

## NOTE

### INTERSTATE SCOPE OF THE UNIFORM SECURITIES ACT—A CASE ANALYSIS

State securities laws, now in force in every state,<sup>1</sup> generally impose

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1. ALA. CODE tit. 53, §§ 28-65 (Cum. Supp. 1973); ALASKA STAT. §§ 45.55.010-.270 (1962, Supp. 1973); ARIZ. REV. STAT. ANN. §§ 44-1801 to -2066.10 (1967, Supp. 1974); ARK. STAT. ANN. §§ 67-1235 to -1263 (1966, Supp. 1973); CAL. CORP. CODE §§ 25000-804, 27000-203 (Deering 1962, Supp. 1974); COLO. REV. STAT. ANN. §§ 125-1-1 to -1-29 (1963, Supps. 1965, 1969); CONN. GEN. STAT. REV. §§ 36-320 to -347 (1973); DEL. CODE ANN. tit. 6, §§ 7301-29 (1 BLUE SKY L. REP. ¶¶ 11,101-29 (July 23, 1973)); D.C. CODE ANN. §§ 2-2401 to -2418 (1973); FLA. STAT. ANN. §§ 517.01-.33 (1972, Supp. 1974); GA. CODE ANN. §§ 97-101 to -122, 97-9901 (Supp. 1973); HAWAII REV. STAT. §§ 485-1 to -25 (1968, Supp. 1973); IDAHO CODE §§ 30-1401 to -1462 (1967, Supp. 1973); ILL. ANN. STAT. ch. 121½, §§ 137.1-.19 (Smith-Hurd 1960, Supp. 1974); IND. CODE §§ 23-2-1-1 to -2-3 (1971); IOWA CODE ANN. §§ 502.1-.31 (1949, Supp. 1974); KAN. STAT. ANN. §§ 17-1252 to -1275 (1964, Supp. 1972); KY. REV. STAT. §§ 292.310-.991 (1971, Supp. 1973); LA. REV. STAT. ANN. §§ 51:701-.720 (1965, Supp. 1974); ME. REV. STAT. ANN. tit. 32, §§ 751-881 (1964, Supp. 1973); MD. ANN. CODE art. 32A, §§ 13-44 (1971); MASS. ANN. LAWS ch. 110A, §§ 101-417 (Supp. 1974); MICH. STAT. ANN. §§ 19.776(101)-(418), 19.781-.784 (1964, Supp. 1974); MINN. STAT. ANN. §§ 80A.01-.31 (Supp. 1974); MISS. CODE ANN. §§ 75-71-1 to -57 (1972, Supp. 1973); MO. REV. STAT. §§ 409.101-.418 (1969, Supp. 1973); MONT. REV. CODES ANN. §§ 15-2001 to -2025 (1967, Supp. 1973); NEB. REV. STAT. §§ 8-1101 to -1124 (1970); NEV. REV. STAT. §§ 90.010-.210 (1973); N.H. REV. STAT. ANN. §§ 421:1-.41 (1968, Supp. 1973); N.J. STAT. ANN. §§ 49:3-47 to -76 (1970, Supp. 1974); N.M. STAT. ANN. §§ 48-16-1 to -21, 48-18-16 to -35 (1966, Supp. 1973); N.Y. GEN. BUS. LAW §§ 339 to 339-f, 352 to 359-h (McKinney 1968, Supp. 1973); N.C. GEN. STAT. §§ 78-1 to -24 (1965, Supp. 1973); N.D. CENT. CODE §§ 10-04-01 to -20 (1960, Supp. 1973); OHIO REV. CODE ANN. §§ 1707.01-.99, 1708.01-.99 (Page 1964, Supp. 1973); OKLA. STAT. ANN. tit. 71, §§ 1-504 (1965, Supp. 1973); ORE. REV. STAT. §§ 59.005-.995 (1973); PA. STAT. ANN. tit. 70, §§ 1-101 to -704 (Supp. 1974); P.R. LAWS ANN. tit. 10, §§ 851-95 (Supp. 1973); R.I. GEN. LAWS ANN. §§ 7-11-1 to -30 (1969); S.C. CODE ANN. §§ 62-1 to -319 (1962, Supp. 1973); S.D. COMPILED LAWS ANN. §§ 47-31-1 to -146 (1967, Supp. 1974); TENN. CODE ANN. §§ 48-1601 to -1651 (1964, Supp. 1973); TEX. REV. CIV. STAT. ANN. arts. 581-1 to -39 (1964, Supp. 1974); UTAH CODE ANN. §§ 61-1-1 to -30 (1968, Supp. 1973); VT. STAT. ANN. tit. 9, §§ 4201-41 (1970, Supp. 1974); VA. CODE ANN. §§ 13.1-501 to -527.3 (1973, Supp. 1974); WASH. REV. CODE ANN. §§ 21.20.005-.940 (1961, Supp. 1973); W. VA. CODE ANN. §§ 32-1-101 to -4-418 (Supp. 1974); WIS. STAT. ANN. §§ 551.01-.69 (Spec. Pamphlet 1974); WYO. STAT. ANN. §§ 17-117.1 to -117.29 (1965, Supp. 1973). For an analysis of the blue sky laws in force before the drafting of the Uniform Securities Act in 1956, see L. LOSS & E. COWETT, BLUE SKY LAW (1958) [hereinafter cited as LOSS & COWETT]. A revised abridgment of the material in LOSS & COWETT 3-42, 180-244 may be found in 1 L. LOSS, SECURITIES REGULATION 23-107 (2d ed. 1961, Supp. 1969) [hereinafter cited as LOSS].

The Uniform Securities Act has been adopted in whole or in major part in thirty-three jurisdictions: Alabama, Alaska, Arkansas, Colorado, Delaware, the District of

criminal penalties<sup>2</sup> and civil liabilities<sup>3</sup> upon anyone who offers<sup>4</sup> or sells<sup>5</sup> a security in the state in violation of the securities registration

Columbia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Puerto Rico, South Carolina, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. 1 BLUE SKY L. REP. ¶ 4901 (July 22, 1974). Hereinafter, citations will be made to the Uniform Securities Act rather than to the corresponding sections of the blue sky laws of these states. The entire text of the Uniform Act, along with the Official Comments of the National Conference of Commissioners on Uniform State Laws, may be found in the following sources: LOSS & COWETT 245-420 (draftsmen's commentary also included); 7 UNIFORM LAWS ANNOTATED 691-795 (master ed. 1970, Supp. 1974); 1 BLUE SKY L. REP. ¶¶ 4901-53 (1971).

2. *E.g.*, UNIFORM SECURITIES ACT § 409; CAL. CORP. CODE § 25540 (Deering Supp. 1974); FLA. STAT. ANN. § 517.302 (1972); ILL. ANN. STAT. ch. 121½, § 137.14 (Smith-Hurd Supp. 1974); OHIO REV. CODE ANN. §§ 1707.44(C), .99 (Page 1964); TEX. REV. CIV. STAT. ANN. art. 581-29.B (Supp. 1974). *See generally* 1 LOSS 38-42; LOSS & COWETT 21-26, 387-89.

3. *E.g.*, UNIFORM SECURITIES ACT §§ 410(a)(1), (b), *modeled in part on Securities Act of 1933* §§ 12(1), 15, 15 U.S.C. §§ 771(1), 770 (1970), *and Securities Exchange Act of 1934* § 20(a), 15 U.S.C. § 78t(a) (1970); CAL. CORP. CODE §§ 25503-04 (Deering Supp. 1974); FLA. STAT. ANN. § 517.21 (1972); ILL. ANN. STAT. ch. 121½, § 137.13.A (Smith-Hurd Supp. 1974); OHIO REV. CODE ANN. § 1707.43 (Page 1964); TEX. REV. CIV. STAT. ANN. art. 581-33.A(1) (1964). The blue sky laws of New Hampshire and Rhode Island do not expressly impose civil liability upon one who offers or sells a security in violation of the securities registration requirements of the laws. New York's Martin Act, which does not require the registration of securities, does not expressly impose civil liability for offers or sales made in violation of the antifraud provisions or broker-dealer licensing requirements of the Act. For a discussion of implied liability under the laws of these states, and of other states before they adopted express liability provisions, see 3 LOSS 1661-69; LOSS & COWETT 155-62; Toll, *Civil Remedies of Purchasers of Securities Under New Hampshire Law*, 15 N.H.B.J. 123 (1974). *See generally* 3 LOSS 1631-82; LOSS & COWETT 129-79, 389-95.

4. MO. REV. STAT. § 409.401 (1969), *following verbatim* UNIFORM SECURITIES ACT § 401(j)(2), defines "offer" in broad terms, characteristic of most securities laws: When used in this act, unless the context otherwise requires:

(j)(2) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

This definition was modeled on Securities Act of 1933 § 2(3), 15 U.S.C. § 77b(3) (1970), *formerly* ch. 38, tit. I, § 2(3), 48 Stat. 74 (1933). *Accord*, CAL. CORP. CODE § 25017(b) (Deering Supp. 1974). *See generally* 1 LOSS 181, 223-24, 512-46; LOSS & COWETT 343-48.

5. MO. REV. STAT. § 409.401(j)(1) (1969), *following verbatim* UNIFORM SECURITIES ACT § 401(j)(1), provides that when used in the Act, unless otherwise required by context, "[s]ale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value." This definition was modeled on Securities Act of 1933 § 2(3), 15 U.S.C. § 77b(3) (1970), *formerly* ch. 38, tit. I, § 2(3), 48 Stat. 74 (1933). *Accord*, CAL. CORP. CODE § 25017(a) (Deering Supp. 1974). Nine states define "sale" or "sell" so as to encompass not only the above defini-

requirements<sup>6</sup> of the law. Most blue sky laws, however, contain no provision explicitly defining when an offer or sale is made "in the state."<sup>7</sup> In the absence of such provisions, courts have resorted to a traditional choice-of-law sort of analysis to determine whether a given transaction having contacts with more than one state falls within the scope of a particular state's law.<sup>8</sup> The constitutional power of the states

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tion of "sale" or "sell," but also the definition of "offer" or "offer to sell," note 4 *supra*, and do not define "offer" separately. *E.g.*, FLA. STAT. ANN. § 517.02(3) (1972); ILL. ANN. STAT. ch. 121½, § 137.2-5 (Smith-Hurd Supp. 1974); OHIO REV. CODE ANN. §§ 1707.01(C)(1), (2) (Page Supp. 1973); TEX. REV. CIV. STAT. ANN. art. 581-4.E (1964). *See generally* 1 LOSS 181, 223-24, 512-46; LOSS & COWETT 343-48.

6. *E.g.*, UNIFORM SECURITIES ACT § 301; CAL. CORP. CODE §§ 25110, 25120, 25130 (Deering Supp. 1974); FLA. STAT. ANN. § 517.07 (1972); ILL. ANN. STAT. ch. 121½, § 137.5 (Smith-Hurd Supp. 1974); OHIO REV. CODE ANN. § 1707.07 (Page 1964); TEX. REV. CIV. STAT. ANN. art. 581-7 (1964).

All jurisdictions except four—Connecticut, the District of Columbia, Nevada (as to interstate offerings), and New York—require the registration of securities. The details of the registration process, however, differ widely, as do the grounds for denial or revocation of registration. Of the thirty-three jurisdictions that have adopted the Uniform Securities Act in whole or in major part, *see* note 1 *supra*, all but the District of Columbia and Nevada have adopted the general requirement of securities registration and at least part of the registration process contained in UNIFORM SECURITIES ACT §§ 301-06. The provisions of the Uniform Act as adopted in these jurisdictions, however, are not truly uniform because of numerous omissions of, additions to, or variations from the language of the Uniform Act.

Furthermore, all states that register securities exempt certain types of securities, and all securities sold in certain kinds of transactions, from their registration requirements. Variations between states in the content of these exemptions and in the underlying definition of "security" further complicate matters. In short, generalizations about the details of registration requirements are impossible, and the law of each state must be consulted to determine the requirements in that state. *See generally* 1 LOSS 43-67; LOSS & COWETT 26-128, 256-60, 282-84; 1-3 BLUE SKY L. REP. *passim*.

7. 1 LOSS 85-89; LOSS & COWETT 224-29; *see* note 14 *infra* and accompanying text.

8. Standard conflict-of-laws analysis, though in a state of confusion in this area, generally determines the validity of a contract having substantial contacts with more than one state in accordance with the law of one of three places: the place of contracting, the place of performance, or the place with reference to which the parties contracted. R. LEFLAR, AMERICAN CONFLICTS LAW §§ 143-45 (1968); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 263-75 (1971). No one of these rules can be said to be the sole rule adopted in any given jurisdiction, since "[t]he typical situation [has been] . . . combined acceptance of all three rules." R. LEFLAR, *supra* § 145, at 358. Recently some courts have adopted another rule, which would determine an issue as to the validity of a contract by reference to the law of the state that has the "most significant contacts" with the contract with respect to the issue in question. R. LEFLAR, *supra* § 147; R. WEINTRAUB, *supra* at 275-80. Compare RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1969), with RESTATEMENT OF CONFLICT OF LAWS § 332 (1934). For an excellent discussion of the various rules, authorities for the rules, and Missouri cases adopting the different rules, *see In re Estate of De Gheest*, 362 Mo. 634, 243 S.W.2d 83 (1951).

to regulate interstate transactions has not been restricted by federal regulation, because the federal securities laws expressly preserve the

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Any interstate offer or sale of securities may fall within the scope of, and thus may violate, the blue sky laws of more than one state. In the typical blue sky "conflicts" case, "the buyer . . . alleges the violation of a particular statute, which often happens to be the forum's, and the question is not whether that statute applies in the face of some other governing law but simply whether it applies at all as a matter of statutory construction." 1 Loss 69; Loss & COWETT 189-90. Professor Loss has commented that the blue sky cases dealing with this question "defy generalization." He gives several reasons for this "bewildering state of affairs": (1) general confusion in this area of conflict-of-laws analysis; (2) conflicting policy considerations—namely, the courts' desire on the one hand to uphold, if possible, an agreement which the parties intended to be valid, and on the other hand to give full effect to the public policy, implicit in blue sky laws, of affording protection to investors; (3) variations in the statutory language upon which the cases were decided; and (4) the numerous combinations and coincidences of the place of contract, place of performance, and place of solicitation in the reported cases. 1 Loss 68-71; Loss & COWETT 186-92. The following classification of the holdings in these cases draws heavily upon the analytical framework developed in Loss, *The Conflict of Laws and the Blue Sky Laws*, 71 HARV. L. REV. 209, 228-41 (1957), in Loss & COWETT 197-210.

The most numerous group of cases points to the place of contracting as determinative of whether or not a given interstate transaction falls within the scope of a particular state's law. *E.g.*, *Brocsals Chem. Co. v. Langsenkamp*, 32 F.2d 725, 729-30 (6th Cir. 1929); *Hohn v. Peters*, 216 Cal. 406, 14 P.2d 519 (1932); *People ex rel. Brundage v. Hill Top Metals Mining Co.*, 300 Ill. 564, 574-76, 133 N.E. 303, 307 (1921); *Carolina Palisades, Inc. v. Manly*, 214 Ind. 565, 570, 16 N.E.2d 886, 888 (1938); *First State Bank v. Wilson*, 246 Ky. 635, 639-40, 55 S.W.2d 657, 658-59 (1932); *Colt v. Fradkin*, — Mass. —, —, 281 N.E.2d 213, 215-16 (1972) (alternative holding); *Somers v. Commercial Fin. Corp.*, 245 Mass. 286, 288, 139 N.E. 837, 838 (1923); *Wilder Nat'l Tavern Sys. v. Jillson*, 256 Mich. 479, 240 N.W. 6 (1932); *Guynn v. Shulters*, 223 Miss. 232, 242, 78 So. 2d 114, 116 (1955); *United States Bond & Fin. Corp. v. National Bldg. & Loan Ass'n of America*, 80 Utah 62, 12 P.2d 758, *rehearing denied*, 80 Utah 70, 17 P.2d 238 (1932); *In re Estate of Suckow*, 192 Wis. 124, 126-29, 212 N.W. 280, 281-82 (1927).

Some cases have held that the place of performance (*i.e.* delivery or issuance of the security) determines whether an interstate transaction is subject to the law of a particular state. *E.g.*, *In re Motor Prods. Mfg. Corp.*, 90 F.2d 8, 10-11 (9th Cir.), *cert. denied*, 302 U.S. 695 (1937); *Los Angeles Fisheries, Inc. v. Crook*, 47 F.2d 1031 (9th Cir. 1931); *Robinson v. Cupples Container Co.*, 316 F. Supp. 1362, 1368 (N.D. Cal. 1970); *Ward v. Home Royalty Ass'n*, 142 Kan. 546, 551, 50 P.2d 992, 995 (1935); *see Sandor v. Ruffer, Ballan & Co.*, 309 F. Supp. 849, 856 (S.D.N.Y. 1970) (alternative holding); *Robbins v. Pacific E. Corp.*, 8 Cal. 2d 241, 277-84, 65 P.2d 42, 60-64 (1937). *But cf.* *Mau v. Montana Pac. Oil Co.*, 16 Del. Ch. 114, 119-22, 141 A. 828, 831-32 (Ch. 1928).

A few cases have held that a contract of sale arising out of illegal solicitations in the state of the purchaser's residence, but consummated in a state where the sale would otherwise be valid, is subject to the law of the place of solicitation and therefore voidable at the purchaser's election. *Green v. Weis, Voisin, Cannon, Inc.*, 479 F.2d 462 (7th Cir. 1973); *Doherty v. Bartlett*, 81 F.2d 920, 927-28 (1st Cir.), *cert. denied*, 298

concurrent jurisdiction of the states over such transactions.<sup>9</sup> Given the states' constitutional power to regulate interstate offers and sales of securities, and in view of the confusion resulting from the courts' use of conflict-of-laws analysis to determine the scope of particular states' laws,<sup>10</sup> the draftsmen of the Uniform Securities Act attempted to pro-

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U.S. 676 (1936); *Stern v. National City Co.*, 25 F. Supp. 948, 951 (D. Minn. 1938), *aff'd sub nom. City Co. v. Stern*, 110 F.2d 601 (8th Cir. 1940), *rev'd per curiam on other grounds*, 312 U.S. 666 (1941); *Intermountain Title Guar. Co. v. Egbert*, 52 Idaho 402, 409-11, 16 P.2d 390, 393 (1932); *Lewis v. Bricker*, 235 Mich. 656, 662-63, 209 N.W. 832, 834 (1926) (*semble*); *see Rhines v. Skinner Packing Co.*, 108 Neb. 105, 108-09, 187 N.W. 874, 875 (1922). *But see Robbins v. Pacific E. Corp.*, 8 Cal. 2d 241, 277-84, 65 P.2d 42, 60-64 (1937).

Finally, a few courts seem to have applied, or reasoned along the lines of, the "most significant contacts" test to determine whether an interstate transaction is subject to the blue sky law of a particular state. *Gaillard v. Field*, 381 F.2d 25, 28 (10th Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968), *noted in* 81 HARV. L. REV. 1864 (1968); *cf. Green v. Weis, Voisin, Cannon, Inc.*, *supra* at 465; *Rhines v. Skinner Packing Co.*, *supra* at 108-09, 187 N.W. at 875.

Express choice-of-law provisions in contracts for the sale of securities did not appear in any of the reported blue sky cases until May 1973. In that month, the United States District Court for the District of South Dakota held inapplicable a provision in a securities purchase agreement, by which the parties purported to choose the law of New York to govern the transaction. The court held that to permit the choice-of-law stipulation to determine whether South Dakota law would apply would provide an effective means of circumventing legislation designed to protect South Dakota citizens, and thus would clearly be against the public policy of the forum state. *Boehnen v. Walston & Co.*, 358 F. Supp. 537, 541 (D.S.D. 1973); *accord, Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 574-76 (S.D. Iowa 1973).

*See generally* 1 LOSS 67-89; LOSS & COWETT 180-229; 31 CALIF. L. REV. 95 (1942); 51 HARV. L. REV. 155 (1937). For an analysis of the scope of blue sky laws and their applicability to interstate transactions having minimal contacts with the regulating state, *see Weinstein, Problems in the Field of State Securities Regulation*, 3 B.C. IND. & COM. L. REV. 381, 381-403 (1962).

9. The jurisdiction-preserving clauses in the federal acts are as follows: Securities Act of 1933 § 18, 15 U.S.C. § 77r (1970); Securities Exchange Act of 1934 § 28(a), 15 U.S.C. § 78bb(a) (1970); Public Utility Holding Company Act of 1935 § 21, 15 U.S.C. § 79u (1970); Trust Indenture Act of 1939 § 326, 15 U.S.C. § 77zzz (1970); Investment Company Act of 1940 § 50, 15 U.S.C. § 80a-49 (1970); Investment Advisers Act of 1940 § 222, 15 U.S.C. § 80b-18a (1970). *See also* Cowett, *Federal-State Relationships in Securities Regulation*, 28 GEO. WASH. L. REV. 287, 289-90 (1959); Smith, *The Relation of Federal and State Securities Laws*, 4 LAW & CONTEMP. PROB. 241, 243 (1937); Smith, *State "Blue-Sky" Laws and the Federal Securities Acts*, 34 MICH. L. REV. 1135, 1158-62 (1936). For an excellent discussion of the debate over the proper federal-state relationship in the area of securities regulation, and a proposal for "partial preemption" of the field in the new Federal Securities Code, *see* Bateman, *State Securities Registration: An Unresolved Dilemma and a Suggestion for the Federal Securities Code*, 27 Sw. L.J. 759 (1973).

10. *See* note 8 *supra*.

vide in section 414<sup>11</sup> a simple and explicit description of the transactions to which the Act would apply.<sup>12</sup>

Of the thirty-three jurisdictions that have adopted the Uniform Act in whole or in major part,<sup>13</sup> twenty-one have included in their acts the general scope-of-act provisions contained in section 414 of the Uniform Act.<sup>14</sup> None of these provisions received judicial construction until 1973,<sup>15</sup> when the United States Court of Appeals for the Eighth Circuit

11. The text of the relevant parts of UNIFORM SECURITIES ACT § 414 is identical to that of MO. REV. STAT. § 409.415 (1969), *quoted in note 21 infra*, except for the proviso to § 409.415(c), which was added by the Missouri General Assembly.

12. Loss has described the premises underlying the specific provisions of UNIFORM SECURITIES ACT § 414 as follows:

(1) that to some extent maximum statutory coverage must yield to the goal of simplicity; (2) that the scope of the act in interstate transactions should be made as explicit as possible; (3) that, above all, it should be made certain that nobody who is acting in good faith and is properly advised will be entrapped by having a law apply other than the law or laws he has satisfied; and (4) that, subject to the first three premises, the conflict-of-laws provisions should not depart unnecessarily from such existing patterns as can be traced in the cases. . . . [which] point either to the place of solicitation or to the place of contract.

1 Loss 87 (footnotes omitted); LOSS & COWETT 226-27. For a discussion of the choice-of-law mechanism of § 414, see D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 241-45 (1965); 1 LOSS 85-89; LOSS & COWETT 224-29, 401-05. For an argument supporting the propositions that § 414 should properly be termed a scope-of-act, and not a conflict-of-laws, provision, and that § 414 by no means resolves potential conflicts between the laws of two states, either or both of which have adopted the Uniform Act, see Hill, *Some Comments on the Uniform Securities Act*, 55 NW. U.L. REV. 661, 685-89 (1961).

13. See notes 1 & 6 *supra*.

14. ALASKA STAT. § 45.55.260 (1962); ARK. STAT. ANN. § 67-1260 (1966); COLO. REV. STAT. ANN. § 125-1-25 (1963) (includes provisions paralleling §§ 414(a) & (b), but not §§ 414(c) & (d), of Uniform Act); D.C. CODE ANN. § 2-2414 (1973); MD. ANN. CODE art. 32A, § 38 (1971); MASS. ANN. LAWS ch. 110A, § 414 (Supp. 1974); MICH. STAT. ANN. § 19.776(414) (Supp. 1974); MINN. STAT. ANN. § 80A.27 (Supp. 1974); MO. REV. STAT. § 409.415 (1969); NEV. REV. STAT. § 90.210 (1973); N.J. STAT. ANN. § 49:3-51 (1970); OKLA. STAT. ANN. tit. 71, § 413 (1965); ORE. REV. STAT. § 59.335, .345 (1973); PA. STAT. ANN. tit. 70, § 1-702 (Supp. 1974); P.R. LAWS ANN. tit. 10, § 894 (Supp. 1973); S.C. CODE ANN. § 62-18 (1962, Supp. 1973); UTAH CODE ANN. § 61-1-26 (1968); W. VA. CODE ANN. § 32-4-414 (Supp. 1974); WIS. STAT. ANN. § 551.66 (Spec. Pamphlet 1974); WYO. STAT. ANN. § 17-117.26 (1965). The new North Carolina Securities Act, which will supersede the present Securities Law on April 1, 1975, is modeled on the Uniform Securities Act and contains a provision corresponding to § 414 of the Uniform Act. N.C. GEN. STAT. § 78-27 (2 BLUE SKY L. REP. ¶ 36,221 (May 7, 1974)). In addition, CAL. CORP. CODE § 25008 (Deering Supp. 1974) provides a scope-of-act scheme similar to that of UNIFORM SECURITIES ACT § 414.

15. Two earlier decisions contain passing references to the scope-of-act sections of the Utah Uniform Securities Act and the Maryland Securities Act, but no issue in the construction of these sections was raised in either case. *Chaney v. Western States Title*

decided *Kreis v. Mates Investment Fund, Inc.*<sup>16</sup> Part I of this Note will describe the *Kreis* court's construction of section 409.415 of the Missouri Uniform Securities Act. Part II will analyze certain inadequacies in the court's reasoning in construing section 409.415(c) and will suggest additional reasons supporting the court's construction of that section. Part III will similarly analyze the court's treatment of section 409.415(d). Drawing upon the preceding analysis, Part IV will recommend specific modifications of the language of section 414 of the Uniform Securities Act, in order to avoid future constructional problems similar to those encountered in *Kreis*.

### I. SUMMARY OF *KREIS V. MATES INVESTMENT FUND, INC.*

*Kreis*, a Missouri citizen and resident, learned of the existence of Mates Investment Fund, an open-end investment company incorporated in Delaware, by reading a laudatory article about the Fund in a national financial magazine. Having had no communication with the Fund or any of its representatives, *Kreis* sent a letter from Missouri to the Fund's principal office in New York, enclosing his personal check for \$20,000 and requesting the Fund to sell him as many shares as were purchasable for that amount. Upon receiving *Kreis*' letter, the Fund posted the sale and issuance of shares to *Kreis* on its books,<sup>17</sup>

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Ins. Co., 292 F. Supp. 376, 377 & n.7, 380 & n.18 (D. Utah 1968); *Shulton, Inc. v. Rubin*, 239 Md. 669, 687, 212 A.2d 476, 486 (1965).

In the first conflict-of-laws case arising in a jurisdiction with the scope-of-act provision, the court disposed of the case by general conflicts analysis (specifically, by use of the public policy doctrine) and did not refer to the possibly relevant section of the Oklahoma Act, OKLA. STAT. ANN. tit. 71, § 413 (1965). *Gaillard v. Field*, 381 F.2d 25 (10th Cir. 1967), cert. denied, 389 U.S. 1044 (1968), noted in 81 HARV. L. REV. 1864 (1968); 4 Loss 2260 (Supp. 1969). See also note 163 *infra*.

16. 473 F.2d 1308 (8th Cir. 1973).

17. In 1968 the Securities and Exchange Commission adopted a rule requiring at least once daily computation of the net asset value of investment companies registered under the Investment Company Act of 1940, in order to minimize possible dilution of the value of outstanding securities of such companies. 17 C.F.R. § 270.22c-1 (1974). This computation determines the price at which redeemable securities of registered investment companies may be sold, redeemed, or repurchased by the companies themselves or by authorized agents or principal underwriters of the companies. *Id.*; see Investment Company Act of 1940 §§ 22(a), (c), 15 U.S.C. §§ 80a-22(a), (c) (1970); 1 Loss 403-04.

In the principal case, *Kreis*' letter was received on June 5, 1968. On June 6, the Fund—which was registered under the Investment Company Act—posted the sale and issuance of shares to *Kreis* on its books, and an entry reflecting *Kreis*' purchase was included in the computation of the Fund's current net asset value on that day. On or

deposited the check, and mailed from New York, to Kreis in Missouri, a prospectus,<sup>18</sup> a confirmation of sale, and later the certificate for the shares purchased. Kreis subsequently learned that the Fund's shares were not registered for sale in Missouri,<sup>19</sup> and brought an action for rescission against the Fund and its president under the Missouri Uniform Securities Act.<sup>20</sup> Defendants contended that the Missouri Act did not apply to the transaction, because there was neither an offer to buy nor an acceptance thereof in Missouri, within the meaning of the Act.<sup>21</sup> The federal district court<sup>22</sup> rendered judgment for defendants,

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after June 7, the Fund deposited Kreis' check, and on or after June 7, the Fund mailed to Kreis the letter of confirmation, dated June 5. *Kreis v. Mates Inv. Fund, Inc.*, 335 F. Supp. 1299, 1301 (E.D. Mo. 1971); App. at 18, *Kreis v. Mates Inv. Fund, Inc.*, *supra*; Brief for Appellant at 5, Brief for Appellees at 2, *Kreis v. Mates Inv. Fund, Inc.*, 473 F.2d 1308 (8th Cir. 1973).

18. The Securities Act of 1933 § 5(b), 15 U.S.C. § 77e(b) (1970), provides in part:

It shall be unlawful for any person, directly or indirectly . . . to carry or cause to be carried through the mails or in interstate commerce any . . . security [with respect to which a registration statement has been filed] for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus . . . .

19. MO. REV. STAT. § 409.301 (1969) provides:

It is unlawful for any person to offer or sell any security in this state unless (1) it is registered under this act or (2) the security or transaction is exempted under section 409.402.

The Fund did not contend that either its securities or the transaction with Kreis was exempt under § 409.402.

20. MO. REV. STAT. § 409.411 (1969) provides in relevant part:

(a) Any person who . . . offers or sells a security in violation of section . . . 409.301 . . . is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security . . . .

(b) . . . [E]very partner, officer, or director of such a seller [liable under the preceding paragraph] . . . is also liable jointly and severally with and to the same extent as the seller . . . .

21. MO. REV. STAT. § 409.415 (1969) (emphasis added) defines the scope of the Act as follows:

(a) Sections 409.101, 409.201(a), 409.301, 409.405, and 409.411 apply to persons who sell or offer to sell when (1) an offer to sell is made in this state, or (2) an offer to buy is made and accepted in this state.

(b) Sections 409.101, 409.201(a), and 409.405 apply to persons who buy or offer to buy when (1) an offer to buy is made in this state, or (2) an offer to sell is made and accepted in this state.

(c) For the purpose of this section, an offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer (1) originates from this state or (2) is directed by the offeror to this state and received at the place to which it is directed (or at any post office

holding that there was an offer to buy but no acceptance thereof in Missouri.<sup>23</sup> On appeal the Eighth Circuit Court of Appeals reversed and held that plaintiff's offer to buy was "made in Missouri" within the meaning of the Act, and that the confirmation of the sale—mailed by defendant in New York to plaintiff in Missouri—constituted "acceptance" of plaintiff's offer in Missouri, within the meaning of the Act.<sup>24</sup>

The *Kreis* case presented questions of first impression<sup>25</sup> in the construction of a statutory provision substantially identical to section 414 of the Uniform Securities Act. Section 409.415(a)<sup>26</sup> of the Missouri Act makes the substantive provisions of the Act, including securities registration requirements, applicable to sellers when an offer to sell is made in the state, or when an offer to buy is made and accepted in the state. The court in *Kreis* had to decide whether an offer to buy had been made and accepted in Missouri.<sup>27</sup> Reasoning that plaintiff's offer

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in this state in the case of a mailed offer); provided, however, if an offer is directed to an offeree in a state other than this state and that offer would be lawful if made in such other state, then for the purposes of this section such offer is not made in this state.

(d) For the purpose of this section, an offer to buy or to sell is accepted in this state when acceptance (1) is communicated to the offeror in this state and (2) has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs *it* to the offeror in this state reasonably believing the offeror to be in this state and *it* is received at the place to which *it* is directed (or at any post office in this state in the case of a *mailed acceptance*).

Except for the addition of the proviso at the end of § (c), this section is a verbatim adoption of UNIFORM SECURITIES ACT § 414.

22. The district court had jurisdiction under 28 U.S.C. § 1332 (1970), on the basis of diversity of citizenship and the required jurisdictional amount in controversy. See note 31 *infra*.

23. *Kreis v. Mates Inv. Fund, Inc.*, 335 F. Supp. 1299, 1304-05 (E.D. Mo. 1971).

24. *Kreis v. Mates Inv. Fund, Inc.*, 473 F.2d 1308 (8th Cir. 1973).

25. See note 15 *supra* and accompanying text.

26. For the text of the relevant parts of MO. REV. STAT. § 409.415 (1969), see note 21 *supra*.

27. In the district court, plaintiff had also argued that the Act was applicable to this transaction because an offer to sell had been made in Missouri by (1) circulation in Missouri of the magazine article describing the Fund, and (2) the mailing by the Fund of a prospectus to plaintiff in Missouri. The district court disposed of the first contention on the ground that the magazine article was clearly exempted from the definition of "offer" by Mo. REV. STAT. § 409.415(e) (1969), which provides:

An offer to sell or to buy is not made in this state when (1) the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than two-thirds of its circulation outside this state during the past twelve

to buy "originated from Missouri" because it was contained in his letter mailed from Missouri, the court concluded that the offer to buy was "made in Missouri" within the meaning of section 409.415(c), unless excluded from the definition by the proviso to that section.<sup>28</sup> The proviso in effect exempts from the class of offers "made in Missouri" any offer originating from Missouri but directed to an offeree in another state where the offer would be lawful. The court decided that this proviso applies only to offers to sell and therefore held that plaintiff's offer to buy was "made in Missouri."<sup>29</sup>

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months, or (2) a radio or television program originating outside this state is received in this state.

*Kreis v. Mates Inv. Fund, Inc.*, 335 F. Supp. 1299, 1303 (E.D. Mo. 1971). The parties had stipulated that the magazine in question, *Barron's National Business and Financial Weekly*, was published outside Missouri and for twelve months prior to the appearance of the article had had less than one-third of its total circulation in Missouri. *Id.* at 1301. (The apparent redundancy in this stipulation probably reflected the parties' desire that the court not become involved with the construction of § 409.415(e).) The parties had also stipulated that the author of the article had no interest in the Fund, received no fees, salaries, wages, or commissions from the Fund, and was not an agent of any type for the Fund or for its president. *Id.*

Plaintiff's second argument was rejected on the ground that the Fund, in mailing a prospectus to plaintiff, was merely responding to plaintiff's offer to buy, and was doing only what was required by federal law. *Id.* at 1303; see note 18 *supra*.

On appeal plaintiff abandoned both of these arguments and contended only that the district court had erred in holding that plaintiff's offer to buy was not "accepted in Missouri." Brief for Appellant at 8. Defendants, however, renewed their argument that plaintiff's offer to buy was neither "made" nor "accepted in Missouri." Brief for Appellees at 8. Thus the correctness of the district court's holdings on both the making and the acceptance of the offer to buy was put in issue.

28. 473 F.2d at 1311.

29. *Id.* at 1312. The court reached this result by reference to the definition of "offer" in Mo. REV. STAT. § 409.401(j)(2) (1969), quoted in note 4 *supra*. The court then observed that this conclusion found support in the purpose of the proviso and in the "practical reality" that offers to buy are rarely illegal under any law. 473 F.2d at 1312. *But see* note 51 *infra*. According to a member and the chairman of the committee that drafted the Missouri Act, the proviso to § 409.415(c) was added to eliminate the "problem" of a Missouri broker "who called or wrote a customer in Illinois offering to sell such customer a security which was registered under the Securities Law of Illinois but not registered for sale in Missouri . . ." The proviso was meant to exempt such a broker from the civil liabilities and criminal penalties that he otherwise might incur under the Missouri Act. Mills & Jensen, *The Missouri Uniform Securities Act*, 24 J. Mo. B. 60, 68 (1968); see Logan, *Missouri's New Uniform Securities Act and Securities Regulations*, 37 U. Mo. K.C.L. REV. 1, 6 (1969), reprinted in *Blue Skyways and Byways of Missouri*, 25 J. Mo. B. 460, 464 (1969). The district court had reached the same result on this issue through the same reasoning. 335 F. Supp. at 1304. For a more exhaustive consideration of the constructional problems raised by the proviso to § 409.415(c), see notes 33-121 *infra* and accompanying text.

The court next considered whether the offer was "accepted in Missouri" within the meaning of section 409.415(d). Observing that the section defines "acceptance in this state" solely for the purpose of determining the scope of the Act, the court reasoned that the emphasis under the section is upon communication<sup>30</sup> of acceptance. The court then purported to apply the "plain language"<sup>31</sup> of the Act, and held that since the Fund's letter of confirmation was the original and only communication of its acceptance received by Kreis, the letter constituted "acceptance in Missouri" for the purpose of section 409.415.<sup>32</sup>

The reasoning through which the *Kreis* court arrived at its two holdings is subject to criticism on several grounds. The next two Parts of this Note will examine in detail the possible objections to the court's reasoning and will explain why these objections are not necessarily fatal to the ultimate disposition in *Kreis*.

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30. *Webster's New International Dictionary* (2d ed. 1957) defines "communicate" as "to make known," "to give by way of information," "to make common to both parties or objects involved the knowledge or quality conveyed."

31. 473 F.2d at 1312. If a federal court sitting in a diversity action is faced with a question of first impression in the construction of a state statute, the court must decide the issue in the same way the state's highest court would, if it were faced with the issue. *See, e.g.*, 1A J. MOORE, FEDERAL PRACTICE ¶ 0.309[2] (2d ed. 1965, Supp. 1973); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 58 (2d ed. 1970); Note, *Federal Interpretation of State Law—An Argument for Expanded Scope of Inquiry*, 53 MINN. L. REV. 806, 814-19 (1969). The Supreme Court of Missouri, in construing statutes, has long followed a rule of "ascertain[ing] the intention of the lawmakers from the words used, if possible, ascribing to the language its plain meaning, and . . . effectuat[ing] the intent found." *State ex rel. MFA Mut. Ins. Co. v. Rooney*, 406 S.W.2d 1, 3 (Mo. 1966) (emphasis added); *accord*, *State ex rel. Wright v. Carter*, 319 S.W.2d 596, 599 (Mo. 1958); *Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 684, 66 S.W.2d 920, 925 (1933). The adoption in Missouri of this hybrid of the "legislative intent" and "plain meaning" rules of statutory construction justifies to some extent the "plain language" approach of the court in *Kreis*. *Cf.* note 92 *infra*. *But see* notes 139-41 *infra* and accompanying text. For a description and comparison of the "meaning" and "intent" approaches to statutory construction, see 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 45.05-.08 (4th ed. C. Sands 1973) [hereinafter cited as SUTHERLAND].

32. 473 F.2d at 1313. The court "note[d], in passing," that a similar construction of § 409.415(d) was arrived at by a Missouri commentator. *Id.*, citing Logan, *supra* note 29, at 6, 25 J. Mo. B. at 464. The court found further support for its conclusion in UNIFORM SECURITIES ACT §§ 414(a)-(f), Comment 8. *See* note 154 *infra* and accompanying text. It is indicative of the ambiguity of Comment 8, however, that the district court also found support in that comment for its holding that the letter of confirmation did *not* constitute "acceptance in this state" within the meaning of Mo. REV. STAT. § 409.415 (1969). 335 F. Supp. at 1305.

## II. CONSTRUCTION OF SECTION 409.415(c) OF THE MISSOURI ACT<sup>33</sup>

### A. *Objections to the Kreis Court's Construction*

In determining that the proviso to section 409.415(c) of the Missouri Act applies only to offers to sell, the *Kreis* court relied heavily upon the "plain words" defining "offer" in section 409.401(j)(2) of the Act.<sup>34</sup> The court ignored, however, equally plain words at the beginning of section 409.401, which state that the definitions in that section apply "unless the context otherwise requires."<sup>35</sup> Strong arguments can be made that the grammatical context of section 409.415(c) and the policy behind section 409.415(c) (1) do require that the term "offer" in the proviso include offers to buy as well as offers to sell. The arguments run as follows.

First, the language of section 409.415(c), taken in its entirety,<sup>36</sup> indicates that the proviso should apply to offers to buy. The function of subsection (c) is to define when an "offer to sell *or to buy* is made in this state . . ."<sup>37</sup> This first reference to "offer" in the subsection expressly encompasses both kinds of offers. Before the proviso is reached, the term "offer" appears two more times:

when the *offer* (1) originates from this state or (2) is directed by the offeror to this state and received at the place to which it is directed (or at any post office in this state in the case of a mailed *offer*). . . .<sup>38</sup>

In each of these instances, "offer" clearly includes both offers to buy

33. The proviso to § 409.415(c) of the Missouri Act was added by the Missouri General Assembly when it enacted UNIFORM SECURITIES ACT § 414(c), *see* notes 11 & 21 *supra*, and has no counterpart in the act of any other state that has adopted the scope-of-act provisions of the Uniform Act, *see* note 14 *supra*. Therefore, the following discussion of the constructional problem raised by the Missouri proviso directly pertains only to the Missouri Act. The analysis of the purposes of §§ 409.415(c)(1) and (c)(2), however, is relevant in any state that has adopted the scope-of-act provisions. *See* notes 59-89, 93-98 *infra* and accompanying text. And the discussion in general should demonstrate that unforeseen constructional problems may result from a state legislature's modification of the language of a Uniform Act, and that a legislature undertaking such a modification should express its intent with particular precision. *Cf.* notes 90-121 *infra* and accompanying text.

34. *See* note 29 *supra* and accompanying text.

35. MO. REV. STAT. § 409.401 (1969) (emphasis added), *quoted in part in* note 4 *supra*.

36. For the entire text of § 409.415(c), *see* note 21 *supra*.

37. MO. REV. STAT. § 409.415(c) (1969) (emphasis added).

38. *Id.*

and offers to sell.<sup>39</sup> The last three appearances of the word are in the proviso:

provided, however, if an *offer* is directed to an offeree in a state other than this state and that *offer* would be lawful if made in such other state, then for the purposes of this section such *offer* is not made in this state.<sup>40</sup>

As a matter of consistency, "offer" should be given the same meaning in the proviso that it has in the rest of subsection (c)—that is, the proviso should apply to offers to buy as well as offers to sell.<sup>41</sup>

Secondly, the policy that arguably underlies section 409.415(c)(l), and the purpose of the proviso that is suggested by that policy, both require that the proviso apply to offers to buy. It is well established that the primary purpose of blue sky laws is to protect investors in securities (the "protective" purpose).<sup>42</sup> A secondary purpose of the laws, however, has occasionally been mentioned—to prevent the use of the regulating state as a base for fraudulent operations or for the sale of questionable securities to residents of other states (the "preventive" purpose).<sup>43</sup> Since sections 409.415(a)(1) and (c)(2) make the sub-

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39. This reading is required by the sentence structure of § 409.415(c) before the proviso, and by the use of the phrase "made in this state" in connection with both offers to buy and offers to sell in §§ 409.415(a) and (b). See note 21 *supra*.

40. MO. REV. STAT. § 409.415(c) (1969) (emphasis added).

41. A shorter version of the above argument was unsuccessfully urged by appellees in *Kreis*. Brief for Appellees at 8-9, *Kreis v. Mates Inv. Fund, Inc.*, 473 F.2d 1308 (8th Cir. 1973). In correspondence with the *Law Quarterly*, Mr. Lewis R. Mills, a member of the committee that drafted the Missouri Act, has suggested the possible validity of this argument. Letter from Lewis R. Mills to the *Washington University Law Quarterly*, Mar. 18, 1974 [hereinafter cited as Mills Letter].

42. See, e.g., *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 550-52 (1917); *Covert v. Cross*, 331 S.W.2d 576, 585 (Mo. 1960); *Garbo v. Hilleary Franchise Systems, Inc.*, 479 S.W.2d 491, 499 (Mo. Ct. App. 1972); *State ex rel. Sanders v. Hartford Accident & Indem. Co.*, 235 Mo. App. 729, 734, 143 S.W.2d 483, 484-85 (1940).

43. See 1 *Loss* 73-74 n.211; 3 *id.* at 1999-2000 & n.79. *LOSS & COWETT* 211 n.1. Pursuit of this secondary purpose reflects adoption by the regulating state of a policy of comity between itself and other states. The regulating state—for example, Missouri—seeks to prevent the use of itself as a base for the victimization of residents of other states, and in return, Missouri expects other states to prevent their use as bases for the victimization of Missouri residents. The ultimate objective of the secondary, or preventive, purpose is thus the same as the objective of the primary, or protective, purpose—protection of Missouri residents. The preventive purpose, however, seeks to achieve this objective in a much less direct manner than the protective purpose, and it is helpful to distinguish between the two purposes. The preventive purpose may also further two minor interests of the regulating state: lightening the burden of administering the state's blue sky law, by discouraging disreputable traffickers in securities from

stantive provisions of the Missouri Act applicable to sellers who direct offers to sell to Missouri residents, it can be argued that the primary purpose of the Act—protection of Missouri residents—is fully achieved without the operation of section 409.415(c)(1). Under this view, the basic policy behind section 409.415(c)(1) is the secondary purpose of the Act—preventing the use of Missouri as a base of fraudulent operations.<sup>44</sup> The proviso, which can apply only to section 409.415(c)(1) and not to section 409.415(c)(2),<sup>45</sup> would thus limit the situations in which Missouri would seek to achieve this secondary purpose. A resident of another state would not receive greater protection from the Missouri Act than he does from the act of his own state.<sup>46</sup> If this view of the policy behind section 409.415(c)(1) is correct, then there is no reason to limit the application of the proviso to offers to sell.<sup>47</sup>

Despite the apparent force of the two preceding arguments, several flaws in the policy argument indicate that the court in *Kreis* probably reached the proper construction of the proviso to section 409.415(c).

## B. *Analysis of the Objections*

### 1. *The Language Argument*

The first objection to the *Kreis* court's limited construction of the

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entering or establishing themselves in the state; and protecting the reputation of the regulating state in the eyes of sister states.

44. This position finds some support in UNIFORM SECURITIES ACT §§ 414(a)-(f), Comment 3. In discussing a hypothetical civil action by a buyer in State B against a seller in State S, resulting from an offer that originated in State S and was directed to State B, the Official Comment makes this observation: "[T]he statute of State S . . . applies to the offer under § 414(c)(1), on the theory that State S should not be used as a base of operations for defrauding persons in other states." The Official Comment, however, does not even imply that the operation of § 414(c)(1) (§ 409.415(c)(1) of the Missouri Act) in a different context may not be based upon another policy objective. See note 89 *infra* and accompanying text.

45. The proviso concerns offers originating in Missouri but directed to another state, see text accompanying note 40 *supra*, whereas § 409.415(c)(2) concerns offers directed to Missouri, see text accompanying note 38 *supra*. Therefore, the proviso has no application to § 409.415(c)(2).

46. The policy argument above was suggested to the author by Mr. Lewis R. Mills. See Mills Letter, *supra* note 41. Appellees in *Kreis* did no more than hint at the argument. See Brief for Appellees at 9-10.

The purpose of the proviso stated in text would not necessarily entail a total sacrifice of the policy of comity underlying the preventive purpose of the Act. See note 43 *supra*. Missouri would still be entitled to expect other states to prevent their use as bases for sales to, or purchases from, Missouri residents that would be unlawful in Missouri. *But cf.* note 103 *infra* and accompanying text.

47. See Mills Letter, *supra* note 41.

proviso—namely, that the language of section 409.415(c) requires application of the proviso to offers to buy<sup>48</sup>—is persuasive. In response to appellees' presentation of this argument in *Kreis*,<sup>49</sup> appellant observed that "an offer to buy could in itself rarely ever be illegal under any state or Federal securities law."<sup>50</sup> Although appellant did not elaborate upon this observation, he could have based two possible—but unsound—counterarguments upon it.

First, it could be argued that because the Missouri legislature phrased the proviso in terms of offers that "would be lawful" in the state to which they were directed, the legislature was not contemplating offers to buy and did not intend the proviso to apply to offers to buy. This argument is unsound for two reasons: (1) the premise upon which it is based—that offers to buy per se are rarely unlawful in any state—is invalid;<sup>51</sup> and (2) the argument ignores the possibility that the legis-

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48. See notes 36-41 *supra* and accompanying text.

49. See note 41 *supra*.

50. Reply Brief for Appellant at 4, *Kreis v. Mates Inv. Fund, Inc.*, 473 F.2d 1308 (8th Cir. 1973). *But see* note 51 *infra*.

51. Of the thirty-three jurisdictions that have adopted the Uniform Securities Act, *see* note 1 *supra*, all have enacted, either verbatim or with minor modification, the section of the Uniform Act that prohibits certain fraudulent practices "in connection with the offer, sale, or purchase of any security." UNIFORM SECURITIES ACT § 101. In this context, it is clear that "offer" is used in the statutorily defined sense of "offer to sell." Therefore, under the laws of these states, a fraudulent offer to buy that does not result in a consummated transaction is not unlawful. In seven "non-uniform" states, however, the statutory language seems broad enough to prohibit fraudulent offers to buy not resulting in actual purchases. *See* ARIZ. REV. STAT. ANN. § 44-1991 (1967); CAL. CORP. CODE § 25401 (Deering Supp. 1974); CONN. GEN. STAT. REV. § 36-338(a) (1972); MISS. CODE ANN. § 75-71-43(b) (1972); TENN. CODE ANN. § 48-1644(B) (1964); TEX. REV. CIV. STAT. ANN. art. 581-29.C (Supp. 1974); *cf.* N.Y. GEN. BUS. LAW §§ 339-a, 352-c (1968).

In two other situations not involving fraud, an offer to buy could, in itself, violate a state securities law. First, if the person making the offer to buy comes within the statutory definition of "broker-dealer" or "agent," *e.g.*, UNIFORM SECURITIES ACT § 401(b), (c), and has not complied with the broker-dealer or agent registration requirement in the state to which the offer is directed, *e.g.*, *id.* § 201(a), then the offer to buy is probably unlawful. Secondly, if the person making the offer to buy has been enjoined by the target state from engaging in specified acts or practices that violate the state's blue sky law, *see, e.g., id.* § 408, then the offer to buy may fall within the scope of the injunction and therefore be unlawful. Even if an unconsummated offer to buy would not itself be a violation of the state's law, the possibility that an offer to buy could lead to a purchase without any further action on the offeror's part may bring the offer to buy within the scope of an injunction against purchases. There is, however, no authority on this question.

At the federal level, the Williams Act of 1968 regulates offers to buy that constitute "tender offers," and makes such tender offers unlawful under certain circumstances. *Se-*

lature used the "would be lawful" language as a shorthand method of bringing most offers to buy, and some offers to sell, within the scope of the proviso.

The second counterargument that appellant could have made is that inclusion of offers to buy within the scope of the proviso severely strains the meaning of other language in section 409.415(c). Arguably, application of the proviso to offers to buy would exclude from the class of offers "made in" Missouri any offer to buy that originates from Missouri but is directed to another state.<sup>52</sup> The result of a broad reading of the word "offer" in the proviso would thus be the restriction of the operative scope of section 409.415(c)(1) to offers to sell. If section 409.415(c)(1) is so restricted, then the single word "offer" appearing immediately before clause (1)<sup>53</sup> would have to assume a split meaning: as used in clause (1) it would refer only to offers to sell, but as used in clause (2) it would refer to both offers to buy and offers to sell. The artificiality of this double meaning would provide a sound rebuttal to the language argument for including offers to buy within the scope of the proviso.

This second counterargument fails for the same reason as the first counterargument: it proceeds upon the invalid assumption<sup>54</sup> that offers to buy are rarely, if ever, unlawful. Since there are several situations in which an offer to buy per se would be unlawful in most states,<sup>55</sup> the application of the proviso to offers to buy would not restrict the operation of section 409.415(c)(1) to offers to sell. Therefore, it is not necessary to give the word "offer" appearing immediately before clause (1) an objectionable split meaning.<sup>56</sup>

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curities Exchange Act of 1934 §§ 14(d)-(f), 15 U.S.C. §§ 78n(d)-(f) (1970). But it is probable—though by no means certain—that the proviso to § 409.415(c) of the Missouri Act should apply to offers that are lawful under the securities law of the state to which they are directed, even if the offers are unlawful under a federal act. If this view is correct, then the critical fault in the assertion that offers to buy, in themselves, are rarely "unlawful" in any state is the possibility, in any of the three situations above, that an unaccepted offer to buy does violate a state securities law.

In *Kreis*, the court of appeals accepted without question appellant's statement that offers to buy are rarely illegal; the court found some support for its construction in this "practical realit[y] of the market." 473 F.2d at 1312; see note 29 *supra*.

52. But see notes 54-55 *infra* and accompanying text.

53. See text accompanying note 38 *supra*.

54. See text accompanying note 52 *supra*.

55. See note 51 *supra*.

56. See text accompanying notes 38 & 53 *supra*.

The language argument for interpreting "offer" in the proviso so as to include both offers to buy and offers to sell thus withstands both possible counterarguments.<sup>57</sup> If, however, an analysis of the purpose of the proviso reveals sound policy reasons for limiting its application to offers to sell, then the argument from the language of section 409.415(c) would have to be weighed carefully against those policy reasons.<sup>58</sup>

## 2. *The Policy Argument*

The policy argument for construing the proviso so as to include offers to buy depends upon the validity of two propositions: first, that section 409.415(c)(2), together with other parts of section 409.415, provides adequate protection to all Missouri residents; and secondly, that the sole purpose of section 409.415(c)(1) must therefore be the prevention of the use of Missouri as a base for fraudulent activities or for the sale of doubtful securities to residents of other states.<sup>59</sup> Although it is probably true that the only purpose behind section 409.415(c)(2) is the protection of Missouri residents,<sup>60</sup> it is doubtful that the protection thereby provided was deemed "adequate" by the Missouri legislature<sup>61</sup> or by the draftsmen of the Uniform Act,<sup>62</sup> or that the sole purpose served by section 409.415(c)(1) is the preventive purpose of the Act.<sup>63</sup>

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57. Notes 49-56 *supra* and accompanying text.

Appellant in *Kreis* also contended that the terms "offeror" and "offeree," when used in connection with a sale of securities, mean the issuer and prospective purchaser of securities respectively, and that "an offer to an offeree can only mean an offer to sell to a prospective buyer." Reply Brief for Appellant at 4. This contention borders on the frivolous, because it disregards the occurrence of the phrase "offer to buy" throughout § 409.415, particularly in § 409.415(c). See note 21 *supra*. Whatever meaning the term "offer" may usually have in securities contexts, its meaning in the proviso must be determined by reference to the surrounding language and the purpose of the proviso.

58. See 2A SUTHERLAND § 47.08 (footnotes omitted):

Where there is doubt . . . as to the extent of the restriction imposed by a proviso on the scope of another provision's operation, the proviso is strictly construed. The reason for this is that the legislative purpose set forth in the main or dominant body of an enactment is assumed to express the legislative policy, and only those subjects expressly exempted by the proviso should be freed from the operation of the statute.

59. See text accompanying notes 43-44 *supra*.

60. See notes 64-74 *infra* and accompanying text.

61. See notes 108-10 *infra* and accompanying text.

62. See text accompanying note 89 *infra*.

63. See notes 75-89 *infra* and accompanying text. For a definition of the preventive purpose and a discussion of the policy of comity underlying it, see note 43 *supra* and accompanying text.

Determination of the purposes served by each part of section 409.415 (c) requires careful examination of the applicability of each part of section 409.415 to four possible kinds of offers: (1) offers to sell directed to Missouri; (2) offers to buy directed to Missouri; (3) offers to sell originating from Missouri; and (4) offers to buy originating from Missouri.

a. *Purpose of Section 409.415(c)(2)*

Section 409.415 (c) (2) of the Missouri Act provides that an offer to sell or to buy is made in this state . . . when the offer . . . is directed by the offeror to this state and received at the place to which it is directed . . . .<sup>64</sup>

Section 409.415(a) makes certain substantive provisions<sup>65</sup> of the Act applicable "to persons who sell or offer to sell when (l) an offer to sell is made in this state . . . ."<sup>66</sup> Together, sections 409.415(a)(1) and (c)(2) thus protect Missouri residents from sales that are made fraudulently, or in violation of Missouri's registration requirements,<sup>67</sup> by out-of-state sellers who have solicited Missouri residents.

Further protection is afforded Missouri residents by the joint operation of sections 409.415(b)(l) and (c)(2). Section 409.415(b) makes certain substantive provisions<sup>68</sup> of the Act applicable "to persons who

64. MO. REV. STAT. § 409.415(c) (1969) (emphasis added), quoted in note 21 *supra*.

65. The provisions applicable to sellers in the specified circumstances are § 409.101 (antifraud provision), § 409.201(a) (broker-dealer and agent registration requirement), § 409.301 (securities registration requirement), § 409.405 (prohibition of representations that registration of person or security, or availability of exception or exemption, constitutes recommendation or approval by commissioner), and § 409.411 (civil liabilities). See note 21 *supra*. See also notes 19 & 20 *supra*.

66. MO. REV. STAT. § 409.415(a) (1969) (emphasis added), quoted in note 21 *supra*.

67. Both the broker-dealer or agent registration requirement, MO. REV. STAT. § 409.201(a) (1969), and the securities registration requirement, *id.* § 409.301, must be satisfied. See note 65 *supra*. If the seller comes within the statutory definition of "broker-dealer," MO. REV. STAT. § 409.401(c) (1969), or "agent," *id.* § 409.401(b), then he must be registered in Missouri, regardless of whether the securities sold are "exempt securities," *id.* § 409.402(a), or are sold in an "exempt transaction," *id.* § 409.402(b). If the securities and the transaction do not fall within one of the exemptions, then the securities must also be registered.

68. The provisions applicable to buyers in the specified circumstances are §§ 409.101, 409.201(a), and 409.405. See note 21 *supra*. For the content of these sections see note 65 *supra*. The Act imposes no civil liability upon persons who buy or offer to buy in violation of these provisions. LOSS & COWETT 252 (Draftsmen's Com-

buy or offer to buy when (1) an offer to buy is *made in this state . . .*"<sup>69</sup> Taken together, sections 409.415(b)(1) and (c)(2) protect Missouri residents from out-of-state buyers who solicit Missouri residents and then buy securities from the residents either fraudulently<sup>70</sup> or in violation of Missouri's broker-dealer or agent registration requirement.

Section 409.415(c)(2) does not serve the secondary purpose of preventing the use of Missouri as a base of fraudulent operations. Upon first inspection, it may appear that the conjunction of sections 409.415(a)(2)<sup>71</sup> and (c)(2) would prevent unscrupulous sellers from using Missouri as a base for victimizing residents of other states. Thus, if an out-of-state resident directed an offer to buy to the Missouri seller, the offer would be "made in" Missouri; and *if* the offer were "accepted in" Missouri, then section 409.415(a)(2) would subject the seller to the provisions of the Missouri Act. Similarly, it may appear that the conjunction of sections 409.415(b)(2)<sup>72</sup> and (c)(2) would prevent disreputable buyers from using Missouri as a base for victimizing out-of-state residents. If a resident of another state directed an offer to sell to the Missouri buyer, the offer would be "made in" Missouri; *if*, in addition, the offer were "accepted in" Missouri, then under section 409.415(b)(2) the buyer would be subject to the provisions of the Missouri Act.

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mentary to UNIFORM SECURITIES ACT § 101); *see* UNIFORM SECURITIES ACT §§ 414(a)-(f), Comment 10. The administrative, injunctive, and criminal sanctions of the Act, however, are available against buyers who violate any of these provisions. UNIFORM SECURITIES ACT § 101, Comment; *see* MO. REV. STAT. §§ 409.204(a)(2)(B), .409, .410 (1969); LOSS & COWETT 252 (Draftsmen's Commentary to UNIFORM SECURITIES ACT § 101).

69. MO. REV. STAT. § 409.415(b) (1969) (emphasis added), *quoted in* note 21 *supra*.

70. In discussions of fraud in securities transactions, it is customary to speak of fraudulent *sellers* and defrauded *buyers*. The positions, however, may be reversed. *See* LOSS & COWETT 251-52 (Draftsmen's Commentary to UNIFORM SECURITIES ACT § 101) (emphasis original):

Although the blue sky laws were originally directed against fraudulent *sellers*, experience at both state and federal levels has demonstrated that fraud is not a one-way street. The stockholder who is persuaded to *sell* by a corporate insider's *bearish* statements is defrauded no less than his brother who is persuaded to *buy* by a salesman's *bullish* statements.

The class of fraudulent buyers is, of course, not restricted to corporate insiders. *See* 3 LOSS 1445 & n.l. Fraudulent tender offerors, for example, would also come under the description.

71. Section 409.415(a)(2) is set out in text accompanying note 88 *infra*.

72. Section 409.415(b)(2) is set out in text accompanying note 85 *infra*.

In neither of the above cases would the Missouri seller or buyer come within the scope of the Missouri Act, because in neither case would the out-of-state resident's offer to buy or sell be "accepted in" Missouri. Section 409.415(d) provides, in effect, that an offer is "accepted in" Missouri if the offeree directs his acceptance, or first notification thereof, to the offeror in Missouri.<sup>73</sup> In the above situations, the Missouri seller or buyer would be directing his acceptance, or notification thereof, to the home state of the offeror, not to Missouri. Therefore, the offers would not be "accepted in" Missouri, and the Missouri Act would not apply to the transactions.<sup>74</sup>

From the preceding analysis, it is clear that the only purpose served by section 409.415(c)(2) is the protection of Missouri residents.

b. *Purpose of Section 409.415(c)(1)*

Section 409.415(c) of the Missouri Act provides that "an offer to sell or to buy is made in this state . . . when the offer (l) *originates from this state . . .*"<sup>75</sup> Together with section 409.415(a)(1),<sup>76</sup> subsection (c)(l) thus makes the substantive provisions<sup>77</sup> of the Act applicable to Missouri sellers who direct offers to sell to persons in other states. The purpose served by the joint operation of sections (a)(l) and (c)(l) is the prevention of the use of Missouri as a base of operations by dishonest sellers.

The conjunction of sections 409.415(b)(l)<sup>78</sup> and (c)(l) also furthers the preventive purpose of the Act. Those two sections make certain

73. For an analysis of § 409.415(d) of the Missouri Act and the constructional problems raised by it, see notes 122-62 *infra* and accompanying text.

74. This result is consonant with the rationale behind the secondary, or preventive, purpose of the Act. See note 43 *supra* and accompanying text. The regulating state desires only to prevent its use as a base for the victimization of residents of other states. Persons who wish to use the regulating state for this purpose will have to solicit residents of other states. If they do, then they will come within the scope of the regulating state's act by means of other scope-of-act provisions. See notes 75-80 *infra* and accompanying text. The situations posited in text both involve unsolicited offers, either to buy or to sell, from nonresidents of Missouri. These situations are atypical of the type of transaction in which a nonresident would be "victimized" by an unscrupulous buyer or seller based in Missouri.

75. MO. REV. STAT. § 409.415(c) (1969) (emphasis added), *quoted in* note 21 *supra*.

76. For the relevant language of § 409.415(a)(1), see text accompanying note 66 *supra*.

77. See note 65 *supra*.

78. For the relevant language of § 409.415(b)(1), see text accompanying note 69 *supra*.

substantive provisions<sup>79</sup> of the Act applicable to Missouri buyers who direct offers to buy to nonresidents of Missouri. The purpose thus served is the prevention of the use of Missouri as a base of operations by dishonest buyers.<sup>80</sup>

Unlike section 409.415(c)(2),<sup>81</sup> however, section 409.415(c)(1) serves an important second function, necessitated by section 409.415(e).<sup>82</sup> Under section 409.415(e), the circulation in Missouri of a national newspaper or magazine containing an advertisement for the sale or purchase of a security, or the reception in Missouri of a radio or television program originating outside Missouri and including a similar commercial, does not constitute an offer to sell or to buy "made in" Missouri. Section 409.415(e) thus creates an exception to section 409.415(c)(2);<sup>83</sup> certain kinds of offers that are directed to Missouri, and would otherwise be "made in" Missouri under section 409.415(c)(2), are not "made in" Missouri because of section 409.415(e).

The effect of section 409.415(e) is to enable out-of-state sellers or buyers to solicit Missouri residents without coming under the scope of the Missouri Act. The second purpose served by section 409.415(c)(1) is to close this gap in the protection of Missouri residents. Section 409.415(b)(2) makes the substantive provisions<sup>84</sup> of the Act applicable "to persons who buy or offer to buy when . . . an offer to sell is *made and accepted in this state*."<sup>85</sup> Section 409.415(d) provides in effect that an offer to buy or to sell is "accepted in this state" when the offeree directs the acceptance or first notification thereof to the offeror in Missouri.<sup>86</sup> If a Missouri resident saw an advertisement to buy, inserted by a nonresident buyer in a national magazine or newspaper, and if the resident responded by sending an offer to sell to the prospective buyer, then the offer to sell would be "made in" Missouri under section 409.415(c)(1) (disregarding, for the moment, the proviso). If

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79. See note 68 *supra*.

80. See note 70 *supra*.

81. See notes 71-74 *supra* and accompanying text.

82. For the text of § 409.415(e), see note 27 *supra*.

83. Section 409.415(e) qualifies § 409.415(c)(2), not § 409.415(c)(1). This is made clear by the phrasing of § (e) in terms of *circulation* of the newspaper or magazine "in this state," or *reception* of the radio or television program "in this state." See note 27 *supra*.

84. See note 68 *supra*.

85. MO. REV. STAT. § 409.415(b) (1969) (emphasis added), *quoted in* note 21 *supra*.

86. See notes 122-62 *infra* and accompanying text.

the buyer then accepts the offer to sell by directing the acceptance, or first notification thereof, to the offeror in Missouri, the offer to sell would be "accepted in" Missouri under section 409.415(d). The conjunction of sections 409.415(b)(2), (c)(1), and (d) thus would provide Missouri residents protection against out-of-state buyers who, by means of section 409.415(e), avoid being covered by the Act under sections 409.415(b)(1) and (c)(2).

Section 409.415(c)(1), in conjunction with subsections (a)(2) and (d), would (but for the proviso) provide similar protection to Missouri residents against out-of-state sellers who, by means of section 409.415(e), avoid being covered by sections 409.415(a)(1) and (c)(2) of the Missouri Act. Section 409.415(a)(2) makes the substantive provisions<sup>87</sup> of the Act applicable "to persons who sell or offer to sell when . . . an offer to buy is *made and accepted in this state*."<sup>88</sup> If a Missouri resident saw an advertisement inserted by an out-of-state seller in a national magazine or newspaper, and if the resident sent an offer to buy to the seller, then under section 409.415(c)(1) (disregarding, for the moment, the proviso) the offer to buy would be "made in" Missouri. Under section 409.415(d), if the offeree directs his acceptance, or first notification thereof, to the offeror in Missouri, then the offer to buy is "accepted in" Missouri, and the seller comes under the coverage of the Act.

The draftsmen of the Uniform Act clearly intended that section 414(c)(1) (section 409.415(c)(1) of the Missouri Act) provide protection to residents of an adopting state who respond to offers covered under section 414(e) (section 409.415(e) of the Missouri Act). Official Comment 7 to section 414 of the Uniform Act states:

The door left open in § 414(e) is then closed somewhat by § 414(a)(2), which provides in effect that a person in State B who makes an offer to *buy* as a result of an advertisement he sees in a paper published in State S (or a radio or television program originating in State S) may render the statute [of State B] applicable if the seller then accepts the offer "in this state" (that is, State B). And § 414(d) specifies when an offer is "accepted in this state."<sup>89</sup>

The draftsmen of the Uniform Act must have intended that section 414

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87. See note 65 *supra*.

88. MO. REV. STAT. § 409.415(a) (1969) (emphasis added), *quoted in* note 21 *supra*.

89. UNIFORM SECURITIES ACT §§ 414(a)-(f), Comment 7 (emphasis original).

(c)(l) apply to the offer to buy from the resident of State B, because otherwise the statute of State B would not apply in this situation.

c. *Purpose of the Proviso*

The preceding analysis demonstrates that the purpose of section 409.415(c)(l) of the Missouri Act (as deduced from the possible applications of the language of the section, except for the proviso), as well as the purpose of the parallel section in the Uniform Act (as indicated in the Official Comment), encompasses the protection of Missouri residents. Application of the proviso to offers to sell or to buy—as the language of section 409.415(c) seems to require<sup>90</sup>—would deny the protection of the Missouri Act to Missouri residents who buy or sell securities in response to advertisements by nonresidents in national publications.<sup>91</sup> Whether the Missouri General Assembly intended<sup>92</sup>

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90. See notes 36-41, 48-58 *supra* and accompanying text.

91. See notes 81-89 *supra* and accompanying text. This denial of protection results because in the situations where § 409.415(c)(1) serves a protective purpose, it is the nonresident who *accepts* the offer who is possibly violating the Missouri Act. The Missouri resident who *makes* the offer is, presumably, not violating another state's law, and therefore the proviso excludes his offer from the class of offers "made in this state."

Strangely enough, if the Missouri resident does in fact violate the law of another state by making his offer, then the offer is not covered by the proviso and would be "made in this state." Consequently, the nonresident who "accepts" the offer "in this state," as defined in § 409.415(d), is subject to the substantive provisions of the Act; if he violates any of the provisions and is sued by the Missouri resident, he must argue that the Missouri resident is *in pari delicto* and estopped from recovering. This defense, however, is not expressly made available by the Act. See MO. REV. STAT. § 409.411 (1969). In short, a Missouri resident who directs an offer to buy or to sell to a nonresident, and whose offer is "accepted in Missouri," seems to be in a better position under the Act—at least as far as the nonresident's possible civil liability is concerned—if the offer is unlawful in the state to which it is directed, than if the offer is lawful there!

92. The main difference between the "intent" and "meaning" approaches to statutory construction lies in the weight to be given to various constructional aids. Under the "intent" approach, more particularized attention is given to legislative history, and less importance is attached to the "conventional or dictionary meanings" of words or to maxims of interpretation, than under the "meaning" approach. 2A SUTHERLAND § 45.08.

Because the rule of construction enunciated by the Missouri Supreme Court is a hybrid of the "intent" and "meaning" approaches, see note 31 *supra*, serious problems in determining the relevance and probative force of different kinds of constructional aids could, theoretically, arise under the Missouri rule. In practice, however, the rule causes few problems because of the lack of legislative history materials on Missouri statutes. The *Journal of the General Assembly* contains only a procedural record of the motions and votes in the two houses; no committee reports or transcripts of debate or discussion

this result must be determined from analysis of the purpose of the proviso.

Although the Missouri legislature may have specifically intended that the proviso limit the protection given Missouri residents by section 409.415(c)(1), it seems more likely that the proviso was meant to serve a different purpose.<sup>93</sup> Under sections 414(a)(1), (b)(1), and (c)(1)

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are included. Indeed, in formulating the Missouri constructional rule in terms of two different approaches, the Missouri Court may have been influenced by an awareness of the unavailability of legislative history. The rule seems to express primarily an emphasis on the legislative intent, and secondarily a recognition that this "intent" can usually be found only in the words of a statute. See note 31 *supra*. Therefore, the discussion in this Note will assume that the standard for construing a Missouri statute is the intent of the Missouri legislature. For a discussion of the concept of legislative "intent," see 2A SUTHERLAND §§ 45.05-.06.

93. The General Assembly may have intended to limit the scope of protection under the Act for three possible reasons. First, in situations where a Missouri resident would be protected by § 409.415(c)(1), the federal securities laws would be applicable; the Missouri legislature may have felt that the protection of the federal laws was adequate. Secondly, the class of Missouri residents who would be protected by § 409.415(c)(1), but not by § 409.415(c)(2), may be small. Thirdly, the legislature may have believed that residents protected only by § 409.415(c)(1) would be either "weshers" or knowledgeable, sophisticated investors who would not deserve or require the protection of the Missouri Act. See Mills Letter, *supra* note 41.

None of these reasons seems adequate to justify restricting the coverage of the Act. In the first place, the Missouri Act protects many persons who also enjoy the protection of the federal securities laws. For example, Missouri residents who buy or sell securities in response to solicitations by nonresident sellers or buyers are protected under § 409.415(c)(2) of the Missouri Act, see notes 64-70 *supra* and accompanying text, even though the federal laws are also applicable. There appears no reason why Missouri residents who buy or sell in response to advertisements in national publications should be treated differently and denied the protection of the Missouri Act.

The validity of the second reason is also doubtful. Nonresident sellers can phrase advertisements in national publications in such a way as to impress upon readers the necessity that prospective buyers enclose payment with their orders. Similarly, nonresident buyers—*e.g.*, tender offerors—can specify in their advertisements that the certificates representing the securities to be sold must be mailed to them along with the offers to sell. See note 170 *infra*. In either case, the nonresident could "close the deal" without directing to Missouri any further correspondence that would be an offer "made in Missouri" under § 409.415(c)(2). The number of Missouri residents who may respond to such advertisements in the specified manner is probably significant.

Finally, the third possible rationale for limiting the protection provided by the Act is unsound. Although many persons protected by § 409.415(c)(1) may be "weshers" in the sense that they wish to back out of unsound investments, the same is true of persons protected by § 409.415(c)(2). Indeed, it can be argued that one purpose of civil liabilities provisions in state securities laws is to permit a buyer to speculate at the expense of the seller if the seller has not complied with the provisions of the laws. Cf. 3 Loss 1677-78. While it is true that regular readers of national *financial* magazines or newspapers are likely to be more knowledgeable about investment matters than the

of the Uniform Securities Act, a resident of a state that has adopted the Act is subject to the substantive provisions of the Act if he directs an offer to sell or to buy to a resident of another state, regardless of whether the offer, or any sale or purchase resulting from it, is unlawful in the other state. Offerees in other states may thus receive more protection from the Act of the offeror's state than they do from the acts of their own states. This result cannot be explained in terms of the protective purpose of the Act, because most states are not directly interested in protecting residents of other states. Rather, the result must be in furtherance of the preventive purpose of the Act and the underlying policy of comity.<sup>94</sup>

The method by which the Uniform Act implements the policy of comity can best be examined in the following context. Assume that state *A* has adopted the Uniform Act in toto. The residents of *A* receive full protection under the Act only if they are as secure in their transactions with residents of state *B* as they are in transactions with other residents of *A*. To this end, section 414 of *A*'s Act makes the substantive provisions of the Act applicable to residents of *B* who engage in certain kinds of transactions with residents of *A*.<sup>95</sup> From the viewpoint of state *A*, however, the ideal situation would be sufficiently

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average Missouri resident, § 409.415(e) also applies to advertisements in *general* news-magazines or newspapers of national circulation, and commercials on *radio* or *television* programs originating outside Missouri. The audience for this second group of publications will doubtless include many persons of average, or less-than-average, financial ability. Furthermore, the likelihood that a Missouri resident will respond to such an advertisement in a way that enables the nonresident advertiser to "close the deal" without further communication with the Missouri resident seems just as much a function of gullibility as of financial sophistication. Therefore, the class of residents who would be protected under § 409.415(c)(1) but not under § 409.415(c)(2) will probably include many of the persons who are most in need of the protection of the Act.

Since the possible reasons for limiting the protection provided by § 409.415(c)(1) are all questionable, it appears likely that the Missouri General Assembly added the proviso to § 409.415(c) for another purpose. *See also* text accompanying note 107 *infra*.

94. *See* note 43 *supra*.

95. *See* notes 64-70, 81-89 *supra* and accompanying text.

Under the Act of state *A*, any nonresident who engages in conduct prohibited or made actionable by the Act, who has not filed a consent to service of process in connection with an application for registration, and over whom personal jurisdiction cannot otherwise be obtained would be deemed to have appointed the Administrator as his agent for receipt of process "in any non-criminal suit, action, or proceeding against him . . . which grows out of that conduct . . ." UNIFORM SECURITIES ACT § 414(h). A resident of state *A* is thus furnished a convenient forum for recovery against a resident of state *B* who has defrauded him or sold him securities in violation of state *A*'s registration requirements.

stringent administrative enforcement of the statute of state *B* to ensure that only honest and reputable persons engage in the securities business in state *B*. In this ideal situation, the number of cases in which a resident of *A* would have to resort to the provisions of section 414 in order to recover against a resident of *B* would be minimized, because "honest and reputable" dealers in state *B* would presumably comply with the law of state *A* before engaging in interstate transactions with residents of *A*.<sup>96</sup>

In order to encourage state *B* to administer its act strictly—and, in particular, to encourage state *B* to provide the full protection of its act to residents of *A* who engage in interstate transactions with residents of *B*—state *A* undertakes to provide the full protection of its Act to residents of *B* who engage in interstate transactions with residents of *A*. State *A* fully realizes that, in some circumstances, it will be protecting residents of *B* who would be unprotected under the law of their own state. But state *A* anticipates that, in other circumstances, as a result of *A*'s pursuit of its policy of comity, *B* will provide protection to residents of *A* who would not be fully protected under *A*'s law.<sup>97</sup>

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96. Cf. text accompanying note 156 *infra*.

97. A resident of state *A* may receive two kinds of additional protection from strict enforcement of the law of state *B*. First, conduct that is lawful in *A* may be proscribed in *B* (e.g., the offer or sale of an unregistered security that is exempt from registration in *A*, but not exempt in *B*). A buyer in *A* may thus be able to recover against a seller in *B* under *B*'s law, but not under *A*'s. The decision by the legislature of *A* not to proscribe the conduct in question does not necessarily reflect a legislative determination that the residents of *A* would derive *no* protection from the proscription. Rather, the legislature may have felt that the administrative and other costs of prohibiting the conduct would exceed any benefit to the residents of *A*. If state *B* has made a contrary finding and does proscribe the conduct, then state *A* would presumably want state *B* to furnish the full protection of its law to residents of *A* who engage in interstate transactions with residents of *B*.

Secondly, it may prove difficult, if not impossible, to apply the administrative and criminal sanctions of *A*'s Act to violators of the Act who make *B* their base of operations. The residents of *A* will be fully protected from such operators only if the enforcement of *B*'s law is sufficiently vigorous to keep the operators out of business. Of course, state *B* cannot administratively enforce the antifraud provisions and registration requirements of state *A*'s Act. But if *B* makes its own act applicable to interstate transactions between its residents and residents of *A*, and if *B* strictly enforces the substantive provisions of its act, then many potential swindlers of *A*'s residents will be kept out of business in *B*. See text accompanying note 96 *supra*.

Even if *B*'s law does not seem to provide as complete protection as *A*'s (e.g., if *B* does not register securities), *A*'s residents would still derive the second kind of additional protection from strict enforcement of *B*'s law. Furthermore, state *A* would have an additional reason for providing the full protection of its Act to residents of *B* who engage in interstate transactions with residents of *A*. Some residents of *B* would enjoy

The ultimate objective of state *A* is thus the maximum possible protection of its own residents.<sup>98</sup>

There is persuasive evidence that the Missouri legislature intended to modify the way in which the scope-of-act provisions of the Uniform Act implement this policy of comity. In an article published shortly after passage of the Missouri Act, a member and the chairman of the committee that drafted the Act stated that the proviso to section 409.415(c) was added to preclude a violation of the Act by a Missouri broker who offered to sell a nonresident a security that was registered in the nonresident's state but unregistered in Missouri.<sup>99</sup> Logically, the same policy should apply if the nonresident's state has no securities registration requirement,<sup>100</sup> or if the Missouri broker-dealer has satisfied the broker-dealer registration requirements in the nonresident's state but not in Missouri,<sup>101</sup> or if the Missouri broker's offer violates the antifraud provision of Missouri but not of the nonresident's state.<sup>102</sup>

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the protection of *A*'s Act, whereas other residents of *B* (those who engage in *intrastate* transactions) would not be so protected. This disparity in the protection available to its own citizens may induce the legislature of *B* to supplement its law (*e.g.*, by adding a securities registration requirement). If *B* makes the protection of its law available to residents of *A* who engage in interstate transactions with residents of *B*, then the supplement in protection under *B*'s act would redound to the benefit of residents of *A*.

98. See notes 43 & 97 *supra*.

99. Mills & Jensen, *supra* note 29, at 68; see note 29 *supra*. For a discussion of the weight to be given to draftsmen's views in construing a statute, see 2A SUTHERLAND § 48.12. With regard to the Missouri Act, there is the additional question of whether the "draftsmen" of the Act were the draftsmen of the Uniform Securities Act or the members of the committee that adapted the Uniform Act to Missouri's needs. When the section being construed is a proviso that was added to the Uniform Act by the state legislature, it is probably sound to regard the members of the state committee as the "draftsmen" of the section.

100. Only four states do not require the registration of securities. See note 6 *supra*.

101. In practice, this situation seems unlikely to arise. A broker from a state other than Missouri may happen to be in Missouri (*e.g.*, on vacation) when he directs an offer to his home state. But in that event, if the broker does not direct more than fifteen offers to sell or to buy to noninstitutional Missouri investors during any twelve-month period, he would be excepted from the definition of "broker-dealer" by Mo. REV. STAT. § 409.401(c)(4)(B) (1969). The situation in text would arise only if a person with a place of business in Missouri confined his securities business to residents of another state in which he was registered.

Every state requires the registration of broker-dealers and agents, 1 Loss 43, 47, but variations between states in the definitions of these terms, in the standards for denial, suspension, or revocation of registration, and in the strictness of administration, see generally Loss & COWETT 43-86, make it likely that a person who can satisfy the requirements in one state may not be able to do so in another.

102. The slight variations between states in the antifraud provisions, see note 51 *supra*, make this situation possible, though unlikely.

By restricting the protection given nonresidents under the Missouri Act to situations in which the nonresidents would be protected under the acts of their own states, the Missouri legislature implicitly encouraged other states to protect Missourians only in situations where the Missourians would be protected under the Missouri Act. The proviso to section 409.415(c) thus reflects a less ambitious pursuit of the policy of comity than that envisioned by the draftsmen of the Uniform Act.<sup>103</sup> There is, however, no evidence that the Missouri legislature intended the proviso to limit the protection afforded Missouri residents by the conjunction of section 409.415(c)(1) and sections 409.415(a)(2) and (b)(2).<sup>104</sup> Rather it seems likely that the limitation of the protection provided to Missouri residents by those sections was an unintended consequence of the proviso.

#### d. *Construction of the Proviso*

If the constructional issue raised by the proviso in *Kreis* had been whether to give the word "offer" the meaning required by the language of section 409.415(c),<sup>105</sup> despite the probably unintended consequences of this meaning, the court would have had no choice but to follow the plain language of the section. This is especially true since full achievement of the purpose of the proviso requires application of the proviso to both offers to sell and offers to buy,<sup>106</sup> and since there are possible policy reasons for tolerating the resulting limitation of protection to Missouri residents.<sup>107</sup> Other considerations, however, support the *Kreis* court's restrictive reading of the proviso.

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The policy discussed in text also requires that a Missouri *buyer* be exempted from the provisions of the Missouri Act if his offer to buy is lawful in the state to which it is directed but unlawful in Missouri, whether because of different broker-dealer registration requirements, *see* note 101 *supra*, or different antifraud provisions, *see* note 51 *supra*, in the laws of the two states.

103. Because of the proviso to § 409.415(c), Missouri could not expect another state—for example, Illinois—to extend the protection of its law to a Missouri resident who engages in an interstate transaction with an Illinois resident, if the Missouri resident would not be protected under the Missouri Act. The Missouri legislature therefore must have reconciled itself to less than the maximum possible protection of Missouri residents. *See* notes 97-98 *supra* and accompanying text.

104. *See generally* notes 81-89 *supra* and accompanying text.

105. *See* notes 36-41, 48-58 *supra* and accompanying text.

106. Presumably, the Missouri legislature desired to restrict the protection given by the Act to nonresidents who either buy from, or sell to, Missouri residents, *See* note 102 *supra*.

107. *See* note 93 *supra*.

When the Missouri legislature adopted the Uniform Act, sections 414 (a)(2) and (b)(2) of the Act were enacted without modification. The sole purpose served by those two sections is the extension of the Act's protection to Missouri residents who buy securities from, or sell securities to, a nonresident who has not "made in" Missouri an offer to sell or to buy.<sup>108</sup> Application of the proviso to offers to sell would totally deprive section 409.415(b)(2) of operative effect.<sup>109</sup> Application of the proviso to offers to buy would have the same effect on section 409.415(a)(2).<sup>110</sup>

It is a cardinal rule of statutory construction that no part of a statute should be so construed as to render inoperative any other part of the statute, unless that result cannot be avoided.<sup>111</sup> Only one possible construction of the word "offer" in the proviso would preserve the operative effect of sections 409.415(a)(2) and (b)(2) and simultaneously accomplish the purpose of the proviso: "offer" would have to encompass both offers to buy and offers to sell when either section 409.415 (a)(1) or (b)(1) was being applied, but "offer" could include neither offers to buy nor offers to sell when section 409.415(a)(2) or (b)(2) was being applied. This "construction," however, amounts to a virtual redraft of the proviso;<sup>112</sup> no court could be expected to give the same word a broad meaning in one set of circumstances, and no meaning at all in another. The question therefore becomes how to construe the proviso so as to give the greatest effect to the intent of the Missouri legislature.

The *Kreis* court's construction of the proviso renders section 409.415 (b)(2) inoperative,<sup>113</sup> and thus denies some Missouri residents the protection of the Act. The persons thus denied protection, however, are residents who *sell* a security to a nonresident, probably in response to an advertisement in a national publication.<sup>114</sup> Even if these persons were "protected" under the Act, they would not be able to bring an

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108. See notes 84-89 *supra* and accompanying text.

109. See note 91 *supra* and accompanying text.

110. See *id.*

111. 2A SUTHERLAND §§ 46.05-.06; see *State ex rel. Wright v. Carter*, 319 S.W.2d 596, 600 (Mo. 1958); *Welborn v. Southern Equip. Co.*, 386 S.W.2d 432, 436 (Mo. Ct. App. 1964), *aff'd in part and rev'd in part*, 395 S.W.2d 119 (Mo. 1965).

112. For a proposed redraft of the proviso that would achieve the purpose of the proviso without limiting the protection given Missouri residents under the Act, see text preceding note 166 *infra*.

113. See text accompanying note 109 *supra*.

114. See text following note 86 *supra*.

action for rescission; their "protection" would be limited to administrative, injunctive, or criminal actions brought by the Commissioner against the nonresident buyer.<sup>115</sup> On the other hand, the *Kreis* court's construction does effect the legislative intent to restrict the protection given to nonresident *buyers* under the Act. Since only buyers can bring an action for rescission under the Act,<sup>116</sup> it is likely that the Missouri legislature was most concerned with limiting the protection that nonresident buyers would receive under the Act.<sup>117</sup>

Application of the proviso to offers to buy as well as offers to sell would more fully effect the purpose of the proviso than does the *Kreis* court's construction, by limiting the protection provided nonresident *sellers* under the Act. The Missouri legislature, however, was probably concerned less with limiting the protection given nonresident sellers than with limiting the protection given nonresident buyers, because sellers would not be able to bring actions for rescission under the Act, even if they were "protected."<sup>118</sup> On the other hand, the application of the proviso to offers to buy would deny the protection of the Act to Missouri residents who, like *Kreis*, would otherwise be protected by the conjunction of sections 409.415(a)(2), (c)(1), and (d).

There is no sure measure of the relative importance that the Missouri legislature attached, on the one hand, to the protective purpose served by sections 409.415(a)(2) and (b)(2) and, on the other hand, to the restriction of the policy of comity achieved by the proviso. Since the protection of Missouri residents is presumably the primary,<sup>119</sup> and ultimate,<sup>120</sup> objective of the Missouri Act, it seems reasonable to assume that the Missouri legislature considered the protective purpose served by sections 409.415(a)(2) and (b)(2) at least as important as the proviso's restriction of the policy of comity. If this assessment is accurate, then the limitation of the proviso to offers to sell is defensible on the ground that that construction best balances the different legislative intents of sections 409.415(a)(2) and (b)(2) on the one hand, and the proviso to section 409.415(c) on the other. Despite the argument based on the language of section 409.415(c) for including both offers

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115. See note 68 *supra*.

116. See *id.*

117. See note 99 *supra* and accompanying text.

118. See note 68 *supra*.

119. See note 42 *supra* and accompanying text.

120. See notes 43 & 98 *supra* and accompanying text.

to sell and offers to buy within the meaning of "offer" in the proviso,<sup>121</sup> the *Kreis* court's construction of "offer" as including only offers to sell was probably correct.

### III. CONSTRUCTION OF SECTION 409.415(D) OF THE MISSOURI ACT

#### A. *Objections to the Kreis Court's Construction*

Assuming that the *Kreis* court reached the proper construction of the proviso to section 409.415(c),<sup>122</sup> the dispositive issue in the case was whether *Kreis*' offer to buy was "accepted in Missouri," within the meaning of section 409.415(d). More broadly stated, the issue was whether it was the intent of the Missouri legislature, as expressed in the words of the Act,<sup>123</sup> for a unilateral contract like that between *Kreis* and the Fund<sup>124</sup> to fall within the scope of the Act. Section 409.301 of the Missouri Act makes it unlawful "for any person to offer or sell any security" in Missouri, unless the security is registered or exempt, or the transaction is exempt.<sup>125</sup> The broad definition of "sell" in section 409.401(j)(1)<sup>126</sup> would appear to bring the Fund's "disposition" of its shares to *Kreis* clearly within the scope of section 409.301. In that case, the Fund would be liable to *Kreis* under section 409.411, which imposes civil liability upon anyone who, *inter alia*, "sells a security in violation of section . . . 409.301 . . . ."<sup>127</sup>

The difficulties in *Kreis* arose under section 409.415, which purports to define specifically the applicability of sections 409.301 and 409.411.

121. See notes 36-41, 48-58 *supra* and accompanying text.

122. See notes 105-21 *supra* and accompanying text.

123. See note 92 *supra*.

124. The district court in *Kreis* determined that common law acceptance of *Kreis*' offer had been effected by the Fund's posting of the sale and issuance of shares, and by the depositing of *Kreis*' check, all of which occurred in New York. 335 F. Supp. at 1304-05; see text accompanying note 17 *supra*. Since § 409.415(d) of the Missouri Act defines "acceptance in this state" in terms of "acceptance," and since the Act provides no special definition of "acceptance," the district court concluded that the word "acceptance," standing alone, retains its common law meaning. 335 F. Supp. at 1305; see text accompanying notes 143-46 *infra*. The district court therefore held that the offer to buy had not been "accepted in Missouri." 335 F. Supp. at 1305.

The court of appeals refused to decide whether common law acceptance had been effected by the Fund's performance in New York, on the ground that this question was irrelevant to a determination of the applicability of § 409.415(d). 473 F.2d at 1312-13.

125. See note 19 *supra*.

126. See note 5 *supra*.

127. See note 20 *supra*.

Section 409.415(a)(2) defines that applicability as attaching whenever "an offer to buy is made and accepted in this state."<sup>128</sup> If "accepted" is used here in its common law sense, then a unilateral contract of the *Kreis-Mates* kind is definitely excluded from the scope of the Act, and the broad scope seemingly indicated by the general terms of section 409.301 would be limited by the specific terms of section 409.415.<sup>129</sup> However, section 409.415(d), which defines "acceptance in this state," seems to prescribe a meaning for "accepted" in section 409.415(a)(2), other than the common law meaning.

In construing section 409.415(d), the *Kreis* court looked to the "plain language" of the section.<sup>130</sup> The court emphasized that subsection (d) defines acceptance *in this state, only for the purpose of section 409.415*, and that the definition "turns upon *communication*"<sup>131</sup> of acceptance. By lifting these words out of their statutory context, the court of appeals was able to gloss over a serious ambiguity in subsection (d).

A careful reading of section 409.415(d)<sup>132</sup> suggests at least two equally reasonable interpretations of the "meaning" of the section: (1) an offer is "accepted in Missouri" if the offeree directs to the offeror in Missouri *either* the actual common law acceptance *or* original notification of the offeree's prior common law acceptance, and the acceptance or the notification thereof is received in Missouri; or (2) an offer is "accepted in Missouri" if the offeree directs to the offeror in Missouri the actual common law acceptance of the offer, and the acceptance is received in Missouri.<sup>133</sup> The first construction of subsection (d) would

128. See note 21 *supra*.

129. It is a well-established rule of statutory construction that "[w]here there is inescapable conflict between general terms or provisions of a statute and other terms or provisions therein of a specific nature, the specific will prevail and be given effect over the general." 2A SUTHERLAND § 46.05, at 57 (footnote omitted).

130. 473 F.2d at 1312; see text accompanying notes 30-31 *supra*.

131. 473 F.2d at 1312 (emphasis added).

132. See note 21 *supra*.

133. The first of these interpretations is suggested by an application of the dictionary definition of "communicate," see note 30 *supra*, to the text of § 409.415(d) up until the semicolon in the section. The text of the section after the semicolon, however, seems to support the second interpretation because of the recurrence of the term "it," the antecedent of which can only be "acceptance." See note 21 *supra*, quoting MO. REV. STAT. § 409.415(d) (1969) (emphasis added). The problem of assigning an antecedent to the pronoun "it" appeared clearly in the following sentence from the opinion of the court: "Substantially, an offer is accepted here in Missouri when *it* is 'communicated to the offeror in this state' . . ." 473 F.2d at 1312 (emphasis added). Certainly the

extend the coverage of the Act to unilateral contracts, because the offeree in such a contract must give notice of acceptance within a reasonable time after accepting.<sup>134</sup> The second possible construction of subsection (d), however, would equate "acceptance in this state" with the offeree's directing to the offeror in Missouri a communication which is itself the acceptance (in the common law sense) of the offer. This construction would exclude from the scope of the Act unilateral contracts created through the offeree's performance of the requested act in a state other than Missouri.<sup>135</sup>

The *Kreis* court would seem to have had the option of adopting either of the suggested constructions of section 409.415(d). The first construction would require the court to admit that there was a failure in the drafting of subsection (d),<sup>136</sup> but would make the scope of the Act as specifically defined in section 409.415 nearly co-extensive with the scope as indicated in the general sections 409.301 and 409.411.<sup>137</sup> The second construction, while requiring no admission of a failure in drafting subsection (d), would seriously restrict the scope of the Act indicated in the general provisions, by attributing a common law meaning to "acceptance" in section 409.415.<sup>138</sup>

The *Kreis* court's failure to discuss the ambiguity in section 409.415 (d) weakens the precedential value of the court's construction of that section. Although the court justifiably sought the "plain meaning" of the section,<sup>139</sup> the scope of its search for this meaning was unnecessarily restricted.<sup>140</sup> Even strict adherence to the plain meaning rule should not prevent a court from referring to parts of a statute other than the

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court cannot be talking about communication of an offer; but just as certainly, the word "it" in the quoted sentence must refer to "offer."

134. See RESTATEMENT OF CONTRACTS § 56 (1932); cf. 1 A. CORBIN, CONTRACTS § 67 (1963, Supp. 1971).

135. This second construction of § 409.415(d) would, however, differ from the common law rule for determining the place of acceptance in *bilateral* contracts. Normally when an offeree accepts by letter, telephone, or telegram, the place of acceptance is the place where the letter is mailed, the words of acceptance are spoken, or the telegram is sent. See 1 A. CORBIN, *supra* note 134, §§ 78-81.

136. Specifically, the suggested drafting failure in § 409.415(d) is the use of the word "it," and its reference back to "acceptance," in the part of the section following the semicolon. See notes 21 & 133 *supra*.

137. See text accompanying notes 124-29 *supra*.

138. See text accompanying note 129 *supra*.

139. See notes 31 & 92 *supra*.

140. The court limited its inquiry into the meaning of § 409.415(d) to the words of that section alone. See text accompanying notes 30-32, 130-31 *supra*.

section being construed in order to resolve an ambiguity in that section.<sup>141</sup> A more thorough analysis of the meaning of section 409.415 (d), however, probably would have led to the same construction as in *Kreis*.

### B. *Additional Support for the Construction in Kreis*

Several considerations seem to indicate that the first suggested construction of section 409.415(d)<sup>142</sup> is more consistent with the legislative intent than is the second suggested construction. First, as the court of appeals observed, “[c]ommon law contract concepts, where supplanted by the Act, obviously no longer control in the applicable areas.”<sup>143</sup> This observation alone does not take us far, because the question remains whether subsection (d) was meant to “supplant” the common law concept of acceptance. Certainly the use of the term “acceptance” in the definition of “acceptance in this state” in subsection (d) does not indicate an intent to supplant the prior, common law meaning of “acceptance.”<sup>144</sup> Nevertheless, some force is given to the court’s observation by the apparent incompatibility between the purpose of section 409.415—namely, the introduction of “order and predictability” into determinations of the scope of the Act<sup>145</sup>—and the “complexities and subtleties” involved in the common law notion of acceptance.<sup>146</sup>

Secondly, the second suggested construction of section 409.415(d) would tend to produce “unreasonable” results. For example, suppose that a Missouri broker called a customer in another state and offered to sell that customer a security not registered under the law of Missouri or the other state. Further assume that the customer purchased the security under circumstances that would have made the customer’s state the common law locus of the purchase. Under sections 409.415(a) and (c), the Missouri Act would be applicable because the broker’s offer to sell was “made in Missouri.” The out-of-state purchaser could therefore rescind under section 409.411 of the Missouri Act. It would be unreasonable to assume that the Missouri General Assembly, in pur-

141. See 2A SUTHERLAND §§ 46.05, 47.02.

142. See text following note 132 *supra*.

143. 473 F.2d at 1311.

144. See note 124 *supra*.

145. See note 12 *supra* and accompanying text.

146. 473 F.2d at 1311, 1312, 1313.

suit of a policy of comity,<sup>147</sup> intended to afford greater protection to an out-of-state buyer against a Missouri broker, than to a Missouri buyer (like Kreis) against an out-of-state seller (like the Fund).<sup>148</sup> Since "the law favors a construction which harmonizes with reason and which tends to avoid . . . unreasonable results,"<sup>149</sup> there is sound reason for preferring, as a matter of reasonable construction, the first suggested interpretation of section 409.415(d).

Thirdly, the second proposed construction of section 409.415(d) would lead to an unreasonable result in another way. Assume that the Fund had mailed Kreis a letter of acceptance before depositing Kreis' check and before posting the sale and issuance of shares to Kreis on its books. In that event, the second construction of subsection (d) would make the Act applicable to the transaction. On the facts of the actual case, however, the second construction would make the Act inapplicable to the sale, because it was not the common law acceptance of Kreis' offer that the Fund directed to him in Missouri. The mere reversal of the time sequence of the Fund's actions in response to Kreis' letter would not justify the difference in coverage under the Act that the second construction of subsection (d) would produce. The unreasonableness of this result provides another reason for preferring the first construction of subsection (d).

Fourthly, adoption of the second construction of section 409.415(d) would seem to produce a result at variance with the public policy behind the Missouri Act. That policy, broadly described, is the protection of investors in securities by means of, *inter alia*, a comprehensive system of registration of all securities sold or offered in the state, except for certain exempt securities or securities sold in certain exempt transactions.<sup>150</sup> If out-of-state sellers of securities placed advertisements in national publications,<sup>151</sup> being sure to impress upon readers

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147. See notes 43, 94-104 *supra* and accompanying text.

148. This assumption would be especially unreasonable in view of the Missouri legislature's desire, manifested by the addition of the proviso to § 409.415(c), to limit the situations in which the policy of comity would be pursued. See note 103 *supra* and accompanying text.

The argument in text also provides support for the *Kreis* court's construction of the proviso to § 409.415(c). Cf. notes 105-21 *supra* and accompanying text.

149. *In re Jackson*, 268 F. Supp. 434, 441 (E.D. Mo.), *aff'd sub nom. Zuke v. Mercantile Trust Co. Nat'l Ass'n*, 385 F.2d 775 (8th Cir. 1967); *accord*, *Laclede Gas Co. v. City of St. Louis*, 363 Mo. 842, 848, 253 S.W.2d 832, 835 (1953).

150. See cases cited note 42 *supra*.

151. Section 409.415(e) of the Missouri Act provides that the circulation in Missouri

the necessity that prospective buyers enclose payment with their orders, and then followed the procedure of the Fund in *Kreis*, then adoption of the second interpretation of subsection (d) would enable the sellers to avoid the registration requirements of the Missouri Act. It is unlikely that the Missouri General Assembly intended for such transactions, not otherwise exempt and not involving exempt securities, to escape the comprehensive registration requirements of the Act.<sup>152</sup>

Fifthly, several extrinsic aids to construction offer support for the first interpretation of section 409.415(d). As discussed above, that interpretation would bring within the scope of the Act all contracts for the sale of securities that are completed by the seller's sending an acceptance to the buyer in Missouri or that, in the case of unilateral contracts, are made binding by the seller's directing to the Missouri buyer, within a reasonable time, notification of the seller's prior acceptance. This construction of subsection (d) would thus minimize, for the purpose of determining the scope of the Act, the importance of the distinction between bilateral and unilateral contracts. A similar policy minimizing the bilateral-unilateral distinction and emphasizing communication between the parties, for the purpose of establishing the enforceability of any contract for the sale of securities, is found in the statute of frauds section of the article on investment securities in the Missouri Uniform Commercial Code.<sup>153</sup>

Although the particular contract in *Kreis* would have been enforceable against the Fund under section 400.8-319(b) of the Missouri Code

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of such publications does not constitute the making of an offer to sell or to buy in Missouri. See text accompanying notes 82-84 *supra*.

152. Cf. text accompanying notes 89 *supra*, 156 *infra*.

153. MO. REV. STAT. § 400.8-319 (1969) provides:

A contract for the sale of securities is not enforceable by way of action or defense unless

(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or

(b) delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment; or

(c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or

(d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

after the Fund deposited Kreis' check, section 400.8-319(a) states the otherwise general requirement that in order for such a contract to be enforceable, there must be a writing signed by the party against whom enforcement is sought and indicating "that a contract has been made for sale of a stated quantity of described securities at a defined or stated price . . . ." Section 400.8-319(c) provides in effect that the prerequisite for a broker's enforcement of such a contract is satisfied if, within a reasonable time, the buyer has received a letter of confirmation sufficient against the broker, and the buyer has failed to send written objection to its contents within ten days after its receipt. The general policy of the section is clearly that a contract for the sale of securities is unenforceable against a broker who has not received payment unless the broker has sent the buyer the required writing. In view of this requirement, it is certainly not unreasonable for section 409.415(d) to look to the sending and receipt of an acceptance, or notification thereof, in order to determine whether an offer to buy is "accepted in Missouri."

The first suggested construction of section 409.415(d) receives additional support from the official comments and draftsmen's commentary to the Uniform Act. Comment 8 to section 414 of the Uniform Act states:

If the selling dealer in State S merely sends a confirmation or delivers the security into State B, or the buyer in State B sends a check in payment from within State B, the statute of State B does not apply *except when under § 414(d) the confirmation or delivery constitutes the seller's acceptance of the buyer's offer to buy.*<sup>154</sup>

As the district judge in *Kreis* astutely observed, "subsection (d) does not define 'acceptance' and the official commentary is of little help in referring the reader back to subsection (d) to determine whether under that section the confirmation constituted the seller's 'acceptance.'"<sup>155</sup> It is likely, however, that the final clause of Comment 8 refers to the seller's "acceptance in State B" (defined in subsection (d)), and not to the seller's common law acceptance of the offer to buy.

This interpretation of Comment 8 receives support from Draftsmen's Commentary 7 to section 414 of the Uniform Act. Draftsmen's Commentary 7 states:

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154. UNIFORM SECURITIES ACT §§ 414(a)-(f), Comment 8 (emphasis added).

155. 335 F. Supp. at 1305.

Suppose a prospective buyer in State B writes or telephones the dealer in State S who inserted [an] advertisement [in a national newspaper or magazine]. The dealer, if he is legitimate and careful, will either comply with the law of State B or reply that he has not done so. If the buyer comes to State S and a sale is made there, only the law of State S applies. On the other hand, if the seller in State S accepts the buyer's offer to buy by sending a letter or delivering the security or a confirmation in State B *without any previous acceptance in State S*, then the law of State B applies to the transaction. *In other words, unless the buyer goes to State S an actual sale to him resulting from the foreign advertisement or program makes the statute of State B apply*; and at the same time there is no possibility that the seller will be entrapped, because he should not accept an offer originating from State B without checking to see whether he must comply and has complied with the statute of State B.<sup>156</sup>

Some difficulty in interpreting this commentary is caused by the use of the term "acceptance." It is inconceivable, however, that when Professor Loss wrote this commentary, he had not contemplated the possibility of common law unilateral contracts for the sale of securities. The only remaining way of reconciling the italicized portions of the commentary (since an offer contemplating acceptance by performance of an act *could* be accepted in State S, in the common law sense, without the buyer physically going to State S) is to assume that Loss was here speaking of "acceptance in State S" in the way defined by subsection (d)—namely, as *communication* of acceptance. Official Comment 8 and Draftsmen's Commentary 7 to section 414 of the Uniform Act thus indicate, though not so clearly as intimated by the court in *Kreis*,<sup>157</sup> that the framers of the Act intended that section 414(d) receive the construction placed upon it by the court.<sup>158</sup>

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156. Loss & Cowett 404-05 (emphasis added).

157. 473 F.2d at 1313.

158. The weight to be given to official comments to uniform laws, in dealing with problems in construction of those laws, is a much disputed matter. *See, e.g.,* Merrill, *Uniformly Correct Construction of Uniform Laws*, 49 A.B.A.J. 545 (1963); Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 Wis. L. Rev. 597, 597-606. Whatever weight is to be given to the official comments, seemingly less weight should be attached to the draftsmen's commentary, available only in a treatise by the authors of the uniform law. (Neither court in *Kreis* even referred to Draftsmen's Commentary 7, although it was clearer and more nearly in point with the issue in *Kreis* than was Comment 8, which both courts cited.) Since the Missouri Supreme Court has not decided what importance should attach to such official comments or draftsmen's commentary, the wisest course appears to be that followed by the two courts

Even if the second suggested construction of section 409.415(d) is accepted as correct, the result in *Kreis* may still be defensible. Because section 409.415 defines the scope of the Act in terms of "offer" and "acceptance," and because the second construction of subsection (d) would in effect give "acceptance" a common law meaning,<sup>159</sup> it can be argued that the scope-of-act provisions in section 409.415 were intended to apply only to bilateral contracts. In that case, the applicability of the Act to unilateral contracts would be governed by language found elsewhere in the Act—for example, the prohibition in section 409.301 of the offer or sale of an unregistered security "in this state."<sup>160</sup> Because of the broad definition of "sale" in section 409.401 (j)(1),<sup>161</sup> the Fund's disposition of its shares to *Kreis* could be held to be a sale "in this state."<sup>162</sup>

#### IV. CONCLUSION

*Kreis* is the only reported case that has required construction of a scope-of-act provision modeled on section 414 of the Uniform Securities Act.<sup>168</sup> Therefore, little basis exists for predicting exactly what prob-

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in *Kreis*—viz., to refer to the official comments only for support of a construction arrived at by use of intrinsic aids to construction.

159. See text accompanying note 138 *supra*.

160. See note 19 *supra*.

161. See note 5 *supra*.

162. In a case decided shortly after *Kreis*, the Court of Appeals for the Seventh Circuit gave a similarly expansive construction of the word "sale" in the Illinois Securities Act. *Green v. Weis, Voisin, Cannon, Inc.*, 479 F.2d 462 (7th Cir. 1973). The definition of "sale" in the Illinois Act, however, is even broader than the corresponding definition in the Missouri Act. See note 5 *supra*.

It is difficult to predict what choice-of-law rule the Missouri courts would use to decide if an offer or sale was made "in this state." See notes 8 & 10 *supra* and accompanying text. To some extent, the uncertainty of results under the choice-of-law rules is lessened by broad readings of "offer" and "sale." But the primary purpose of § 414 of the Uniform Securities Act was elimination of the complexity and unpredictability inherent in the application of traditional choice-of-law rules to interstate securities transactions. See notes 10-12 *supra* and accompanying text. For this reason, it is unlikely that the draftsmen of the Uniform Act intended § 414 to apply only to bilateral contracts.

163. The only post-*Kreis* case in which a scope-of-act provision identical to UNIFORM SECURITIES ACT § 414 has even been mentioned is *In re Information Resources Corp.*, 126 N.J. Super. 42, 312 A.2d 671 (App. Div. 1973). The court there held that for the purpose of determining the availability of the New Jersey "private offering" exemption, identical to UNIFORM SECURITIES ACT § 402(b)(9), the New Jersey provisions identical to §§ 414(a)-(d) of the Uniform Act were irrelevant where all parts of the transactions in question took place outside New Jersey. 126 N.J. Super. at 49, 312 A.2d at 675. See also note 15 *supra* and accompanying text.

lems may arise in the construction of the section. The issues raised in *Kreis*, however, do indicate that certain modifications in the language of section 414 (section 409.415 of the Missouri Act) may avert some constructional problems in future cases.

First, the proviso to section 409.415(c) of the Missouri Act could be rewritten in either of two ways, depending upon the intent of the Missouri legislature.<sup>164</sup> If the legislature did intend to restrict the protection provided Missouri residents through the conjunction of section 409.415(c)(1) and sections 409.415(a)(2) and (b)(2), then the addition of the phrase "to sell or to buy" after the first appearance of the word "offer" in the proviso would achieve the legislative intent. The proviso would then read as follows:

provided, however, if an offer to sell or to buy is directed to an offeree in a state other than this state and that offer would be lawful if made in such other state, then for the purposes of this section such offer is not made in this state.<sup>165</sup>

If, however, the legislature did not intend to limit the protection given Missouri residents under the Act, then the proviso could be reworded in the following way:

provided, however, that if any person directs an offer that would otherwise violate this Act to an offeree in a state other than this state, and that offer would be lawful if made in such other state, then for the purposes of this section such offer is not made in this state.

This redraft would restrict the applicability of the proviso to cases involving sections 409.415(a)(1) or (b)(1). The protection afforded Missouri residents under sections 409.415(a)(2) and (b)(2) would not be restricted because, in cases involving those sections, the Missouri

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164. In this discussion, it is assumed that the Missouri legislature's primary intent in adding the proviso to § 409.415(c) was to limit the pursuit of the policy of comity. See notes 90-104, 106 *supra* and accompanying text. The wisdom of this legislative decision will not be examined here.

165. The legislative intent expressed in this redraft could be defeated only if a court construed the proviso as applicable to cases involving §§ 409.415(a)(1) or (b)(1), but inapplicable to cases involving §§ 409.415(a)(2) or (b)(2). This construction would seem highly unlikely for two reasons. First, it would require a court to give the same words full effect in one set of circumstances, and no effect at all in another. Cf. text accompanying note 112 *supra*. Secondly, the construction would ignore the amendment of the proviso in response to, and apparently in disapproval of, the construction in *Kreis*. Cf. 2A SUTHERLAND § 49.10.

To eliminate the possibility of conflict between different parts of § 409.415, see notes 108-21 *supra* and accompanying text, the legislature should also delete §§ 409.415(a)(2) and (b)(2).

resident would not be making "an offer that would otherwise violate this Act . . . ." <sup>166</sup>

Alternatively, the legislative intent to restrict the pursuit of the policy of comity but not to limit the protection provided Missouri residents could be achieved by deleting the proviso to section 409.415(c) and adding provisos to sections 409.415(a) and (b). The proviso to section 409.415(a) would read as follows:

provided, however, that section 409.101, 409.201 (a), 409.301, 409.405, and 409.411 do not apply to a person who sells or offers to sell if the person directs an offer to sell to an offeree in a state other than this state, and that offer would be lawful in such other state.

A parallel proviso, *mutatis mutandis*, would be added to section 409.415(b). <sup>167</sup>

Secondly, revision of section 409.415(d) of the Missouri Act (section 414(d) of the Uniform Act) could resolve the issue raised in *Kreis* as to the proper construction of that section. Since the draftsmen of the Uniform Act probably intended section 414 to apply to both bilateral and unilateral contracts, <sup>168</sup> the attempt to revise section 414(d) should focus on the second part of the section. <sup>169</sup> Substitution of the phrase "acceptance or notice thereof" for the term "it" in the second half of the section would probably eliminate the constructional problem raised in *Kreis*. In its entirety, revised section 414(d) would read as follows:

For the purpose of this section, an offer to buy or to sell is accepted in this state when acceptance (1) is communicated to the offeror in this

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166. See note 91 *supra*.

167. This second method of effecting the legislative intent—namely, deletion of the proviso to § 409.415(c) and addition of provisos to §§ 409.415(a) and (b)—is somewhat objectionable because it requires two provisos instead of one. Although each of the provisos would be in closer juxtaposition to the sections ultimately restricted—§§ 409.415(a)(1) and (b)(1)—than would the proviso to § 409.415(c), additional problems would arise because §§ 409.415(a)(1) and (b)(1) are each phrased in terms of offers "made in this state" whereas the provisos to §§ (a) and (b) would not be so phrased. For these reasons, rewording of the proviso to § 409.415(c) would probably be the preferable way of implementing the legislative intent.

It is also true that the provisos added to §§ 409.415(a) and (b) would be separated from the clauses they restrict by §§ 409.415(a)(2) and (b)(2). But this objection is equally true of the proviso to § 409.415(c). See note 45 *supra* and accompanying text. Given the structure of §§ 414(a), (b), and (c) of the Uniform Act, there is no way of expressing the intent of the Missouri legislature without placing a proviso next to a clause that the proviso does not restrict.

168. See notes 154-58 *supra* and accompanying text; note 162 *supra*.

169. See notes 133 & 136 *supra* and accompanying text.

state and (2) has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs the acceptance or notice thereof to the offeror in this state reasonably believing the offeror to be in this state, and the acceptance or notice thereof is received at the place to which it is directed (or at any post office in this state in the case of a mailed acceptance or notice).

Although this redraft of section 414(d) may not resolve all foreseeable issues in the construction of the section,<sup>170</sup> it would probably resolve those problems—like the one in *Kreis*—that are most likely to arise.

Since many states have already enacted the scope-of-act provisions of the Uniform Act, including section 414(d),<sup>171</sup> adoption of the revised section 414(d) proposed above would necessarily entail some sacrifice of the goal of uniformity.<sup>172</sup> Nevertheless, the revision of section 414(d) would probably help achieve the declared objective of the draftsmen of the Uniform Act: a simple and explicit description of the transactions to which the Act applies.<sup>173</sup>

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170. For example, a tender offeror in New York could place an advertisement in the *Wall Street Journal*, inviting shareholders to send their stock certificates along with their offers to sell to a named depository. The offeror could state in the advertisement that the transactions will be closed when the desired number of shares have been received. Then, after the specified number of shares have been tendered, the offeror could run a notice to that effect in the *Journal* and could mail checks to the persons who have tendered shares. It is not at all clear whether the mailing of such a check to a seller in Missouri would constitute acceptance "in this state" under § 409.415(d) and would thus bring the buyer within the scope of § 409.415(b)(2). It is even less clear whether the notice in the *Journal* that the transactions have been closed would constitute acceptance "in this state." The proposed redraft of § 409.415(d) would not significantly clarify the situation.

171. See notes 13-14 *supra* and accompanying text.

172. Adoption in Missouri of one of the suggested revisions of the proviso to § 409.415(c), notes 164-67 *supra* and accompanying text, would not entail any such sacrifice of uniformity, because the Missouri legislature has already departed from the Uniform Act by adding the proviso.

173. See note 12 *supra* and accompanying text.