

# Deference to Claims of Investors

# Statute of Limitations

- Whether Indiana applies the adverse domination doctrine is an open question. Mutual Security Life Insurance Co. v. Fidelity and Deposit Co. of Maryland, 659 N.E.2d 1096 (Ind.App. 1995).
- Following INB National Bank v. Moran, U.S. District Court for Northern District of Indiana concluded “the court stands by its conclusion that Indiana courts would apply adverse domination to calculate the accrual of RTC’s state law claims. . .” Resolution Trust Corp. v. O’Bear, Overholser, Smith & Huffer, 886 F.Supp. 658, 664 (N.D.Ind. 1995).

# Statute of Limitations

- INB National Bank v. Moran, 608 N.E.2d 702, 707 (Ind.App. 1993), rejected the “presidential domination” doctrine on the facts of that case where court noted plaintiff’s (former board member’s) “long acquiescence” in president’s misconduct.
- Equitable tolling appropriate where Defendants had duty of oversight.
- Fraud – 6 years; Indiana securities claims – 3 years; other state law claims – 2 years.

# Claim upon which relief can be granted

- Count I - Controlling person liability under § 20 and the Indiana Code
- Count II – Sale of Unregistered Securities
- Count III – Breach of Fiduciary Duty and Fraud
- Count IV – Civil Action by Crime Victim
- Count V – Negligent Supervision

# Count I - Controlling person liability under § 20 and the Indiana Code

- § 20a -

“Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable *jointly and severally* with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.”

# Count I - Controlling person liability - continued

- Henrickson v. Henrickson, 640 F.2d 880 (7<sup>th</sup> Cir. 1981), *cert denied*, 454 U.S. 1097 (1981)
- Harrison v. Dean Witter Reynolds, Inc., 79 F.3d 609 (7<sup>th</sup> Cir. 1996)

- Sufficient Allegation of “control” ?—

- “Each defendant was able to directly or indirectly control Payne and Danker during the time period Payne or Danker was an employee and/or agent of that Broker Dealer . . .” ¶ 35

- “Each Broker Dealer had a duty to monitor the conduct of Payne and Danker and to conduct appropriate oversight over Payne and Danker . . .” ¶

# Count I - Controlling person liability - continued

- SEC v. Zandford, 122 S.Ct. 1899, 1906 (2002)

– The “complaint describes a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide. Those breaches were therefore “in connection with” securities sales within the meaning of § 10(b).”

# Count I - Controlling person liability - continued

- **Ind. Code § 23-2-1-19. Civil penalty.-**

“(d) A person who directly or indirectly controls a person liable under subsection (a), (b), or (c), ... are also liable jointly and severally with and to the same extent as the person, unless the person who is liable sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons liable.”

# Count II – Sale of Unregistered Securities

# Count III – Breach of Fiduciary

## Duty and Fraud

- “Jonathon Roberts has conceded that the Receiver has a (sic) breach of fiduciary duty and fraud claims against Payne and Danker as officers in Heartland/JMS . . .” Reply Brief at 9.
- Duty of oversight imposed by NASD regulations is broad – not limited to sale of securities.
- Heartland was an office of supervisory jurisdiction for (at a minimum) FFP.
- Zandford – “a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide.”

# Count IV – Civil Action by Crime Victim

- “Jonathon Roberts does not dispute that Payne and Danker looted millions from the Heartland/JMS accounts and that as a consequence Heartland/JMS were the victims of a crime.” Reply Brief at 11.
- -- “could not have been ‘within the scope of their authority’ with the Broker/Dealers but instead were made possible by and committed while Payne and Danker were officers in Heartland/JMS.” Reply Brief at 11.

# Count IV – Civil Action by Crime Victim - continued

- “During the time periods as set forth above in which Payne and Danker were acting as licensed securities dealers and employees and agents of the Broker Dealers . . . ” ¶ 23
- The determination of whether an employee was acting within the scope of his/her master’s employment “is dependent on the facts and circumstances of each case, . . . and is generally a question of fact for the jury.” Gomez v. Adams, 462 N.E.2d 212, 223 (Ind.App. 1984).

## Count IV – Civil Action by

### Crime Victim - continued

- “An employee is acting within the scope of his employment when he is acting, at least in part, to further the interests of his employer.” Konkle v. Henson, 672 N.E.2d 450, 456 (Ind.App. 1996).
- “Even if an employee is primarily motivated by self-serving purposes, if he was at least partially serving his employer’s interests, liability will accrue.” Konkle, 672 N.E.2d at 456-57.
- The test “is whether [Payne or Danker’s] actions were at least for a time authorized” by a Broker Dealer and/or whether Payne or Danker’s motivation “at least in part” was to “further the interests of” a Broker Dealer. Konkle v. Henson, 672 N.E.2d 450, 457 (Ind.App. 1996).

## Count V – Negligent Supervision

- “As with the prior sections, a principal can be liable for negligently supervising its agents only when those agents are acting within the course and scope of their agency.” Reply Brief at 15.
- No citation to authority for this proposition.

# Count V – Negligent Supervision

## - continued

- “Indiana recognizes the tort of negligent retention” and “has adopted the Restatement (Second) of Torts § 317, applicable in such cases.” Frye v. American Painting Co., 642 N.E.2d 995 (Ind. 1994). The court quoted the comment to § 317 which states that an employer:

may subject himself to liability under the rule stated in this section by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others. This is true although he has without success made every other effort to prevent their misconduct by the exercise of his authority as master.

Frye, 642 N.E.2d at 998-99 (quoting Restatement (Second) Torts § 317, comment c).

