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Case Notes

CASE NOTES

Administrative Law—FCC Applies Fairness Doctrine To Cigarette Commercials.—Acting for himself, attorney John Banzhaf III filed a complaint requesting that WCBS-TV grant free and equal air time to groups opposed to cigarette smoking because it is a health hazard.[1] The FCC ruled in favor of the complaint, holding that cigarette commercials present a "controversial issue of public importance" and are therefore within the ambit of the fairness doctrine.[2] The Commission suggested that WCBS-TV comply with the ruling by presenting public service announcements available from the American Cancer Society or the Department of Health, Education and Welfare. However, the FCC emphasized that equal time was not required by the fairness doctrine, but that a "significant" amount of time, to be determined by the licensee, would be sufficient. *In re Television Station WCBS-TV*, 8 F.C.C.2d 381 (1967). The FCC later denied a petition for stay of effectiveness.[3] The Commission also issued a clarification notice, stating that licensees were not *required* to use the suggested spot announcements, nor were they required to grant free rebuttal time to the tobacco industry.[4]

As a licensee of the Government,[5] bound to operate in the public interest,[6] a broadcasting station is expected to keep its audience informed of major public issues.[7] The Federal Communication Commission's fairness doctrine imposes upon broadcast licensees who present "controversial issues of public importance" an affirmative obligation to provide a significant amount of air time to responsible spokesmen for conflicting points of view.[8] The broadcaster may not require payment for the time provided,[9] but he has been permitted to retain substantial discretion in selecting spokesmen for the opposition point of view,[10] allotting

1. Letter from John Banzhaf III to FCC, Jan. 5, 1967, on file in Fordham Law Review Office.

2. Television Station WCBS-TV, 8 F.C.C.2d 381 (1967).

3. Television Station WCBS-TV, 36 U.S.L.W. 2170 (F.C.C. Sept. 8, 1967).

4. FCC Doc. 67-1074, 36 U.S.L.W. 2194 (Sept. 21, 1967). The order is being challenged in the United States Court of Appeals for the Fourth Circuit. N.Y. Times, Sept. 22, 1967, at 25, col. 3.

5. Communications Act of 1934, 47 U.S.C. § 301 (1964). Licenses are granted for three year periods, with renewal provisions. 48 Stat. 1084 (1934), as amended, 47 U.S.C. § 307(d) (1964).

6. 47 U.S.C. § 307(a) (1964).

7. FCC Public Notice 95462 (Mar. 27, 1946).

8. 48 Stat. 1088 (1934), as amended, 47 U.S.C. § 315(a) (1964); Cullman Broadcasting Co., 25 P & F Radio Reg. 895 (1963); FCC, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964) [hereinafter cited as Fairness Primer].

9. "[Y]ou cannot reject programming—otherwise suitable to you—solely on the ground that it is not sponsored, where you have not presented and do not plan to present the conflicting viewpoints in other programming." John Norris, 1 F.C.C.2d 541, 542 (1965).

10. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1251-52 (1949) [hereinafter cited as Report on Editorializing].

time[11] and choosing program format.[12] The doctrine is generally applied to both national[13] and local issues,[14] where an individual has been attacked on the air,[15] and to the broadcast of political spot announcements.[16]

Broadcast licensees, like other communicators, are protected by the constitutional guarantee of free speech.[17] The first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."[18] Broadcasting makes possible the exercise of free speech in a unique fashion, reaching vast numbers of people simultaneously. However, the physical limitations of the broadcast band make it impossible to assign individual frequencies to all those with differing viewpoints on important questions.[19] As licensor of this vital but limited medium,[20] the Government has a responsibility to assure the maximum possible dissemination of opposing views.[21] Without censoring the programs presented by licensees,[22] the FCC has required that the few who are licensed permit others to voice their opinions over the air.[23] The Commission demands that a license applicant or license renewal applicant be prepared to present balanced programming to the public, with sufficient time devoted to the discussion of major public issues.[24]

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11. Id.

12. Id.

13. E.g., Capitol Broadcasting Co., 38 F.C.C. 1135 (1965) (civil rights); Cullman Broadcasting Co., 25 P & F Radio Reg. 895 (1963) (nuclear weapons test ban treaty).

14. E.g., Richard B. Wheeler, 6 F.C.C.2d 599 (1965) (credit counseling and debt adjusting); Spartan Radiocasting Co., 33 F.C.C. 765 (1962); Hon. Charles L. Murphy, 23 P & F Radio Reg. 953 (1962) (hospital conditions); The Evening News Ass'n (WWJ), 6 P & F Radio Reg. 283 (1950) (labor strikes).

15. Milton Broadcasting Co., 23 P & F Radio Reg. 586 (1962); Billings Broadcasting Co., 23 P & F Radio Reg. 951 (1962).

16. Lawrence M. C. Smith, 25 P & F Radio Reg. 291 (1963).

17. Associated Press v. United States, 326 U.S. 1 (1945).

18. Id. at 20.

19. National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943).

20. 47 U.S.C. § 301 (1964).

21. See Barron, In Defense of "Fairness": A First Amendment Rationale For Broadcasting's "Fairness" Doctrine, 37 U. Colo. L. Rev. 31, 44 (1964).

22. 48 Stat. 1091 (1934), as amended, 47 U.S.C. § 326 (1964): "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship . . . and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech . . . ." See Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir.), cert. granted, N.Y. Times, Dec. 5, 1967, at 31, cols. 2-3 (No. 600, 1967 Term).

23. "It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." Report on Editorializing at 1249.

24. FCC Public Notice 95462 (Mar. 27, 1946). Although not specifically authorized to do so by statute, the FCC has always considered program service an important factor in determining whether a station has fulfilled the public interest requirement. See W. Emery, Broadcasting and Government 36-41 (1961). Overall programming control by the FCC has received

The fairness doctrine becomes operative *after* a license has been granted. Its purpose is to prevent infringement of free access to the air waves during the term of the license.[25] If the licensee presents one side of a "controversial issue of public importance," he is required to seek out, and offer time to, those who represent conflicting points of view on that issue.[26] Such infringement upon broadcasters' freedom of speech is considered necessary in order to protect the public's right to be informed.[27] However, the FCC generally does *not* specify which issues a broadcaster must present, nor does it control the choice of opposition spokesmen or the time offered to them. Thus, as long as the licensee does not deprive some responsible persons of their right to speak freely over the air, he retains substantial editorial freedom.[28]

Broadcasters contend that by "suggesting" the presentation of public service spot announcements, the FCC has departed from fairness doctrine policy, which in the past has emphasized that programming is a matter for licensee determination.[29] Because of the broadcasters' argument that the Commission's departure bordered on censorship,[30] the FCC specifically clarified its original position by stating that licensees are free to employ other types of programming, for example, roundtable discussions or documentaries.[31] Despite this clarification, the FCC has, in effect, prescribed the manner of compliance since the presentation of paid cigarette commercials requires presentation of opposing advertisements, gratis. Larger network affiliated stations, which have the facilities and the capital to broadcast discussions, interviews and documentaries on controversial issues, do not consider the smoking problem of sufficient audience interest to justify an increase in the time presently devoted to the cigarette controversy and a reduc-

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judicial recognition. Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933). See also National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

25. Report on Editorializing at 1248-49 n.1.

26. Fairness Primer at 104 23.

27. Id.

28. Id. at 1024.

29. Report on Editorializing at 1251-52; McIntire v. William Penn Broadcasting Co., 151 F.2d 597 (3d Cir. 1945), cert. denied, 327 U.S. 779 (1946). See Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967).

30. Letter from WCBS-TV to FCC, June 23, 1967, at 1-2, 6, on file in the Fordham Law Review Office. In asking the FCC to reconsider its decision, Peter Allport, President of the National Association of Broadcasters, stated: " 'The principle of the inviolability of editorial content from advertising influence stems from the broader freedom of editors and publishers from all outside pressure. . . . The decision on what and what not to publish . . . has been up to the editor. But the ruling now instructs the broadcast media to use their editorial (non-commercial) time to counter the possible influence of advertisements. The freedom of editorial decision has thus been violated. In the future editorial content, in part, at least, will not be dictated by the conscience and responsibility of the licensee, but by special interest groups acting through the commission.

" 'We fear that this may open the floodgates to "editorial pressure" to the detriment of a free and unbiased press.' " Advertising Age, July 10, 1967, at 3, 56, cols. 4-5, 1-3.

31. FCC Doc. 67-1074, 36 U.S.L.W. 2194 (Sept. 21, 1967).

tion of the time scheduled for other controversial issues.[32] Moreover, the standards necessary for compliance with the doctrine are vague,[33] and broadcasters are reluctant to experiment with other methods of compliance when they can safely retain their licenses by following suggestions which would clearly satisfy the FCC.[34] If documentaries are used, should they present solely the health hazard side of the controversy, or would it be permissible to present the views of the tobacco industry as well? Would the audience be interested in a one-sided documentary? The prohibitive cost of producing programs precludes most smaller stations from undertaking documentaries or other expensive programming[35] and compels them to use the canned spots composed by the American Cancer Society.

No previous case has ever specifically applied the fairness doctrine to a commercial product advertisement.[36] In *Sam Morris*,[37] while holding that radio advertisements for alcoholic beverages can raise "substantial issues of public importance,"[38] the FCC refused to apply the requirements of the fairness doctrine, reasoning that it would be unfair to punish one station for the industry-wide practice of broadcasting such commercials.[39] However, this decision made it quite clear that merely because a broadcast takes the form of a commercial, it is not impossible for a controversial issue to be raised.[40] Nevertheless, no license has ever been denied solely on fairness doctrine grounds.[41] Absent bad faith or unreasonable judgment in licensee compliance with the fairness doctrine, the FCC will not deny a renewal application.[42] Since it was not a renewal proceeding, there was no question of license revocation at the instant proceeding. It is probable that the Commission used the opportunity presented by Mr. Banz-

32. "If the Commission's ruling stands, the impact of smoking on health will become the most significant public issue on which broadcasters will regularly be presenting broadcast material. It need hardly be suggested that . . . it does not deserve this degree of prominence. In the health field alone, there are numerous issues equally as important. Many other national and international issues vie for and receive attention from conscientious broadcast licensees. Their allocation of time to the broad range of important public issues will suffer if their acceptance of product advertising is held to impose a strait-jacket on their freedom of selection of controversial issues." Letter from WCBS-TV to FCC, supra note 30, at 8.

33. See Barron, The Federal Communications Commission's Fairness Doctrine: An Evaluation, 30 Geo. Wash. L. Rev. 1, 41 (1961).

34. N.Y. Times, Oct. 6, 1967, at 55, cols. 3-4.

35. Instead of using other types of programming, one Chicago channel has given $17,500 worth of free commercial time in one month. Id.

36. The Report on Editorializing and the Fairness Primer, which together set forth the basic fairness doctrine guidelines, make no reference to product advertising. CBS made a point of this silence in its request for rescission of the Commission's ruling. Letter from WCBS-TV to FCC, supra note 30, at 3-4.

37. 11 F.C.C. 197 (1946).

38. Id. at 199.

39. Id. at 198.

40. Id. at 199.

41. Barron, supra note 33, at 4.

42. Fairness Primer at 10416.

haf's complaint to extend the doctrine, forewarning the broadcasting industry that its presentation of the cigarette controversy will be taken into consideration at renewal time.

In the past, the FCC's broadcast advertising policy has been less concerned with particular products advertised than with such matters as false and misleading advertising and excessive commercialization.[43] In its early history, the Commission occasionally weighed the qualitative merits of advertisements;[44] but generally it has been cautious about delineating rules since it recognizes that advertising provides the means of support for broadcasting stations.[45] However, by imposing on broadcasters an affirmative duty to offer free[46] time to groups opposing cigarette smoking, the instant decision may signify a softening of the FCC's reluctance to restrict the content of material which supplies the broadcasters' profit.[47]

The ruling suggests that a "significant" amount of time be provided for health announcements.[48] Assuming licensees will employ spot announcements rather than use other types of programming, they still face the problem of deciding how frequently the announcements must be aired. There is no standard by which to ascertain the minimum amount of time which would satisfy the FCC. The General Counsel for the Commission has ventured his personal opinion that compliance with the instant ruling would be satisfactory if approximately one third of the total time devoted to cigarette commercials were granted to the anti-smoking point of view.[49] Using that proportion, a broadcaster would have an affirmative obligation to offer an immense amount of time to organizations such as the American Cancer Society or other anti-smoking groups. For example, on NBC from May 29 to June 4, 1967, 34 cigarette spots were shown, 5 per cent of a total of 713 spots.[50] At a 3 to 1 ratio, 10 to 12 anti-cigarette spots of comparable duration would fulfill the broadcaster's obligation, about 1.7 per cent of total available spots. By continuing to advertise, the cigarette companies would be providing time for those critical of their own product, and the broadcaster would receive no compensation for time he could sell to other commercial advertisers.

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43. Ramey, The Federal Communications Commission and Broadcast Advertising: An Analytical Review, 20 Fed. Com. B.J. 71, 72-79 (1966).

44. KXL Broadcasters, 4 F.C.C. 186 (1937) (lotteries); Knickerbocker Broadcasting Co., 2 F.C.C. 76 (1935) (birth-control devices); United States Broadcasting Corp., 2 F.C.C. 208, 218-19 (1935) (ads by clergymen); Scroggin & Co. Bank, 1 F.C.C. 194 (1935) (advice on marriage and family matters). See generally Ramey, The Federal Communications Commission and Broadcast Advertising: An Analytical Review, 20 Fed. Com. B.J. 71 (1966).

45. "[T]he Commission realizes that some profit must be obtained because stations are not always licensed to philanthropic . . . organizations." WGAR Broadcasting Co., 4 F.C.C. 540, 549 (1937).

46. John Norris, 1 F.C.C.2d 541, 542 (1965).

47. Report on Editorializing at 1251; Capitol Broadcasting Co., 38 F.C.C. 1135, 1140 (1965).

48. 8 F.C.C. 2d at 382.

49. N.Y. Times, June 3, 1967, at 1, 20, cols. 1, 6.

50. Id., June 11, 1967, § 4, at 2, col. 6.

In view of the broadcasters' already tightly packed program schedules, it would be very difficult for a station to increase the number of spots available to advertisers.[51] Therefore, a station would either have to increase its advertising rates to cover the loss resulting from the free time granted or cut time offered to the cigarette companies to avoid granting a large amount of corresponding free time. The latter alternative would mean sacrificing some of the huge amounts of money spent by the tobacco industry on television ads.[52] The tobacco industry itself is likely to curtail its broadcast advertising, placing more emphasis on other media.[53] It has been claimed that the resultant loss in billings could put numerous broadcasters out of business.[54] Moreover, it is likely that the broadcasters could not deduct the free air time granted as a charitable contribution for income tax purposes.[55]

In the past, issues concerning health[56] and issues which have been the subject of congressional activity[57] have been brought within the purview of the fairness doctrine. In the instant case, the FCC cited the 1964 Report of the Surgeon General's Committee and the Federal Cigarette Labeling and Advertising Act of 1965 as authority for considering normal use of cigarettes a health hazard.[58] The ruling was "tailored to carry out the Congressional purpose" of promoting "smoking education campaigns."[59]

The decision imposes a duty to broadcast information in opposition to cigarette commercials per se, irrespective of their content, and may therefore be criticized to the extent that cigarette commercials do not raise a controversial health issue.[60] The Federal Trade Commission already prohibits specific health claims in cigarette advertising,[61] and the Radio and Television Codes of the National

51. Furthermore, a significant increase in the proportion of commercial to sustaining time might jeopardize a renewal application, since the FCC will probably demand an explanation if actual commercial time exceeds 10% of that proposed in the license application. In the Matter of Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314, and 315, 1 F.C.C.2d 439 (1965).

52. The tobacco industry spent a total of $297,500,000 on all advertising in 1966. 66.6% of this total was spent for television ads. Advertising Age, July 3, 1967, at 1, 53, cols. 1, 2-5.

53. Id., June 26, 1967, at 1, 157, cols. 5-6, 2-3.

54. Id.

55. Rev. Rul. 67-236, 1967 Int. Rev. Bull. No. 30, at 6.

56. Broadcast of "Living Should Be Fun," 33 F.C.C. 101, 107 (1962) (flouridation of water; krebiozen in treatment of cancer).

57. WSOC Broadcasting Co., 17 P & F Radio Reg. 548 (1958) (pay-TV); New Broadcasting Co., 6 P & F Radio Reg. 258 (1950) (Nat'l Fair Employment Practices Comm'n).

58. 8 F.C.C.2d at 382.

59. Id.

60. Letter from WCBS-TV to FCC, supra note 30, at 1, 4-6. See Advertising Age, July 10, 1967, at 3, col. 4, where the National Association of Broadcasters stated: " 'So long as a lawful business sells lawful products by means of lawful advertising, that business has the inviolate right to convince the consumer that the brand of the product being advertised should be purchased instead of a competitor's brand. Thus, product advertising in and of itself does not involve the discussion of a public issue.' "

61. FTC Release, Sept. 22, 1955, 2 Trade Reg. Rep. ¶ 7,894, at 12,802-03.

Association of Broadcasters also impose restrictions on advertising cigarettes as healthful.[62] These limitations on the content of cigarette commercials indicate that the promotion of a particular cigarette as "attractive or enjoyable" does not automatically mean an affirmative claim is made as to its healthfulness.[63] The FCC has noted that there is a distinction between implicit and explicit advocation of one side of a particular issue. The broadcast of church services does not create a duty to broadcast an atheistic or agnostic point of view, whereas an explicit attack on atheism or agnosticism might give rise to such an obligation.[64] If no explicit health claims are made by cigarette commercials, it is arguable that there is no justification for applying the fairness doctrine.

Possible extension of the fairness doctrine to other products has caused considerable apprehension in the broadcasting industry.[65] While it is true that the FCC expressly limited its holding to cigarettes,[66] it can be argued that the fairness doctrine could logically be applied to other products advertised over the airwaves.[67] It has been suggested that such controversial products as automobiles, toothpaste, candy, beer and proprietary drugs would come under fairness doctrine principles.[68] Controversy over automobile safety has become important enough to cause federal investigation and legislation. Unlike cigarette commercials, which avoid affirmative health claims, automobile advertisements on radio and television boast specific safety innovations. In so far as automobile safety claims are often explicit, it would seem that the FCC, in making its initial fairness doctrine incursion into broadcast advertising, should have applied the doctrine to automobile rather than cigarette commercials. While an extension is possible, it seems unlikely that the FCC will depart further from traditional fairness doctrine application by embarking upon a program of concerted regulation of commercials, the lifeblood of the broadcasting industry.

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62. New cigarette ad guidelines took effect on Sept. 1, 1967. See Advertising Age, July 24, 1967, at 3, col. 1. Robert B. Meyner, administrator of the NAB cigarette code, has criticized the ruling: "'The FTC's present position . . . is that a cigaret advertisement makes an affirmative health claim if it does not portray smokers as a sickly, miserable lot and if it does not recite that cigaret smoking is unhealthy and a vice . . . . The code is operated on the principle that affirmative claims for health, distinction, success and sexual attraction are not allowed. The code has not descended to the illogical position that the absence of any claim in these areas is automatically a claim that cigaret smoking is safe.'" Advertising Age, Aug. 21, 1967, at 1, 97, cols. 1, 5. But see 5 Trade Reg. Rep. ¶ 50,174 at 55,289 (1967).

63. Letter from WCBS-TV to FCC, supra note 30.

64. Madalyn Murray, 5 P & F Radio Reg. 2d 263, 266-67 (1965) (concurring opinion). See also Robert H. Scott, 25 P & F Radio Reg. 349 (1963); Letter from Wayne Coy to Edward J. Heffron, 3 P & F Radio Reg. 264a (1948).

65. See generally Letter from WCBS-TV to FCC, supra note 30, at 9; N.Y. Times, June 4, 1967, at 57, col. 1; id., June 11, 1967, at 5, col. 1.

66. 8 F.C.C.2d at 381.

67. Letter from WCBS-TV to FCC, supra note 30, at 9.

68. Advertising Age, June 26, 1967, at 1, 157, cols. 4-5, 2-3. Many other products have been suggested, e.g., petroleum products, food and grocery products, toiletries, and many textile products. Id. Advertising Age, July 10, 1967, at 3, cols. 5, 1-3.

Admiralty—Officer's Assignment of Insufficient Work Party Renders Vessel Unseaworthy.—Plaintiff, a crewman on defendant's vessel, fell and injured his back while unraveling a rope during a docking operation. Plaintiff claimed negligence and unseaworthiness arising from the assignment of an inadequate number of men to perform the task. The trial court referred the issue of negligence to the jury, which held for the defendant. On the issue of unseaworthiness the trial court directed a verdict for the defendant, holding that the facts failed as a matter of law to constitute unseaworthiness. The Court of Appeals for the Second Circuit affirmed.[1] The Supreme Court reversed and remanded to allow the plaintiff to present his theory of unseaworthiness to the jury. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967).

The doctrine of unseaworthiness[2] requires a shipowner to furnish a vessel and appurtenances, including hull, equipment and manning, reasonably safe for its intended use.[3] "Proper equipment" has been held to mean gear that is sufficient in quantity,[4] mechanically sound and properly used[5] for each individual task.[6] For a vessel to be seaworthy with respect to personnel, it is necessary that the shipowner provide a crew which is sufficient in number and in competency to meet the normal contingencies of the voyage.[7]

The Supreme Court granted certiorari in the instant case to resolve a question which had caused a conflict among the circuits.[8] "The single legal question pre-

1. Waldron v. Moore-McCormack Lines, Inc., 356 F.2d 247 (2d Cir. 1966).

2. In The Osceola, 189 U.S. 158 (1903), the Supreme Court, in dictum, outlined the general content of unseaworthiness, which became an essential legal remedy to complement the injured seamens' original basis of recovery through maintenance and cure. Maintenance and cure was the earliest of the injured seaman's legal rights and entitled him to adequate medical treatment, food and lodging until going ashore, and wages to the extent of the voyage for which he contracted. In 1920 the Merchant Marine Act (Jones Act) § 33, 46 U.S.C. § 688 (1964) further enlarged his remedies by allowing a seaman to recover damages for the negligence of an employer or other employees. For a concise history of the judicial development and expansion of the doctrine see Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 543-49 (1960).

3. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960). The duty to provide a seaworthy vessel is absolute and non-delegable. See id. at 548-49, which cites Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) (shipowner's liability extends to longshoremen performing work traditionally done by seamen) and Mahnich v. Southern S.S. Co., 321 U.S. 96, 102 (1944).

4. The instant case refers to loading an excessive quantity of rope on a pulley as a clear case of unseaworthiness. 386 U.S. at 728.

5. "Properly" includes both the proper use, Ferrante v. Swedish Am. Lines, 331 F.2d 571 (3d Cir.), cert. dismissed, 379 U.S. 801 (1964), and the proper purpose, Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959).

6. Mere availability of proper equipment will not satisfy the seaworthiness requirement. The test of seaworthiness is applied, "when and where the work is to be done." Mahnich v. Southern S.S. Co., 321 U.S. 96, 104 (1943).

7. Keen v. Overseas Tankship Corp., 194 F.2d 515, 518 (2d Cir. 1952). See also Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955); Robinson v. S.S. Atlantic Starling, 369 F.2d 69 (5th Cir. 1966); The Magdapur, 3 F. Supp. 971 (S.D.N.Y. 1933).

8. For a discussion of this conflict see 66 Colum. L. Rev. 1180 (1966).

sented by this case," the Court noted, "is whether a vessel is unseaworthy when its officers assign too few crewmen to perform a particular task in a safe and prudent manner."[9] In *American President Lines, Ltd. v. Redfern*,[10] the ninth circuit had held that such an assignment creates a dangerous condition rendering a vessel unseaworthy. The plaintiff in *Redfern* was ordered to open a stuck gate valve by himself, although the task involved the turning of a large wheel and normally required two men. In his suit for personal injuries, the plaintiff alleged both negligence and unseaworthiness.[11] The court held that the stuck valve and lack of assistance rendered the ship unseaworthy. In effect, *Redfern* held that the assignment of one man to perform the job, given the condition of the valve, had created an unseaworthy condition.

In the instant case, the second circuit decided that a seaman injured solely as result of the act or omission of an otherwise competent officer had to prove negligence.[12] In so declining to increase the potential liability of a shipowner without fault under the seaworthy doctrine, the court of appeals reasoned that such an extension "in the absence of legislation"[13] would impose upon the shipowner the duty, already explicitly negated by the Supreme Court,[14] of providing an "accident proof" vessel.[15] The Supreme Court has now resolved this conflict by including such a factual situation within the doctrine of unseaworthiness and thus increasing the area of a shipowner's absolute liability. In an effort to reconcile its holding with past decisions, the Court reasoned that a shipowner's responsibility should not be less when he employs men rather than machines and held the requirement of an adequate and sufficient ship's crew to be as inclusive and demanding as those respecting its equipment.[16] The Court found that the employment of an *insufficient* number of men for a particular job and the

9. 386 U.S. at 724.

10. 345 F.2d 629 (9th Cir. 1965).

11. Id. at 631-32. A literal reading of the decision might suggest that it was *both* the stuck valve and the lack of assistance which created the unseaworthy condition. However, since "all valves have a tendency to stick on occasion, due to temperature changes" this particular valve was actually "within the normal range of maritime appliances" and could not by itself render the vessel unseaworthy. Id. Thus it was clearly the assignment of too few men to operate the stuck valve which created the unseaworthiness.

12. 356 F.2d 247, 251 (2d Cir. 1966).

13. Id. at 251. This desire expressed by the court to leave the task of expansion of the doctrine of unseaworthiness to Congress has been criticized since the doctrine itself, unlike the theory of negligence under the Jones Act, is considered under "general maritime law" and has been both defined and expanded by the decisions of the courts themselves. "No area of federal law is judge-made at its source to such an extent as is the law of admiralty." Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) (Frankfurter, J., dissenting). See also 66 Colum. L. Rev. 1180, 1183 (1966).

14. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960).

15. 356 F.2d 247, 251 (2d Cir. 1966).

16. The Court thus equated the requirement of gear sufficient in quantity with the requirement of a crew sufficient in numbers; gear that is mechanically sound, with a competent crew; and the proper use of equipment, with the proper use of the men for each individual task.

resulting *misuse* of the men constituted unseaworthiness making it necessary to protect the seaman "from dangerous conditions beyond his control."[17]

By expanding the scope of unseaworthiness, American courts have pursued a technique of risk distribution whereby the financial burden of seamens' injuries resulting from the inherent and frequent dangers of the enterprise, fall upon the shipowner, "because he is in a better position, by means of prices and insurance, to shift it to the public."[18] The critics of this system of risk distribution[19] maintain that the shipping industry, so vital to the nation's economy and defense,[20] could be crippled and priced out of its market by the expanded financial liability. They cite the 600% rise in insurance rates in the industry between 1945 and 1954 as well as the large number of steamship companies which have gone out of business[21] as evincing the fact that the "shipping industry is not the horn of plenty . . . envisioned by the courts."[22] If it is socially undesirable for either the traditionally helpless[23] seaman or his employer, the shipowner, to bear the burden, it might be asked who should bear the expense?[24]

A critic of the risk-distribution theory might also ask whether the performance of a particular task by an inadequate number of seamen constitutes unseaworthiness only when the task is performed pursuant to an officer's order. Since fault is not an element of unseaworthiness,[25] it might follow that the courts would further expand the doctrine to include cases where an insufficient number of men take it upon themselves to perform a task which they feel necessary. If the Court were to go this far, it would in effect be requiring the shipowner to provide an accident-free vessel[26] and thus be making him an insurer. If, how-

17. 386 U.S. at 728.

18. W. Prosser, Torts § 79, at 542 (3d ed. 1964). For an analysis of the theory of "risk distribution" and its theoretical justifications, see Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961). The application of the theory of risk distribution to the doctrine of unseaworthiness is examined in 75 Yale L.J. 1174 (1966).

19. See Shields & Byrne, Application of the "Unseaworthiness" Doctrine to Longshoremen, 111 U. Pa. L. Rev. 1137 (1963).

20. Id. at 1149. See also White, A New Look at the Shipowner's Right-Over for Shipboard Injuries, 12 Stan. L. Rev. 717 (1960).

21. See Comment, Expanding the Warranty of Seaworthiness: Social Welfare or Maritime Disaster, 9 Vill. L. Rev. 422, 440-41 (1964).

22. Id. at 440.

23. Reed v. The Yaka, 373 U.S. 410, 413 (1963).

24. "If there is a genuine social interest in preserving the American shipping industry, the government, rather than the worker should pay the subsidy." 75 Yale L.J. 1174, 1188 (1966).

25. "It [unseaworthiness] is essentially a species of liability without fault . . . . It is a form of absolute duty owing to all within the range of its humanitarian policy." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946). Mr. Justice Stewart stated in reference to the Sieracki case: "From that day to this, the decisions of this court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty . . . to exercise reasonable care." Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960).

26. The Supreme Court insists that the shipowner's duty does not extend this far. 362 U.S. at 550.

ever, the Court should choose not to expand the doctrine of unseaworthiness so as to include such cases, it might properly be accused of allowing the concept of fault to encroach upon the doctrine of unseaworthiness. The only conceivable basis for holding that unseaworthiness exists in cases where an officer or employee of the shipowner assigns too few men to perform a particular task and not holding unseaworthiness when too few men undertake the task themselves is the absence of fault on the part of the shipowner. However, the courts have emphatically stressed that liability under the doctrine of unseaworthiness is completely distinct from the concept of fault.[27]

The dissent in the present case raises the interesting question of whether it was necessary to remand the issue of unseaworthiness to the jury, which had already found that the defendant had not been negligent. Though negligence and unseaworthiness are independent,[28] the dissent suggested that they may be coextensive when the facts involve the human element, namely, the assignment by the officer. To establish whether the third mate was negligent in making the assignment the jury had to consider whether "under the circumstances a reasonably prudent man would not have given such an order,"[29] i.e., whether he exercised due care. The conditions surrounding the docking operation were such that the exercise of due care could only have resulted in the mate's assigning the proper number of men to uncoil the rope in the absence of an emergency.[30] In an emergency, it is conceivable that he could have exercised due care under the circumstances and, nevertheless, have created an unseaworthy condition. The dissenting justices, however, stated that "no such special facts"[31] existed here. Absent such emergency, then, an order made in the exercise of due care could only result in the assignment of the correct number of men to the job. Thus, when the jury decided there was no negligence, it necessarily failed to believe the testimony to the effect that more than two men were required for the job. But, by deciding that only two men were necessary, the jury also determined that there was no unseaworthiness. Naturally, the validity of this theory depends upon the accuracy of the conclusion that if the third mate had exercised reasonable care in the circumstances of the docking operation, he necessarily had to assign a safe number of men to the rope. The pertinent facts reveal that as the ship was engaged in its docking operation, the officer on the bridge decided another mooring line was necessary as a spring line.[32] As all the other crewmen were occupied with other lines, the third mate assigned to plaintiff and another "exceptionally strong and capable" seaman the task of putting out a new line

27. Supra note 24.

28. Mitchell v. Trawler Racer Inc., 362 U.S. 539, 549 (1960). See also Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954).

29. 356 F.2d 247, 248 (2d Cir. 1966). See also Metzger v. S.S. Kirsten Torm, 245 F. Supp. 227, 231 (D. Md. 1965).

30. Prosser defines such a situation as one in which the "actor is left no time for thought, or is reasonably so disturbed or excited, that he cannot weigh alternative courses of action, and must make a speedy decision, based very largely upon impulse or guess." W. Prosser, supra note 18, at 171-72.

31. 386 U.S. at 730.

32. Waldron v. Moore-McCormack Lines, Inc., 356 F.2d 247, 248 (2d Cir. 1966).

" 'as quickly as possible.' "[33] It was during this operation, while tugging at the top of the coil, that the plaintiff slipped and was injured. The "urgency of getting out the new line, the tasks being performed by the other men [engaged during the docking operation], the condition of the current, wind and so on"[34] may not have been pressing enough to prevent the third mate, in the exercise of due care, from making the correct determination as to whether the particular men involved could safely carry the rope. If, as the jury decided, the third mate was not negligent, after making this determination, he could not have assigned too few men to the job.

It may also be maintained that the conditions surrounding the docking operation *did* create an emergency grave enough to occasion the issuance of an order prudently made but, nevertheless, resulting in a faulty assignment. In such an emergency, the third mate might have exercised due care under the circumstances and still, without fault, have created an unseaworthy condition by assigning too few men. Thus, the issue in the instant case would become quite simple. Only if the circumstances surrounding the docking operation were of an extraordinary nature could the third mate have made a prudent decision and nevertheless created an unseaworthy condition. The jury has already decided that the decision was prudent. Thus, the remand in this case should have required the trial judge to instruct the jury that they may decide the issue of unseaworthiness only if they find that an extraordinary, i.e., emergency, situation existed. If they find no emergency, then it is unnecessary to decide the question of unseaworthiness—the issue of the sufficiency of the assigned number of men under ordinary circumstances having already been decided by the first jury when they found no negligence.

Constitutional Law—Search and Seizure—Evidence Obtained During Police Investigation of an Emergency Held Admissible.—A police officer, while on radio patrol, received instructions to go to an address where a man was reportedly causing a disturbance. The officer responded to the call at what turned out to be a rooming house, whose manager had made the complaint. The manager led the policeman to a room out of which came noises of shouting, screaming and hand clapping. The officer knocked at the door and a voice answered: "Wait a minute, I'm not dressed." The policeman, after waiting for a minute, directed the manager to open the door with his pass-key. The defendant was found standing in the middle of the room with a syringe, eye dropper and a needle in his hands. The policeman then seized the evidence and arrested the defendant who was subsequently convicted of possession of narcotics. The appellate term in the first judicial department affirmed the conviction. The defendant appealed maintaining that since the officer did not comply with the statute requiring announcement of office and purpose prior to making a nonconsensual entry for the purpose of arrest, the arrest was illegal and the evidence secured was inadmissible. The court of appeals, in a 4-3 decision, affirmed the

33. Id.
34. Id. at 249.

conviction on the ground that the statute was inapplicable to this set of facts and that the entry of the police was investigatory and privileged. *People v. Gallmon*, 19 N.Y.2d 389, 227 N.E.2d 284, 280 N.Y.S.2d 356 (1967).

In *Mapp v. Ohio*[1], the Supreme Court held that evidence obtained by unconstitutional searches and seizures is inadmissible in a state court.[2] A search is constitutional if conducted pursuant to a legal search warrant, if it is carried out with the consent of the person whose premises are being searched or if the search is incident to a lawful arrest.[3] Since the policeman in the case at bar did not have a search warrant, the validity of the search must have been based on one of the other categories.

Since the defendant, himself, never consented to the search, to predicate the constitutionality of the search on a traditional theory of consent it is necessary to find that the night manager had authority to consent for the defendant. The court held that the hotel manager did have the authority to allow the police to enter the defendant's room[4] since in an emergency the management of a hotel should be able to enter a guest's room regardless of the guest's wishes.[5] But in the instant case no emergency situation existed. Thus, the holding of the court is difficult to reconcile with recent Supreme Court decisions. In *Stoner v. California*,[6] the Supreme Court held that evidence acquired by a search of the defendant's hotel room was inadmissible when consent was given by the clerk of the hotel without the defendant's permission. The *Stoner* Court said:

> It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room.[7]

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1. 367 U.S. 643 (1961).

2. Id. at 654. Mapp overruled Wolf v. Colorado, 338 U.S. 25 (1949), which held that: "[I]n a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." Id. at 33. Mapp had the effect of applying what had previously been federal standards of search and seizure to state prosecutions in state courts.

3. People v. Yarmosh, 11 N.Y.2d 397, 400, 184 N.E.2d 165, 166, 230 N.Y.S.2d 185, 187 (1962); People v. Loria, 10 N.Y.2d 368, 373, 179 N.E.2d 478, 482, 223 N.Y.S.2d 462, 466 (1961).

4. 19 N.Y.2d at 392-93, 227 N.E.2d at 286-87, 280 N.Y.S.2d at 359-60. The court bases this authority on the decision in DeWolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908) which held: "If the guest is assigned to a room upon the express or implied understanding that he is to be the sole occupant thereof during the time that it is set apart for his use, the innkeeper retains a right of access thereto only at such proper times and for such reasonable purposes as may be necessary in the general conduct of the inn or in attending to the needs of the particular guest." Id. at 403, 86 N.E. at 530.

5. See Restatement (Second) of Torts § 197(e), Illustration 8 (1965).

6. 376 U.S. 483 (1964).

7. Id. at 489.

The instant court noted that the fact that a rooming house was involved was "critically significant" and inferred that the constitutional rights of a guest in a rooming house are not the same as those of a tenant in demised premises. The weight of authority, however, is to the contrary. A guest in a hotel room is entitled to the same protection against unreasonable searches and seizures as is a tenant in an apartment, and these rights cannot be waived by the management of the hotel on behalf of the occupant.[8] Although the majority here indicated that the search in question was validated by the manager's consent, this was not the sole basis for the decision.

The court, however, did not predicate the constitutionality of the search on the theory that it was incident to a lawful arrest. The lawfulness of an arrest is determined by the law of the state in which the arrest takes place,[9] and each state has the right and the obligation to develop rules to meet the practical demands of criminal investigation and law enforcement.[10] In New York a police officer has the authority to arrest without a warrant under fixed circumstances,[11] and it is arguable that this authority would extend to the facts presented here.[12] Section 178 of the N.Y. Code of Criminal Procedure, the so-called "no-knock" statute, forbids the police officer to break the door unless he first announces his authority and purpose.[13] Here there was no attempt to comply with the statute. The district attorney contended, however, that entry by a policeman by means of a pass-key is not a breaking within the meaning of the statute,[14] and secondly, that

8. Id. Chapman v. United States, 365 U.S. 610 (1961) (rented house); United States v. Jeffers, 342 U.S. 48 (1951) (hotel room); Lustig v. United States, 338 U.S. 74 (1949) (hotel room).

9. Ker v. California, 374 U.S. 23, 37 (1963).

10. Id. at 34. Obviously these rules must not violate "the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain." Id.

11. N.Y. Code of Crim. Proc. § 177 (Supp. 1967).

12. N.Y. Code of Crim. Proc. § 177(1) empowers the police officer to make an arrest, without a warrant, when he has reasonable grounds for believing that a crime is being committed in his presence. In the case at bar the officer had reasonable grounds to believe that the defendant was guilty of disorderly conduct because of the unusual sounds emanating from the defendant's room. However, an argument could be made that the crime of disorderly conduct was already completed prior to the entry by the policeman for the purpose of arrest, thus requiring the policeman to obtain a warrant prior to making the arrest for disorderly conduct.

13. N.Y. Code of Crim. Proc. § 178: "To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance."

14. The meaning of the phrase "break open an outer or inner door or window" has not been expressly determined in the New York courts. The brief filed by the district attorney suggests that the statute should not apply to every non-consensual entry; he suggests that entry by a policeman by means of a pass-key is not a breaking within the meaning of the "no-knock" statute. The view taken by the respondent is that the term "breaking" necessarily carries with it the connotation of physical force and destruction of property. Brief for Respondent at 5-6. The court did not address itself to this contention, but by inference, ac-

even if it were, noncompliance with the statute would not demand the exclusion of the evidence obtained after the entry.[15] The instant court indicated that the entry by the police was not a breaking within the "no-knock" statute but that if an entry had been made for the purpose of arrest, then compliance with the "no-knock" statute would be mandatory and a failure to comply would result in a setting aside of the conviction.[16] The court held that the "no-knock" statute was inapplicable because at the time the police came to the rooming house they did not have an arrest-making state of mind. The court reasoned that since the policeman had not come to the rooming house to make an arrest, they were not bound by the procedural requirements of the "no-knock" statute. The police came to the rooming house to investigate an unusual, noisy disturbance and the action that they would have to take was uncertain. Certainly, they did not realize that they would be making an arrest until they opened the door. And as the court noted: "[T]he fact that the defendant was committing a crime does not retroactively invalidate the entry for it is not defendant's actions but the intent and purpose of the policeman prior to the entry that controls."[17]

Basically, the holding of the court is that in an emergency situation the police

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cepted the prevailing view that every non-consensual entry is a "breaking." The purpose of the notification requirement is to protect the individual from invasions of his privacy without his first being apprised that he is being sought pursuant to valid process. Miller v. United States, 357 U.S. 301, 313-14 (1958); Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949). In Ker v. California, 374 U.S. 23 (1963), the Supreme Court assumed that entry by the use of a pass-key by the police was a "breaking" within the meaning of the California "no-knock" statute. Thus the contention of the district attorney that "breaking" implies physical force is untenable in the light of prior cases dealing with similar statutes. It is the fact of entry, under the circumstances, and not the means used which constitutes the "breaking."

15. Brief for Respondent at 6-7. State courts are required to invoke the exclusionary rule only when the search is unreasonable, that is to say, unconstitutional. A search can meet constitutional standards even though it is illegal with respect to state standards. It is within the discretion of the court to make the decision of whether or not the evidence should be admitted.

In Ker v. California, 374 U.S. 23 (1963), the Supreme Court upheld a conviction which was based on evidence secured from a search which was preceded by a "breaking," although there had been no announcement by the police of their authority and purpose. The Court held that the lawfulness of the arrest was to be determined by the California law which provides that, under exceptional circumstances, the need to state authority and purpose need not be complied with. Id. at 37-38. This decision, to some extent, lends authority to the contention of the respondent that even if the "no-knock" statute is applicable to all non-consensual entries, the failure of the policeman to comply with it does not automatically call for enforcement by the exclusionary rule.

16. The New York courts have always required strict compliance with the "no-knock" statute and where the police have failed to comply with it, the arrest has been held illegal, and the evidence suppressed. People v. Griffin, 22 App. Div. 2d 957, 256 N.Y.S.2d 115 (1964) (mem.); People v. Goldfarb, 34 Misc. 2d 866, 229 N.Y.S.2d 620 (Sup. Ct. 1962). This would seem to imply that the New York courts, unlike the courts of California, feel that the "no-knock" statute is of constitutional dimensions.

17. 19 N.Y.2d at 393, 227 N.E.2d at 287, 280 N.Y.S.2d at 360.

may enter without regard to any procedural limitations. Thus an entry made for a purely investigatory purpose, in an emergency, is privileged. This would appear to be a new, distinct category of constitutional search. The rationale for this is clear. The police serve many functions within the community that have little or nothing to do with the apprehension of criminals.[18] If not privileged to make an entry for investigatory purposes, the police will be hampered in their salutary duty of aiding persons in distress.[19]

With the appearance of this new privilege the problem arises of determining when an entry is made for purely investigatory purposes and when, for arrest. This court apparently puts great faith in the expertise of trial court judges. It said:

> [T]he trial courts are familiar with police practices and should be able to determine when an entry is in truth only for investigative purposes based on privileged grounds without any intention to make an arrest. In making that determination the courts must be cognizant that there is a strong factual inference that an entry which results in an arrest or seizure of evidence was for the purpose of effecting an arrest or seizure. That inference should prevail unless the police establish a different purpose justified by objective evidence of a privileged basis for making the entry. In this case the evidence undisputedly established a different purpose and a privileged basis for the entry.[20]

This reasoning may well give less trouble in future cases than it does here. The district attorney had argued that the police officer, standing outside the defendant's room, had reasonable grounds to believe that the defendant was guilty of disorderly conduct. Thus, the prosecutor contended that the officer had power to make an arrest on that charge and that the entry was effected for this purpose.[21] Given this obvious arrest-making state of mind by the policeman, it is difficult to understand on what grounds the court was able to rebut the "strong factual inference." Furthermore, the court pointed out that these privileged investigatory entries must be limited to emergency situations. Two conspicuous circumstances in the instant case would seem to nullify the existence of an emergency. First, if there had been an emergency situation inside the room (or if the policeman had so believed) why did the policeman wait a full minute before seeking entrance to the room by use of the pass-key?[22] Secondly, the unusual sounds had been emanating from the room for several days; yet, when the police knocked, the noises ceased and a man coherently answered, "Wait a minute, I'm not dressed." This is not the language of a person in distress.

Under the holding of this case evidence obtained by the police after entering premises to investigate a reported emergency would be admissible even though the police had no warrant, the defendant had not consented to the entry and the

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18. See 2 C. Alexander, Law of Arrest § 637 (1949), which discusses the work done by police which is in no way connected with crime.

19. 19 N.Y.2d at 394, 227 N.E.2d at 288, 280 N.Y.S.2d at 361.

20. Id. at 394-95, 227 N.E.2d at 288, 280 N.Y.S.2d at 361-62.

21. Brief for Respondent at 3-4.

22. 19 N.Y.2d at 391, 227 N.E.2d at 286, 280 N.Y.S.2d at 358.

entry was not made to effect a lawful arrest. A search made pursuant to this new privilege could, of course, become unreasonable and thus unconstitutional, when the police act beyond the necessities of the emergency. The instant court's clear warning that the new privilege should be strictly construed must be followed by future courts, if further erosion of the individual's privacy is to be avoided.

Impleader—United States Permitted to Implead a State on an Indemnity Contract.—Plaintiff sustained injuries while employed as a seaman aboard a vessel owned by the United States and being used by the State of New York as a training ship for the New York Maritime College. A resident of New Jersey, he sued the United States in the Federal District Court for the Southern District of New York and asserted a claim for damages arising out of the injuries caused by the unseaworthiness of the vessel and by the negligence of the United States and its employees. The United States then sought to implead the State of New York,[1] claiming a right of indemnity based upon contractual obligations and warranties. New York moved to dismiss the third-party complaint for lack of jurisdiction of the court over the person of the state.[2] The court denied the motion to dismiss, holding that the state could properly be impleaded. *Williams v. United States*, 42 F.R.D. 609 (S.D.N.Y. 1967).

A fact pattern almost identical to that in the instant case arose in *Parks v. United States*,[3] a case relied upon heavily by New York in the instant case in support of its jurisdictional and constitutional arguments. *Parks* involved an action under the Federal Tort Claims Act brought by a citizen of New York seeking to recover damages arising out of a flood control project. The United States sought to implead the State of New York on the basis of an indemnity agreement similar to the agreement in the instant case, but the court granted New York's motion to dismiss on the ground that a state could not properly be impleaded in a district court.

New York claimed that it is not a "person" within the meaning of Rule 14(a)[4] and based its contention on the definition of "person" found in the United

1. Fed. R. Civ. P. 14(a) provides: "At any time after commencement of the action a defending party . . . may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

2. Fed. R. Civ. P. 12(b). Although the third-party complaint was filed pursuant to Rule 56 of the Supreme Court Admiralty Rules, the motion to dismiss was deemed as having been made pursuant to Rule 12(b) because the Admiralty Rules had been merged into the Federal Rules of Civil Procedure prior to any court action on the impleader. Therefore, as the court points out in its decision, the issue, in effect, deals with practice under the Federal Rules and the substantive law or procedural devices of admiralty practice have little to do with the problem under discussion.

3. 241 F. Supp. 297 (N.D.N.Y. 1965).

4. Fed. R. Civ. P. 14(a). "[A] defending party . . . may cause a summons and complaint to be served upon a person . . . ."

States Code.[5] The court rejected this semantic argument in light of the legislative history and liberal judicial interpretation of the Federal Rules.[6] The court pointed out, moreover, that the United States, as well as various state and municipal subdivisions, have been successfully impleaded in the federal courts.[7] The *Parks* case, however, had held that a state cannot be treated as a "person" under Rule 14(a) and ignored the liberal tendency of other courts in interpreting Rule 14(a).[8] It also ignored the intent of the Congress in providing this liberal provision for the consolidation of actions[9] and has been criticized for its incorrect application of the rule.[10]

The second argument posed by New York was that the court lacked jurisdiction over New York because the third-party action was not a suit "commenced by the United States . . . ."[11] Although the district courts have concurrent jurisdiction with the Supreme Court of "[a]ll controversies between the United States and a State,"[12] New York argued that such jurisdiction is limited to actions which are instigated by the United States and does not extend to third-party actions. In *United States v. Arizona*[13] the defendant raised the identical argument and, although the case was decided on other grounds,[14] the court stated in dictum that "the United States may assert a right to recoupment against a state, if it has a right, in a United States district court. . . . If the right over exists, this court is of the opinion that it is implied that the right against anyone, individual or state, is to be settled in a district court . . . ."[15] The only previous case to decide this

5. 1 U.S.C. § 1 (1964) provides that "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

6. 42 F.R.D. at 611-12. The liberal interpretation given to these Rules is best expressed by the Supreme Court in British Transp. Comm'n v. United States, 354 U.S. 129, 138-39 (1957): "we hold it a necessary concomitant of jurisdiction . . . that the Court have power to adjudicate all of the demands made and arising out of the same disaster. This too reflects the basic policy of the Federal Rules of Civil Procedure. Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other federal practices."

7. 42 F.R.D. at 614.

8. See note 6 supra.

9. See F. James, Jr., Civil Procedure § 10.20, at 506 (1965); 3 J. Moore, Federal Practice ¶¶ 14.01(1)-(3), at 403-07 (2d ed. 1966).

10. 13 U.C.L.A. L. Rev. 433 (1966).

11. 28 U.S.C. § 1345 (1964).

12. 28 U.S.C. § 1251(b)(2) (1964); 28 U.S.C. § 1345 (1964); United States v. California, 328 F.2d 729 (9th Cir.), cert. denied, 379 U.S. 817 (1964) (waiver of immunity not necessary to confer jurisdiction on district court).

13. 214 F.2d 389 (9th Cir. 1954). Action under the Federal Tort Claims Act in which the United States sought to implead the State of Arizona as a joint tort-feasor.

14. Id. at 392. The state's motion to dismiss the third-party complaint was granted because there was no indemnity agreement between the parties and Arizona law permits impleader only where the right to contribution is a contractual one.

15. Id. at 394.

issue was *Parks*, which held that the district courts have jurisdiction over a state only where the suit is originally brought by the United States. The present case, however, held that in the absence of congressional intent to exclude third-party actions from the purview of the section, it must be assumed that the district courts do have jurisdiction in such cases.[16]

The third-party action was "commenced" by the United States and it did concern a dispute between the United States and a state. Therefore, even if the question is to be decided by using the strict interpretation approach found in *Parks*, a recognition that the third-party proceeding was a separate action commenced by the United States would still lead to a finding that the district court had jurisdiction. Both the narrow approach used in *Parks* and the legislative history approach employed by the instant case lead to the conclusion that the district court had jurisdiction over the third-party action. It was the court's failure in *Parks* to recognize the nature of the third-party action which led to its finding that it was not an action commenced by the United States.

The main argument raised by New York in the instant case, however, was that the allowance of impleader would subject it to a suit brought by a private citizen and thus violate the sovereign immunity guaranteed to it by the Constitution.[17] It was contended that the United States' claim for total indemnity would require New York to defend an action from which it is constitutionally immune. The United States, on the other hand, argued that no suit would exist between the plaintiff and New York as a result of the impleader, and that the third-party complaint merely called upon New York to answer the plaintiff's complaint in conformance with the indemnity agreement and contained no demand against New York on behalf of the plaintiff. The controversy, in effect, focused on the relationship of the parties involved in the third-party action and on the nature of the impleader procedure itself.

Before determining whether the impleader would subject New York to a suit by the plaintiff, an initial inquiry must be made concerning what constitutes a suit. In *Weston v. City Council of Charleston*,[18] the Court, addressing itself to the question, stated: "The term is . . . understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him . . . [i]f a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."[19] Therefore, it seems clear that the impleader must make some demand on behalf of the plaintiff or place into litigation some right which the plaintiff has against the state, in order for a suit to exist between the parties. That the state may be called upon to answer allegations made by the plaintiff is insufficient to find a suit between the parties in the absence of some claim or right

16. 42 F.R.D. at 614.

17. U.S. Const. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ."

18. 27 U.S. (2 Pet.) 289 (1829).

19. Id. at 300. See also Ex parte New York, 256 U.S. 490, 500 (1921); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 407 (1821).

being asserted against the state by, or on behalf of, the plaintiff. Although Rule 14(a) permits the plaintiff to amend his complaint to include a claim against the third-party defendant, an amendment in this case would not be possible because the state's sovereign immunity would prevent the plaintiff from doing so. This discussion is limited to situations where the defendant alone makes a claim against the third-party defendant and with the relationship that arises between the plaintiff and third-party defendant as a result of the defendant's action.

The state's immunity from a suit commenced or prosecuted by the plaintiff, a citizen of another state, or by any private individual is not questioned.[20] It has also been held that a rule which is intended to control practices and procedures in the courts, such as is Rule 14(a), cannot affect the substantive rights of the parties.[21] Therefore, there was no contention on the part of the United States in the instant case that Rule 14(a) acts to waive the immunity of the states when they are impleaded in the federal courts. It was the contention of the United States that sovereign immunity never becomes an issue in such a case because no suit exists between the plaintiff and the third-party defendant, and that the effect of impleader is to litigate any rights or claims existing between the third-parties only.

The nature of a third-party action based on an indemnity agreement has been interpreted as follows: "The third party proceeding is predicted solely upon a certain written indemnity agreement entered into by the third party defendant and the defendant, and said proceeding raises no issue between the plaintiff and third party defendant . . . ."[22] Perhaps the best illustration of the relationship between the parties in a third-party action to the plaintiff is contained in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*[23] In *Ryan,* the plaintiff contracted to load and unload defendant's ship and agreed to indemnify the defendant from liability for the negligence of any of plaintiff's workers. The cargo was negligently loaded and one of plaintiff's employees was injured while attempting to unload the poorly stacked cargo. The worker sued the defendant shipowner, who in turn sought to implead the plaintiff on the indemnity agreement. The plaintiff claimed that impleader was not possible in this situation because it thereby became subject to a suit by one of its employees and that it was immune from such an action under Workmen's Compensation Law. The court held that plaintiff's immunity from suit by an employee had nothing to do with its contractual obligation to defendant and that the impleader was proper because it did not subject the plaintiff to the claim of the injured workman. The court said that the effect of the impleader was to render the plaintiff potentially liable on the indemnity agreement to the defendant and not to render it potentially liable to the workman for its tortious acts.

20. U.S. Const. amend. XI; Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) (state's consent to be sued in its own courts does not act as waiver of immunity from suit in federal courts); Hans v. Louisiana, 134 U.S. 1 (1889) (state must consent to be sued in a federal court by one of its own citizens).

21. Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

22. Chapin v. United States, 102 F. Supp. 638, 639 (D.S.D. 1951).

23. 350 U.S. 124 (1955).

The *Parks* case upheld New York's argument under the Eleventh Amendment by deciding that, although there was actually no suit between the plaintiff and third-party defendant, subjecting New York to pretrial and trial proceedings as though it were being sued directly by the plaintiff would nevertheless constitute a violation of its sovereign immunity.[24] The instant case, on the other hand, adhered to the reasoning of *Chapin* and *Ryan* by holding that the nature of impleader is not to create a suit between the plaintiff and third-party defendant and that New York's immunity from suit is not properly an issue. The instant case and *Parks* agreed that there is actually no suit between the plaintiff and the impleaded third-party defendant. However, the *Parks* court reasoned that requiring the third-party defendant to engage in the necessary activities of a trial would be tantamount to subjecting it to a suit and ignored the essential element of a suit, which is the litigation and resolution of some right or claim asserted by one party against another. It is precisely this litigation of rights and claims which is lacking in third-party actions and from which the Eleventh Amendment seeks to protect the states. The purpose of impleader is not to create a suit between the plaintiff and third-party defendant, but to "do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant."[25]

A consideration of the practicalities involved in cases of this nature is most important. As the instant court pointed out, the plaintiff has nothing to gain from a judgment against New York in favor of the United States, and such a judgment would merely render New York liable on the indemnity agreement.[26] It would not resolve any issues involving the plaintiff's claim and would not serve to increase the amount of any judgment he might recover. Furthermore, a judgment against New York would indicate that it would also have been liable in a separate action, and it is to New York's advantage to participate with the United States in defense of the main action.[27] Such participation on the part of New York represents a means of protection against its ultimate liability to the United States on the indemnity agreement by affording it an opportunity to contest the claims of the plaintiff and to pool its resources with those of the defendant. Therefore, the plaintiff has nothing to gain if New York enters the defense of the main action, and New York is thereby given a convenient opportunity to defeat the plaintiff's claim and to avoid further controversy.

One further point which the instant court touched upon briefly is the theory of implied waiver of immunity. In *Parden v. Terminal Railway of the Alabama State Dock Department*,[28] the State of Alabama was held to have waived immunity from suit by operating a railroad in interstate commerce. The Court said that when a state performs activities which are removed from the sphere of activities usually carried on by government, and which are governed by laws which allow civil redress in the federal courts for employees or private citizens, the state

24. 241 F. Supp. at 299.

25. 3 J. Moore, Federal Practice ¶ 14.04, at 412 (2d ed. 1966).

26. 42 F.R.D. at 616.

27. See James, supra note 9, at 508.

28. 377 U.S. 184 (1964).

has impliedly consented to be sued in the federal courts. Perhaps when a state is party to an indemnity agreement, the act of signing the agreement also constitutes a waiver of its immunity from suit.[29] The act of signing such an agreement is meaningless if the state is then allowed to avoid being impleaded, thereby requiring additional unnecessary expense and litigation on the part of the United States.

It has been argued that sovereign immunity is an improper issue in cases of this nature.[30] Such cases might yield more practical results if the courts treated states entering such indemnity agreements as private individuals rather than sovereign entities. The theory of implied waiver would permit such an approach and would eliminate the issue of immunity from cases of this kind. Although impleader was allowed in the instant case, it was allowed only because the defendant was the United States, a party against whom immunity does not apply. Since the United States may sue in a federal court, it may also implead a state in a federal court. This solution would not apply, however, where a state agreed to indemnify a private individual since the state's sovereign immunity would shield it from an impleader action by that individual in a federal court. By treating the state's agreement to indemnify as an implied waiver of immunity, however, the courts could allow private individuals to implead a state in such cases and thereby give full effect to the requirements of such agreements.

Securities Regulation—Statutory Merger Involves A "Purchase" Or "Sale" Under Section 10(b).—In two recent cases the Courts of Appeals for the Second and Seventh Circuits held that a statutory merger[1] involves a pur-

29. See 65 Colum. L. Rev. 1506 (1965).

30. 64 Mich. L. Rev. 948 (1966).

1. A merger is the absorption of one corporation by another with the result that the existence of the former ceases, while the latter survives with the addition of the merged corporation. 15 W. Fletcher, Private Corporations § 7041 (rev. ed. 1961); H. Henn, Corporations § 346 (1961). Upon merger, a shareholder of the merged corporation loses most of his rights, such as voting for the election and removal of directors, changes in the by-laws and charter, qualified inspection of the books and records of the corporation. H. Henn, supra at §§ 290-330. However, certain rights are personal to the shareholder and may survive the merger. Chief among these is the right to receive payment for shares either in cash or in some security of the surviving corporation, as provided in the merger agreement. A dissenting shareholder, dissatisfied with the terms of the merger, may bring a judicial action for an appraisal. This remedy is provided by most jurisdictions for dissenting shareholders of the merged corporation. E.g., N.Y. Bus. Corp. Law § 910; see also H. Henn, supra at § 349 n.3.

It is well settled that merger is not within the powers of a corporation absent express statutory grant. In effect, all mergers are statutory. McKay v. Teleprompter Corp., 17 App. Div. 2d 299, 234 N.Y.S.2d 531 (1st Dep't 1962); Agoodash Achim v. Temple Beth-El, Inc., 147 Misc. 405, 263 N.Y.S. 81 (Sup. Ct. 1933); 15 W. Fletcher, supra at § 7048; 1 G. Hornstein, Corporation Law and Practice § 362 (1959). It has been suggested that before the passage of incorporation statutes the unanimous consent of the shareholders was required to effectuate a merger. H. Henn, supra at § 362; Comment, The Short Merger Statute, 32 U. Chi. L. Rev. 596 (1965).

chase and sale of securities for purposes of Section 10(b) of the Securities Exchange Act of 1934[2] and Rule 10b-5 of the General Rules and Regulations Under the Securities Exchange Act of 1934.[3] These decisions represent the culmination of a recent line of decisions[4] extending section 10(b) protection to merger situations after years of vacillation by the Securities and Exchange Commission.[5]

In the first case, a minority Class A shareholder of Crown Finance Company, Inc. alleged that its officers and directors, in collusion with Beneficial Finance Co., defrauded the Class A shareholders of approximately $900,000 by means of a series of fraudulent transactions. The outstanding shares of Crown consisted of almost 625,000 Class A shares and 46,500 Class B shares. Both classes had equal voting power except that the Class B shareholders elected two-thirds of the directors. The fraudulent scheme was tripartite. First, Beneficial purchased the Class B shares from the directors and officers of Crown (the principal Class B shareholders) at an excessive price. Then, Beneficial made a public offer to the Class A shareholders in order to acquire 95 per cent of the outstanding shares. Third, Beneficial consummated a short-form merger[6] of Crown into a wholly-owned New York subsidiary of Beneficial. The merger agreement required the surrender of the remaining Class A shares in return for cash payments. The district court dismissed the complaint for lack of jurisdiction and for failure to state a cause of action upon which relief could be granted.[7] The Court of Appeals for the Second

2. 15 U.S.C. § 78j(b) (1964).

3. 17 C.F.R. § 240.10b-5 (1967).

4. Voege v. American Sumatra Tobacco Corp., 241 F. Supp. 369 (D. Del. 1965) involving substantially the same factual situation as Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir.), cert. denied, 88 S. Ct. — (1967), also held a merger to be a sale under section 10(b) and rule 10b-5.

5. The history of the Commission position is discussed in notes 13-22 infra and accompanying text.

6. A "short-form" merger may be consummated by a resolution of the board of directors of a parent corporation which owns a specified percentage of the outstanding shares of each class of a subsidiary. The required percentage is set by statute and is 90% in Delaware and 95% in New York. Del. Code Ann. tit. 8, § 253 (1967); N.Y. Bus. Corp. Law § 905 (Supp. 1967). Authorization is not required by the shareholders of either corporation and dissenting shareholders may receive payment for their shares or bring suit for an appraisal where available. In a regular or statutory "long-form" merger, approval by the required fraction of shareholders of both corporations is required (this fraction is usually two-thirds, but there need not be the parent-subsidiary relationship). Del. Code Ann. tit. 8, § 251(c) (1967); N.J. Rev. Stat. § 14:12-3 (1937); N.Y. Bus. Corp. Law § 803 (Supp. 1967).

7. Vine v. Beneficial Fin. Co., 252 F. Supp. 212, 215 (S.D.N.Y. 1966), rev'd, 374 F.2d 627 (2d Cir.), cert. denied, 88 S. Ct. — (1967). The plaintiff's complaint alleged three causes of action: an individual federal claim under section 10(b), a class action based on state law under Fed. R. Civ. P. 23(a), and a federal derivative claim on behalf of Crown. After considering the difficulties involved in bringing an action on behalf of a nonexistent corporation the court of appeals decided that the plaintiff really did not want to bring a derivative suit, for the benefits would accrue to the Class B shareholders—almost all of whom took part in the conspiracy. Vine v. Beneficial Fin. Co., 374 F.2d 628, 637 & n.15 (2d Cir. 1967). No decision was made with respect to whether the class action should be allowed as the individual federal claim was reinstated. The district court had dismissed the

Circuit reversed, holding that a short-form merger involved a sale of securities under section 10(b) and rule 10b-5 which is actionable[8] by a defrauded shareholder. *Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), cert. denied, 88 S. Ct. — (1967).

In the second case, defendants, a group of directors and officers of the Susquehanna Corporation, allegedly entered into a conspiracy with Herbert F. Korholz, chairman of the board of American Gypsum, by the terms of which the group sold 435,000 shares of Susquehanna to Korholz at a price $1,740,000 in excess of their fair market value. The group then vested control of Susquehanna in Korholz and his nominees by their *seriatim* resignations.[9] Korholz in turn transferred the shares to American Gypsum Co., which obtained a bank loan for substantially all of the purchase price. After gaining control of both Susquehanna and American Gypsum, Korholz secured the passage of resolutions by the directors of the corporations recommending the merger of Gypsum into Susquehanna. The merger agreement provided for an exchange of 1.9 shares of Gypsum for each share of Susquehanna which allegedly resulted in a gross overvaluation of Gypsum shares. Finally, Susquehanna assumed the bank loan for the purchase of its own shares at the inflated price. Plaintiff, a minority shareholder, brought a derivative action[10] on behalf of Susquehanna against its directors and officers, among others, charging a conspiracy to defraud Susquehanna in the purchase and sale of securities in violation of section 17(a) of the Securities Act of 1933,[11]

state law claim because the federal claim was insufficient and, therefore, there was no longer any basis for exercising "pendent jurisdiction." Id. at 637. As far as the court was concerned the individual claim under section 10(b) was the plaintiff's primary right to relief and afforded him a complete remedy.

8. The Securities Exchange Act of 1934 provides the Commission with broad regulatory and enforcement powers. Although section 10(b) does not specifically allow a person injured by its violation to bring an action, the courts have interpreted the language of the Act to provide a civil remedy based upon the theory that disregard of a statutory command is a tort. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). See Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961); Speed v. Transamerica Corp., 235 F.2d 369 (3d Cir. 1956); Comment, Civil Liability Under Section 10B And Rule 10B-5: A Suggestion For Replacing The Doctrine Of Privity, 74 Yale L.J. 658 (1965).

9. A provision in a contract for the sale of shares which calls for the seriatim resignations of the board of directors is not illegal per se, at least where the buyer is purchasing a substantial percentage of the outstanding shares. Essex Universal Corp. v. Yates, 305 F.2d 572 (2d Cir. 1962) (28.3% held substantial).

10. The derivative suit was developed in equity where a shareholder could enforce a right on behalf of a corporation against an officer, director or other, when those in control of the corporation refused to do so. The suit is brought on behalf of the corporation who was the real party plaintiff. The shareholder bringing a derivative suit must have been a shareholder at the time the suit was commenced and all during it. In addition, the majority of jurisdictions require that he be a shareholder "at the time of the transaction of which he complains." E.g., Del. Code Ann. tit. 8, § 327 (1967); N.Y. Bus. Corp. Law § 626(b); Fed. R. Civ. P. 23(b). See also H. Henn, supra note 1, at §§ 352-83.

11. Section 17(a) of the Securities Act of 1933 provides: "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of

section 10(b) and rule 10b-5. The district court dismissed the complaint for lack of jurisdiction and for failure to state a cause of action upon which relief could be granted.[12] The Court of Appeals for the Seventh Circuit reversed, holding that the issuance of securities to be exchanged for shares of another corporation pursuant to a statutory merger involves a purchase and sale of securities. *Dasho v. Susquehanna Corporation*, 380 F.2d 262 (7th Cir.), cert. denied, 88 S. Ct. — (1967).

In 1935, the SEC, in the Note to Rule 5 of Form E-1, the form for most registrations, took the position[13] that, for registration purposes, there was no sale to shareholders when a statutory merger or consolidation was approved by the vote of such shareholders.[14] By 1943 the Commission was apparently of the view that a merger or consolidation did not involve a sale for any purpose, including the anti-fraud provisions.[15] In 1947 Form E-1 was rescinded to simplify the registration forms,[16] but the policy of excluding these transactions from the registration provisions was maintained by means of administrative policy.[17] This policy was formalized once again in 1951 when the Commission adopted Rule 133 of the General Rules and Regulations Under the Securities Act of 1933.[18] This rule specifically provides that a statutory merger or consolidation shall not involve a sale for "purposes . . . of section 5 of the act, [the registration provisions]."[19] The Commission expressly provided that "[a]s a matter of statutory construction the Commission does not deem the 'no sale theory' which is described in the rule as being applicable for purposes of any of the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934."[20] Although the Commission did not expressly argue that such a transaction should be considered a sale, this was the interpretation placed on the new rule and com-

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transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a) (1964).

12. Dasho v. Susquehanna Corp., 267 F. Supp. 508, 513 (N.D. Ill. 1966), rev'd, 380 F.2d 262 (7th Cir.), cert. denied, 88 S. Ct. — (1967).

13. For a more thorough discussion of the developments leading to the present Commission position, see Sommer, Mergers, Consolidations, Sales of Assets—Rule 133, 16 W. Res. L. Rev. 11 (1964); Comment, Rule 133 and the No Sale Theory: Interpretation or Legislation?, 13 J. Pub. L. 520 (1964).

14. SEC Securities Act Release No. 493(C) (Sept. 20, 1935).

15. In National Supply Co. v. Leland Stanford Jr. Univ., 134 F.2d 689 (9th Cir.), cert. denied, 320 U.S. 773 (1943), the Commission filed an amicus curiae brief expressing its opinion that a consolidation did not involve a sale. Id. at 694.

16. SEC Securities Act Release No. 3211 (April 14, 1947).

17. 1 L. Loss, Securities Regulation 521 (2d ed. 1961); Sommer, supra note 13, at 15.

18. SEC Securities Act Release No. 3420 (Aug. 2, 1951).

19. 17 C.F.R. § 230.133 (1967). This is the "no sale" theory of the Commission.

20. SEC Securities Act Release No. 3420 (Aug. 2, 1951).

mentary by at least one text writer.[21] In any event, the SEC is now squarely in favor of applying section 10(b) and rule 10b-5 to these situations.[22]

The reason for the change of position seems to stem from a realization, acquired over years of administrative experience, that there is a great opportunity to defraud investors by the use of corporate mergers. The need for investor protection compelled the Commission to deviate from the logical position of having a particular transaction treated similarly for the anti-fraud and the registration provisions.[23] The Commission attributes this dichotomy to the difficulty experienced in applying the registration provisions to mergers.[24]

Although the SEC has been criticized for this basic inconsistency,[25] the Commission's present position with respect to the anti-fraud provisions is in accord with the intent of section 10(b). The purpose of enacting section 10(b) and adopting rule 10b-5[26] was to enlarge the provisions of section 17(a) of the 1933 Act to prohibit fraud in connection with the "sale" as well as the "purchase" of securities.[27] These terms are broadly defined in section 3(a) of the 1934 Act,[28] and several transactions which do not fit the commercial definition of "purchase" and "sale"[29] have been held to fall within section 3(a). The issuance by a corporation of its own shares has been held to involve sales under section 10(b).[30] The acquisition of shares under a plan of corporate simplification,[31] the conversion of convertible debentures into common shares,[32] the conversion of preferred

21. 1 L. Loss, supra note 17, at 524.

22. Brief for SEC as Amicus Curiae at 5, Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir. 1967); Brief for SEC as Amicus Curiae at 6-28, Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir. 1967).

23. Brief for SEC as Amicus Curiae at 20, Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir. 1967).

24. Id. at 15-18.

25. 1 L. Loss, supra note 17, at 522.

26. The Commission has the power to make such rules and regulations necessary to carry out the power granted to it by the Acts. 15 U.S.C. §§ 77s, 78w (1964).

27. 380 F.2d at 266; Hooper v. Mountain States Sec. Corp., 282 F.2d 195, 201 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961); Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir.), cert. denied, 343 U.S. 956 (1952).

28. Section 3(a) of the Securities Exchange Act of 1934 provides: "When used in this chapter, unless the context otherwise requires—(13) The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire. (14) The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of." 15 U.S.C. § 78c(a) (1964) [hereinafter cited as section 3(a)].

29. " 'Purchase' includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property." N.Y. U.C.C. § 1-201 (32). "A 'sale' consists in the passing of title from the seller to the buyer for a price . . . ." N.Y. U.C.C. § 2-106(1).

30. Ruckle v. Roto Am. Corp., 339 F.2d 24 (2d Cir. 1964); Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961); Kane v. Central Am. Mining and Oil Inc., 235 F. Supp. 559 (S.D.N.Y. 1964).

31. Blau v. Hodgkinson, 100 F. Supp. 361 (S.D.N.Y. 1951).

32. Heli-Coil Corp. v. Webster, 222 F. Supp. 831 (D.C.N.J. 1963), modified on other grounds, 352 F.2d 156 (3d Cir. 1965).

shares into common shares,[33] the acquisition and disposition of equity securities in options, stock warrants and reclassifications,[34] have all been considered to be a purchase and/or sale for purposes of section 16(b).[35]

Despite the SEC's struggle with the question, the problem here presented received little judicial consideration prior to the instant cases. A similar question was raised in *National Supply Company v. Leland Stanford Junior University*,[36] a 1943 case involving a consolidation rather than a merger, but the decision denied the plaintiff relief upon the equitable basis of laches and estoppel.[37] The plaintiff had been advised of its right to dissent from the consolidation and failed to do so within the statutory period.[38] The court, however, agreed with the then current position of the SEC that a consolidation was not a sale for purposes of section 10(b).[39] In 1960 a corporation sued under section 10(b) alleging that it had been fraudulently induced to issue shares pursuant to a plan of merger. Denying a motion to dismiss, the court held without discussion that a merger "may or may not involve a purchase and sale" within section 10(b).[40] More recently, *Simon v. New Haven Board & Carton Company*[41] allowed a derivative action involving a merger transaction to be brought under section 10(b). The court apparently considered the merger to be a sale, but the parties did not raise the issue and the court did not discuss it. *Voege v. American Sumatra Tobacco Corporation*[42] is a square holding by a district court that a merger is a sale under section 10(b). There the plaintiff was allowed to bring an individual action on facts similar to *Vine*. The instant cases provide the first thorough discussion of the problem at the appellate level.

Vine allowed the plaintiff to bring an action in his own behalf, on the theory that he became a "forced" seller of securities when the merger was consummated without his consent. The court found that once the merger was consummated, the plaintiff's rights in his shares were frozen and that in order to realize any value for them he must eventually exchange them for cash—by accepting Beneficial's offer under the merger agreement or by pursuing his rights to an appraisal.[43]

33. Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir.), cert. denied, 332 U.S. 761 (1947).

34. Blau v. Lamb, 363 F.2d 507, 516 (2d Cir. 1966), cert. denied, 385 U.S. 507 (1967) (dictum). Contra, Roberts v. Eaton, 212 F.2d 82 (2d Cir.), cert. denied, 348 U.S. 827 (1954) (reclassification); Shaw v. Dreyfus, 172 F.2d 140 (2d Cir.), cert. denied, 337 U.S. 907 (1949) (stock warrants).

35. 15 U.S.C. § 78p(b) (1964). This section allows an action to be brought by or on behalf of an issuer of securities to recover any profit realized from any purchase or sale of any equity security, within six months, by a 10% owner, an officer or a director of the issuer.

36. 134 F.2d 689 (9th Cir.), cert. denied, 320 U.S. 773 (1943).

37. Id. at 694.

38. Id. at 690-91.

39. Id. at 694.

40. H.L. Green Co. v. Childree, 185 F. Supp. 95 (S.D.N.Y. 1960).

41. 250 F. Supp. 297 (D. Conn. 1966).

42. 241 F. Supp. 369 (D. Del. 1965).

43. 374 F.2d at 634.

Since the allegedly fradulent merger placed the plaintiff in this inextricable position, the court dispensed with the "needless formality" of having to actually exchange his shares in order to become a seller.[44] Although the plaintiff did not pass "title to the buyer for a price"[45] in order to come within the technical definition of a commercial seller,[46] a sale was inevitable, and the court construed the definition of "sale" in section 3(a) to include this plaintiff.

Oddly enough, the district court in *Dasho*[47] applied similar reasoning in holding that a merger was not a sale. The court attempted to distinguish a sale of shares from a merger by characterizing a merger as an involuntary conversion of one type of security into another, while a sale required a volitional act.[48] The court of appeals disposed of this argument by concluding that the district court "was unduly impressed by semantic and conceptual difficulties arising"[49] from the application of the terms "purchase" and "sale" to mergers. Noting the broad language of the statute, the court felt that neither Congress nor the Supreme Court intended to restrict the definition of purchase and sale to that of the commercial law of sales[50] and found no reason for holding that an exchange of shares pursuant to a merger was not a sale.[51]

Reading *Vine* and *Dasho* together, it appears that section 10(b) protection is available to all the parties who may be affected by a merger. The merger will be deemed to involve a sale whether it requires an exchange of shares for cash (*Vine*) or for shares of the other corporation (*Dasho*). The surviving corporation can sue if it has been defrauded (*Dasho*) or its shareholders can bring a derivative suit if those in control of the corporation are participants in the fraudulent scheme. The shareholders of the acquired corporation will be protected whether voluntary or forced sellers. In the case of a short form merger, all the shareholders will be forced sellers. But even where there is a regular merger approved by the required proportion of shareholders who exchange their shares for cash or other consideration, the only logical extension of the present decisions would be to deem them sellers under the statute and rule. Of course, in this situation, a court might require that the exchange have actually taken place unless the merger agreement was not revocable by the injured shareholders either because of insufficient voting power or otherwise.

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44. Apparently the merger in Dasho had not been consummated. 380 F.2d at 266. Therefore, the Dasho court, by holding the corporation to be a seller although it had not completed the mechanics of the transaction, achieved a result analogous to Vine. However, the court in Dasho was not overly concerned with this problem, perhaps failing to realize that a "sale" was not inevitable, as it was in Vine, for the directors of both corporations could still have rescinded the merger agreement before it was approved by the stockholders.

45. N.Y. U.C.C. § 2-106(1).

46. N.Y. U.C.C. § 2-103(1)(d).

47. Dasho v. Susquehanna Corp., 267 F. Supp. 508, 511, 514-15 (N.D. Ill. 1966).

48. Id. at 511.

49. 380 F.2d at 267.

50. Id. at 266.

51. Id.

The decisions in *Vine* and *Dasho* afford a reasonable remedy to defrauded shareholders in response to increasing criticism of statutory mergers. These mergers frequently sacrifice the protection of minority interests, especially when one of the participating corporations holds an interest in the other sufficiently large to effectuate the merger by itself.[52] Application of section 10(b) to statutory mergers provides uniform protection for defrauded plaintiffs in contrast to the diversity of requirements for relief in different states, if a remedy exists at all.[53] In the case of national corporations whose shares are traded on the exchanges and whose shareholders are found throughout the country, the policy of the federal legislation would seem to require equal protection for all shareholders who are defrauded in the same manner.

Torts—Contributory Negligence—More Than Apparent Peril Needed For The Rescue Doctrine.—Plaintiff and his wife had been proceeding along a highway when he observed that a car in front of him, driven by defendant Martenson, was out of control. The defendant's car, collided with a parked car, crossed the road and struck a nearby house. At that point the plaintiff, seeing the defendant Martenson " 'slumped over the steering wheel'," remarked to his wife that she " 'must have a heart attack'."[1] Plaintiff immediately got out of his own car and started to cross the road, intending to give what aid he could to defendant Martenson. Although he noticed a car approaching, he continued crossing the road. Having miscalculated his ability to reach the other side of the road, plaintiff was struck by the approaching car, which was driven by defendant Sam. The appellate division, holding that there was no basis upon which the rescue doctrine could be applied, reversed[2] the trial court's verdict of $45,000 which had been entered against both defendants.[3] The court concluded that

52. Comment, The Short Merger Statute, 32 U. Chi. L. Rev. 596 (1965).

53. Comment, Civil Liability Under Section 10B and Rule 10B-5: A Suggestion for Replacing the Doctrine of Privity, 74 Yale L.J. 658, 670-71 & n.58 (1965).

1. Provenzo v. Sam, 27 App. Div. 2d 442, 446, 280 N.Y.S.2d 308, 312 (4th Dep't 1967) (dissenting opinion). The issue of the admissibility of plaintiff's statement to his wife is not within the scope of this casenote. In New York, however, it is an area in which there is great confusion. The statement might be admitted: (1) as part of the res gestae; compare id. at 443, 280 N.Y.S.2d at 310 (majority opinion), with id. at 448, 280 N.Y.S.2d at 314 (dissenting opinion); (2) as a spontaneous declaration, see W. Richardson, Evidence, §§ 266-67 (9th ed. J. Prince 1964); (3) as relating to plaintiff's state of mind, id. at §§ 270-71.

2. 27 App. Div. 2d at 445, 280 N.Y.S.2d at 311.

3. The charge of the trial judge as to the applicability of the rescue doctrine to defendant Sam was clearly erroneous as he did not place the rescued party in peril. See note 11 infra and accompanying text. Thus the instant court was correct in holding that it was a reversible error to apply the doctrine against a "motorist proceeding on a highway without knowledge that an accident has happened and that a would-be rescuer is about to run in front of the passing vehicle." Id. at 445, 280 N.Y.S.2d at 311.

"upon the elimination of the rescue doctrine from the case, a finding that plaintiff was free from contributory negligence could not stand."[4] *Provenzo v. Sam*, 27 App. Div. 2d 442, 280 N.Y.S.2d 308 (4th Dep't 1967).

The courts, although rigidly adhering to the doctrine of contributory negligence, have carved out an exception that has become a rule in itself.[5] This exception affords relief to one who seeks to recover damages for personal injuries sustained while attempting to rescue another who has been exposed to peril by the defendant's negligence.[6] This rule places the rescuer in a favorable status as a matter of law, if he did not act recklessly and if he did not cause the peril.[7] Thus, one whose actions would normally constitute contributory negligence may invoke the rescue doctrine to defeat this defense.[8]

The courts refuse to invoke the doctrine unless the plaintiff can establish (1) danger,[9] either to person or property,[10] (2) caused by the defendant, (3) creating a situation of "immediacy and urgency."[11] Although the rescuer's protection does not decrease because he had time to deliberate and plan his course of action,[12] he will be precluded from recovery by his rash and reckless acts.[13]

The majority of courts apply the doctrine whether real or apparent peril be

4. Id. at 444, 280 N.Y.S.2d at 310.

5. Hymes v. Pollock, 108 Cal. App. 2d 536, 238 P.2d 1056 (Dist. Ct. App. 1952); Devine v. Phaelzer, 277 Ill. 255, 115 N.E. 126 (1917); Holle v. Lake, 194 Kan. 200, 398 P.2d 300 (1965); Brown v. Ross, 345 Mich. 54, 75 N.W.2d 68 (1956); Arnold v. Northern States Power Co., 209 Minn. 551, 297 N.W. 182 (1941); Eversole v. Wabash R.R., 249 Mo. 523, 155 S.W. 419 (1913); Kelley v. Alexander, 392 S.W.2d 790 (Tex. Civ. App. 1965); Wright v. Atlantic Coast Line R.R., 110 Va. 670, 66 S.E. 848 (1910); Highland v. Wilsonian Inv. Co., 171 Wash. 34, 17 P.2d 631 (1932); Thoresen v. St. Paul & Tacoma Lumber Co., 73 Wash. 99, 131 P. 645 (1913).

6. W. Prosser, Torts § 51, at 316 (3d ed. 1964); Restatement (Second) of Torts § 445 (1965).

7. W. Prosser, Torts § 51 (3d ed. 1964); Restatement (Second) of Torts § 473 (1965).

8. W. Prosser, Torts § 50, at 297 (3d ed. 1964); Restatement (Second) of Torts § 472 (1965).

9. This element was first announced in Wagner v. International Ry., 232 N.Y. 176, 180, 133 N.E. 437 (1921), where Judge Cardozo stated "danger invites rescue."

10. See Rague v. Staten Island Coach Co., 288 N.Y. 206, 42 N.E.2d 488 (1942); Wardrop v. Santi Moving & Express Co., 233 N.Y. 227, 135 N.E. 272 (1922); Eufemia v. Pacifico, 24 App. Div. 2d 673, 261 N.Y.S.2d 100 (3d Dep't 1965); Breslin v. State, 189 Misc. 547, 72 N.Y.S.2d 62 (Ct. Cl. 1947).

11. Luce v. Hartman, 5 App. Div. 2d 19, 22, 168 N.Y.S.2d 501, 505 (4th Dep't 1957), rev'd on other grounds, 6 N.Y.2d 786, 159 N.E.2d 677, 188 N.Y.S.2d 184 (1959).

12. Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).

13. Miller v. Union R.R., 191 N.Y. 77, 83 N.E. 583 (1908); Eckert v. Long Island R.R., 43 N.Y. 502 (1871); Luce v. Hartman, 5 App. Div. 2d 19, 168 N.Y.S.2d 501 (4th Dep't 1957), rev'd on other grounds, 6 N.Y.2d 786, 159 N.E.2d 677, 188 N.Y.S.2d 184 (1959). See also Wardrop v. Santi Moving & Express Co., 233 N.Y. 227, 229, 135 N.E. 272 (1922): "Undoubtedly more risks may be taken to protect life than to protect property without involving the imputation of negligence, but the rule is that a reasonable effort may be made even in the latter case." Rague v. Staten Island Coach Co., 288 N.Y. 206, 210, 42 N.E.2d 488, 490 (1942).

present.[14] Thus the highest court of Washington[15] has ruled that the rescuer is entitled to act upon appearances even though an actual peril did not in fact exist.[16] Similarly, the Supreme Court of Nebraska[17] ruled that the doctrine could be applied if the situation would "create the apprehension of danger even though danger to a definite person or a definite property was not actually imminent at the moment."[18] Other courts have seemingly required proof of the existence of actual peril.[19] In *Holle v. Lake*,[20] for example, where plaintiff attempted to stop a moving truck which had been parked by the defendant on a highway, the court stated that justification in risking one's life to rescue another can occur only when the "peril threatening the latter . . . [is] imminent and real. . . ."[21] The instant court, by stating that the doctrine may be invoked where there is a " 'reasonable basis for believing' "[22] one is in imminent peril, seemingly adopted an apparent peril test.[23] From the facts it would appear that a reasonable basis for the rescue was present. The driver had collided with a snowbank, a car and finally a house.[24] She was slumped over the steering wheel[25] and the possibility of the car igniting or exploding was present. Yet the court found as a matter of law that no "reasonable person could conclude that"[26] the driver was in any "imminent or serious peril."[27] If no reasonable person could conclude that the driver was in imminent peril, under what circumstances could such a conclusion be reached? The implication to be drawn from the majority opinion is that under no circumstance short of actual peril could such a belief be provoked. Thus, the instant court, through its application of the apparent peril test, has in fact created and adopted a real peril test.[28] However, to apply the apparent peril test properly, the issue of whether the plaintiff was justified in attempting the rescue should have been a question for the jury.[29]

14. Arnold v. Northern States Power Co., 209 Minn. 551, 297 N.W. 182 (1941); Ellmaker v. Goodyear Tire & Rubber Co., 372 S.W.2d 650 (Mo. Ct. App. 1963); Eversole v. Wabash R.R., 249 Mo. 523, 155 S.W. 419 (1913); Wolfinger v. Shaw, 138 Neb. 229, 292 N.W. 731 (1940); Highland v. Wilsonian Inv. Co., 171 Wash. 34, 17 P.2d 631 (1932); Thoresen v. St. Paul & Tacoma Lumber Co., 73 Wash. 99, 131 P. 645 (1913).

15. Thoresen v. St. Paul & Tacoma Lumber Co., 73 Wash. 99, 131 P. 645 (1913).

16. Id. at 104, 131 P. at 647.

17. Wolfinger v. Shaw, 138 Neb. 229, 292 N.W. 731 (1940).

18. Id. at 236, 292 N.W. at 735 (citation omitted).

19. Holle v. Lake, 194 Kan. 200, 398 P.2d 300 (1965); Kelley v. Alexander, 392 S.W.2d 790 (Tex. Civ. App. 1965); Wright v. Atlantic Coast Line R.R., 110 Va. 670, 66 S.E. 848 (1910).

20. 194 Kan. 200, 398 P.2d 300 (1965).

21. Id. at 204-05, 398 P.2d at 304.

22. 27 App. Div. 2d at 444, 280 N.Y.S.2d at 310 (citation omitted).

23. Compare id. with id. at 447, 280 N.Y.S.2d at 313.

24. Id. at 443, 280 N.Y.S.2d at 309 (dissenting opinion).

25. Id. at 446, 280 N.Y.S.2d at 312 (dissenting opinion).

26. Id. at 444, 280 N.Y.S.2d at 311 (dissenting opinion).

27. Id.

28. Id. at 447, 280 N.Y.S.2d at 313 (dissenting opinion).

29. See Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921); Carney v. Buyea, 271 App. Div. 338, 65 N.Y.S.2d 902 (4th Dep't 1946).

By implicitly refusing to accept any other standard except real peril, the court advocated a position that seemed to be more concerned with the negative task of preventing abuse of the rescue doctrine than with encouraging rescues. Thus, the decision is in direct opposition to the rationale of the rescue doctrine to the extent that such a standard would mean that the rescuer would have to delay performance until he is certain that the danger is real. In many instances, this would cause the rescuer, out of fear of liability, either to forego the attempt or to hesitate for such a long period of time that any attempt would be futile.[30] Conversely, the one causing the peril would reap the benefits of the non-applicability of the doctrine where no actual peril exists. Thus, the instant court has created a definite inequity by placing the rescuer in an unfavorable status unless real peril is present.

The injustice created by the instant case could be resolved by the application of a true apparent peril test. The generally accepted rule is that appearances should be judged objectively by the reasonable man in the position of the rescuer.[31] An appeal of the instant decision to the highest court in this state has been filed.[32] Thus, the court of appeals will have the opportunity to clarify the ambiguity of the application of the apparent peril test to the rescue doctrine.

30. Kelley v. Alexander, 392 S.W.2d 790, 795 (Tex. Civ. App. 1965) (dissenting opinion).

31. "The rescuer is entitled to act as a reasonably prudent person under the circumstances as they are presented to him." 27 App. Div. 2d at 447, 280 N.Y.S.2d at 313 (dissenting opinion). See W. Prosser, Torts § 32, at 153 (3d ed. 1964).

32. Letter from Charles J. Hannum to the Fordham Law Review, July 25, 1967, on file in the Fordham Law Review office.