examination or

achieve (or have achieved) a specified professional designation. The proposed fee for investment adviser representative licensure and license renewal is \$50.

The proposed anti-fraud standards mirror those contained in the Investment Advisers Act of 1940. By rule, the Division intends to adopt a custody standard that matches the custody standard set out in the regulations promulgated under the Investment Advisers Act of 1940. The Division also intends to adopt additional administrative rules that enumerate conduct standards for investment advisers and investment adviser representatives.

H.B. 695 also contains several non-investment adviser amendments to the Ohio Securities Act. Specific proposals include:

- (1) in response to NSMIA, a notice filing provision for certain “covered securities,” including investment company securities;
- (2) in response to NSMIA, a new Ohio companion exemption for securities sold pursuant to federal Rule 506;
- (3) the “California exemption” that permits certain solicitations in cer-

tain private placement transactions; and

- (4) statutory authority for the Division to promulgate rules to accept electronic filings.

After introduction into the Ohio House of Representatives, H.B. 695 was referred to the House Financial Institutions Committee. The Committee held hearings on the bill on March 11 and March 25. By law, the bill must be subject to at least three hearings in Committee before being voted on by the House. At the time this article was written, the House was in recess until May 12. As a result, the third hearing was not expected to be held until late May or early June.

If H.B. 695 is voted out of Committee, the measure would go to a vote of the entire House. If approved by the House, the bill would go to the Ohio Senate, where it would be assigned to a Committee and go through a similar three hearing process.

Copies of H.B. 695 may be obtained from the Legislative Service Commission’s Bill Room in the basement of the Statehouse building in Columbus.

PUBLIC NOTICE

At 10:00 a.m. on Monday, July 6, 1998, the Ohio Division of Securities will hold a public hearing regarding proposed amendments to Ohio Administrative Code (OAC) 1301:6-1-03 and 1301:6-3-14, and the adoption of proposed OAC 1301:6-3-041. The hearing will be held in the offices of the Division located at 77 South High Street, 22nd Floor, Columbus, Ohio 43215. The Division has proposed the following:

OAC 1301:6-1-03 Public Notice of Promulgation of Rule: Provisions for public notice to be submitted to the Blue Sky Reporter and the Ohio State Bar Association Report will be deleted. Also deleted will be unnecessary references regarding the rule's applicability for purposes of public notice. A provision that the Division may publish notice on its web site (in addition to publication in the Ohio Securities Bulletin or to its subscribers) will be added.

OAC 1301:6-3-041 Control Bids: Paragraph (A) of this proposed rule would give withdrawal rights to shareholders who tender shares in a tender offer that is not subject to the federal Williams Act. Paragraph (B) would allow the Division, under certain conditions, to terminate a control bid that has been suspended. An offeror would be able to reinstitute a control bid by filing new or amended information with the Division.

OAC 1301:6-3-14 Exceptions to Dealer License and Securities and Exchange Commission Registration Requirements: Provisions will be added to the rule to allow firms and individuals to be able to provide certain information over the Internet without being licensed in Ohio.

The purpose of the amendment to OAC 1301:6-1-03 is to require the Division to publish public notice of rule changes only in the Ohio Securities Bulletin or by mailing the public notice to subscribers of the Ohio Securities Bulletin. New provisions would allow, but not require, the Division to publish public notice on its web site to reach an even broader spectrum of the investing public. Deleting unnecessary references to the rule's applicability is a non-substantive, ministerial change.

The purpose of proposed OAC 1301:6-3-041 is to provide protection for shareholders confronted with a tender offer, and to ensure that the pursuit of a control bid by an offeror be based on current, viable, information filed with the Division.

The purpose of the amendment to OAC 1301:6-3-14 is to create a safe harbor from state licensing requirements for firms and individuals that use the Internet to disseminate general information.

Copies of the proposed amendments to OAC 1301:6-1-03 and 1301:6-3-14 and the adoption of proposed OAC 1301:6-3-041 may be obtained by contacting the Ohio Division of Securities, 77 South High Street, 22nd Floor, Columbus, Ohio 43215 or visiting the Division's web site located at www.securities.state.oh.us

Investor Protection and Education

By Karen Terhune

International Internet Sweep Day

On October 16, 1997, the Ohio Division of Securities participated in "International Internet Sweep Day" along with three federal law enforcement agencies, 22 other state agencies and consumer protection officials from 24 countries. The project was organized by the Federal Trade Commission (FTC) in the United States and was designed to target get-rich-quick scams on the Internet.

The state securities regulators and consumer protection agencies, along with the FTC, identified hundreds of Web sites offering get-rich-quick schemes and sent operators of approximately 180 sites educational E-mail messages. Potential pyramid sites on the Internet received messages that described legitimate multi-level marketing plans and pyramid schemes. Promoters of business opportunities received messages emphasizing their legal obligation to be truthful when making earnings claims and informing them that they had to be able to substantiate such claims.

The Investor Bill of Rights

Director of Commerce Donna Owens and Securities Commissioner Thomas Geyer announced the availability of the "Investor Bill of Rights" at the Lakewood Senior Center West in Lakewood, Ohio on November 21, 1997. The "Investor Bill of Rights" is a ten-point declaration that can help investors guard against becoming a victim of securities fraud and abuse. The document was originally developed and released by the North American Securities Administrators Association as part of National Consumers' Week.

Director Owens told the senior citizens that "the ten points can be summarized rather simply: this is your hard earned money. You are entitled to protect it." Securities Commissioner Geyer provided tips for investors. He told them "there are a few simple words to live by when it comes to investing. The one that we can use in all our financial decisions is: if it sounds too good to be true, it probably is."

To obtain a color copy of the "Investor Bill of Rights" contact the Division of Securities or visit our Web site (www.securities.state.oh.us).

Investor Education Information

The Public Employees Retirement System of Ohio announced the availability of "The Informed Investor" series of publications of the Ohio Division of Securities in its November 1997 newsletter, *Updated for Retirants*. The response to the announcement was tremendous and the Division mailed the four publications, "Questions for Informed Investors," "Mutual Funds," "Who's Who in the Financial Planner and Investment Adviser Field" and "How to Spot a Con Artist" to hundreds of callers.

To make inquiries for investor education information easier for Ohio citizens, the Division redesigned its Investor Protection Hotline in December 1997 to include a specific option for investor education information requests. The Division's Investor Protection Hotline number is 1-800-788-1194, or 644-7381 in the Columbus area.

AARP Presentation

John Bordenet, Senior Program Specialist of the American Association of Retired Persons (AARP) Washington, D.C. office, presented a program to the Ohio Division of Securities' staff on December 5, 1997, entitled "Dealing with the Elderly." Bordenet provided information about the learning abilities of older persons. He also provided techniques for dealing with older people to compensate for the hearing and vision losses experienced by some in this age group.

Channel 4 NBC news of Columbus covered the presentation by AARP and also aired an interview with Securities Commissioner Thomas Geyer who provided tips for investors.

Federal Court Issues Permanent Injunction against The Infinity Group Company

By Matthew Fornshell

Following a four-day trial, on February 6, 1998, the United States District Court for the Eastern District of Pennsylvania granted the Securities and Exchange Commission request for a permanent injunction against The Infinity Group Company, Geoffrey P. Benson, Geoffrey O'Connor and other relief defendants. The court found that the defendants violated registration and anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 in the sale of securities.

In a memorandum issued by Judge Stewart Dalzell, the court found that Infinity raised over \$26.6 million from more than 10,000 investors nationwide. Approximately \$11.8 million of the total received from investors went to what Infinity characterized as its "investments." These "investments" included "Prime Bank Notes" or "guarantees issued by a top 100 World Bank." The evidence presented at trial was uncontroverted that Infinity earned not one cent of interest, dividend or return of any kind. Unrebutted testimony offered by SEC expert witness, Professor James Byrne, persuaded the court that "references to such bogus instruments are widely considered to be a red flag for securities fraud."

Evidence introduced by the SEC through the court appointed Trustee, Robert F. Sanville, further elaborated on the use of investor money by Benson and Infinity. Judge Dalzell wrote, "(i)n the time-dishonored tradition of Charles Ponzi, Infinity substituted over \$2 million of new investor money for real investment return on old investors' funds." In a reference to a new Mercedes-Benz purchased by one of the relief defendants, Judge Dalzell stated that downline commissions paid to old investors from new investor funds kept "the engine of the enterprise humming like a new Mercedes on the autobahn."

The rest of Infinity's expenditures were even less investment-related. Benson spent over \$800,000 on real estate, a significant portion of which went to the purchase and development of a personal residence for the Bensons. The Bensons also furnished their new home and purchased and leased new cars with investor money. Additionally, Benson and O'Connor paid themselves nearly \$300,000 in cash from Infinity's funds, none of which was reported to the Internal Revenue Service or even documented in Infinity's own records. Infinity money was used by the Bensons for grocery shopping, their son's college tuition and payment for personal debt. In short, the court

stated that "the Bensons used Infinity as their personal checking account." Finally, after characterizing Infinity as "a financial train wreck," the court stated that Infinity was no charity and that investors were defrauded for the defendants' and relief defendants' personal gain.

Incorporated in Judge Dalzell's order was a provision providing for the continuation of Sanville as Trustee. Sanville was ordered to continue in his present capacity, but was provided additional authority to liquidate all of Infinity's non-cash assets. Sanville was ordered to trace and take control over as much of Infinity's assets as is possible in preparation of returning the money to investors. Judge Dalzell also ordered the relief defendants to disgorge all funds and assets now in their possession originating from Infinity.

As described in Bulletin 97:3, the Division commenced law enforcement efforts against Infinity in June 1997. After obtaining a preliminary injunction on July 28, 1997, the Division executed a search warrant at Infinity's offices on August 14, 1997. Susequent to the search warrant, the SEC commenced its legal action on August 27, 1997. The Division's investigation of Infinity for violations of the Ohio Securities Act is ongoing.



Division Enforcement Section Reports

Administrative Orders

THE CAPITAL RESTAURANT, L.L.C.

On December 1, 1997, the Division issued a Cease and Desist Order (including an Order Declaring Form 3-Q, File No. 468258, Null and Void), Order No. 97-410 against The Capital Restaurant, L.L.C., a Texas limited liability company.

The Division had previously issued to the Respondent a Notice of Opportunity for Hearing, Order No. 97-269. The Order alleged that the Respondent violated the provisions of O.A.C. 1301:6-3-03(B)(3) and R.C. 1707.44(C)(1), respectively, selling securities where the facts necessary for a claim of exemption did not exist at the time the claim was made, and selling unregistered securities. The Respondent failed to request an adjudicative hearing pursuant to Chapter 119 of the Ohio Revised Code after receiving service of the Order. Therefore, the Division issued its final Order No. 97-410. The Order incorporated the allegations set forth in the Notice of Opportunity for Hearing as findings.

EDWARD L. MOSELEY

On December 4, 1997, the Division issued a Final Order to Deny Application for License, Order No. 97-414, to Edward L. Moseley, a Georgia resident.

The Division had previously issued Division Order No. 97-145, a Notice of Opportunity for Hearing, to the Respondent. The Order alleged the Respondent was "not of good business repute" as that phrase is used in Ohio Revised Code sections 1707.16 and 1707.19 and Ohio Administrative Code Rule 1301:6-3-19(D)(7) and (9) and gave him notice of intent to deny his application for licensure as a salesman of securities. The Respondent timely requested an adjudicative hearing after receiving service of the Order, and the Hearing Officer found in the Division's favor.

The Division approved the Hearing Officer's recommendation and issued its Final Order to Deny Application for License, Order No. 97-414. Respondent appealed the Final Order by filing a Notice of Appeal with the Division and the Franklin County Court of Common Pleas on December 19, 1997.

PAUL CHRISTOPHER MUSIC

On January 13, 1998, the Division issued a Cease and Desist Order, Order No. 98-010, against Paul Christopher Music, an Ohio resident.

The Division had previously issued a Notice of Opportunity for Hearing, Order No. 97-415, to the Respondent. The Order alleged the Respondent had violated R.C. 1707.19(I), conducting business in violation of the Division's rules and regulations (the rule involved was O.A.C. 1301:6-3-19(A)(19), effecting securities transactions not recorded on the regular books or records of the dealer which the salesman represents). The Respondent failed to timely request an adjudicative hearing pursuant to Chapter 119 of the Ohio Revised Code upon service of the Order. Therefore, the Division issued its final Cease and Desist Order, No. 98-010. The Order incorporated the allegations set forth in the Notice of Opportunity for Hearing as findings.

RUSSELL WARREN BAUMAN

On January 5, 1998, the Division issued a Final Order, Order No. 98-001, to Russell Warren Bauman, an Indiana resident. The Order granted Bauman an Ohio securities salesman's license.

The Division had previously issued Order No. 97-296, a Notice of Opportunity for Hearing, to the Respondent. The Order alleged that Respondent was not of good "business repute" as that phrase is used in Ohio Revised Code sections 1707.16 and 1707.19, and Ohio Administrative Code Rule 1301:6-3-19(D)(7) and

(9) and gave Respondent notice of intent to deny Respondent's application for licensure as a salesman of securities. Upon being served the Order, the Respondent timely requested an adjudicative hearing pursuant to Chapter 119 of the Ohio Revised Code. The Hearing Officer ruled in the Respondent's favor, and the Division approved the Hearing Officer's recommendation. The Division then issued its Final Order granting the Respondent an Ohio Securities salesman's license.

NICHOLAS PHILIP RUEBEL, II

On January 13, 1998, the Division issued a Cease and Desist Order, Order No. 98-011, against Nicholas Philip Ruebel, II, an Ohio resident.

The Division had previously issued a Notice of Opportunity for Hearing, Order No. 97-413, to the Respondent. The Order alleged that the Respondent had violated R.C. 1707.19(I), conducting business in violation of the Division's rules and regulations (the rule involved was O.A.C. Rule 1301:6-3-19(A)(19), effecting a securities transaction not recorded on the regular books or records of the dealer which the salesman represents). The Respondent failed to timely request an adjudicative hearing pursuant to Chapter 119 of the Ohio Revised Code upon being served the notice. Therefore, the Division issued its final Cease and Desist Order No. 98-011 against the Respondent. The Order incorporated the allegations set forth in the Notice of Opportunity for Hearing as findings.

TERRY WIGTON

On January 22, 1998, the Division issued Order No. 98-018, a Cease and Desist Order, against Terry Wigton, a resident of Ohio.

The Division had previously issued Order No. 97-424, a Notice of Opportunity for Hearing, to the Respondent. The

Order alleged the Respondent had violated R.C. 1707.44(C)(1), selling unregistered securities. The Respondent failed to timely request an adjudicative hearing pursuant to Chapter 119 of the Ohio Revised Code upon being served the Order. Therefore, the Division issued its final Cease and Desist Order No. 98-018 against the Respondent. The Order incorporated the allegations set forth in the Notice of Opportunity for Hearing as findings.

CAPITAL FUNDING AND FINANCIAL GROUP, INC.; KIDZTIME TV

On January 30, 1998, the Division issued Order No. 98-032, a Cease and Desist Order, against Capital Funding and Financial Group, Inc. of Colorado and Kidztime TV, located in Colorado and Ohio.

The Division had previously issued Order No. 97-427, a Notice and Opportunity for Hearing, against the Respondents. The Order alleged that Capital Funding & Financial Group, Inc. had violated R.C. 1707.44 (A) and R.C. 1707.(C)(1). R.C. 1707.44(A) relates to the unlicensed sale of securities; R.C. 1707.44(C)(1) relates to the sale of unregistered securities. The Order also alleged that Kidztime TV violated provisions of R.C. 1707.44(C)(1). Both Respondents failed to timely request an adjudicative hearing pursuant to Chapter 119 of the Ohio Revised Code upon being served the Order. Therefore, the Division issued its final Cease and Desist Order No. 98-032 against the Respondent. The Order incorporated the allegations set forth in the Notice of Opportunity for Hearing as findings.

BARRY W. MURPHY & COMPANY, INC. D.B.A. BARRY MURPHY & COMPANY, INC.

On February 11, 1998, the Division issued Order No. 98-045, a consented Cease and Desist Order, against Barry W. Murphy & Company, Inc. d.b.a. Barry Murphy & Company, Inc. The Respondent is a resident of Massachusetts.

The Division had previously issued Order No. 98-031, a Notice of Opportunity for Hearing. The Order alleged the Respondent had violated R.C. 1707.44(A), which relates to the unlicensed sale of securities. Upon the Respondent's receipt of service, the Respondent and the Division negotiated and executed a consent agreement. The agreement principally required the Respondent to stipulate to terms set forth in an accompanying Cease and Desist Order (Order No. 98-045) and to the issuance of this Order. The Order incorporated the allegations set forth in the Notice of Opportunity for Hearing as findings.

ROBERT ALLISON SHEPHERD

On March 4, 1998, the Division issued a Final Order to Deny Application for Securities Salesman License, Order No. 98-068, to Robert Allison Shepherd, an Oklahoma resident.

The Division had previously issued to the Respondent Order No. 97-175, a Notice of Opportunity for Hearing. The Order alleged that the Respondent was not of "good business repute" as that term is used in O.A.C. Rule 1301:6-3-19(D)(7) and (9). The Respondent failed to timely request an adjudicative hearing pursuant to Chapter 119 of the Ohio Revised Code upon service of the Order. Therefore, the Division issued its Final Order to Deny Application for Securities Salesman License, Order No. 98-068.

CHARLES PATRICK MCGLOSHEN

On March 4, 1998, the Division issued a Final Order to Deny Application for Securities Salesman License, Order No. 98-069, to Charles Patrick McGloshen, an Indiana resident.

The Division had previously issued a Notice of Opportunity for Hearing, Order No. 97-102 to the Respondent. The Order alleged the Respondent was not of "good business repute" as that term is used in O.A.C. Rule 1301:6-3-19(D)(3) and (9) and R.C. 1707.19(A). The Respondent did not timely request an adjudicative hearing pursuant to Chapter 119 of the Ohio Revised Code. Therefore, the Division issued its Final Order to Deny Application for Securities Salesman License, Order No. 98-069.

Editor's Note: Enforcement Section Reports of Division Orders issued or finalized for the remainder of March, 1998, will be reported in the next Ohio Securities Bulletin. Those wishing further information regarding any of the above enforcement actions may contact the Division and review the Orders summarized above.



Capital Formation Statistics
 Amounts in Thousands (rounded up)

Filing Type	First Quarter 1998	YTD 1998
Exemptions		
Form 3(Q) & Form D*	\$1,335,978	\$1,335,978
Form 3(W)	22,084	22,084
Registrations		
Form .06	134,128	134,128
Form .09	332,261	332,261
Form .091	800,507	800,507
Investment Companies		
Definite	100,849	100,849
Indefinite**	672 filings	672 filings
TOTAL	\$2,725,807	\$2,725,807

**Reflects sales actually reported. Remaining categories reflect amount of securities registered or eligible to be sold in Ohio by issuers.*

***Investment companies may seek to sell an indefinite amount of securities by submitting maximum fees. The assumption on an indefinite filing is that the issuer will be selling, at a minimum, \$1,000,000 of securities, and has no maximum as to the amount that may be sold.*

Because the Division's mission includes enhancing capital formation, the Division has begun to tabulate the aggregate dollar amount of securities to be sold in Ohio pursuant to filings made with the Division. As indicated in the notes to the table, the aggregate dollar amount does not include a value for securities to be sold pursuant to an "indefinite" filing. Further, the table does not reflect the value of securities sold pursuant to "self-executing exemptions" like the "exchange listed" exemption in R.C. 1707.02(E) and the "limited offering" exemption in R.C. 1707.03(O). However, the Division believes that the statistics set out in the table are representative of the amount of capital formation taking place in Ohio.

Registration Statistics

The following table sets forth the number of registration and exemption filings received by the Division during the first quarter of 1998, compared to the number of filings received during the first quarter of 1997. Likewise, the table compares the year-to-date filings for 1997 and 1998.

Filing Type	1Q'98	YTD'98	1Q'97	YTD'97
1707.03(Q)	372*	372	328	328
1707.03(W)	18	18	15	15
1707.04	0	0	0	0
1707.041	1	1	2	2
1707.06	39	39	39	39
1707.09	10	10	247	247
1707.091	101	101	847	847
Form NF**	1056	1056	8	8
1707.39	1	1	8	8
1707.391	26	26	36	36
Total	1624	1624	1530	1530

*Includes 210 filings submitted on federal Form D for offerings made pursuant to Rule 506 of Regulation D. Use of the federal Form D was not available before April 21, 1997.

**The Form NF is a form adopted by the North American Securities Administrators Association, Inc. to be used by investment companies in making notice filings. The form was drafted as a result of the National Securities Markets Improvement Act of 1996, and is used at the election of the issuer. Usage of the Form NF began in 1997, with its usage increasing throughout the year.

Licensing Statistics

The table below sets out the number of Salesmen and Dealers licensed by the Division at the end of the first quarter of 1998, compared to the first quarter of 1997 as well as the second, third, and fourth quarters of 1997 compared to the corresponding quarters of 1996.

	End of Q1 1998	End of Q1 1997	End of Q4 1997	End of Q4 1996	End of Q3 1997	End of Q3 1996	End of Q2 1997	End of Q2 1996
Number of Salesmen Licensed:	81,210	80,289	83,238	82,498	83,545	83,438	82,135	81,795
Number of Dealers Licensed:	2,082	2,050	2,170	2,060	2,154	2,061	2,113	2,011

OHIO SECURITIES BULLETIN

Ohio Division of Securities
77 South High Street
22nd Floor
Columbus, Ohio 43215

Bulk Rate
U.S. Postage
PAID
Columbus, Ohio
Permit No. 5455