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Corporate Puzzles: Being a True and Complete
Explanation of De Facto Corporations and
Corporations by Estoppel, Their Historical
Development, Attempted Abolition, and Eventual
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Norwood Beveridge

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NORWOOD P. BEVERIDGE*

This Article introduces the reader to the difficulties organizers of corporations face – and explains the historical development of de facto corporations and corporations by estoppel. The author reviews over one hundred and fifty years of jurisprudence that has blurred the differences between de facto corporations and corporations by estoppel and reminds the reader of the attempts by the American Bar Association Committee on Corporate Laws to limit or abolish the concept of de facto corporations. The Article concludes with the proposition that the 1984 Model Business Corporation Act has essentially restored these doctrines to their pre-1950 condition and suggests that ultimately it is the reasonable commercial expectations of the parties that should guide the courts in defective incorporation cases.

* Professor of Law, Oklahoma City University; A.B., LL.B., Harvard University; LL.M., New York University. Professor Beveridge is a former member of the American Bar Association Committee on Corporate Law Departments and chief legal officer of a New York Stock Exchange listed manufacturing corporation. This Article was made possible by a research grant from the Kerr Foundation at Oklahoma City University. The author gratefully acknowledges the research assistance of Victoria L. Allen, Esq. and the helpful criticism of his colleagues on the faculty of Oklahoma City University School of Law.

I. INTRODUCTION: THE PROBLEM DEFINED

In the usual case, there will be a period of time between any decision to incorporate a business and the actual incorporation, which is accomplished under modern statutes by filing articles of incorporation.¹ In some cases, the articles of incorporation will in fact never be filed, for one reason or another. In either case, during this period prior to any corporate formation, there will be some activity directed toward organization of the business, such as consultations and negotiations among the prospective owners and investors, their counsel, accountants and financial advisers. Agreements of various kinds may be entered into with suppliers, customers, employees and the like. These so-called promoters' contracts have frequently given rise to litigation, both when the corporation is eventually formed and when it is not. The litigation is usually directed toward the liability of the corporation for pre-incorporation contracts² as well as the personal liability of the promoters for those contracts, whether or not the corporation is formed or itself becomes liable.³

Another difficulty which often arises during the incorporation process results from the various requirements for effective incorporation, which may give rise to problems in execution. For example, there may be defects in the articles of incorporation which will result in their rejection by the

1. See REVISED MODEL BUS. CORP. ACT § 2.03(a) (1984); CAL. CORP. CODE § 200(c) (West 1990); DEL. CODE ANN. tit. 8, § 106 (West 1991); N.Y. BUS. CORP. LAW § 403 (McKinney Supp. 1997-1998). The document is called a certificate of incorporation in some states, such as Delaware.

2. See 1A WILLIAM MEADE FLETCHER ET. AL., CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 205-214 (perm. ed. rev. vol. 1993) (discussing rules for establishing corporate liability on promoters' contracts); Annotation, *Liability of Corporation on Contracts of Promoters*, 17 A.L.R. 452 (1922) (corporation is not automatically liable, but may become liable).

3. See FLETCHER, *supra* n. 2, at §§ 215-217 (discussing liability of promoters on pre-incorporation contracts); M. L. Cross, Annotation, *Personal Liability of Promoter to Third Person on or With Respect to Contract Made for Corporation or in Aid of Promotion*, 41 A.L.R. 2d 477 (1955) (analyzing cases involving different fact patterns). The term "promoter" is used to refer to all persons acting or purporting to act on behalf of a corporation to be formed, whether or not the corporation is represented to a third person to be actually in existence.

Secretary of State, as where the corporation has selected a name which is unavailable⁴ or where the document is not properly executed⁵ or omits a required element, for instance the name and address of the agent for service of process.⁶ Even if the articles are properly drawn and executed, there may be a delay in filing due to neglect, or the articles may be filed in one required location but not another.⁷ All of these defects, and many more, have resulted in hundreds of reported cases, frequently but by no means exclusively on the subject of the personal liability of individuals who appear as incorporators or putative stockholders, directors or officers of defectively formed corporations. In turn, these problems in corporate formation have given rise to the related, but historically distinct, doctrines of "de facto corporation" and "corporation by estoppel," both of which are direct-

4. The name must be distinguishable from names used or reserved for use by other corporations. See REV. MODEL BUS. CORP. ACT § 4.01 (1984); CAL. CORP. CODE § 201(b) (West Supp. 1998); DEL. CODE ANN. tit. 8, § 102(a)(1) (Supp. 1996); N.Y. BUS. CORP. LAW § 301(a)(2) (McKinney 1986). This problem is usually avoided by first checking the availability of the name with the Secretary of State and then reserving the name for use, which can be done for a fee, see REV. MODEL BUS. CORP. ACT § 4.02 (1984); CAL. CORP. CODE § 201(c) (West Supp. 1998); DEL. CODE ANN. tit. 8, § 391(a)(23) (1991); N.Y. BUS. CORP. LAW § 303 (McKinney 1986).

5. The articles of incorporation must contain the names and addresses of, and be signed by, the incorporators. There are also statutory requirements as to the identity and number of incorporators. See REV. MODEL BUS. CORP. ACT §§ 1.20(f), 1.40, 2.01, 2.02(a)(4) (1984); CAL. CORP. CODE § 200(a) (West 1990); DEL. CODE ANN. tit. 8, §§ 101, 102(a)(5), 103(a)(1) (1991); N.Y. BUS. CORP. L. §§ 401, 402(a) (McKinney 1986).

6. Each corporation is required to have an agent for service of process, who must be identified in the articles of incorporation. See REV. MODEL BUS. CORP. ACT §§ 2.02(a)(3), 5.01 (1984); CAL. CORP. CODE § 202(c) (West 1990); DEL. CODE ANN. tit. 8, §§ 102(a)(2), 132 (1991); N.Y. BUS. CORP. LAW § 402(a)(7), (8) (McKinney 1986).

7. Almost all states require only one filing, usually with the secretary of state. See REV. MODEL CORP. ACT § 2.03, Cmt. (1984); CAL. CORP. CODE §§ 169, 200(a) (West 1990); DEL. CODE ANN. tit. 8, §§ 101(a), 103(c) (1991) (amended ch. 349, L. '96 eff. July 1, 1996); N.Y. BUS. CORP. LAW §§ 104, 402-403 (McKinney 1986 & Supp. 1997-1998). A few states still require a second filing, such as with the county clerk of the county of the corporate registered office. See 805 ILL. COMP. STAT. §§ 5/1.10(e)(3)(iv), 5/2.10, 5/2.15 (West 1993 & Supp. 1997); KAN. STAT. ANN. § 17-6003(c) (1995); LA. REV. STAT. ANN. § 12.25 (West 1994); W. VA. CODE § 31-1-28 (1996).

ed toward preventing third persons from attacking the validity of corporate organization.

A recent study of defective incorporation cases reports that most corporate law scholars regard these doctrines as "mystifying" and "a puzzle."⁸ This is nothing new, since half a century ago, Professor Henry Winthrop Ballantine of the University of California at Berkeley referred to the judicial decisions in this area as "a discouraging and baffling maze."⁹ In 1952, Professor Alexander Hamilton Frey of the University of Pennsylvania concluded in a much-cited article that the de facto doctrine is "just so much jargon and ought to be abandoned."¹⁰ In addition to this continuing academic criticism, the American Bar Association Committee on Corporate Laws attempted in 1950,¹¹ again in 1969,¹² and in

8. Fred S. McChesney, *Doctrinal Analysis and Statistical Modeling In Law: The Case of Defective Incorporation*, 71 WASH. U. L.Q. 493, 532 (1993).

9. HENRY WINTHROP BALLANTINE, *BALLANTINE ON CORPORATIONS* 71 (rev. ed. 1946).

10. Alexander Hamilton Frey, *Legal Analysis and the "De Facto" Doctrine*, 100 U. PA. L. REV. 1153, 1178 (1952). The debate goes back much further. See E. Merrick Dodd, Jr., *Partnership Liability Of Stockholders In Defective Corporations*, 40 HARV. L. REV. 521 (1927) (such stockholders should generally be liable to third persons); Calvert Magruder, *A Note On Partnership Liability Of Stockholders In Defective Corporations*, 40 HARV. L. REV. 733 (1927) (defective corporations are not necessarily partnerships); Annotation, *Effect Upon the Corporate Existence of Failure to File Certificate in Organizing a Corporation*, 22 A.L.R. 376 (1923) (decisions are in conflict), 37 A.L.R. 1319 (1925); Edward H. Warren, *Collateral Attack On Incorporation*, 20 HARV. L. REV. 456 (1907) (public policy is the explanation for the de facto corporation doctrine); WILLIAM W. COOK, *A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK*, §§ 231-234 (4th ed. 1898) (stockholders liability as partners due to deficient incorporation); Note, *Partnership Liability of Stockholders in Case of Defective or Illegal Incorporation*, 17 L.R.A. 549 (1905); Note, *Corporators, Liability As Partners*, 11 L.R.A. 515 (1905).

11. See MODEL BUS. CORP. ACT § 50 (rev. 1950):

Upon the issuance of the certificate of incorporation, the corporate existence shall begin, and such certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act, except as against this State in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation.

The Comment to § 50 provides:

Under this Section, "de jure" incorporation is complete upon the issuance of the certificate of incorporation, except for certain proceedings

1984¹³ to limit or abolish the concept of de facto corporation through provisions in the Model Business Corporation Act and Commentary.

At the outset, it should be said that although there exist areas of overlap and confusion, these three doctrines of promoters' contracts, de facto corporations, and corporations by estoppel have historically been treated as having a quite separate existence.¹⁴ The failure to acknowledge this fact

brought by the State. Because a colorable and apparent compliance with the law is generally a requisite of "de facto" corporate existence, and because it is unlikely that any steps short of securing a certificate of incorporation would be held to constitute apparent compliance, there is little, if any, difference between "de facto" and "de jure" corporation under a section such as the above.

Section 50 is substantially the same as § 49 of the 1946 draft of the MODEL BUS. CORP. ACT and § 48 of the 1943 PRELIMINARY DRAFT OF THE FED. CORP. ACT, both drafted by the ABA Corporation Law Committee.

Section 139 of the 1950 MODEL BUS. CORP. ACT also addressed this subject, and it reads as follows: "All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof."

The comment to § 139 states: "The issuance of a certificate of incorporation, nothing more, nothing less, is the authority creating the existence of a corporation (§ 50)."

Section 139 is the same as § 134 of the 1946 MODEL BUS. CORP. ACT.

12. In the 1969 revision of the MODEL BUS. CORP. ACT, the text of these two sections was unchanged, although § 50 was renumbered § 56 and § 139 became § 146. However, the comments were extensively rewritten. See *infra* note 204 and accompanying text.

13. MODEL BUS. CORP. ACT §§ 2.03, 2.04 (1984). Section 2.04 reads as follows: "All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this Act, are jointly and severally liable for all liabilities created while so acting."

The official comment to § 2.04 says, somewhat cryptically, that the revised Model Act has adopted "a slightly more flexible or relaxed standard." It further states: "A number of situations have arisen, however, in which the protection of limited liability arguably should be recognized even though the simple incorporation process established by modern statutes has not been completed." MODEL BUS. CORP. ACT § 2.04 (1984).

14. See authorities on promoters' contracts cited in *supra* notes 2-3; 8 FLETCHER *supra* note 2, §§ 3759-3888 (de facto corporations), §§ 3889-3991 (corporations by estoppel) (perm. ed. rev. vol. 1992); David Barber, *Incorporation Risks: Defective Incorporation and Piercing the Corporate Veil in California*, 12 PAC. L.J. 829 (1981) (discussing de facto corporations and corporations by estoppel in California); Robert Rieke, Comment, *Defective Incorporation: De Facto Corporations, Corporations by Estoppel, and Section 21-2054*, 58 NEB. L. REV. 763 (1979); Fritz B. Ziegler, Comment, *De Facto Incorporation and Estop-*

has contributed substantially to the existing controversy. Thus, in his influential, but flawed article in 1952, Professor Frey threw together indiscriminately over two hundred cases involving one or more of these doctrines without differentiation, creating a huge and indigestible mass, which he then pronounced incoherent.¹⁵ A 1993 article by Professor McChesney concludes that the doctrines of de facto corporation and corporation by estoppel are really the same,¹⁶ a

pel to Deny Corporate Existence in Louisiana, 37 LA. L. REV. 1121 (1977); Lowry F. Kline, Comment, *Estoppel to Deny Corporate Existence*, 31 TENN. L. REV. 336 (1964); HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS, §§ 20-34 (de facto corporations), 31-32 (estoppel to deny corporate existence) (rev. ed. 1946); 7 R.C.L. Corporations §§ 42-46 (de facto corporations), 44 (estoppel to deny corporate existence) (1929); ARTHUR W. MACHEN, JR., I A TREATISE ON THE MODERN LAW OF CORPORATIONS §§ 278-282 (estoppel to deny incorporation), 284-292 (Incorporation De Facto) (1908); SEYMOUR D. THOMPSON, I COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS §§ 225-259 (de facto corporations), 250 (estoppel to question incorporation) (2d ed. 1908); JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE §§ 80, 94, 635 (estoppel to deny corporate existence) (10th ed. 1875).

15. See Frey, *supra* note 10. Many of Professor Frey's cases are mischaracterized. See Fred S. McChesney, *supra* note 8, at 503 n.32 (Frey's factual characterizations are frequently incorrect). One case is counted twice, see Frey, *supra* note 10, at 1158-59 (*Spencer Field & Co. v. Cooks*, 16 La. Ann. 153 (1861) is counted both in notes 20 and 21). Two others had at the time of his article been overruled either expressly, see *Patterson v. Arnold*, 45 Pa. 410 (1863), overruled, *Cochran v. Arnold*, 58 Pa. 399 (1868) (cited by Frey, *supra* note 10, at 1170 n.70), or overruled by implication, see *Inter-Ocean Newspaper Co. v. Robertson*, 129 N.E. 523 (Ill. 1920) (cited by Frey, *supra* note 10, at 1167-68 nn.62 & 64) which surely, as he himself notes, overruled *Hall v. Robertson*, 213 Ill. App. 147 (1919) (cited by Frey, *supra* note 10, at 1167-68 nn.62-64). Some did not even deal with corporations at all, but with business trusts, see *McClaren v. Dawes Elec. Sign & Mfg. Co.*, 156 N.E. 584 (Ind. App. 1927) (cited by Frey, *supra* note 10, at 1163 n.40), Pennsylvania partnership associations, see *Smith v. Warden*, 86 Mo. 382 (1885) (cited by Frey, *supra* note 10, at 1158 n.20), or other form of business organizations. Frey's claim, at *supra* note 10, at 1156-57, to have catalogued all reported cases on the question of personal liability of shareholders in defectively organized corporations cannot be credited. See Charles E. Carpenter, *Are the Members of a Defectively Organized Corporation Liable As Partners?*, 8 MINN. L. REV. 409 (1924); Joseph L. Lewinsohn, *Liability To Third Persons Of Associates In Defectively Incorporated Associations*, 13 MICH. L. REV. 271 (1915); Francis M. Burdick, *Are Defectively Incorporated Associations Partnerships?*, 6 COLUM. L. REV. 1 (1906) and authorities cited *supra* n. 10.

16. See McChesney, *supra* note 8, at 530-31.

proposition that cannot be reconciled with a hundred and fifty years of American jurisprudence.

II. PROMOTERS' CONTRACTS

In the case of promoters' contracts, typically there has been no *bona fide* effort at all to incorporate at the time of contracting. While discussions may have been had in contemplation of incorporation, certainly no articles of incorporation have been filed, and ordinarily no articles have been prepared or executed. In the mind of the promoter or person operating the business, there is usually no question that a corporation does not exist, although he may represent to a third person that it does. This failure to attempt corporate organization, coupled with a lack of a good faith belief in corporate existence prevents the creation of a *de facto* corporation, and a corporation by estoppel in favor of the promoter or manager does not result even from a third person's belief that a corporation exists, since the promoter or manager knows that it does not.

Professor Frey includes in his article on *de facto* corporations seventeen cases in which personal liability for "corporate" obligations is sought against members of associations which he states were held out as corporations even though no attempt at incorporation had been made.¹⁷ He reports that the plaintiffs were successful in fifteen cases.¹⁸

17. See Frey, *supra* note 10, at 1163-65 & n.40.

18. See *Forbes v. Whittemore*, 35 S.W. 223 (Ark. 1896); *Doyle-Kidd Dry Goods Co. v. A.W. Kennedy & Co.*, 243 S.W. 66 (Ark. 1922); *Meinhard, Schaul & Co. v. Bedingfield Mercantile Co.*, 61 S.E. 34 (Ga. Ct. App. 1908); *McRee v. Quitman Oil Co.*, 84 S.E. 487 (Ga. Ct. App. 1915); *Hagan v. Asa G. Candler, Inc.*, 5 S.E.2d 739 (Ga. 1939); *Liebold v. Green*, 69 Ill. App. 527 (1897); *McClaren v. Dawes Elec. Sign & Mfg. Co.*, 156 N.E. 584 (Ind. App. 1927); *American Mut. Liab. Ins. Co. v. Condon*, 183 N.E. 106 (Mass. 1932); *H.J. Hughes Co. v. Farmers' Union Produce Co.*, 194 N.W. 872 (Neb. 1923); *Booth v. Wonderly*, 36 N.J.L. 250 (1873); *Imperial Shale Brick Co. v. Jewett*, 62 N.E. 167 (N.Y. 1901); *Puro Filter Corp. v. Trembley*, 41 N.Y.S.2d 472 (N.Y. App. Div. 1943); *Perrine v. Levin*, 123 N.Y.S. 1007 (N.Y. Sup. Ct. 1910); *Mapel v. Long-Bell Lumber Co.*, 229 P. 793 (Okla. 1924); *Hess v. Werts*, 4 Serg. & Rawle 356 (Pa. 1818). In at least two of the successful cases, the plaintiff actually thought he was dealing with a partnership. See *Meinhard, Schaul & Co. v. Bedingfield Mercantile Co.*, 61 S.E. 34 (Ga. Ct. App. 1908); *Mapel v. Long-Bell Lumber Co.*, 229 P. 793 (Okla. 1924). However, the fact in the other

However, the defendants in the two unsuccessful cases were found not liable for reasons of personal defenses under general principles of agency and partnership law, not because they enjoyed the protection of any corporate shield.¹⁹ In a later study which updates the Frey analysis, personal liability was imposed in eight cases in which individuals held themselves out as acting on behalf of non-existent corporations.²⁰ In summary, in all of the cases where no attempt at

successful cases that the plaintiff either did not know the legal status of the contracting entity. See, e.g., *H.J. Hughes Co. v. Farmers' Union Produce Co.*, 194 N.W. 872 (Neb. 1923), or even thought it was a corporation, see *Hagan v. Asa G. Candler, Inc.*, 5 S.E.2d 739 (Ga. 1939), did not prevent the imposition of personal liability.

19. In one of the two unsuccessful cases, the defendant was unaware that the business was not incorporated, and he joined the company as president and a shareholder, as he imagined, after the plaintiff's contract was made with the "corporation." See *Fuller v. Rowe*, 57 N.Y. 23 (1874). The court held that he could not be liable since he was not an incorporator or a member of the firm when the contract sued upon was made. See *id.* at 26. As a matter of partnership law, partners are not personally liable for obligations of the firm made prior to their becoming partners. See UNIF. PARTNERSHIP ACT §§ 17, 41(7) (1914); UNIF. PARTNERSHIP ACT § 306(b) (1994). In the other unsuccessful case cited by Frey, see *Merchants' Nat'l Bank v. Pendleton*, 9 N.Y.S. 46 (N.Y. Sup. Ct. 1890), the exonerated defendants also were unaware that the company had not been incorporated, and their only connection with the company was in holding, as they believed, shares of its stock, fully-paid, on which they received "dividends," without taking part in its management in any way. Again, as a matter of partnership law, sharing of profits alone without participating or having the right to participate in management does not necessarily create partnership liability. See *Martin v. Peyton*, 158 N. E. 77 (N.Y. 1927); UNIF. PARTNERSHIP ACT § 7 (1914); UNIF. PARTNERSHIP ACT § 202 (1994). These cases are entirely consistent with the cases in which the plaintiffs prevailed. They support the conclusion that the doctrines of de facto corporation and corporation by estoppel will not operate as a shield against personal liability where no attempt has been made to incorporate the business at all. If the plaintiffs had sued active associates, they would have been successful.

20. See Wayne N. Bradley, Comment, *An Empirical Study Of Defective Incorporation*, 39 EMORY L.J. 523, 543 & n.126 (1990) (citing *Tan-Line Studios, Inc. v. Bradley*, 1 U.S.P.Q.2d 2032 (E.D. Pa.), *aff'd*, 808 F.2d 1518 (3d Cir. 1986); *Booker Custom Packing Co., v. Sallomi*, 716 P.2d 1061 (Ariz. Ct. App. 1986); *Video Power, Inc. v. First Capital Income Properties, Inc.*, 373 S.E.2d 855 (Ga. Ct. App. 1988); *Guernsey Pet. Corp. v. Data Gen. Corp.*, 359 S.E.2d 920 (Ga. Ct. App. 1987); *Walker v. Self-Service Storage & Miniwarehouses, Inc.*, 519 So. 2d 771 (La. 1988); *Stair v. Glazer*, No. 87-139, 1987 WL 6552 (Tenn. Ct. App. Feb. 13, 1987); *A to Z Rental Center v. Burris*, 714 S.W.2d 433 (Tex. Ct. App. 1986)).

incorporation had been made, the active associates were held personally liable to creditors.

It is perhaps not surprising that individuals who purport to be acting for a corporation which they know does not exist will be personally liable on obligations undertaken by them,²¹ even where the third party was content to deal on the credit of the supposed corporation.²² As a matter of agency law, an agent becomes liable to a third party creditor either in tort or in contract where he purports to represent a nonexistent principal.²³ In some jurisdictions following the Model Act, this result has been reached by applying statutory provisions creating personal liability for unauthorized assumption of corporate powers.²⁴

21. See *W.O.S. Construction Co. v. Hanyard*, 684 S.W.2d 675 (Tex. 1985) (holding promoter liable where contract signed before corporate formation).

22. See *Trenton Dressed Poultry, Inc. v. Jamson, Inc.*, 282 A.2d 405 (N.J. Super. Ct. App. Div. 1971) (imposing personal liability in the absence of any bona fide attempt to organize a corporation under the statute). The promoter will certainly be personally liable where he does not disclose that he is representing a corporation in formation. See *Weiss v. Anderson*, 341 N.W.2d 367 (N.D. 1983).

23. See 3 C.J.S. *Agency* § 378 (1973); RESTATEMENT (SECOND) OF AGENCY § 329 (agent liable for breach of warranty of authority), § 330 (agent liable for tortious misrepresentation of authority) (1958); FLOYD R. MECHEM, *A TREATISE ON THE LAW OF AGENCY* § 1383 (2d ed. 1914).

24. See MODEL BUS. CORP. ACT § 139 (rev. 1950), *renumbered* § 146 (2d ed. 1971) ("All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof."); *Blute Profit Sharing Plan v. Terrazas*, 800 P.2d 977 (Ariz. Ct. App. 1990) and *Booker Custom Packing Co., v. Sallomi*, 716 P.2d 1061 (Ariz. Ct. App. 1986) (imposing personal liability under former Arizona statute following MODEL BUS. CORP. ACT § 146); *Royal Dev. & Mgmt. Corp. v. Guardian 50/50 Fund V, Ltd.*, 583 So. 2d 403 (Fla. Dist. Ct. App. 1991) (imposing personal liability under former Florida statute following MODEL BUS. CORP. ACT § 146); *cf. Harry Rich Corp. v. Feinberg*, 518 So. 2d 377 (Fla. Dist. Ct. App. 1987) (holding no personal liability under former Florida statute following § 146 of officer not aware of lack of incorporation); *Video Power, Inc. v. First Capital Income Properties, Inc.*, 373 S.E.2d 855 (Ga. Ct. App. 1988) and *Don Swann Sales Corp. v. Echols*, 287 S.E.2d 577 (Ga. Ct. App. 1981) (imposing personal liability under former Georgia statute following MODEL BUS. CORP. ACT § 146). The current version of the MODEL BUS. CORP. ACT has changed this provision. See MODEL BUS. CORP. ACT § 2.04 ("All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this Act, are jointly and severally liable for all liabilities created while so acting."); *Harris v. Looney*, 862 S.W.2d 282 (Ark. Ct. App. 1993) (holding incorporators who didn't act for corporation in the transaction not liable under statute

In two of Professor Frey's cases, the plaintiffs were actually led to believe that they were dealing with a partnership, not a corporation.²⁵ In this circumstance, different policy considerations come into play, since an agent who does not properly identify his principal or misrepresents his authority may be personally liable.²⁶ Furthermore, a partnership by estoppel may be created by misrepresentation relied on by a third party, where no actual partnership exists.²⁷ Finally, an existing partnership which dissolves and no longer exists, as where it transfers its business to a corporation, is still a partnership with respect to third party creditors without actual or imputed knowledge of the dissolution.²⁸ Therefore, in these cases, personal liability does not really turn on the existence *vel non* of a corporation at all.

Quite frequently in the promoter cases, the third party knows that the corporation has not been formed, and this fact may change the result although it does not necessarily do so in the absence of some agreement on the part of the

following MODEL BUS. CORP. ACT § 2.04); *Weir v. Kirby Constr. Co.*, 446 S.E.2d 186 (Ga. Ct. App. 1994) (holding officer who didn't know certificate had not been filed is not personally liable under Georgia statute following MODEL BUS. CORP. ACT § 2.04). One jurisdiction following Model Act § 146 has held the provision not applicable to promoters. *See Sherwood & Roberts-Oregon, Inc. v. Alexander*, 525 P.2d 135 (Or. 1974) (statute applies to de facto corporations, not promoters; promoter not liable where both parties knew corporation was non-existent and third party looked only to corporation to be formed); *cf. Sivers v. R & F Capital Corp.*, 858 P.2d 895 (Or. Ct. App. 1993), *rev. denied*, 870 P.2d 220 (Or. 1994) (Model Act § 2.04 requires actual, not constructive knowledge). *See also* *Equipto Div. Aurora Equip. Co. v. Yarmouth*, 950 P.2d 451 (Wash. 1998) (en banc) (sec. 2.04 applies to pre-incorporation and post-dissolution situations). Several jurisdictions have changed § 2.04 of the Model Act in their adoption to clarify that it does not apply where both parties know of corporate non-existence. *See* authorities cited *infra* note 211.

25. *See Meinhard, Schaul & Co. v. Bedingfield Mercantile Co.* 61 S.E. 34 (Ga. Ct. App. 1908); *Mapel v. Long-Bell Lumber Co.*, 229 P. 793 (Okla. 1924).

26. *See* RESTATEMENT (SECOND) OF AGENCY §§ 329-330 (1958) (agent liable if he misrepresents his principal or his authority); FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY §§ 1362-1363 (2d ed. 1914).

27. *See* UNIF. PARTNERSHIP ACT § 16 (1914); UNIF. PARTNERSHIP ACT § 308 (1994); ALAN R. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 36 (1968).

28. *See* UNIF. PARTNERSHIP ACT § 35 (1914); UNIF. PARTNERSHIP ACT §§ 804-805 (1994).

third party to look only to the corporation in formation. The Restatement (Second) of Agency states that unless otherwise agreed, a person who purports to be acting as agent for a principal known to both parties to be nonexistent becomes a party to the contract.²⁹ Therefore, for example, where a promoter for a corporation to be formed contracts for tax and accounting services for the future corporation, he is personally liable for payment unless he carries the burden of proving an agreement to look only to the future corporation.³⁰

In general, when a party enters into a pre-incorporation agreement which contains undertakings on behalf of a corporation to be formed, that party is individually liable for a breach of those undertakings.³¹ If the proposed incorporation is abandoned, the promoter's personal liability continues.³² Also, in the absence of an agreement to release the promoter, his liability continues even where the corporation is later formed and also becomes liable on the contract.³³ The later corporation is not automatically bound by the contract,³⁴ but it will become liable where it adopts the contract either expressly or by implication.³⁵ Therefore, a real estate purchase agreement which provided that if the buyers

29. See RESTATEMENT (SECOND) OF AGENCY § 326 (1958). Comment b states that in the case of corporate promoters, there are four possibilities: (1) the normal understanding is that a revocable offer is being made which will result in a contract if the corporation is formed and accepts the offer; or (2) an irrevocable offer for a limited time is being made, supported by consideration; or (3) a present contract is being made with the promoter, whose liability will be terminated if the corporation is formed and adopts the contract; or (4) a present contract is being made with the promoter, whose liability will continue even if a corporation is formed and adopts the contract. See *id.* at cmt. b.

30. See *Coopers & Lybrand v. Fox*, 758 P.2d 683 (Colo. Ct. App. 1988).

31. See *Illinois Controls, Inc. v. Langham*, 639 N.E.2d 771 (Ohio 1994); *Randolph Foods, Inc. v. McLaughlin*, 115 N.W.2d 868 (Iowa 1962).

32. See *McDaniel v. Service Feed & Supply, Inc.*, 316 A.2d 800 (Md. 1974).

33. See *Illinois Controls, Inc. v. Langham*, 639 N.E.2d 771 (Ohio 1994); *Randolph Foods, Inc. v. McLaughlin*, 115 N.W.2d 868 (Iowa 1962); *Wolfe v. Warfield*, 296 A.2d 158 (Md. 1972); *Jacobson v. Stern*, 605 P.2d 198 (Nev. 1980) (promoter continued liable for architectural services); *American Seamount Corp. v. Science & Eng'g Assoc.*, 812 P.2d 505 (Wash. Ct. App.) (promoters liable for prevailing party attorney's fees), *rev. denied*, 820 P.2d 510 (Wash. 1991).

34. See *Skandinavia, Inc. v. Cormier*, 514 A.2d 1250 (N.H. 1986) (holding corporation not liable where it took no action to adopt the contract).

35. See *Stolmeier v. Beck*, 441 N.W.2d 888 (Neb. 1989) (holding corporation liable where it accepts benefits under the contract).

completed the formation of a corporation by closing, the agreement would be construed to have been made with that corporation was nonetheless held not to release the individual promoters from liability simply upon formation of the corporation.³⁶

In a case where a construction and mortgage loan application for a proposed real estate development project disclosed that title was to be in the name of a "corporation to be formed," the corporation was in fact formed and adopted the application but later refused to close the loan. The court held that the promoter was not personally liable for the unpaid commission under the application since the lender intended to look only to the corporation for payment.³⁷ Also, where a corporation was intended to be the borrower to avoid the state usury statute and both parties knew the corporation was not in existence, the promoter was held not liable on a deposit note signed in the name of the corporation since the parties intended to obligate only the corporation to be formed.³⁸ However, this is a question of intention of the parties, and the mere signing of a contract by a promoter as president of a corporation "in formation" does not by itself constitute an agreement to look only to the corporation.³⁹

36. See *RKO-Stanley Warner Theatres, Inc. v. Graziano*, 355 A.2d 830 (Pa. 1976).

37. See *H.F. Philipsborn & Co., v. Suson*, 322 N.E.2d 45 (Ill. 1975) (mortgage banker looked only to corporation for payment, even if banker was not aware that corporation had not been formed at time of application).

38. See *Sherwood & Roberts-Oregon, Inc. v. Alexander*, 525 P.2d 135 (Or. 1974); *Quaker Hill, Inc. v. Parr*, 364 P.2d 1056 (Colo. 1961) (no intention to hold promoters personally liable where contract signed in name of corporation and both parties knew corporation not in existence); *Company Stores Dev. Corp. v. Pottery Warehouse, Inc.*, 733 S.W.2d 886 (Tenn. Ct. App. 1987) (holding promoter not liable where lessor agreed to look only to named lessee as "a corporation to be formed"); *Tin Cup Pass Ltd. Partnership v. Daniels*, 553 N.E.2d 82 (Ill. App. Ct. 1990) (holding promoters not personally liable where lease signed in name of corporation both parties knew had not been formed).

39. See *Goodman v. Darden, Doman & Stafford Assoc.*, 670 P.2d 648 (Wash. 1983); *Johnson v. Sams*, 206 N.W.2d 925 (Minn. 1973) (promoters personally liable on note signed in name of corporation all parties knew to be nonexistent).

III. DE FACTO CORPORATIONS AND CORPORATIONS BY ESTOPPEL

In the case of promoters' contracts, we have seen that no corporation exists in law, in fact or by estoppel simply by the assertion of its existence, without an attempt to effect incorporation according to law. However, under the doctrine of de facto corporations, a corporation which is not correctly incorporated de jure (according to law), may under certain circumstances exist in fact (de facto), and its existence may not be challenged by any third party, but only by the state. Under the doctrine of corporation by estoppel, certain parties who dealt with a purported corporation in its corporate capacity may be estopped to deny that it is validly incorporated.

In a leading mid-nineteenth century New York case, a religious corporation brought suit on a subscription by the defendant toward the rebuilding of its church.⁴⁰ The defendant objected that the church had not proved its due incorporation some thirty years earlier since its recorded certificate did not show that its organization meeting was held on proper notice, nor that the persons present were members of the church, nor that other formalities were observed.⁴¹ The court held that the defendant, having contracted with the corporation as such, would not be allowed to challenge the de facto incorporation of the plaintiff by alleging that it had not organized strictly according to the general incorporation statute.⁴² While it was incumbent upon the plaintiff to prove its incorporation, that issue having been raised in the pleadings, it might do so by proving (1) the existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user of the rights claimed to be conferred by such charter or law.⁴³ It could not, however, prove its existence as a corporation de facto by showing merely that it had acted as a corporation

40. See *Methodist Episcopal Union Church v. Pickett*, 19 N.Y. 482 (1859).

41. See *id.* at 484.

42. See *id.* at 485.

43. See *id.*

for any period of time, however long.⁴⁴ The United States Supreme Court addressed the issue in a turn-of-the-century case involving a claim for unpaid interest due under bonds issued by a California municipal corporation organized under a state irrigation statute.⁴⁵ The corporation and certain intervening landowners in the irrigation district, whose property was subject to assessment and tax to pay the principal and interest on the bonds, objected that the bonds were invalid since the corporation had not been legally formed under the statute.⁴⁶ The objection was based upon the fact that the names of the petitioners were not printed under the notice of petition to the county board of supervisors, but only under the petition itself, which was printed together with the notice as required for two weeks in a county newspaper.⁴⁷ The Court held that even though the district failed to be organized as a de jure corporation, it met the requirements for a de facto corporation, which the Court stated as follows: (1) a charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise.⁴⁸ Being a de facto corporation, the district was estopped to deny the validity of its own organization against the plaintiff, a bona fide holder for value of the bonds.⁴⁹ Furthermore, the landowners were similarly estopped, having not challenged the issuance of the bonds, the proceeds of which had already been expended.⁵⁰

All jurisdictions have general incorporation statutes, and user of the corporate franchise can be fairly easily shown. Therefore, under the Supreme Court's formulation, the critical question becomes, what kind of an attempt to organize in good faith will be sufficient to create a de facto

44. *See id.*

45. *See* *Tulare Irrigation Dist. v. Shepard*, 185 U.S. 1 (1902).

46. *See id.* at 2-3.

47. *See id.* at 6-7.

48. *See id.* at 13. To these three requirements is sometimes added a fourth — that the parties seeking to incorporate acted in good faith. *See* Warren, *supra* note 10, at 464-65.

49. *See Shepard*, 185 U.S. at 26.

50. *See id.* at 25-26.

corporation? In a recent decision of the Kansas Supreme Court, it was held that no de facto corporation existed where the articles of incorporation were properly filed with the Kansas Secretary of State, but a certified duplicate copy of the articles was not filed with the Register of Deeds for the county in which the corporation's registered office was located as required by the statute.⁵¹ The result was that the incorporator and stockholder defendant was personally liable for the corporation's obligation.⁵²

Kansas is one of only four states which require duplicate filing in the county of the corporation's registered office or principal place of business.⁵³ The cases are not uniform on the question of whether making one of two required filings will be sufficient to create a corporation de facto or by estoppel. In Professor Frey's 1952 article, he cited eighteen cases where the articles had been filed with the Secretary of State but not recorded in the local county.⁵⁴ Professor Frey found

51. See *Fee Ins. Agency, Inc. v. Snyder*, 930 P.2d 1054 (Kan. 1997). The court held that its decision was compelled as a matter of statutory interpretation, even though the statute had been amended in 1987 to delete a provision that the articles would not take effect upon filing with the secretary of state unless recorded by the register of deeds within twenty days. *Id.* at 1056; cf. *State ex rel. McCain v. Constr. Enter., Inc.*, 631 P.2d 1240 (Kan. Ct. App. 1981) (reaching same result under statute prior to amendment). The Kansas statute does provide that a copy of the articles of incorporation, certified by both the secretary of state and register of deeds, is prima facie evidence of performance of all conditions precedent to the articles' effectiveness. See KAN. STAT. ANN. § 17-6005 (1995).

52. See *Snyder*, 930 P.2d at 1058-59.

53. Illinois, Kansas, Louisiana, and West Virginia. See statutory citations, *supra* note 7.

54. See Frey, *supra* note 10, at 1167-69 (citing *Gazette Publ'g Co. v. Brady*, 162 S.W.2d 494 (Ark. 1942); *Humphreys v. Mooney*, 5 Colo. 282 (1880); *Inter-Ocean Newspaper Co. v. Robertson*, 129 N.E. 523 (Ill. 1921); *Hall v. Robertson*, 213 Ill. App. 147 (1919); *Brown v. Melick*, 185 Ill. App. 3 (1913); *Hamill v. Watts*, 180 Ill. App. 279 (1913); *Curtis v. Meeker*, 62 Ill. App. 49 (1895), *aff'd*, 48 N.E. 399 (Ill. 1897); *Aetna Life Ins. Co. v. Weatherhogg*, 4 N.E.2d 679 (Ind. Ct. App. 1936); *Newcomb-Endicott Co. v. Fee*, 133 N.W. 540 (Mich. 1911); *Diamond Rubber Co. v. Fohey*, 71 So. 906 (Miss. 1916); *Granby Mining & Smelting Co. v. Richards*, 8 S.W. 246 (Mo. 1888); *Railroad Gazette v. Wherry*, 58 Mo. App. 423 (1894); *Swofford Bros. Dry Goods Co. v. Owen*, 133 P. 193 (Okla. 1913); *Tonge v. Item Publ'g Co.*, 91 A. 229 (Pa. 1914); *New York Nat. Exch. Bank v. Crowell*, 35 A. 613 (Pa. 1896); *Guckert v. Hacke*, 28 A. 249 (Pa. 1893); *Campbell v. Beaman*, 68 Pa. Super. 30 (1917); *Refsnes v. Myers*, 2 P.2d 656 (Wash. 1931).

that the plaintiff recovered against shareholders personally in seven cases and did not recover in eleven cases.⁵⁵

Professor Frey's analysis is flawed, and his characterization of the cases is frequently incorrect. His premise is also subject to question. He has selected only cases involving the personal liability of individuals associated with an allegedly defectively organized corporation without demonstrating that that particular fact pattern presents a coherent subgroup of the de facto and estoppel corporation cases. In fact, the cases which he does select frequently cite as authority cases not involving that fact pattern. Furthermore, it is not statistically meaningful to present multiple cases from the same jurisdiction, particularly a minority jurisdiction,⁵⁶ and then count the total number of cases by result in order to reach some conclusion about the existence of a majority rule. In any event, the issue is not whether the plaintiff recovers, but whether or not a corporation by estoppel or a de facto corporation is found to exist, since the plaintiff might be barred from personal recovery, or not barred, for other reasons.

Thus, Professor Frey counts one Pennsylvania case as a plaintiff victory,⁵⁷ although there the plaintiffs, who were corporate judgment creditors, were barred from recovery from the subscribers to shares, who were held not estopped to deny the existence of the corporation as a defense to their

55. See Frey, *supra* note 10, at 1167-68. The seven successful cases, according to Frey, were *Gazette Publ'g Co. v. Brady*, 162 S.W.2d 494 (Ark. 1942); *Hall v. Robertson*, 213 Ill. App. 147 (1919); *Hamill v. Watts*, 180 Ill. App. 279 (1913); *Tonge v. Item Publ'g Co.*, 91 A. 229 (Pa. 1914); *New York Nat'l Exch. Bank v. Crowell*, 35 A. 613 (Pa. 1896); *Guckert v. Hacke*, 28 A. 249 (Pa. 1893); *Campbell v. Beaman*, 68 Pa. Super. 30 (1917).

56. One might expect in a minority jurisdiction such as Arkansas that there would be multiple cases seeking to modify, distinguish, or overrule its apparently inequitable rule. See *Burks v. Cook*, 284 S.W.2d 855, 856 (Ark. 1955) (distinguishing but refusing to overrule Arkansas doctrine); *Whitaker v. Mitchell Mfg. Co.*, 244 S.W.2d 965, 967 (Ark. 1952) (refusing to overrule Arkansas doctrine); *Wesco Supply Co. v. Smith*, 203 S.W. 6, 8 (Ark. 1918) (criticizing and distinguishing but not overruling Arkansas doctrine); *Bank of Midland v. Harris*, 170 S.W. 67, 72 (Ark. 1914) (Arkansas rule is against the weight of modern authority and should not be extended).

57. See *Tonge v. Item Publ'g Co.*, 91 A. 229 (Pa. 1914); see Frey, *supra* note 10, at 1168 n.65.

liability.⁵⁸ The plaintiffs were further not allowed to amend their pleadings to assert liability of the defendants as partners due to the expiration of the statute of limitations on that claim.⁵⁹ This was so despite the Pennsylvania rule that (1) no de facto corporation results where local filing is omitted, although (2) one dealing with the corporation as such is estopped to deny its due incorporation.⁶⁰ Finally, the court suggested that plaintiffs might recover against the estate of the individual actually operating the business, but subsequent efforts to do so resulted in a claim against an estate with no assets.⁶¹ The Pennsylvania rule allowing personal recovery in the absence of corporate dealings explains the plaintiff's recovery in three cases.⁶² A fourth case from the minority jurisdiction of Arkansas also allows personal recovery where no local filing is made, even though the plaintiff there dealt with the corporation as a corporation.⁶³ A fifth decision from Illinois favoring the plaintiff,⁶⁴ as Professor Frey himself notes,⁶⁵ was overruled by implication by the Illinois Supreme Court the next year,⁶⁶ and a sixth earlier

58. See *Tonge*, 91 A. at 230.

59. See *id.* at 232.

60. See *Guckert*, 28 A. at 250 (citing *Spahr v. Bank*, 94 Pa. 429 (1880)) (estoppel to deny due incorporation). See also *Bala Corp. v. McGlinn*, 144 A. 823 (Pa. 1929) (estoppel to challenge corporate existence); *Pinkerton v. Pennsylvania Traction Co.*, 44 A. 284 (Pa. 1899) (estoppel to challenge corporate existence where tort action founded on corporate contract). Since it used to be quite common to use only the style "Company" in a corporate name, even persons contracting with a purported corporation might be unaware of its corporate nature. See *New York Nat'l Exch. Bank v. Crowell*, 35 A. at 614 (the name "Crowell & Class Cold-Storage Company" does not give notice of corporate character).

61. See *In re Fitzgerald's Estate*, 97 A. 935 (Pa. 1916) (allowing claims against estate); *In re Fitzgerald's Estate*, 109 A. 635 (Pa. 1920) (refusing to compel legatees and distributees to restore distributed assets to estate, which was otherwise without assets).

62. See *New York Nat'l Exch. Bank v. Crowell*, 35 A. 613 (Pa. 1896); *Guckert v. Hacke*, 28 A. 249 (Pa. 1893); *Campbell v. Beaman*, 68 Pa. Super. 30 (1917), cited in Frey, *supra* note 10, at 1167-68 nn.62 & 65.

63. See *Gazette Publ'g Co. v. Brady*, 162 S.W.2d 494 (Ark. 1942) (relying on *Garnett v. Richardson*, 35 Ark. 144 (1879), although *Garnett* was described as "against the weight of modern authority" in *Bank of Midland v. Harris*, 170 S.W. 67, 72 (Ark. 1914)).

64. See *Hall v. Robertson*, 213 Ill. App. 147 (1919).

65. See Frey, *supra* note 10, at 1168 n.64.

66. See *Inter-Ocean Newspaper Co. v. Robertson*, 129 N.E. 523, 524-25 (Ill.

decision for a plaintiff from Illinois cited by Frey did not involve the issue of liability of shareholders of a defective corporation at all.⁶⁷

In short, the great weight of authority in the cases cited by Frey from Colorado,⁶⁸ Illinois,⁶⁹ Indiana,⁷⁰ Michigan,⁷¹ Mississippi,⁷² Missouri,⁷³ Oklahoma,⁷⁴ and Washington⁷⁵ holds that a second filing with the County Clerk is not a condition precedent so as to prevent the existence of the corporation de facto, with respect to persons dealing with it as a corporation. In the Pennsylvania cases where the plaintiff did not deal with the corporation as a corporation and was not estopped to deny its due formation, the defendants were held personally liable. The existence of a minority view in Arkansas which refused to recognize an

1921) (great weight of authority holds that stockholders of a defectively organized corporation are not partners liable to corporate creditors); *cf.* *Curtis v. Meeker*, 48 N.E. 399 (Ill. 1897) (director and stockholder estopped in suit on corporate note to challenge due incorporation in suit against officers and directors of defective corporation based upon their statutory liability to creditors). *See generally*, Christopher P. Yates, Note, *Illinois Corporate Investors' Liability In The Case Of Defective Incorporation*, 1986 U. ILL. L. REV. 1255, 1264-65 (discussing development of common law de facto doctrine in Illinois).

67. *See* *Hamill v. Watts*, 180 Ill. App. 279 (1913) (mine owner liable for unpaid wages of workers; evidence of prior sale of mine to corporation not sufficient since the corporation had not completed its organization by filing with the county clerk).

68. *See* *Humphreys v. Mooney*, 5 Colo. 282 (1880). Under current Colorado law, which follows section 2.04 of the 1984 MODEL BUS. CORP. ACT, *see* COLO. REV. STAT. § 7-102-104 (1997), a reasonable good faith belief in authority to represent the corporation is required to escape personal liability. *See* *Jean Claude Boisset Wines U.S.A. v. Newton*, 830 P.2d 1134 (Colo. Ct. App. 1992) (personal liability imposed on promoter despite his good faith belief in corporate existence where no corporate documents ever prepared).

69. *See* *Inter-Ocean Newspaper Co. v. Robertson*, 129 N.E. 523 (Ill. 1921).

70. *See* *Aetna Life Ins. Co. v. Weatherhogg*, 4 N.E.2d 679, 683 (Ind. Ct. App. 1936) (weight of authority is in protecting incorporators of de facto corporations, except in a few cases such as in Arkansas).

71. *See* *Newcomb-Endicott Co. v. Fee*, 133 N.W. 540 (Mich. 1911).

72. *See* *Diamond Rubber Co. v. Fohey*, 71 So. 906 (Miss. 1916).

73. *See* *Granby Mining & Smelting Co. v. Richards*, 8 S.W. at 248 (distinguishing situation from that of filing with the county clerk, but not the secretary of state, as in *Hurt v. Salisbury*, 55 Mo. 310 (1874)).

74. *See* *Swofford Bros. Dry Goods Co. v. Owen*, 133 P. 193, 196 (Okla. 1913) (citing principle and the great weight of authority).

75. *See* *Refsnes v. Myers*, 2 P.2d 656, 657 (Wash. 1931) (citing the great weight of authority).

estoppel even when the parties dealt on a corporate basis is not evidence of incoherence of the majority rule of no personal liability.⁷⁶

Professor Frey also cites sixteen cases in which the articles of incorporation were recorded locally but not with the Secretary of State.⁷⁷ In all of these cases, the parties had dealt on a corporate basis.⁷⁸ Frey reports that the plaintiff was successful in imposing personal liability on shareholders in seven cases and unsuccessful in nine cases,⁷⁹ but again this analysis is misleading. Two Arkansas cases applied the minority Arkansas rule requiring both filings and not recognizing any estoppel arising from corporate dealings, the later case acknowledging explicitly that the result was contrary to the "apparent weight of authority."⁸⁰ Three Missouri cases applied the Missouri rule requiring filing with the Secretary of State, as distinguished from the County Clerk, and not recognizing any estoppel due to the Missouri conception that the estoppel is limited to suits between the corporation and the third party, although the later decision acknowledged that "in some of the states the rule is otherwise."⁸¹ A sixth

76. Arkansas has since changed its rule when it adopted the 1984 MODEL BUS. CORP. ACT in 1987. See Ark. Stat. Ann. Sec. 4-27-204 (1996); *Harris v. Looney*, 862 S.W.2d 282 (Ark. Ct. App. 1993) (only persons acting for the corporation and knowing there was no incorporation are personally liable).

77. See Frey, *supra* note 10, at 1165-67 (citing *Morse v. Burkart Mfg. Co.*, 242 S.W. 810 (Ark. 1922); *Wesco Supply Co. v. Smith*, 203 S.W. 6 (Ark. 1918); *Garnett v. Richardson*, 35 Ark. 144 (1879); *Doty v. Patterson*, 56 N.E. 668 (Ind. 1900); *Bond & Braswell v. Scott Lumber Co.*, 55 So. 468 (La. 1911); *General Motor Acceptance Co. v. Thomas*, 33 S.W.2d 1033 (Mo. Ct. App. 1930); *Martin v. Fewell*, 79 Mo. 401 (1883); *Hurt v. Salisbury*, 55 Mo. 310 (1874); *Farmers' State Bank v. Kuchs*, 147 S.W. 862 (Mo. Ct. App. 1912); *Glenn v. Bergmann*, 20 Mo. App. 343 (1886); *Nebraska Nat'l Bank v. Ferguson*, 68 N.W. 370 (Neb. 1896); *Burstein v. Palermo*, 140 A. 326 (N.J. 1928); *Vanneman v. Young*, 20 A. 53 (N.J. 1890); *Jessup v. Carnegie*, 80 N.Y. 441 (1880); *Mitchell v. Jensen*, 81 P. 165 (Utah 1905); *Heisen v. Churchill*, 205 F. 368 (7th Cir. 1913)).

78. See Frey, *supra* note 10, at 1165 & n.50.

79. See *id.* at 1166.

80. *Morse v. Burkart Mfg. Co.*, 242 S.W. 810 (Ark. 1922) (Arkansas rule is minority rule); *Garnett v. Richardson*, 35 Ark. 144 (1879).

81. *Glenn v. Bergmann*, 20 Mo. App. 343 (1886); *Martin v. Fewell*, 79 Mo. 401 (1883); *Hurt v. Salisbury*, 55 Mo. 310 (1874). The court of appeals in *Glenn* held that the doctrine of corporation by estoppel was not available, since in Missouri that doctrine only applies when it is used as a shield against liability to the corporation. See 20 Mo. App. at 345-46. The Supreme Court in *Hurt*

Utah case is mischaracterized as a plaintiff victory; the court there did not decide the question of the existence of a de facto corporation or corporation by estoppel in spite of multiple defects in organization.⁸² In the seventh case, a federal circuit court of appeals interpreting Louisiana law found personal liability where the articles had not been filed either with the Secretary of State or the local parish at the time of the transaction in suit, so that the case was really one of promoter liability.⁸³

On the other hand, decisions exonerating the individual defendants are cited from Arkansas,⁸⁴ Indiana,⁸⁵ Louisiana,⁸⁶ Missouri,⁸⁷ Nebraska,⁸⁸ New Jersey,⁸⁹ and New York.⁹⁰ In a case from the minority jurisdiction of Arkansas,⁹¹ the court acknowledged that its general rule required two filings, contrary to "the weight of modern authority."⁹²

held that while the corporation might be estopped from denying its own existence if sued on the corporate note, the plaintiffs were not estopped from charging the defendants individually. *See* 55 Mo. at 313; *see also* Danny R. Carpenter & Jill Diann Vick, *Recent Developments in Missouri: Corporate Law – A Continuing Evolution*, 48 UMKC L. REV. 545, 570-75 (1980) (corporations by estoppel and de facto corporations are distinct concepts in Missouri). Arizona has a constitutional provision, and other states have statutory provisions, against using a claim of want of legal corporate organization as a defense to any claim. *See* ARIZ. CONST. art. XIV, § 13 (1984); DEL. CODE ANN. tit. 8, § 329 (1991); Fla. Stat. ch. 607.1904 (West Supp. 1998); IOWA CODE § 491.65 (1991); KAN. STAT. ANN. § 17-7104 (1995); OKLA. STAT. tit. 18, § 1128 (1986); TEX. REV. CIV. STAT. ANN. art. 1302-2.03 (West 1997). For a collection of the cases, *see* Note, *Defective Formation and Suits in the Corporate Name*, 84 U. PA. L. REV. 514 (1936).

82. *See* Mitchell v. Jensen, 81 P. 165, 168 (Utah 1905). The court remanded for a new trial on the issues of whether the plaintiffs were estopped as having dealt with the corporation as such and whether the defendants were liable as having been active in the carrying on of the business. *See id.* at 168.

83. *See* Heisen v. Churchill, 205 F. 368 (7th Cir. 1913).

84. *See* Wesco Supply Co. v. Smith, 208 S.W. 6 (Ark. 1918).

85. *See* Doty v. Patterson, 56 N.E. 668 (Ind. 1900).

86. *See* Bond & Braswell v. Scott Lumber Co., 55 So. 468 (La. 1911).

87. *See* General Motor Acceptance Co. v. Thomas, 33 S.W.2d 1033 (Mo. Ct. App. 1930); Farmers' State Bank v. Kuchs, 147 S.W. 862 (Mo. Ct. App. 1912).

88. *See* Nebraska Nat'l Bank v. Ferguson, 68 N.W. 370 (Neb. 1896).

89. *See* Burstein v. Palermo, 140 A. 326 (N.J. 1928); Vanneman v. Young, 20 A. 53 (N.J. 1890).

90. *See* Jessup v. Carnegie, 80 N.Y. 441 (1880).

91. *See* Wesco Supply Co. v. Smith, 203 S.W. 6 (Ark. 1918).

92. *Id.* at 8.

However, the court declined to extend the rule to fix liability on a defendant who was not an original shareholder but a purchaser of stock from an existing shareholder.⁹³ An Indiana court refused to find a partnership on the facts, saying that "the great weight of authority" holds that the stockholders in such a de facto corporation are not liable as partners.⁹⁴ A Louisiana case found the defendants protected by the estoppel of the plaintiffs to challenge due incorporation, having dealt with the corporation as such, stating that in such a case it may not even be necessary to show the existence of a de facto corporation.⁹⁵ A Missouri decision found that both filings had in fact been made at the time the note in suit was given.⁹⁶ A second Missouri decision acknowledged that the usual Missouri rule required filing with the Secretary of State, but held that the defendant passive stockholders were not personally liable since they had not authorized the commencement of business or the incurring of plaintiff's debt.⁹⁷ A Nebraska case held the plaintiff, by having dealt with and obtained a judgment against the corporation, was estopped to challenge the validity of its organization.⁹⁸ Two New Jersey cases held that the corporation was at least a de facto corporation under the facts.⁹⁹ A New York case held that filing the articles of an Iowa corporation with the Iowa Secretary of State four months after filing with the county recorder, instead of three months as re-

93. *See id.*

94. *Doty v. Patterson*, 56 N.E. 668, 670 (Ind. 1900) (The suit was by stockholders in the de facto corporation for an accounting, on the theory that a partnership existed by reason of failure to properly file the articles).

95. *See Bond & Braswell v. Scott Lumber Co.*, 55 So. 468 (La. 1911). There was also present in that case a Louisiana statute which codified the doctrine of de facto corporation with respect to parties who attempt to form a corporation and execute, record and publish the charter. *See id.* at 470.

96. *See General Motors Acceptance Co. v. Thomas*, 33 S.W.2d 1033 (Mo. Ct. App. 1930). It was thus irrelevant that the filing with the secretary of state was not made until after the plaintiff was informed that the business was being incorporated and would no longer operate as a partnership. *See id.* at 1036.

97. *See Farmers' State Bank v. Kuchs*, 147 S.W. 862 (Mo. Ct. App. 1912).

98. *See Nebraska Nat'l Bank v. Ferguson*, 68 N.W. 370 (Neb. 1896).

99. *See Burstein v. Palermo*, 140 A. 326 (N.J. 1928); *Vanneman v. Young*, 20 A. 53 (N.J. 1890).

quired by statute, did not affect the validity of the corporation.¹⁰⁰ Once again, except for the minority jurisdictions of Arkansas and Missouri, the weight of authority is against personal liability of stockholders in this fact pattern, with respect to persons dealing with the corporation as such.

Since most states require only one filing, with the secretary of state, the question arises whether a corporation can exist *de facto* or by estoppel without having made that one filing? The answer is, it depends on the state and the reasons for failing to make the filing. Professor Frey cites thirty-four cases in which the promoters had failed to make any filing at all.¹⁰¹ He reports that plaintiffs were successful in fixing personal liability on the promoters in twenty-two cases and unsuccessful in twelve.¹⁰² Once again, his count is wrong, and in any event just counting the cases does not tell us very much.

The plaintiffs were successful in cases from Georgia,¹⁰³ Illinois,¹⁰⁴ Missouri (three cases),¹⁰⁵ Texas (two cases),¹⁰⁶

100. See *Jessup v. Carnegie*, 80 N.Y. 441 (1880). The court held that a decision by the Supreme Court of Iowa as to the meaning of the same Iowa statute in another action involving the same corporation was conclusive. See *id.* at 455.

101. See Frey, *supra* note 10, at 1158-62. He says there are thirty-five, but he counts the case of *Spencer Field & Co. v. Cooks*, 16 La. Ann. 153 (1861) twice, both as non-corporate dealing (see n.20) and corporate dealing (see n.21). It is apparently a corporate dealing case, but the court found no estoppel.

102. See *id.* at 1158 & nn.20-22, 24. Again, Professor Frey counts twenty-three successful cases by counting *Spencer Field* twice.

103. See *Michael Bros. Co. v. Davidson & Coleman*, 60 S.E. 362 (Ga. Ct. App. 1908) (credit extended to partnership which later incorporated).

104. See *Bigelow v. Gregory*, 73 Ill. 197 (1874) (no corporate dealings, no constructive notice of incorporation given by filing).

105. See *Queen City Furniture & Carpet Co. v. Crawford*, 30 S.W. 163 (Mo. 1895) (no question of estoppel, contract was made with defendants personally); *Smith v. Warden*, 86 Mo. 382 (1885) (tort action against defective Pennsylvania partnership association); *Ferris v. Thaw*, 72 Mo. 446 (1880) (court does not discuss corporations *de facto* or by estoppel, see *Hurt v. Salisbury*, 55 Mo. 310 (1874)).

106. See *Luck v. Alamo Printing Co.*, 190 S.W. 204 (Tex. Civ. App. 1916) (no actual or constructive notice of corporate entity by filing; name of "Mexico American Colony Association" does not give notice); *Bank of De Soto v. Reed*, 109 S.W. 256 (Tex. Civ. App. 1908) (no corporate dealings and no *de facto* corporation). See Annotation, *What Names Import Corporation Within Rule That One Contracting With Body Described by Corporate Name is Estopped to Deny its Corporate Existence*, 5 A.L.R. 1580 (1920).

and a circuit court of appeals¹⁰⁷ — a total of eight cases where the plaintiffs had apparently not dealt with the defendants as a corporation. In a ninth New Jersey case, Professor Frey reports that the plaintiff was unsuccessful against the individual defendants.¹⁰⁸ That was true, but there the defendant corporation was the party objecting to its characterization as a corporation, saying that at the time of plaintiff's accident, the executed certificate of incorporation had been executed and sent to the county clerk, but had not yet been filed.¹⁰⁹ The court held the defendant to be a de facto corporation, the certificate having been filed with the county clerk the day after the accident and with the secretary of state three days later.¹¹⁰

In fifteen other cases from Arkansas (two cases),¹¹¹ Illinois,¹¹² Indiana,¹¹³ Kansas,¹¹⁴ Louisiana (two cases),¹¹⁵ Michigan,¹¹⁶ Missouri (two cases),¹¹⁷ Nebraska,¹¹⁸ New

107. See *Owen v. Shepard*, 59 F. 746 (8th Cir. 1894) (no de facto corporation; the name "Indian Trading Company" does not give notice of corporate character).

108. See *Frawley v. Tenaflly Transp. Co.*, 113 A. 242 (N.J. 1921). See also Frey, *supra* note 10, at 1159 & n. 24. Actually, it is not clear that dealings were on a non-corporate basis, since the plaintiff and her family were passengers on a bus operated by the Tenaflly Transportation Company, a corporation. The point is not discussed in the opinion.

109. See *Frawley*, 113 A. at 243.

110. See *id.* at 244.

111. See *Harris v. Ashdown Potato Curing Ass'n*, 284 S.W. 755 (Ark. 1926) (no de facto corporation, no estoppel to deny incorporation even if corporate dealings, passive investors not liable); *Bailey v. Sutton*, 185 S.W.2d 276 (Ark. 1945) (partnership liability since no filing, no discussion of corporate dealings).

112. See *Pettis v. Atkins*, 60 Ill. 454 (1871) (directors and incorporators held to be partners, no discussion of corporate dealings or estoppel).

113. See *Coleman v. Coleman*, 78 Ind. 344 (1881) (suit by assignee of one member in defective corporation against others; suit properly dismissed since only remedy is for accounting and contribution).

114. See *McLennan v. Hopkins*, 41 P. 1061 (Kan. Ct. App. 1895) (no de facto corporation, corporate dealings but estoppel would only arise if used as a defense to a suit by the corporation).

115. See *Spencer Field & Co. v. Cooks*, 16 La. Ann. 153 (1861) (no estoppel since creditor ignorant of facts, statute excusing "informality in organization" not applicable); *Lind v. Senton*, 120 So. 535 (La. Ct. App. 1929) (incorporators liable as partners, no discussion of estoppel).

116. See *Campbell v. Rukamp*, 244 N.W. 222 (Mich. 1932) (no de facto corporation, no discussion of estoppel, passive subscriber not liable).

117. See *Richardson v. Pitts*, 71 Mo. 128 (1879) (suit for contribution allowed

Jersey,¹¹⁹ New York,¹²⁰ and two United States circuit courts of appeals,¹²¹ the creditors were successful although in some of the cases it appeared that they had dealt with the corporation as such. In the Kansas case,¹²² as in Missouri,¹²³ the doctrine of estoppel was held limited to suits between the creditor and the corporation. In the other cases where the plaintiffs were successful, the decisions are consistent with the promoter liability cases, where the belief of the plaintiff in the existence of a corporation does not give rise to any estoppel.

In the other ten cases, from the United States Supreme Court,¹²⁴ Alabama,¹²⁵ Illinois,¹²⁶ Iowa,¹²⁷ Louisiana,¹²⁸ Michigan (three cases),¹²⁹ Missouri,¹³⁰ and

by active partners, who had become individually liable, citing *Hurt v. Salisbury*, 55 Mo. 310 (1874)); *Weir Furnace Co. v. Bodwell*, 73 Mo. App. 389 (1898) (promoter liability as partners, no agreement to look to corporation to be formed).

118. See *Abbott v. Omaha Co.*, 4 Neb. 416 (1876) (no de facto corporation, no estoppel where no color of franchise).

119. See *Federal Advert. Corp. v. Hundertmark*, 160 A. 40 (N.J. 1932) (no de facto corporation, no estoppel where plaintiff was misled into believing corporation existed).

120. See *Tuccillo v. Pittelli*, 127 N.Y.S. 314 (N.Y. Sup. Ct. 1911) (partnership liability except as to passive investor).

121. See *Harrill v. Davis*, 168 F. 187 (8th Cir. 1909) (no de facto corporation, no estoppel). Frey says there was no personal liability in *Baker v. Bates-Street Shirt Co.*, 6 F.2d 854, 858 (1st Cir. 1925) (no de facto corporation, no estoppel, inactive subscribers not liable as partners). See Frey, *supra* note 10, at 1159 & n.22, but that is incorrect.

122. See *McLennon v. Hopkins*, 41 P. 1061 (Kan. Ct. App. 1895).

123. See *Hurt v. Salisbury*, 55 Mo. 310 (1874).

124. See *Whitney v. Wyman*, 101 U.S. 392 (1879) (parties contracted for corporation in formation, promoters not liable where corporation formed and ratified contract).

125. See *Magnolia Shingle Co. v. J. Zimmern's Co.*, 58 So. 90 (Ala. Ct. App. 1912) (creditor estopped to deny incorporation, defendants either acted in good faith belief that attorney had filed the certificate or were inactive in the business).

126. See *Tarbell v. Page*, 24 Ill. 46 (1860) (plaintiff dealt with corporation as such and may not challenge its due incorporation).

127. See *Heald v. Owen*, 44 N.W. 210 (Iowa 1890) (plaintiffs were stockholders and directors of corporation and acted in excess of their authority in incurring debts for which they sought contribution).

128. See *John Lucas & Co. v. Bernhardt's Estate*, 100 So. 399 (La. 1924) (plaintiff estopped by corporate dealings to challenge due incorporation).

129. See *Berlin State Bank v. Nelson*, 204 N.W. 92 (Mich. 1925) (articles executed but not filed, de facto corporation existed); *Tisch Auto Supply Co. v.*

South Dakota,¹³¹ where the plaintiffs were not successful, the plaintiffs had dealt with the company as a corporation and the defendants had either made good faith efforts to incorporate, had not been active in the business,¹³² or in two cases were promoters whose creditor had agreed to look to the corporation in formation.¹³³

The rule of law that can be derived from these complete failure-to-file cases is that where the plaintiff has not dealt with the corporation as such, he is not estopped to deny its due incorporation in a suit against the stockholders.¹³⁴ The opinions in some cases point out that no notice of incorporation had been given either expressly or constructively by filing with the state.¹³⁵ Where the dealings have been on a corporate basis, except in a minority jurisdiction such as Arkansas¹³⁶ or Kansas,¹³⁷ this will give rise to an estoppel to deny corporate existence where the defendants had made good faith efforts to file, as where the articles were executed but not filed through inadvertence or excusable

Nelson, 192 N.W. 600 (Mich. 1923) (same corporation as in *Berlin* held to be de facto corporation); *Lockwood v. Wynkoop*, 144 N.W. 846 (Mich. 1914) (articles filed but returned for correction, plaintiff estopped by corporate dealings to deny due incorporation).

130. See *A.W. Mendenhall Co. v. Booher*, 48 S.W.2d 120 (Mo. Ct. App. 1932) (no de facto corporation, but passive incorporators not liable).

131. See *Mason v. Stevens*, 92 N.W. 424 (S.D. 1902) (bank was de facto corporation, depositors dealt with it as a corporation and may not challenge due incorporation).

132. See Annotation, *Signing Articles of Incorporation as Rendering One Liable on Contracts Entered Into Prior to Conclusion of Incorporation*, 44 A.L.R. 776 (1926) (passive signers are not liable).

133. See *Whitney v. Wyman*, 101 U.S. 392 (1879); *John Lucas & Co. Inc. v. Bernhardt's Estate*, 100 So. 399 (La. 1924).

134. See *supra* notes 103-110 and accompanying text. As stated in note 108, it is not clear that the plaintiff in the ninth unsuccessful case, *Frawley*, dealt on a non-corporate basis since the contract of carriage which was the basis of plaintiff's tort suit was with the corporation. See *Pinkerton v. Pennsylvania Traction Co.*, 44 A. 284 (Pa. 1899).

135. See *Bigelow v. Gregory*, 73 Ill. 197, 200 (1874) (Wisconsin corporation styled the Warfield Cold Water Soap Company, no publication of articles in newspaper or filing with the secretary of state and city clerk); *Luck v. Alamo Printing Co.*, 190 S.W. 204, 205 (Tex. Civ. App. 1916) (no actual or constructive notice by filing with the secretary of state).

136. See *Harris v. Ashdown Potato Curing Ass'n*, 284 S.W. 755 (Ark. 1926).

137. See *McLennan v. Hopkins*, 41 P. 1061 (Kan. Ct. App. 1895).

error or had been filed but returned for correction.¹³⁸ Dealings that have been on a corporate basis will not give rise to an estoppel in a jurisdiction which regards estoppel as only applicable to use of defective incorporation as a shield in a suit between the corporation and the creditor.¹³⁹ Also, such dealings will not give rise to an estoppel where the defendants did not make good faith efforts to incorporate and knew or should have known the corporation was not in existence.¹⁴⁰ Finally, even if no corporation exists by estoppel or de facto, inactive investors may not be charged with partnership liability.¹⁴¹

Frey collected thirty-eight cases in which personal liability was sought to be imposed for failure to pay in the capital of the corporation.¹⁴² He reports that in twenty-two cases where the dealings had been on a corporate basis, the plaintiffs were unsuccessful.¹⁴³ These cases were from California,¹⁴⁴ Georgia (two cases),¹⁴⁵ Kansas,¹⁴⁶ Maryland,¹⁴⁷ Massachusetts,¹⁴⁸ Michigan (three cases),¹⁴⁹ Minneso-

138. See cases cited *supra* notes 125 & 129.

139. See cases cited *supra* notes 111 & 114.

140. See cases cited *supra* notes 116 & 118.

141. See cases cited *supra* notes 125, 130 & 132.

142. See Frey, *supra* note 10, at 1170 & n.70. For another review of the cases, see Annotation, *Individual Liability of Stockholders, Directors, or Officers on Corporate Contracts Improperly Entered Into Before Subscription of Requisite Amount of Stock*, 50 A.L.R. 1030 (1927); Note, *Corporations: Liability of Directors for Permitting Business Before Capital Stock is All Subscribed*, 35 L.R.A. (N.S.) 453 (1912).

143. See Frey, *supra* note 10, at 1171 & n.72.

144. See *J.W. Williams Co. v. Quin*, 186 P. 401 (Cal. Ct. App. 1919) (corporation was regularly and legally formed, five incorporators subscribed for one share each at \$10 par value).

145. See *Wright Co. v. Saul*, 120 S.E. 23 (Ga. Ct. App. 1923) (organization completed a month after transaction, it may be inferred that at least 10% of capital was paid in as required, de facto corporation, plaintiff estopped); *Orr v. McLeay*, 65 S.E. 164 (Ga. Ct. App. 1909) (plaintiff subscriber to stock estopped to deny corporate existence).

146. See *Murdock v. Lamb*, 142 P. 961 (Kan. 1914) (capital was all paid in, failure to file affidavit of payment of at least 20% of capital does not create personal liability).

147. See *Lafin & Rand Powder Co. v. Sinsheimer*, 46 Md. 315 (1876) (certificate of West Virginia Secretary of State of due incorporation may not be collaterally attacked).

148. See *First Nat'l Bank v. Almy*, 117 Mass. 476 (1875) (stockholders can be sued only according to the statute, which requires a prior action against the

ta,¹⁵⁰ Mississippi,¹⁵¹ Missouri (two cases),¹⁵² Ohio (two cases),¹⁵³ Oklahoma,¹⁵⁴ Oregon,¹⁵⁵ Pennsylvania,¹⁵⁶ Tennessee,¹⁵⁷ Texas,¹⁵⁸ and Washington.¹⁵⁹ In the other fifteen¹⁶⁰ cases, recovery was permitted. These cases were from Alabama,¹⁶¹ Georgia (three cases),¹⁶² Kansas (two

corporation, Secretary's certificate of organization is conclusive).

149. See *Love v. Ramsey*, 102 N.W. 279 (Mich. 1905) (stockholders may be compelled to pay in only the stock subscribed); *Gow v. Collin & Parker Lumber Co.*, 66 N.W. 676 (Mich. 1896) (plaintiff estopped by corporate dealings and by suit on a corporate mortgage); *American Mirror & Glass-Beveling Co. v. Bulkley*, 65 N.W. 291 (Mich. 1895) (10% of capital paid in as required by statute, defendant subscriber paid her full subscription, not active in management, no fraud shown).

150. See *Moe v. Harris*, 172 N.W. 494 (Minn. 1919) (corporation de jure existed, no statute requires paying in capital).

151. See *Quinn v. Woods*, 99 So. 510 (Miss. 1924) (statute requiring 25% of capital to be paid in prior to commencing business is not a condition precedent to corporate existence).

152. See *First Nat'l Bank v. Rockefeller*, 93 S.W. 761 (Mo. 1906); *Webb v. Rockefeller*, 93 S.W. 772 (Mo. 1906) (two cases involving the same corporation; certificate of incorporation begins corporate existence, great weight of authority is that failure to pay in capital does not make incorporators partners).

153. See *Second Nat'l Bank v. Hall*, 35 Ohio St. 158 (1878) (Kentucky corporation, subscription of total capital is not a condition precedent to corporate existence); *Garwood v. Great W. Oil Co.*, 11 Ohio App. 96 (1919) (failure to file certificate of payment of 10% of capital with secretary of state does not create partnership liability).

154. See *Industrial Building & Loan Ass'n v. Williams*, 268 P. 228 (Okla. 1928) (de facto corporation, parties estopped to deny corporate existence).

155. See *Rutherford v. Hill*, 29 P. 546 (Or. 1892) (weight of authority and reason is against partnership liability).

156. See *Cochran v. Arnold*, 58 Pa. 399 (1868) (de facto corporation, no collateral attack allowed).

157. See *Crouch v. Gray*, 290 S.W. 391 (Tenn. 1926) (payment of capital is not a condition precedent, no personal liability results from non-payment).

158. See *Berwald v. Hamilton-Brown Shoe Co.*, 22 S.W.2d 760 (Tex. Civ. App. 1929) (de facto corporation, no collateral attack).

159. See *American Radiator Co. v. Kinnear*, 105 P. 630 (Wash. 1909) (weight of authority denies personal liability).

160. Not counting one case which was overruled. See *Patterson v. Arnold*, 45 Pa. 410 (1863), *overruled by Cochran v. Arnold*, 58 Pa. 399 (1868).

161. See *Christian & Craft Grocery Co. v. Fruitdale Lumber Co.*, 25 So. 566 (Ala. 1899) (no corporate dealings, no estoppel, no capital paid in, fraudulent affidavits of stock subscription).

162. See *Ward-Truitt Co. v. Bryan & Lamb*, 87 S.E. 1037 (Ga. 1916) (partnership never organized corporation, which was nonexistent with no paid-in capital, to continue business); *Brooke v. Day*, 59 S.E. 769 (Ga. 1907) (no capital paid in, no estoppel if no corporate dealings); *Burns v. Beck*, 10 S.E. 121 (Ga. 1889) (personal liability of officers and stockholders, but only to the extent of

cases),¹⁶³ Louisiana,¹⁶⁴ Minnesota,¹⁶⁵ Missouri (three cases),¹⁶⁶ Ohio,¹⁶⁷ Oregon,¹⁶⁸ and South Carolina.¹⁶⁹ In these latter cases, there was usually a total failure to pay in any capital, which the court regarded as a fraud on the public, but the statutes and fact patterns are too diverse to make any generalization as to the reasoning behind imposing personal liability.

It will be seen from the foregoing that Frey's methodology obscured rather than clarified the doctrines of de facto corporation and corporation by estoppel due to the following errors:

1. Professor Frey did not distinguish among cases decided according to the separate doctrines of promoter contracts, de facto corporations, and corporations by estoppel, which point in different directions and lead to opposite results.

2. Professor Frey focuses on only two characteristics of the cases analyzed, namely (a) whether the defendants were active in the business and (b) whether the dealings were on

the required minimum 10% of capital not paid in).

163. See *Central Nat'l Bank v. Sheldon*, 121 P. 340 (Kan. 1912) (sham Arizona corporation, no stock subscribed for, officers personally liable); *Whetstone v. Crane Bros. Mfg. Co.*, 41 P. 211 (Kan. Ct. App. 1895) (no stock subscribed for, promoters personally liable, no estoppel created by corporate dealings).

164. See *Provident Bank & Trust Co. v. Saxon*, 40 So. 778 (La. 1906) (no estoppel arising from corporate dealings, no stock subscribed for, no publication in proper newspaper, no local recording of list of stock subscriptions).

165. See *Johnson v. Corser*, 25 N.W. 799 (Minn. 1885) (articles executed, but apparently not filed; nonprofit association resulted, not a partnership).

166. See *Journal Co. v. Nelson*, 113 S.W. 690 (Mo. App. 1908) (Arizona corporation formed to sell stock in Missouri never had any legal existence when only \$500 of its \$5 million capital paid in); *Hyatt v. Van Riper*, 78 S.W. 1043 (Mo. App. 1904) (no capital paid in, corporation was a fraud, directors liable); *Davidson v. Hobson*, 59 Mo. App. 130 (1894) (Colorado corporation, none of \$1 million capital paid in, promoters and members liable as partners). *Davidson* was distinguished as involving principles of comity in *First Nat'l Bank v. Rockefeller*, 93 S.W. 761, at 772 (Mo. 1906). See *supra* note 152.

167. See *Medill v. Collier*, 16 Ohio St. 599 (1866) (persons who carry on banking business without making required deposit of bonds personally liable); *Beck v. Stimmel*, 177 N.E. 920 (Ohio App. 1931) (incorporators liable as partners where they engage in business before paying in capital or completing corporate organization).

168. See *McVicker v. Cone*, 28 P. 76 (Or. 1891) (no capital paid in, corporation never organized).

169. See *Meyer v. Brunson*, 88 S.E. 359 (S.C. 1916) (charter not issued until after debt incurred, not mere irregularity to fail to pay in capital).

a corporate basis,¹⁷⁰ without recognizing the importance of another characteristic: whether the defendants had taken reasonable steps to incorporate and reasonably believed they were incorporated.

3. Professor Frey categorizes the cases by result only, that is whether or not the plaintiff prevailed, not taking into account the fact that the plaintiff might prevail, or not prevail, for reasons unrelated to the existence of a *de facto* corporation or corporation by estoppel.

Once we acknowledge Frey's errors, a proper analysis of his cases demonstrates the following:

1. Under the doctrine of promoter liability, the plaintiff's belief in the existence of a corporation does not give rise to an estoppel to charge the promoters with personal liability,¹⁷¹ although it may in the case of corporation by estoppel.¹⁷² The difference is that the promoter knows or should know that no corporation exists, but the defendants in a corporation by estoppel case do not.

2. The fact that dealings have been on a corporate basis may give rise to an estoppel to deny due incorporation where no *de facto* corporation exists. Therefore a plaintiff who is estopped may not be able to sue the stockholders personally, whereas a plaintiff who is not estopped will be able to sue them personally.¹⁷³

3. In the minority jurisdictions of Arkansas¹⁷⁴ and Missouri¹⁷⁵ prior to adoption of the Model Acts, and in Kansas,¹⁷⁶ the doctrine of corporation by estoppel does not necessarily prevent a suit to impose personal liability by one dealing with the corporation as such.

4. The question of whether the defendants were active in the business is only important where no corporation ex-

170. See Frey, *supra* note 10, at 1157-58 & n.18.

171. See cases cited *supra* notes 18-22 and accompanying text.

172. See cases cited *supra* notes 60-141 and accompanying text.

173. See cases cited *supra* notes 60, 95, 125 & 129 and accompanying text.

174. See cases cited *supra* notes 63, 80 & 111 and accompanying text.

175. See cases cited *supra* notes 81 & 117 and accompanying text.

176. See case cited *supra* note 114.

ists de facto or by estoppel, where it may excuse a passive investor from liability.¹⁷⁷

Except in jurisdictions following the Model Acts,¹⁷⁸ which will be discussed below, the modern cases on de facto corporations are not much different from the cases catalogued by Professor Frey.¹⁷⁹ In a federal case interpreting Ohio law, the court held that no corporation de facto existed merely because two letters were written on its stationery and a promoter said he thought he had told his attorney to incorporate.¹⁸⁰ Decisions under New York law concluded that no de facto corporation existed merely because two promoters had reserved a corporate name with the secretary of state,¹⁸¹ or where a promoter had paid an attorney to incorporate and had received a corporate seal from him,¹⁸²

177. See authorities cited *supra* notes 116, 127 & 132.

178. See ALA. CODE §§ 10-2B-2.03 to .04 (1994); ALASKA STAT. §§ 10.06.218, .220 (1996); ARIZ. REV. STAT. ANN. §§ 10-203 to -204 (West 1996); ARK. CODE ANN. §§ 4-27-203 to -204 (Michie 1996); COLO. REV. STAT. §§ 7-102-103 to -104 (1997); CONN. GEN. STAT. §§ 33-637 to -638 (Supp. 1997); D.C. CODE ANN. §§ 29-349, -399.40 (1996); FLA. STAT. ANN. §§ 607.0203 to .0204 (West 1993); GA. CODE ANN. §§ 14-2-203 to -204 (1994); HAW. REV. STAT. §§ 415-56, -146 (1993); IDAHO CODE §§ 30-1-203 to -204 (1997 Cum. Supp.); 805 ILL. COMP. STAT. 5/2.15 /3.20 (1993); IND. CODE ANN. §§ 23-1-21-3 to -4 (West 1995); IOWA CODE ANN. § 490.203 to .204 (West 1991); KY. REV. STAT. ANN. §§ 271B.2-030, -040 (Michie 1989); MISS. CODE ANN. §§ 79-4-2.03 to .04 (West 1996); MO. ANN. STAT. §§ 351.053, .075 (West 1991); MONT. CODE ANN. §§ 35-1-119 to -220 (1997); NEB. REV. STAT. §§ 21-2019, -2020 (Supp. 1996); N.H. REV. STAT. ANN. §§ 293-A:2.03 to .04 (Supp. 1996); N.M. STAT. ANN. §§ 53-12-4, -18-9 (Michie 1993); N.C. GEN. STAT. § 55-2-03 (1990); N.D. CENT. CODE §§ 10-19.1-12, -29 (1995); OR. REV. STAT. §§ 60.054, .051 (1988); R.I. GEN. LAWS §§ 7-1.1-50, -136 (1992); S.C. CODE ANN. §§ 33-2-103 to -104 (Law. Co-op. 1990); S.D. CODIFIED LAWS ANN. §§ 47-2-7, -59 (Michie 1991); TENN. CODE ANN. §§ 48-12-103 to -104 (1995); UTAH CODE ANN. §§ 16-10a-203 to -204 (1995); VT. STAT. ANN. tit. 11A, §§ 2.03 to .04 (1997); VA. CODE ANN. §§ 13.1-621 to -622 (Michie 1993); WASH. REV. CODE ANN. §§ 23B.02.030 to .040 (West 1994); WYO. STA. §§ 17-16-203 to -204 (Michie 1997). In general, Alaska, the District of Columbia, Hawaii, Idaho, Illinois, Montana, New Mexico, North Dakota, Rhode Island, and South Dakota have versions of the 1969 Model Act §§ 56 & 146, while the other states have versions, but by no means uniform versions, of the 1984 Model Act §§ 2.03 & 2.04.

179. Modern cases are collected in Bradley's article cited *supra* note 20.

180. See *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299 (6th Cir. 1989), *modified by* 879 F.2d 1304 (6th Cir. 1989).

181. See *Clinton Investors Co. v. Watkins*, 536 N.Y.S.2d 270 (N.Y. App. Div. 1989).

182. See *Conway v. Samet*, 300 N.Y.S.2d 243 (N.Y. Sup. Ct. 1969).

or a promoter had executed a certificate of incorporation but not filed it until seven weeks later.¹⁸³

On the other hand, *de facto* corporations were found to exist in New York where the certificate was executed the same day as the contract in suit and filed six days later,¹⁸⁴ or where the certificate had been filed a week prior to the agreement, rejected for nonavailability of corporate name, and refiled under a new name a week after the agreement.¹⁸⁵ In a Maryland case, the articles had been executed but not filed due to oversight by the attorney for the corporation.¹⁸⁶ The Maryland Court of Appeals concluded that the parties having dealt with the corporation as such were estopped to challenge corporate existence.¹⁸⁷

In two similar cases, a *de facto* corporation was found to exist in New Jersey¹⁸⁸ where a certificate of incorporation had been executed and mailed to the secretary of state thirteen days prior to the contract in suit, but not filed by the secretary until two days after the contract, and in Minnesota¹⁸⁹ where articles of incorporation were executed and mailed to the secretary of state six days prior to the contract, but the secretary did not issue the certificate until seven days after. In two cases in Delaware, excusable delay in filing a certificate of incorporation did not prevent a *de facto* corporation sufficient to prevent personal liability in contract¹⁹⁰ or in tort.¹⁹¹ The Illinois courts have continued

183. See *Lenny Bruce Enterprises, Inc. v. Fantasy Records, Inc.*, 243 N.Y.S.2d 789 (N.Y. Sup. Ct. 1963); cf. *Kiamesha Dev. Corp. v. Guild Properties, Inc.*, 151 N.E.2d 214 (N.Y. 1958) (no *de facto* corporation where no certificate even prepared or executed).

184. See *Bankers Trust Co. v. Zecher*, 426 N.Y.S.2d 960 (N.Y. Sup. Ct. 1980).

185. See *Rubinstein Bros. v. Ole of 34th St., Inc.*, 421 N.Y.S.2d 534 (N.Y. Civ. Ct. 1979).

186. See *Cranson v. International Bus. Mach. Corp.*, 200 A.2d 33 (Md. 1964).

187. See *id.* at 39.

188. See *Cantor v. Sunshine Greenery, Inc.*, 398 A.2d 571 (N.J. Super. Ct. App. Div. 1979).

189. See *Almac, Inc. v. JRH Dev., Inc.*, 391 N.W.2d 919 (Minn. Ct. App. 1986).

190. See *Big Valley Assoc. v. DiAntonio*, Civ.A. No. 94C-05-089, 1995 WL 339072 (Del. Super. Ct. May 10, 1995).

191. See *Cleary v. North Delaware A-OK Campground, Inc.*, C.A. No. 85C-OC-70 (Del. Super. Ct. Dec. 9, 1987), 1987 Del. Super. LEXIS 1374, *appeal dis-*

to rely on the doctrines of de facto incorporation and corporation by estoppel.¹⁹² A Michigan appellate court held that a corporation de facto might exist where the articles were executed eleven days prior to the transaction in suit but not filed until three weeks later.¹⁹³

IV. THE IMPACT OF THE 1950 MODEL BUSINESS CORPORATION ACT

The arrival of the 1950 Model Act, coupled with critical academic commentary, had a pronounced effect on the development of the law in this area. The comment to Section 50¹⁹⁴ of the 1950 Model Act stated that there was little, if any, difference between a de facto and a de jure corporation under Section 50 because it was "unlikely" that any steps short of securing a certificate of incorporation would be a sufficient attempt at compliance with the 1950 Model Act to form a de facto corporation.¹⁹⁵ Section 50 provided that the certificate would be "conclusive evidence" of incorporation except as against the state, and Section 139 of the 1950 Model Act provided that persons who assumed to act as a corporation without authority would be jointly and severally liable for all resulting debts.¹⁹⁶ Although the comment to section 50 was tentative on the subject of abolishing the doctrine of de facto corporation, the Preface to the 1950 Model Act stated categorically that "there can be no de facto existence prior" to the issuance of the certificate of incorporation.¹⁹⁷ In the 1960 revision of the Model Act, the text of

missed, 541 A.2d 598 (Del. 1988).

192. See *A.A. Store Fixtures Co., Inc. v. Shopiro*, 651 N.E.2d 525 (Ill. App. Ct. 1995); *Department of Revenue v. Roman S. Dombrowski Enter., Inc.*, 560 N.E.2d 881 (Ill. App. Ct. 1990).

193. See *Henderson v. Sprout Bros., Inc.*, 440 N.W.2d 629 (Mich. Ct. App. 1989).

194. See *supra* note 11 and text of § 50.

195. See *id.*

196. See *supra* note 11 and text of § 139.

197. In the preface, Committee member Ray Garrett stated:

Another example is the elimination of all conditions precedent and subsequent to incorporation that might create a de facto corporation. Under the Model Act, corporate existence begins when a certificate of incorporation is issued by the Secretary of State. There can be no de

Section 50 remained the same, but the comment was rewritten to say that the possible existence of a de facto corporation under the 1960 Model Act was remote.¹⁹⁸

If the intention of the Committee was to abolish de facto corporations, the language chosen to do so was not suited for that purpose. The 1933 Illinois Business Corporation Act was the pattern for the 1950 Model Act, and Sections 50 and 139 of the 1950 Model Act are drawn from Secs. 49 and 150 of the Illinois statute.¹⁹⁹ However, the Illinois statute had not been interpreted to abolish the de facto doctrine in Illinois, although the official comment, like the 1950 and 1960 Model Act comments, stated that that might be the result.²⁰⁰ Contemporary academic evaluation of the Illinois statute concluded that it did not and should not be held to abolish de facto corporations.²⁰¹

facto existence prior thereto, and there is nothing to be done thereafter that would affect de jure existence.

MODEL BUS. CORP. ACT (1950). See also Whitney Campbell, *The Model Business Corporation Act*, 6 BUS. LAW. 98, 103 (1956) ("Section 50 of the model act abolishes the *de facto* doctrine.").

198. The rewritten Comment stated as follows: "Since it is unlikely that any steps short of securing a certificate of incorporation would be held to constitute apparent compliance, the possibility that a de facto corporation could exist under such a provision is remote." MODEL BUS. CORP. ACT § 50 Cmt. (1960).

199. Whitney Campbell was for many years a member of the ABA Committee on Corporate Laws, see Campbell, *supra* note 197, at 98, and he says that the 1933 Illinois Business Corporation Act was the parent for the Model Act. See *id.* at 100. Section 49 of the 1933 Illinois statute provides:

Upon the issuance of the certificate of incorporation by the Secretary of State, the corporate existence shall begin, and such certificate of incorporation shall be conclusive evidence, except as against the State, that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act.

Section 150 of the 1933 Illinois statute reads as follows: "All persons who assume to exercise corporate powers without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof."

200. See ILL. BUS. CORP. ACT ANN. 202 (1934) ("Little room, if any, has been left for the operation of the great body of law with respect to de facto corporations.").

201. See Henry Winthrop Ballantine, *A Critical Survey of the Illinois Business Corporation Act*, 1 U. CHI. L. REV. 357, 380-81 (1934) (stating that the common law doctrines of de facto corporations and corporations by estoppel will still need to be resorted to under the Illinois statute where there is a failure to file

The first judicial opinion to interpret the provisions of the 1960 Model Act was a case where the articles of incorporation had been filed and rejected, then later refiled and a certificate issued nine days after the contract in suit.²⁰² The District of Columbia Court of Appeals held that the Model Act had abolished both the concept of de facto corporation and corporation by estoppel, so that the president of the corporation was personally liable on its note.²⁰³

In the 1969 revision of the Model Act, the text of Sections 50 and 139 remained the same, although the sections were renumbered as Sections 56 and 146, respectively. However, once again the Comments were rewritten by the Committee, this time to make it unmistakable that de facto corporations had been abolished.²⁰⁴

the articles at all); H. L. McIntyre, *De Facto Corporations Under the 1933 Illinois Business Corporations Act*, 29 ILL. L. REV. 653, 657-60, 663 (1934) (nothing in the statute should prevent courts from applying principles of de facto corporations). The provisions of both Sections 49 and 150 of the 1933 Illinois Act are still in the current ILLINOIS BUS. CORP. ACT of 1983. See 805 ILL. COMP. STAT. 5/2.15, 3.20 (1993). They have not prevented the Illinois courts from applying the doctrines of de facto and estoppel corporations. See *A.A. Store Fixtures Co., Inc. v. Shopiro*, 651 N.E.2d 525 (Ill. App. Ct. 1995) (estoppel to deny de facto corporation); *Department of Revenue v. Roman S. Dombrowski Enter., Inc.*, 560 N.E.2d 881 (Ill. App. Ct. 1990) (Illinois statute did not abolish de facto corporations and corporations by estoppel in Illinois); Christopher P. Yates, Note, *Illinois Corporate Investors' Liability in the Case of Defective Incorporation*, 1986 U. ILL. L. REV. 1255, 1267 (question unclear as to effect of the statute, but common law doctrines may survive).

202. See *Robertson v. Levy*, 197 A.2d 443 (D.C. 1964).

203. See *id.* at 447. The same court did apply the doctrine of corporation by estoppel in the case of *Namerdy v. Generalcar*, 217 A.2d 109 (D.C. 1966), but that case involved a Belgian corporation not subject to the D.C. code. The result in *Robertson* on this point was criticized in William L. Stocks, Note, 43 N.C. L. REV. 206 (1964), but approved in Richard H. Zamboldi, Note, 10 VILL. L. REV. 166, 171 (1964) (put risk of non-compliance on incorporator, where it belongs); cf. Ernest L. Folk, III, *Corporation Statutes: 1959-1966*, 1966 DUKE L.J. 875, 884-86 (unclear what effect statute has; it may abolish both doctrines).

204. See MODEL BUS. CORP. ACT § 56, cmt. (2d ed. 1971): "Under the unequivocal provisions of the Model Act, any steps short of securing a certificate of incorporation would not constitute apparent compliance. Therefore a de facto corporation cannot exist under the Model Act." See also § 146, cmt. (2d ed. 1971): "Abolition of the concept of de facto incorporation, which at best was fuzzy, is a sound result. No reason exists for its continuance under general corporate laws, where the process of acquiring de jure incorporation is both simple and clear. The vestigial appendage should be removed."

Other courts agreed that the effect of the 1950 and 1969 Model Acts was to abolish the doctrine of de facto corporation,²⁰⁵ so that the question became whether the doctrine of corporation by estoppel continued to exist. Courts in Tennessee and Utah held that the Model Act also abolished the doctrine of corporation by estoppel,²⁰⁶ while the Supreme Court of Oregon found it unnecessary to decide the question.²⁰⁷ The Supreme Court of Georgia held that its unique statute codifying the doctrine of corporation by estoppel had survived the adoption of the Model Act for the purpose of preserving that doctrine.²⁰⁸

In the meantime, the authors of the Model Act did an about-face in the 1984 Model Business Corporate Act (hereinafter MBCA), but were not very clear about their reasons.²⁰⁹ The official comment to the 1984 MBCA Section 2.04 acknowledged that the doctrines of de facto corporation and corporation by estoppel continue to be applied even in states where corporate existence commences only upon filing

205. See *Swindel v. Kelly*, 499 P.2d 291, 299 n.28 (Alaska 1972) (statute was designed to eliminate concept of de facto corporation in Alaska). In its 1988 version of the MODEL ACT § 56, Alaska added a sentence: "The doctrines of de jure compliance, de facto corporations, and corporations by estoppel are abolished." ALASKA STAT. § 10.06.218 (1996). See also *Booker Custom Packing Co. v. Sallomi*, 716 P.2d 1061, 1063 (Ariz. Ct. App. 1986) (de facto doctrine abolished in Arizona by statute); *Cahoon v. Ward*, 204 S.E.2d 622, 624-25 (Ga. 1974) (no longer any concept of de facto corporation in Georgia); *Timberline Equip. Co. v. Davenport*, 514 P.2d 1109, 1111 (Or. 1973) (principle of de facto corporation no longer exists in Oregon); *Delaware Systems Corp. v. Greenfield*, 636 A.2d 1318 (R.I. 1994) (Rhode Island statute negates possibility of de facto corporation); *Thompson & Green Mach. Co. v. Music City Lumber Co.*, 683 S.W.2d 340, 344-45 (Tenn. Ct. App. 1984) (statute abolishes the concept of de facto incorporation in Tennessee); *American Vending Services, Inc. v. Morse*, 881 P.2d 917, 920-23 (Utah Ct. App. 1994) (de facto corporation doctrine has been extinguished in Utah by statute).

206. See Tennessee and Utah cases cited *supra* note 205. The Utah decision was criticized in Douglas C. Waddoups, Note, *American Vending Services, Inc. v. Morse: The Problem Of Defective Incorporation in Utah*, 1995 B.Y.U. L. REV. 303.

207. See *Davenport*, 514 P.2d at 1112-13.

208. See *Cahoon v. Ward*, 204 S.E.2d at 622. The present version of the Georgia statute provides: "The existence of a corporation claiming a charter under color of law cannot be collaterally attacked by persons who have dealt with it as a corporation. Such persons are estopped from denying its corporate existence." GA. CODE ANN. § 14-5-4 (1994).

209. See MBCA § 2.04 (1984).

of articles of incorporation. The comment states that the 1984 MBCA Model Act is relaxing its standard so that limited liability might be recognized in the following situations: (1) where a corporate organizer reasonably and honestly believes that the articles have been filed, but in fact they have not been due, for example, to attorney neglect; (2) where the articles have been mailed or delivered for filing, but not received by the secretary of state through no fault of the corporate organizer; (3) where the third party knows the articles have not been filed and looks only to the corporation in formation; (4) where the third party relies on the corporation's credit even though no corporation exists, and the corporate organizer knows that; and (5) where inactive investors have not authorized the commencement of business without the protection of the corporate shield and business is commenced without their knowledge.

The comment concludes that limited liability should probably be available in situations (1), (2), (3) and (5) and probably not in (4). Section 2.04 does this by providing that "[a]ll persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this Act, are jointly and severally liable for all liabilities created while so acting." North Carolina did not adopt Section 2.04 at all when it adopted the 1984 MBCA,²¹⁰ and several other states modified the language of Section 2.04 when they adopted the 1984 MBCA.²¹¹ As the MBCA comment ac-

210. See N.C. GEN. STAT. § 55-2-04, cmt. (§ 2.04 is too simplistic to cover all preincorporation acts) (1990).

211. See, e.g., COLO. REV. STAT. § 7-102-104 (1997) (rejecting § 2.04 and providing exception for persons who have "good faith belief" that they have authority to act for the corporation); FLA. STAT. ANN. § 607.0204 (West 1993) (requiring "actual knowledge" of lack of incorporation and providing no liability to any person who also has actual knowledge); IDAHO CODE § 30-1-204 (Supp. 1997) (rejecting § 2.04 and retaining version of 1969 Model Act § 146); S.C. CODE ANN. § 33-2-104 (1990) (rejecting § 2.04 and providing exception for persons "believing in good faith that the articles have been filed"); TENN. CODE ANN. § 48-12-104 (1995) (providing no liability to any persons who "knew or reasonably should have known that there was no incorporation"); VA. CODE ANN. 13.1-622 (Michie 1993) (providing no liability to any person "who also knew that there was no incorporation"); WASH. REV. CODE ANN. § 23B.02.040 (West 1994) (providing no liability to any person who also knew that there was no incorporation).

knowledges, Section 2.04 does not cover situation (3) explicitly.

The striking thing about the 1984 MBCA is that it returns the situation for all practical purposes to where it was in 1950. Situations (1) and (2) are prototypical *de facto* corporation scenarios.²¹² Situation (3) posits the usual justification for promoter nonliability, that the third party knows of lack of incorporation and agrees to look only to the corporation in formation.²¹³ Situation (5) is the case where no *de facto* corporation or corporation by estoppel exists, but a passive investor is found not personally liable.²¹⁴ Finally, situation (4) is the usual promoter liability case, where a corporate organizer is not freed from personal liability merely because the third party believes a corporation to exist.²¹⁵ The comment should explicitly acknowledge that the doctrines of *de facto* corporations and corporations by estoppel are no longer abolished in Model Act states.

V. CONCLUSION

One can only sympathize with Professor Frey, or anyone else who has attempted to distill a rule of law from the huge mass of defective incorporation cases. However, his conclusions must be rejected as unreliable in light of his failure to realize the critical importance of protecting the reasonable commercial expectations of both parties, and in particular, the reasonable expectations of the incorporators. Reasonable, good faith efforts to incorporate by filing the articles of incorporation and reasonable, good faith belief in corporate existence, coupled with lack of prejudice to a third party contracting with the corporation as such, are the essence of the defective incorporation doctrines. States which have adopted the 1984 MBCA should follow its more enlightened advice in this area. States which still have a version of the 1950 Mod-

212. See cases cited *supra* notes 125, 129, 184-193 and accompanying text.

213. See cases cited *supra* notes 30, 37-38 and accompanying text.

214. See cases cited *supra* notes 125, 130 & 132 and accompanying text. See also the discussion in *Timberline Equip. Co. v. Davenport*, 514 P.2d 1109 (Or. 1973) (inactive investors would not be liable under 1969 MODEL ACT).

215. See cases cited *supra* notes 18-22 and accompanying text.

el Act should take an approach to defective incorporation cases which allows for equitable protection of the reasonable expectations of the parties.