

# Ohio Securities Bulletin



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Issue 2 — 1980

## Howard v. Rowley and Brown Petroleum Corp., An Ohio Unreported Decision

By David G. LeGrand and Gregory M. Newman\*\*

Among the primary considerations of a securities offeror amid the modern regulatory sphere is the necessity to comply with all applicable state law.<sup>1</sup> A recent decision by the Franklin County Court of Appeals, Howard v. Rowley and Brown Petroleum Corp.,<sup>2</sup> reflects the concerns and liabilities attendant to securities distributions.

In April, 1975, a representative of defendant Rowley and Brown Petroleum Corp. ("Petroleum"), an Ohio corporation, contacted plaintiffs, Tommy Howard and Burt Wheeler, at their homes in Mississippi.<sup>3</sup> This initial contact resulted in plaintiffs' signing at their homes, purchase contracts mailed by Petroleum from its Ohio office.<sup>4</sup> According to the contracts plaintiffs purchased percentage working interests in Ohio oil and gas leases owned by Petroleum. The contracts bound Petroleum to drill, complete, and operate a well. Petroleum also was to provide copies of the drilling and operating agreements to plaintiffs and provide written assignments of plaintiffs' interests.<sup>5</sup> Petroleum deposited the checks tendered by plaintiffs into its Ohio banking accounts.<sup>6</sup>

The working interests sold by Petroleum to plaintiffs were not registered with the Ohio Division of Securities nor did the interests qualify for an exemption under Chapter 1707. of the Ohio Revised Code.<sup>7</sup>

In May, 1976, after completion of the wells and payment or tender of royalties by Petroleum, Wheeler and Howard filed suit in Ohio seeking rescission of their contracts. Grounds for the complaint included, one, Petroleum's failure to register the working interests as securities with the Ohio Division of Securities and, two, Petroleum's failure to provide the promised consideration.<sup>8</sup> The primary issue was whether "sale"<sup>9</sup> of the working interests occurred in Ohio,<sup>10</sup> thereby creating a right to rescission under Section 1707.43 O.R.C.<sup>11</sup>

In July, 1977, the trial court granted plaintiff's motion for summary judgment on both the Ohio Securities Act count and the contract count.<sup>12</sup> The court stated that, "defendant's argument that the sale involved in this case took place in Mississippi, not in Ohio; and therefore, that they need not comply with the security laws of this State, is without merit".<sup>13</sup> This was followed in the text by the statutory definition of "sale".<sup>14</sup> The trial court further stated that, "acts of sale took place in Ohio, notwithstanding the fact that other acts took place in Mississippi."<sup>15</sup>

Defendants appealed, arguing that the trial court erred (1) in finding the contract voidable under Section 1707.43 O.R.C. and (2) in determining by summary disposition that defendants had materially breached the contract.<sup>16</sup>

In a unanimous decision, the Court of Appeals for Franklin County upheld the trial court's judgment on both issues.<sup>17</sup>

Defendants sought review of the appellate court decision before the Ohio Supreme Court. Their petition for writ of certiorari and appeal were denied.<sup>18</sup>

Although the decision in Howard may not have come as a complete surprise,<sup>19</sup> it does pose questions about the scope of the "sale" concept and, as a corollary, the jurisdiction of the Ohio Division of Securities. Because the latter is empowered to enforce the Securities Act,<sup>20</sup> its jurisdiction is co-extant with "acts of sale".

For example, assume a Michigan licensed broker-dealer solicited sales in Ohio without registering the securities in Ohio. The Ohio solicitations were made by salesmen who sometimes made personal visits to Ohio purchasers, and who sometimes used the telephone and mail from Michigan. Because of Howard, an Ohio purchaser suing for rescission

\*\*David G. LeGrand and Gregory M. Neuman are currently serving as staff attorney and registration examiner, respectively, for the Ohio Division of Securities. Comments or opinions contained herein are those of the authors and do not necessarily reflect the position of the Ohio Division of Securities.

**OHIO SECURITIES BULLETIN**

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(continued from front page).

in an Ohio court could easily assert that the "acts of sale" took place in Ohio. Offering circulars, subscription agreements, and securities certificates would have been received by the Ohio residents at their homes. It would be as easy to say that telephone conversations took place in Ohio as in Michigan.<sup>21</sup>

After Howard, counsel for the Michigan broker-dealer would be required to procure an Ohio license and securities registration, or find an exemption under Ohio law.<sup>22</sup> Other courts interpreting similar language are generally in accord with Howard.<sup>23</sup>

From Howard, a second example can be extrapolated. Assume defendant corporation in Howard engaged, as a substantial part of its business, in selling issues of securities. Even if no residents of Ohio were offered the securities, and even if the securities sold related to property not located in Ohio, (e.g. mineral rights, fractional interests in oil or gas leases, etc.) the seller could be subject to criminal and/or civil action for failure to comply with broker-dealer and salesman licensing requirements in Ohio.<sup>24</sup> Broker-dealer requirements would apply to such a corporation because of its "acts of sale" in Ohio, such as receipts and disbursement of sale proceeds, commissions payments, mailings, and telephone usage. Since Ohio arguably has a substantial interest in not becoming a haven for illicit or unscrupulous securities brokers, the scope of its regulation is reasonable. The constitutionality of such broad regulation has been upheld in a variety of contexts and jurisdictions including Ohio.<sup>25</sup>

The recent (1978) amendment of the Ohio Securities Act by insertion of a private offering exemption,<sup>26</sup> has lessened the burden imposed upon interstate commerce by the Act. By adherence to the 1933 Securities Act Section 4(2) and regulations promulgated thereunder,<sup>27</sup> an out of state issuer may carry out sales of its securities in Ohio, provided it timely files the required form and fee.<sup>28</sup> Additionally, Ohio imposes a ten percent limitation on commissions, which may be paid only to Ohio licensed salespersons.<sup>29</sup> In large issues by well-known corporations, this multiple regulation is of little consequence, since the issuer will be "Blue-Skyed" in all states in which the issue is to be sold. But for small issuers and broker-dealers who sell across state lines, even inadvertently, multiple regulation can be an expensive surprise. Arguments that the burden imposed by Blue Sky laws is an unreasonable burden on interstate commerce, have generally been unsuccessful.<sup>30</sup>

1 In particular, local "Blue Sky" acts must be observed, as for example, Chapter 1707 Ohio Revised Code.

2 Howard v. Rowley and Brown Petroleum Corporation No. 78AP 113, (Ct. App., Franklin County Aug. 15, 1978).

3 Memorandum Contra Motion for Summary Judgment, at 1, Howard v. Rowley and Brown Petroleum Corp., No. 76 CV 05 1966, (C.P. Franklin County, Jan. 30, 1978).

4 Affidavits at 1, Howard, No. 76 CV05 1966, (C.P. Franklin County, Jan. 30, 1978)

5 Brief for Defendants-Appellants, Howard, at 2, No. 78 AP 113 (Ct. App., Franklin County, Aug. 15, 1978).

6 Brief for Plaintiffs-Appellees at 1, Howard.

7 Id. at 2.

8 Brief for Defendants-Appellants, Howard. No. 78AP113, (Ct. App. Franklin County, Aug. 15, 1978).

9 Section 1707.01(C)(1) Ohio Revised Code Ann. (Page).

10 The parties did not controvert that the interests sold to plaintiffs were "securities" within Section 1707.01(B) O.R.C.

- 11 Section 1707.43 Ohio Revised Code Ann. (Page).
- 12 Decision at 1, Howard, (No. CV 05-1966, C. P. Franklin County, Jan. 30, 1978).
- 13 *Id.* at 4
- 14 *Id.*
- 15 *Id.*
- 16 Brief for Defendants-Appellants at 19, Howard, No. 78 AP 113 (Ct. App. Franklin County, Aug. 15, 1978).
- 17 Decision at 24-26, Howard, No. 78 AP 113, (Ct. App. Franklin County, Aug. 15, 1978).
- 18 Howard v. Rowley and Brown Petroleum Corp., cert. denied, appeal dismissed, No. 78 AP-113, (Sup. Ct., Dec. 4, 1978).
- 19 Jordan, Regulation of the Sale of Oil and Gas Interests-Ohio and Federal, 26 Ohio St. L.J. 572 (1965).
- 20 Chapter 1707. Ohio Revised Code Ann. (Page).
- 21 Bothwell v. Buckbee, Meorse Co. 275 U.S. 274 (1927).
- 22 See Ohio Securities Act, Sections 1707.03(Q), 1707.02(G), 1707.03(D), 1707.06(B) Ohio Revised Code Ann. (Page).
- 23 Getter v. R. G. Dickinson & Co., 366 F. Supp. 599 (S.D. Iowa, 1973); Hardtke v. Love Tree Corp. 386 F. Supp. 1085 (E.D. Wis., 1975); Enntex Oil & Gas Co. v. State, 560 S.W. 2d 494 (Ct. of Civ. App., 1977, rehearing denied, 1978); Green v. Weis, Voisin, Cannon, Inc., 479 F. 2d 462 (7th Cir., 1973).
- 24 Matter of O/G Energy Investments, Inc., Order to Cease and Desist. (Div. of Sec., June 14, 1979).
- 25 Enntex Oil and Gas Co. v. State; Hall v. Geiger-Jones Co., 242 U.S. 539 (1916).
- 26 Section 1707.03(Q) Ohio Revised Code Ann. (Page).
- 27 15 U.S.C.A. Sections 77a - 77aa.
- 28 Section 1707.03(Q)(4) and (5) Ohio Revised Code Ann. (Page).
- 29 Section 1707.03(Q)(2) Ohio Revised Code Ann. (Page).
- 30 See generally cases cited foot note 25 supra.

## Announcements Section

### FOREIGN REAL ESTATE

In June, the Division of Securities decided to limit foreign real estate syndications to a three year period of effectiveness. Such a change eliminates "perpetual life" registration for foreign real estate issues.

Previously, foreign real estate issuers could file amendments to registrations, which would extend their effectiveness. Some registrations remained effective for as long as fifteen years. Between amendments, issuers were required to file six-month statistical reports, reporting the progress of registered developments toward completion. The six-month statistical report requirement was included in all of the Division's foreign real estate orders as a condition to the issuer's "perpetual life" registration.

The Division experienced a number of problems with the filing of the six-month statistical report. These included:

1. Failure to file the report.
2. Late filing of the report.
3. Discrepancies between the registration and the report (found only after reviewing the original registration and all subsequent amendments).
4. Insufficient or inappropriate information provided by the issuer on the six-month statistical report.

5. Unclear status of the registration when no report is filed, since the report is a condition precedent to the perpetual life of the registration.

6. Appropriateness of any action by the Division to compel filing of the six-month report.

7. Appropriateness of any action by the Division against the issue/issuer who fails to keep the "perpetual life" registration alive by filing the six-month statistical report.

8. Shortness of the six-month period as a measure of developmental progress.

If a six-month statistical report was not filed in the case of a perpetual life registration, the Division was without current information about a registrant. The registrant could have been selling foreign real estate fraught with a variety of problems, which would not be permitted in a new foreign real estate issue.

In an attempt to treat all issuers the same, while protecting Ohio investors, the Division has limited foreign real estate syndications to a three-year period of effectiveness. At the same time, the Division has eliminated the six-month statistical report requirement. The new registrations should more accurately reflect the issuer's progress in meeting its commitments for the development.

**IMPLEMENTATION** — All new foreign real estate registrations will terminate after three years. Current registrants will be notified that the requirements to file a six-month statistical report has been eliminated and that foreign real estate registrations no longer have a "perpetual life".

On the dates when their six-month statistical reports would have been due, the Division will notify 1980 registrants that their registrations are effective for a three year period. Registrations filed on or before December 31, 1979 will be made effective for a two year period, commencing on the due date of the six-month statistical report.

The Division has also dropped the "FR" numbering system for foreign real estate registrations. Beginning June 16, 1980, these offerings were numbered consecutively with all other registrations coming into the Division of Securities.

### LIMITED OFFERING EXEMPTION

Pursuant to a number of requests from practitioners, the Division initiated a study of the desirability of incorporating the Securities and Exchange Commission's new limited offering exemption, Rule 242, into Ohio Securities Act. A drafting committee has been formed to propose legislation and rules which might effect such an inclusion.

Although the final draft is not ready for submission to the Division's advisory committees, it is anticipated that the proposed legislation will broaden Section 1707.06 to provide a limited offering provision similar to Rule 242.

## STAFF CHANGES

In June, Phillip Lehmkuhl, Staff Attorney for the Enforcement Section, left the Division of Securities to enter private practice in Springfield, Ohio. Mr. Lehmkuhl joined the Division in 1977 and also served as counsel to the commissioner.

Mark Holderman joined the Division in January, 1980, as staff attorney in the Enforcement Section. Mr. Holderman is a graduate of Kenyon College and received an MBA and law degree from University of Toledo. Mr. Holderman was admitted to the Bar in May, 1980.

Nancy Ivers Ferguson joined the Division in April and will work in both the registration and enforcement sections of the Division. Ms. Ferguson is a graduate of Ohio State University with a Masters Degree from Xavier University and a law degree from Capital University in Columbus. Prior to joining the Division, Ms. Ferguson was employed by the Ohio Division of Real Estate.

In July, Scott Roberts joined the Division after serving with the Legislative Services Commission. Mr. Roberts is a graduate of Ohio University with a masters degree from De Paul University in Chicago and a juris doctorate degree from Ohio State University.

## PENDING LEGISLATION OUTLINED

In February, 1980, Senate Bill 363 was introduced into the General Assembly. As reported in the last issue of the Ohio Securities Bulletin, this bill would enable the Division of Securities to participate in the acceptance of the Uniform State Law exam administered by the N.A.S.D. and to specify, by rule, the types of examinations to be given to applicants.

The uniform state law exam project was undertaken by NASAA in an effort to promote uniform test requirements in the individual states while facilitating the testing and licensing of principals and salesmen dealing primarily in interstate offerings. The uniform state law exam obviates the need for an individual already licensed by the N.A.S.D., the New York Stock Exchange, or SECO to take twenty-one separate blue sky examinations in order to sell securities nationwide.

The uniform state law exam contains a bank of questions from which a prescribed number are chosen at random. These questions are individually flashed on a T.V.-like monitor and are answered electronically by the applicant. The uniform state law exam is given at N.A.S.D. testing centers throughout the United States.

Twenty-one of the fifty states give examinations designed to test a principal's or salesman's knowledge of that state's blue sky law. Twenty of those twenty-one states have contracted with the National Association of Securities Dealers through the North American Securities Administrators Association (NASAA) to give the uniform state law exam in lieu of the blue sky examination.

If adopted, Senate Bill 363 would enable Ohio to become the twenty-first of the testing states to participate in the uniform state law project. Without the passage of Senate Bill 363, Ohio will remain the only state which requires an applicant to physically come into Ohio to take a broker-dealer or salesman's exam, in order to be licensed here.

On July 11, 1980, Senate Bill 363 passed the Ohio Senate unanimously. Senate Bill 363 has been referred to the House Small Business and General Business Committee for consideration. Interested persons are urged to contact their state representative to speed passage of the legislation through the House of Representatives.

## OHIO SECURITIES CONFERENCE

The Ohio Division of Securities will sponsor a one day seminar on Friday, November 14, 1980 at the Neil House in Columbus. The first annual Ohio Securities Conference will feature speakers from the Securities and Exchange Commission and the Ohio Division of Securities as well as several prominent Ohio practitioners.

The conference program will center on registration of securities in Ohio which are exempt from regulation under the Securities Act of 1933. Specific topics will include SEC Rules 146 and 242, real estate syndication offerings, oil and gas programs and takeovers.

For further information concerning the conference, contact Marc N. Segel at (614) 466-7602.

The Division's registration examiners are always willing to respond to individuals inquiring as to the status of a particular registration. Recently, however, one of the examiners was subjected to excessive pressure concerning the resolution of a problem filing by an attorney representing a secondary underwriter.

The attorney for the secondary underwriter repeatedly attempted to intervene and negotiate the substantive issues under consideration by the Division with New York counsel. This was done with the registration examiner, his supervisor and his supervisor's supervisor.

All attorneys practicing before the Division of Securities should be on notice that substantive issues relating to any registration and/or exemption filing, will be discussed only with the individual designated by the applicant to act on his or her behalf, absent specific written authority from the applicant.

## TENDER OFFERS

Since the last issue of the Bulletin, the Division of Securities has been requested to review the activities of three companies to determine the need for compliance with Section 1707.041 O.R.C., the Ohio "Takeover" Act:

## Diamond International vs. Cavenham Development, Inc.

Counsel for Diamond International Corporation ("Diamond") notified the Division on May 16, 1980 that Cavenham Development Inc. ("Cavenham") had made an offer to purchase 4,500,000 shares of common stock of Diamond two days previously. The Division requested each side submit a memorandum relative to the issue of jurisdiction under Section 1707.041 O.R.C. Upon review of the documents filed, the Division notified counsel for Diamond that Ohio did not have jurisdiction over the offer.

On May 27, 1980 counsel for Diamond requested the Division to reconsider its decision on jurisdiction. The Division reaffirmed its position and an appeal was filed with the Court of Common Pleas, Franklin County, Ohio. The appeal was later dismissed by Diamond after an agreement was reached with Cavenham.

## Ponderosa Systems Inc. vs. General Host Corporation

The Division was also asked to review the open market purchases of Ponderosa Systems, Inc. ("Ponderosa") common stock by General Host Corporation ("GHC"). Ponderosa sued GHC and Kenneth Krouse, Commissioner of Securities, in Common Pleas Court, Franklin County, Ohio alleging that GHC was engaging in a "take-over" bid without filing the requisite documents under Section 1707.041 O.R.C. Commissioner Krouse was joined as a defendant for his alleged failure to order GHC to cease and desist from violation of the Ohio Takeover Act.

The Court granted Ponderosa's motion for a temporary restraining order and set Friday, June 13, 1980 as the date for the hearing on a preliminary injunction. Prior to the hearing, Ponderosa and GHC reached an agreement where Ponderosa would buy back its stock from GHC.

## Dayton Malleable vs. Sharon Steel Corporation

More recently, the Division was asked to review the open market purchases of shares of Dayton Malleable ("Dayton") by Sharon Steel Corporation ("Sharon") and subsidiaries. Counsel for Dayton asked the Division to solicit from Sharon its intentions with respect to Dayton's shares.

The Division requested information from Sharon relative to their purchases. Upon receipt of its response, the Division determined that no violation of the Ohio Securities Act had taken place. No further action by the Division is anticipated unless there is a change in the existing situation.

The S.E.C. has recently proposed amendments to the Williams Act which would effectively preempt the tender offer field. The new portion of Section 28(a) of the Securities Exchange Act of 1934 would regulate all tender offers except those where the target company has its principal place of business in that 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 the aforementioned resident shareholders own 50% or more of the target's outstanding securities.

# Inquiries Section

## 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. Will the Division accept a Form 3-Q filed more than sixty days after the date of sale?

A. Section 1707.03(Q)(4) requires the filing of a report with the Division "not later than sixty days after the sale . . .". Although the Division can accept the filing after 60 days, the perfection of the 3-Q exemption is impaired when the sixty day requirement is not met.

Q. Is it necessary for an issuer selling its own securities to become a licensed dealer?

A. Yes, unless the securities are sold pursuant to Section 1707.06 O.R.C. or the issuer qualifies for an exemption under Section 1707.14(B) O.R.C.

Q. Is it possible to contact the Division of Securities to determine whether a sale of securities needs to be registered?

A. It is the policy of the Division of Securities to refrain from issuing "no-action" or interpretive letters.

# Enforcement Section

## DIVISION ORDERS

3/4/80 — The Division issued an order terminating the suspension of Albert A. Wickley's dealer's license. Mr. Wickley's license had been suspended in November, 1978 for failure to submit current reports of financial condition. Mr. Wickley did not renew his license as a dealer in securities for 1980.

3/13/80 — The Division ordered that G. Weeks & Co., Inc. be refused a license as a dealer of securities. Said action was based on Weeks' refusal to comply with the examination requirement and on the company's participation in the sale of securities without a license.

4/14/80 — The Division ordered that Daniel J. Engard be found NOT to have violated Sections 1707.44(C), 1707.19(D) and 1707.19(I) of the Revised Code. The Division further ordered that the suspension of Mr. Engard's license as a salesman of securities be terminated.

## CRIMINAL ACTIONS

On May 16, 1980, James A. Mierop was sentenced to 10-50 years in the Ohio State Penitentiary and was fined \$20,000 by the Summit County Court of Common Pleas. Mr. Mierop was convicted of 6 counts of grand theft and 4 counts of sale of unregistered securities in the following purported limited partnerships: Village Square Real Estate Partners, Ltd., Recording Connections I, Ltd., Providence and Properties I, Ltd.

## STATISTICS

An analysis of total filings received by the Division during the second quarter of 1980 shows a decrease of 4.37% from 1979. This decrease can be attributed to Form 6 registrations which have fallen 39.54% (189 filings) and Form 3-0 reports which are down 8.81% (215 filings).

Although total filings for the period are lower than the previous year, total Form 9 filings have increased by 37.77% (122). A portion of the increase is due to the "clone" mutual funds that were formed when the Federal Reserve required money market funds to maintain reserves. Interstate corporate filings have also increased significantly during the last quarter.

The figures show that the utilization of Form 3-Q (notification of sales of private offerings) has increased more than any other form. The Division received 280 3-Q filings in the second quarter of 1980, which is a 57.30% increase over the 1979 figure of 178 notifications.

Comparative figures for 1980 and 1979 are as follows:

<u>FORM</u>	<u>1980</u>	<u>1979</u>	<u>Percentage Increase (Decrease)</u>
2(B)	208	178	16.85%
3-0	2224	2439	(8.81)
3-Q	280	178	57.30
5(A)	2	3	(50.00)
6(A)(1) & (2)	242	386	(37.31)
6(A)(3)	22	70	(68.57)
6(A)(4)	25	22	13.64
9	445	323	37.77
33	2	0	-
39	50	61	(18.03)
<b>TOTAL FILINGS</b>	<b>3500</b>	<b>3660</b>	<b>(4.37)</b>

## BREAKDOWN OF FORM 9 REGISTRATIONS

Investment Companies	177	115	53.91%
Oil & Gas	81	61	32.79
Real Estate	27	18	50.00
Stock Option/ Purchase Plans	27	24	12.50
Interstate Corporate	127	88	44.32
Intrastate Corporate	1	11	(90.91)
REIT	0	1	-
Cattle Programs	0	2	-
Other Non-Corporate	5	3	66.67
<b>TOTAL FORM 9</b>	<b>445</b>	<b>323</b>	<b>37.78</b>

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