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Case Notes

CASE NOTES

Administrative Law—Freedom of Information Act—Letters of Warning and Detention Are Identifiable Records Not Within Investigatory Files Exemption, And Their Disclosure Is Not a Violation of Due Process.—Appellee requested disclosure by the Department of Agriculture under the Freedom of Information Act[1] of letters of warning sent to non-federally inspected meat or poultry processors suspected of being unlawfully engaged in interstate commerce, information relating to administrative detention of meat or poultry products,[2] bi-weekly reports of the Director of the Slaughter Inspection Division, and minutes of the National Food Inspection Advisory Committee.[3] Pursuant to the enforcement clause of the Act,[4] the appellee sought in the United States District Court of Maryland[5] to compel the appellant, the Secretary of Agriculture, to produce the items after he had previously refused to do so. Both sides moved for summary judgment and the appellant moved for dismissal, objecting to disclosure of the first two items on the ground that they were part of "investigatory files" and thus exempt[6] and of the latter two items because they were "inter-agency or intra-agency" memoranda, also exempt from disclosure under the Act.[7] The appellants further argued that the records were not "identifiable"[8] within the meaning of the Act.[9] The district court refused to rule on the latter two items prior to an in camera inspection of the documents. As to the first two items, both of the appellants' contentions were rejected and the letters were ordered disclosed.[10] The appellants contended on appeal that the letters were part of investigatory files and, additionally, that the due process clause dictated continued secrecy of the letters.[11] The United States Court of Appeals for the Fourth Circuit held that all such materials constituted identifiable records, were not within the "investigatory files" exemption, and that there was no statutory exemption or constitutional bar to their production. *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971).

1. 5 U.S.C. § 552 (1970).
2. The Poultry Products Inspection Act, 21 U.S.C. § 462 (1970), gives the Secretary of Agriculture the discretion to prosecute violators "whenever he believes that the public interest will be adequately served and compliance with the chapter obtained by a suitable written notice or warning." Id. The Federal Meat Inspection Act, 21 U.S.C. § 676(b), gives the Secretary a similar option, although limited to "minor violations."
3. Wellford v. Hardin, 315 F. Supp. 175, 176 (D. Md. 1970), aff'd, 444 F.2d 21 (4th Cir. 1971).
4. 5 U.S.C. § 552(a)(3) (1970).
5. Wellford v. Hardin, 315 F. Supp. 175 (D. Md. 1970), aff'd, 444 F.2d 21 (4th Cir. 1971).
6. 5 U.S.C. § 552(b)(7) (1970).
7. Id. § 552(b)(5).
8. Id. § 552(a)(3).
9. 315 F. Supp. at 176.
10. Id. at 179.
11. 444 F.2d at 22, 24-25.

Central to American political philosophy from the inception of the Republic has been the premise that a well-informed citizenry is the key to democracy.[12] Antecedent to the rights of free speech and freedom of the press is the right to gather information.[13] Without this right, the goal of a well-informed citizenry is endangered.[14]

However, it was not until 1946 that the first statutory disclosure plan was passed. The Public Information section of the Administrative Procedure Act[15] required agencies to publish in the Federal Register, or otherwise make available to the public, certain governmental information.[16] This Act, however, exempted materials "requiring secrecy in the public interest" or relating "solely to the

12. Former President Johnson recognized this when he signed the Freedom of Information Act and stated that access to information was "one of our most essential principles." Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 20 Ad. L. Rev. 263 (1968). Of course executive and administrative refusal to disclose information also has its historical roots. See Younger, Secret Papers: Presidents v. Congress, 166 N.Y.L.J., Sept. 17, 1971, at 4, col. 3. Most recently in the oral argument on behalf of the Washington Post in the landmark case of New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam), appellee's counsel suggested that readers of newspapers had a due process right to know generally. Rogge, The Right to Know, 166 N.Y.L.J., Aug. 5, 1971, at 1, col. 4. As Justice Douglas, concurring, stated in this case: "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors." 403 U.S. at 724. Since this decision, many government bodies have been attacked for impinging on the public's right to know. See, e.g., Gillers, The Right to Know About the FBI, 166 N.Y.L.J., Nov. 19, 1971, at 4, col. 3; Miller, High Court Secrets, N.Y. Times, Nov. 17, 1971, at 47, col. 7; Wise, The Institution of Lying, N.Y. Times, Nov. 18, 1971, at 47, col. 7; N.Y. Times, Nov. 17, 1971, at 46, col. 2 (editorial) (secret trial). See also N.Y. Post, Nov. 8, 1971, at 26, col. 1 (FTC, SEC, and large corporations).

13. Note, The Right of the Press to Gather Information, 71 Colum. L. Rev. 838, 843 (1971). The right of newsmen to gather information and to inform the public without fear of having disclosure of their sources compelled was asserted in Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), cert. granted, 402 U.S. 942 (1971). See Comment, Pappas and Caldwell, The Newsmen's Privilege—Two Judicial Views, 56 Mass. L.Q. 155 (1971); Note, The Newsman's Privilege and the Constitution, 23 S.C.L. Rev. 436 (1971); Note, The Newsmen's Privilege: A Need for Constitutional Protection, 10 Washburn L.J. 387 (1971). An academic privilege tied to the public's right to know has also been asserted. Reinhold, Scholars Seeking Right Not to Disclose Sources, N.Y. Times, Oct. 25, 1971, at 29, col. 7.

14. In Grosjean v. American Press Co., 297 U.S. 233 (1936), the Court stated: "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." Id. at 250. See also H. Cross, The People's Right to Know 131-32 (1953).

15. Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238 (repealed 1966) (now 5 U.S.C. § 552 (1970)). For the Act's legislative history, see H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946).

16. Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946).

internal management of an agency," final opinions and orders required "for good cause to be held confidential," and official records sought by persons not "properly and directly concerned."[17] The section was a failure since instead of becoming a vehicle for greater access to government information, it became an excuse for the withholding of it.[18]

In response to the failure of the Public Information section,[19] Congress, in 1967, passed the Freedom of Information Act.[20] This Act has been likened to an Aristotelian "golden mean" by one commentator,[21] and a veritable nullity by others.[22] There are three basic differences between this Act and its predecessor.[23] First, any person has standing to seek a document[24]—no longer does a party have to be directly aggrieved. Second, the government has the burden of justifying the withholding of a document.[25] The standard is no longer that an agency may withhold unless there is good reason to disclose; rather an agency must disclose unless there is good reason to withhold.[26] Finally, the Act gives federal courts the power to make positive use of an injunction and thereby enjoin an agency from withholding documents which the agency believes are exempted by the Act.[27]

The Act is basically uncontroversial except for section b,[28] which contains the

17. Id.

18. For example, in 1961, the Secretary of the Navy cited section 3 in ruling that "'telephone directories fall in the category of information relating to the internal management of the Navy . . . .'" 80 Harv. L. Rev. 909 (1967). For further criticism of this abuse, see 112 Cong. Rec. 12976 (1966) (remarks of Representative Howard); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5 (1966); H.R. Rep. No. 918, 88th Cong., 1st Sess. 5 (1963); S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965). It is the consensus of authority that section 3 was counterproductive to the ends it sought. See Katz, The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act, 48 Texas L. Rev. 1261 (1970); Moss, Public Information Policies, the APA, and Executive Privilege, 15 Ad. L. Rev. 111, 113-14 (1963); Comment, The Freedom of Information Act: Access to Law, 36 Fordham L. Rev. 765 (1968); Note, Freedom of Information: The Statute and the Regulations, 56 Geo. L.J. 18 (1967); Note, The Freedom of Information Act: A Critical Review, 38 Geo. Wash. L. Rev. 150 (1969).

19. See S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).

20. Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (codified at 5 U.S.C. § 552 (1970)).

21. Address by Assistant Attorney General William H. Rehnquist, 63rd Annual Meeting of the American Association of Law Libraries, July 1, 1970, in Rights in Conflict—Reconciling Privacy With the Public's Right to Know, 63 L. Lib. J. 551 (1970).

22. Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 802-12 (1967) [hereinafter cited as Davis]; Katz, supra note 18, at 1262.

23. Wozencraft, The Freedom of Information Act—The First 36 Days, 20 Ad. L. Rev. 249 (1968). See generally Davis.

24. 5 U.S.C. § 552(a)(3) (1970). This provision of the Act seems to have a completely salutary effect. Compare Katz, supra note 18, at 1261, with Davis 765-66.

25. 5 U.S.C. § 552(a)(3) (1970).

26. Wozencraft, supra note 23, at 249.

27. 5 U.S.C. § 552(a)(3) (1970).

28. Id. § 552(b) reads as follows:

nine exemptions to mandatory disclosure.[29] Central to the controversy over the construction of these exemptions are three factors. The first is the poor draftmanship of the Act.[30] The second is the conflict between the House and Senate committee reports which are relied upon to establish the legislative intent underlying the Act.[31] The final factor is the delicate balance which must be struck between the public's right of access to agency files and the agency's need to carry out its mission effectively,[32] coupled with the right of individuals to privacy—both those individuals who are informants and those who are investigated. Illustrative of this controversy is the evolution of the "investigatory files" exemption.[33]

"(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells."

29. Project, Federal Administrative Law Developments—1970, 1971 Duke L.J. 149, 164-65. Roughly 100 suits have been brought under all sections of the Act. Saloschin, The Work of The Freedom of Information Committee of the Department of Justice, 23 Ad. L. Rev. 147 (1971).

30. Davis 807-09; Note, Freedom of Information: The Statute and the Regulations, 56 Geo. L.J. 18, 52-53 (1967); see American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 701 (D.C. Cir. 1969); Wozencraft, supra note 23, at 251.

31. Compare S. Rep. No. 813, 89th Cong., 1st Sess. (1965), with H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966). "In general, the Senate committee is relatively faithful to the words of the Act, and the House committee ambitiously undertakes to change the meaning that appears in the Act's words. The main thrust of the House committee remarks . . . is almost always in the direction of nondisclosure." Davis 763; see id. 809-10; Note, The Freedom of Information Act: A Critical Review, 38 Geo. Wash. L. Rev. 150, 153-155 (1969). Thus agencies favor the House report; pro-disclosure advocates, the Senate report. See, e.g., Uretz, Freedom of Information and the IRS, 20 Ark. L. Rev. 283, 287 (1967).

32. "The essence of this controversy is that a governmental agency should not have to 'operate in a fishbowl' and neither should a citizen, when attacking an agency decision, have to 'operate in a darkroom.'" Talbott Constr. Co. v. United States, 49 F.R.D. 68, 71 (E.D. Ky. 1969); see Rehnquist, supra note 21, at 551; 2 U.S. Code Cong. & Ad. News 2421-23 (1966).

33. 5 U.S.C. § 552(b)(7) (1970).

Subsection b(7) of the Act exempts "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency . . . ."[34] The purpose of this exemption is to protect the government's case from premature discovery.[35] As to the exact coverage of this exception, however, there is some confusion. The House Report defined "law enforcement" in its broadest sense[36] to cover "investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws."[37] The Senate Report, however, defined the exception narrowly: "These are the files prepared by Government agencies to prosecute law violators."[38] Thus, under the Senate definition, an agency must have the intention to prosecute. This intention is not required under the House definition. Since "investigations are often for multiple purposes, for purposes that change as the investigations proceed, and for purposes that are never clarified,"[39] this conflict in legislative intent fosters government contentions that a file is investigatory and therefore exempt.[40]

The first case to construe the investigatory files exemption was *Barceloneta Shoe Corp. v. Compton*,[41] in which statements by employees made to NLRB investigators during the investigation of alleged unfair labor practices were held to be within the scope of subsection b(7).[42] The district court therefore denied disclosure of these statements to the employer corporation prior to a hearing of the NLRB at which the employees were to testify.[43] Adopting the House Committee's interpretation[44] of the exemption,[45] the court balanced the interests of the parties and decided that the hampering effect which disclosure would have upon the NLRB's investigation was greater than the right of the plaintiff to the information.[46] The following year, in a similar case, *Clement Brothers Co. v.*

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34. Id.

35. Wellford v. Hardin, 315 F. Supp. 175, 177-78 (D. Md. 1970), aff'd, 444 F.2d 21 (4th Cir. 1971); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 703, 711-12 (E.D. Pa. 1968); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966); see Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 582 (D.C. Cir. 1970). The exemption has been construed to mean that if a court would routinely order a document produced in the discovery process, it should be made available even though the agency might oppose production. General Servs. Admin. v. Benson, 415 F.2d 878, 880 (9th Cir. 1969).

36. Note, Freedom of Information: The Statute and the Regulations, 56 Geo. L.J. 18, 47 (1967).

37. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

38. S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

39. Davis 800.

40. For a vivid example of the abuse of this exemption, see Fellmeth, The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance, 4 Harv. Civ. Rights-Civ. Lib. L. Rev. 345, 361-66 (1969).

41. 271 F. Supp. 591 (D.P.R. 1967).

42. Id. at 593.

43. Id.

44. See notes 36 & 37 supra and accompanying text.

45. 271 F. Supp. at 593-94.

46. Id. at 594. But see Wellford v. Hardin, 444 F.2d 21, 24-25 (4th Cir. 1971). See also

NLRB,[47] another federal district court rejected the plaintiff's contention that the applicability of the exemption was limited to criminal prosecutions.[48]

In *Cooney v. Sun Shipbuilding & Drydock Co.*[49] the court distinguished the situation before it from situations in which the government was actually bringing forward or contemplating a case.[50] In that case, the government was not a party to the action—a civil suit for damages arising out of the accidental death of plaintiff's decedent, an employee of the defendant.[51] Since the purpose of the investigatory files exemption was to prevent premature discovery of the government's case and the government, although it initially gathered the data for law enforcement purposes, had no intention of bringing forward an action, the court ruled that this exemption was inapplicable.[52] The court concurred with the *Barceloneta* and *Clement* decisions, "but only within the context in which they were rendered. For in cases in which an agency hearing or judicial litigation is impending, the situation is often rife with possibilities for a defendant to intimidate witnesses, or anticipate and avoid the government's case . . . ."[53] The court held that, under facts such as those presented in *Cooney*, the rationale of *Barceloneta* and *Clement* had no relevance.[54]

The next significant case construing the investigatory files exemption was *Bristol-Myers Co. v. FTC*.[55] In that case, although the FTC had apparently intended to proceed against Bristol-Myers for misleading advertising practices, the complaint was withdrawn more than three years prior to the appellant's request for disclosure of the documents.[56] The United States Court of Appeals for the District of Columbia Circuit rejected the agency practice of stamping all its files with the label "investigatory" on the mere basis that proceedings might be forthcoming at some future unspecified time.[57] The court remanded the case to "determine whether the prospect of enforcement proceedings [was] concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company [were] nevertheless discoverable."[58] Thus, the *Bristol-Myers* court implied that, despite subsection b(7), some parts of an investigatory file may nevertheless be

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United States v. Reynolds, 345 U.S. 1 (1953); Consumers Union of United States, Inc. v. Veterans Admin., 301 F. Supp. 796, 806 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

47. 282 F. Supp. 540 (N.D. Ga. 1968).
48. Id. at 542.
49. 288 F. Supp. 708 (E.D. Pa. 1968).
50. Id. at 712.
51. Id. at 709.
52. Id. at 710-12.
53. Id. at 712.
54. Id.
55. 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).
56. Id. at 939.
57. Id.
58. Id. at 939-40.

discoverable.[59] This ruling extended to subsection b(7) the policy of the District of Columbia Circuit with regard to exemptions of trade secrets and confidential commercial or financial information claimed under subsection b(4) of the Act.[60] This rule, followed in *Bristol-Myers*[61] and developed earlier by the court in *Grumman Aircraft Engineering Corp. v. Renegotiation Board*,[62] provides that in situations where requested records contain some confidential information, this information can be deleted and the remaining information disclosed.[63] With the application of this rule to subsection b(7), an agency would be prevented from exempting items merely by placing them in its investigatory files.

In *Wellford v. Hardin*,[64] the Fourth Circuit Court of Appeals has further circumscribed the scope of a subsection b(7) exemption as outlined in *Bristol-Myers*[65] by requiring the disclosure of letters of warning and dentention. The threshold question in *Bristol-Myers* was whether the files sought by Bristol-Myers could be characterized as incident to an enforcement proceeding.[66] The *Wellford* court noted that even if the files were part of an enforcement action, the written records of enforcement action already taken should be disclosed upon request.[67]

The *Wellford* court distinguished the facts before it from *Barceloneta*.[68] Reasoning that disclosure of materials already in the hands of potential parties to law enforcement proceedings can in no way be said to interfere with the agency's legitimate law enforcement functions, the court found that the letters were clearly not within the investigatory files exemption.[69] In *Barceloneta*, the request for records was made by a party to an adjudication in progress but, in *Wellford*, the proceedings were completed when the letters of warning and detention were sent.[70]

The Department argued that the investigatory files exemption served to protect the identity of informants and the nature of investigative techniques from disclosure. The court pointed out, however, that since Wellford requested "no more than the results of the enforcement actions and, at any rate, no more than was already in the hands of the companies who were warned or whose

59. Id.

60. 5 U.S.C. § 552(b)(4) (1970).

61. 424 F.2d at 938-39.

62. 425 F.2d 578 (D.C. Cir. 1970).

63. Id. at 580-81.

64. 444 F.2d 21 (4th Cir. 1971).

65. 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970); see text accompanying notes 55-59 supra.

66. 424 F.2d at 939.

67. 444 F.2d at 24.

68. 271 F. Supp. 591 (D.P.R. 1967); see text accompanying notes 41-46 supra.

69. 444 F.2d at 24. Two courts have accepted the Senate report's definition as the reliable indication of legislative intent. General Servs. Admin. v. Benson, 415 F.2d 878 (9th Cir. 1969); Consumers Union of United States, Inc. v. Veterans Admin., 301 F. Supp. 796, 801 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

70. 444 F.2d at 24.

products were detained,"[71] neither secret investigative techniques nor the identity of informants would be revealed.[72] The Department also contended that disclosure of enforcement records may discourage voluntary compliance with the Meat and Poultry Inspection Acts.[73] After considering a letter submitted by a former Administrator of the Consumer and Marketing Service which denied the likelihood of such a result,[74] the court held that even if this consideration were valid, "[t]he Freedom of Information Act was not designed to increase administrative efficiency, but to guarantee the public's right to know how the government is discharging its duty to protect the public interest."[75]

Finally, the Department argued that the investigatory files exemption was "intended to protect not only the investigator, but also the investigated."[76] This argument was based in part upon a consideration of the Supreme Court's recent decision in *Wisconsin v. Constantineau*.[77] In that case, a chief of police, without notice or hearing, posted the appellee's name in retail liquor stores as a person to whom liquor was not to be sold for a period of one year.[78] The Supreme Court approved the reasoning of the lower court[79] that by posting the appellee's name, the official was exposing the individual to public embarassment and ridicule without procedural due process.[80] At first blush, the similarity between the issuance of letters of detention and warning without a hearing and the posting in *Constantineau* is striking. However, the *Wellford* majority reasoned that the Supreme Court had realized the possible application of this case to administrative actions and rejected it when it stated that some federal administrative procedures are " 'summary by reason of necessity' " and involve no due process right of the individual.[81] The majority further distinguished the situation in *Wellford* from that in *Constantineau*: "Since the constitutionality of the Department's unpublicized enforcement of the Inspection Acts is accepted by both parties, the same proceedings are not rendered unconstitutional simply because a record of them is released to the public."[82]

Contemporaneous with the Fourth Circuit's decision in *Wellford*, the United States District Court for the District of Columbia, faced with substantially the

71. Id.

72. Id.; see Evans v. Department of Transp., 446 F.2d 821, 823-24 (5th Cir. 1971), petition for cert. filed, 40 U.S.L.W. 3265 (U.S. Nov. 24, 1971) (No. 698).

73. Federal Meat Inspection Act, 21 U.S.C. §§ 601-695 (1970); Poultry Products Inspection Act, 21 U.S.C. §§ 451-470 (1970).

74. 444 F.2d at 24 n.4.

75. Id. at 24.

76. Id.

77. 400 U.S. 433 (1971).

78. Id. at 435.

79. Constantineau v. Grager, 302 F. Supp. 861 (E.D. Wis. 1969), aff'd sub nom. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

80. 400 U.S. at 436. It is significant to note that although the decision was 6-3, all three dissents were based on procedural rather than substantive grounds.

81. 444 F.2d at 25.

82. Id.

same facts in a second *Wellford v. Hardin*,[83] reached a different result. In that case, Wellford requested disclosure of records of the Pesticides Regulation Division of the Agriculture Department.[84] The court, while granting access to some of the documents, refused to order the disclosure of information which cited other companies for violations of pesticide regulations.[85] Thus this district court, unlike the Maryland district court in the first *Wellford* case, refused to grant the petitioner access to information concerning previously adjudicated matters.[86]

Although the two *Wellford* cases are not totally reconcilable, neither are they totally incompatible. Together they stand for the proposition that an agency may no longer decline to disclose information where only part of the requested information is exempt. The two decisions concur in their condemnation of an agency's refusal to disclose records which can not be "identified specifically" when the specific number of the file requested is in the exclusive control of the agency.[87]

The Fourth Circuit's decision in *Wellford v. Hardin* is significant in that it represents the convergence of two trends in the law—the right of the public to know what its government is doing and the right of privacy. The court's ruling goes a long way toward resolving the ambiguity in the investigatory files exemption of the Freedom of Information Act in favor of greater access. In so doing, *Wellford* is a step towards the realization of the goals of the Act—insurance that it will not suffer the same fate as its predecessor.[88]

Conflict of Laws—Torts—Guest Statutes in Both State of Accident and State of Defendant's Residence and Insurance Bar Action in New York by New York Guest.—Plaintiff, a New York resident, while a passenger in an automobile owned and operated by defendants, was injured in a two-car[1]

83. 315 F. Supp. 768 (D.D.C. 1970).

84. Id. at 769.

85. Id. at 769-70.

86. See Project, Federal Administrative Law Developments—1970, 1971 Duke L.J. 149, 182. The District of Columbia Circuit previously reversed a district court decision wherein it was stated that the exceptions of the Act are almost greater than the grant. Bristol-Myers Co. v. FTC, 284 F. Supp. 745, 747 (D.D.C. 1968), rev'd, 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).

87. Compare 315 F. Supp. at 176-77, with 315 F. Supp. at 769-70.

88. The need for change in the Freedom of Information Act is both manifest and great; however, the vehicle for improving the Act may not be judicial action, but rather congressional amendment. A review of the first four years of the Freedom of Information Act is being conducted by the House Subcommittee on Foreign Operations and Government Information with a view towards amending the Act. Horton, The Public's Right to Know, 77 Case & Comment 3, 14 (Jan.-Feb. 1972).

1. There were no apparent injuries suffered by anyone in the second car, which was

accident in Ohio.[2] Defendants were residents of Florida, where their car was registered and insured. Plaintiff, seeking to recover for her injuries, commenced suit in New York[3] and in accordance with New York law pleaded negligence on the part of the defendant driver. Guest statutes in both Florida[4] and Ohio,[5] however, barred recovery by a gratuitous passenger absent an allegation of gross negligence or willful misconduct. The United States District Court for the Western District of New York concluded that the Ohio guest statute was applicable and accordingly dismissed the complaint for failure to state a claim upon which relief could be granted.[6] The United States Court of Appeals for the Second Circuit affirmed, holding that New York choice of law rules[7] preclude application of New York internal law to allow recovery by a New York guest where guest statutes in both the state of the accident and the state of the defendants' residence and insurance would bar the action. *Pryor v. Swarner*, 445 F.2d 1272 (2d Cir. 1971).

The traditional choice of law rule applied in tort cases was lex loci delicti, i.e., the law of the place where the injury occurred.[8] Accordingly, the applicable law governing the duty owed by a host to a guest was that of the site of the accident.[9] In recent years this territorially oriented conflicts rule has come un-

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from Tennessee, and no lawsuit arose out of the involvement of that vehicle. Pryor v. Swarner, 445 F.2d 1272, 1275 (2d Cir. 1971).

2. The defendants were on vacation in Wisconsin when they learned of the death of a relative in Buffalo, New York. They agreed to pick plaintiff up at her summer cottage in Ohio and take her to the funeral. The accident occurred while they were returning plaintiff to Ohio. Id. at 1273.

3. Plaintiff commenced the suit in New York supreme court, obtaining quasi in rem jurisdiction by attachment of the contractual obligation of defendants' insurer to defend and indemnify defendants. Id. See Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). Defendants, upon a showing of diversity of citizenship, successfully petitioned pursuant to 28 U.S.C. § 1441 (1970), for removal to the United States District Court for the Western District of New York. 445 F.2d at 1273.

4. Fla. Stat. Ann. § 320.59 (1968).

5. Ohio Rev. Code Ann. § 4515.02 (1965).

6. 445 F.2d at 1274.

7. A federal court must apply the conflict of laws rule of the forum state. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

8. See Reiss v. Klein, 8 N.Y.2d 925, 926, 168 N.E.2d 837, 838, 204 N.Y.S.2d 167 (1960) (mem.); Poplar v. Bourjois, Inc., 298 N.Y. 62, 66, 80 N.E.2d 334, 336 (1948); Restatement of Conflict of Laws §§ 377-78, 384 (1934). See also Annot., 77 A.L.R.2d 1266 (1961). Lex loci delicti was premised on the vested rights doctrine, which provided that the right to recover for tortious conduct depended upon the law of the jurisdiction where the actual wrong occurred. R. Leflar, American Conflicts Law § 90 (rev. ed. 1968); see, e.g., Cuba R.R. v. Crosby, 222 U.S. 473 (1912); Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904).

9. See, e.g., Kerfoot v. Kelley, 294 N.Y. 288, 62 N.E.2d 74, cert. denied, 326 U.S. 764 (1945); Smith v. Clute, 277 N.Y. 407, 14 N.E.2d 455 (1938); Metcalf v. Reynolds, 267 N.Y. 52, 195 N.E. 681 (1935).

der attack on the ground that its application may often result in irrational and unjust decisions.[10] This criticism has led to the rejection of lex loci delicti in twenty-two jurisdictions,[11] including New York.[12]

The New York Court of Appeals replaced the lex loci delicti doctrine with a "center of gravity" or "grouping of contacts" test in *Babcock v. Jackson*.[13] In that case plaintiff and defendant, residents of New York, had taken a weekend trip to Ontario where plaintiff guest was seriously injured when defendant lost control of his car and hit a stone wall.[14] In a negligence action brought in New York, the Ontario guest statute[15] was invoked as a defense.[16] The court rejected the defense, holding that the law of New York, not Ontario, governed the rights of the guest against his host.[17]

The court, reasoning that it was not necessary to resolve all issues arising out of a tort claim with reference to the law of one jurisdiction, compared the relative "contacts" and "interests" of New York and Ontario in deciding whether to apply the Ontario guest statute.[18] The court noted that the case involved

10. See, e.g., Weintraub, A Method For Solving Conflict Problems—Torts, 48 Cornell L.Q. 215, 215-16 (1963). See generally Cheatham & Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959 (1952); Ehrenzweig, The Lex Fori—Basic Rule in the Conflict of Laws, 58 Mich. L. Rev. 637 (1960).

11. R. Weintraub, Commentary on the Conflict of Laws 234-36 n.36 (1971). See also Restatement (Second) of Conflict of Laws §§ 145-46 (1971). Several states, however, continue to follow the traditional doctrine of lex loci delicti. See, e.g., Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1018 (1965); Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So. 2d 216 (1970); White v. King, 244 Md. 348, 223 A.2d 763 (1966); Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964). See generally Annot., 29 A.L.R.3d 603, 613-17 (1970). A reason given for continued adherence is the predictability of results. See Friday v. Smoot, 58 Del. 488, 492-93, 211 A.2d 594, 596-97 (1965).

12. See Babcock v. Jackson, 12 N.Y.2d 473, 481-82, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963).

13. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), noted in 32 Fordham L. Rev. 158 (1963). The court of appeals first enunciated the "grouping of contacts" or "interest analysis" approach to choice of law cases in a contract case, Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954). The court refused to apply the law of the place of the making of the contract, stating that the applicable law was that of the place "'which has the most significant contacts with the matter in dispute.'" Id. at 160, 124 N.E.2d at 102 (citations omitted). A subsequent case, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), although not expressly adopting the "grouping of contacts" or "interest analysis" standard for tort cases, did reject the application of a limitation on recovery in wrongful death actions found in law of the state where the accident took place.

14. 12 N.Y.2d at 476, 191 N.E.2d at 280, 240 N.Y.S.2d at 745.

15. Ont. Rev. Stat. c. 172, § 105(2) (1960).

16. 12 N.Y.2d at 477, 191 N.E.2d at 280, 240 N.Y.S.2d at 745.

17. Id. at 483-84, 191 N.E.2d at 285, 240 N.Y.S.2d at 751-52.

18. Id. at 482-83, 191 N.E.2d at 284, 240 N.Y.S.2d at 750. The court stated that a case involving rights and liabilities stemming from a guest-host relationship differs significantly from one in which the issue relates to the manner in which the defendant was driving his car at the time of the accident. Where the defendant's exercise of proper care in the opera-

"injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there,"[19] whereas Ontario's sole relation with the controversy was the "purely adventitious circumstance" that the accident occurred in Ontario.[20] Furthermore, the court recognized that Ontario had no interest in having its statute applied, since the purpose of the statute was the prevention of fraudulent claims by guests in collusion with their hosts against Ontario defendants and their insurers, not New York defendants and their insurers.[21]

The New York Court of Appeals first applied the principles enunciated in *Babcock* in *Dym v. Gordon*.[22] While plaintiff and defendant, both domiciliaries of New York, were on their way to a class at the University of Colorado where they were attending summer school, defendant host's car collided with a vehicle driven by a Kansas resident, injuring plaintiff guest.[23] At the time the parties left New York, they had not arranged to meet in Colorado or to ride together in defendant's car,[24] which was registered and insured in New York.[25] When plaintiff brought suit in New York alleging ordinary negligence, the Colorado guest statute[26] was pleaded as a defense.[27] The court of appeals, in a four to three opinion, dismissed the complaint, holding that the Colorado guest statute applied.[28]

The majority stated that *Dym* did not represent a departure from the rule announced in *Babcock*, but merely exemplified its application, and distinguished *Babcock* on several factual grounds.[29] Unlike *Dym*, *Babcock* involved only a single car. Thus it was not necessary to consider the interests of injured persons in other cars with respect to the assets of the negligent driver.[30] The Colorado

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tion of his automobile is in issue, the locus delicti would generally have the greater interest. Id. at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750-51.

19. Id. at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

20. Id.

21. Id. at 482-83, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

22. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), noted in 34 Fordham L. Rev. 711 (1966).

23. Id. at 123, 209 N.E.2d at 793, 262 N.Y.S.2d at 465.

24. Id.

25. Id. at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

26. Colo. Rev. Stat. Ann. § 13-9-1 (1963).

27. 16 N.Y.2d at 122, 209 N.E.2d at 793, 262 N.Y.S.2d at 464-65.

28. Id. at 122, 209 N.E.2d at 793, 262 N.Y.S.2d at 465.

29. Id. at 124-25, 209 N.E.2d at 794, 262 N.Y.S.2d at 466. The dissenting judges, however, were of the opinion that there was "no material distinction between the factual situation [in Dym] . . . and that in the Babcock case" and would have applied New York law. Id. at 129, 209 N.E.2d at 797, 262 N.Y.S.2d at 471 (italics omitted). While conceding that Colorado's contacts were "quantitatively greater" than those of Ontario in Babcock, the dissenters felt that the contacts were not superior with respect to the specific issue presented, i.e., did the New York plaintiff have a cause of action against her New York host. Id. at 133, 209 N.E.2d at 800, 262 N.Y.S.2d at 473.

30. Id. at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

guest statute, however, was intended to provide nonguests with a priority for their claim against the assets of the negligent host.[31] In addition, the parties in *Dym* were living in Colorado when the guest-host relationship arose and the accident grew out of a Colorado based activity.[32] Thus the fact that the accident occurred in Colorado could not be termed "fortuitous" as it was in *Babcock*, where the relationship was clearly seated in New York.[33] The majority said that since the parties had chosen to live under Colorado law on a day-to-day basis and had accepted the benefits of that law for a prolonged period, "it [was] spurious to maintain that Colorado [had] no interest in a relationship which was formed there."[34]

Dym was followed by *Macey v. Rozbicki*[35] where plaintiff, a New York resident, visited defendants, also residents of New York, at their summer home in Ontario.[36] While riding in defendants' car, plaintiff guest was injured in a two-car collision in Ontario.[37] When suit was brought in New York, defendants interposed the Ontario guest statute[38] as an affirmative defense.[39] The court of appeals reasoned that the relationship of the parties was not affected by their "temporary meeting" in Canada[40] and, in striking the defense, held that New York law governed.[41]

The most recent case decided by the New York Court of Appeals raising a

31. Id. The court stated that "the policy underlying Colorado's law [was] threefold: the protection of Colorado drivers and their insurance carriers against fraudulent claims, the prevention of suits by 'ungrateful guests', and the priority of injured parties in other cars in the assets of the negligent defendant." Id.

32. 16 N.Y.2d at 125, 209 N.E.2d at 794, 262 N.Y.S.2d at 467.

33. Id. Professor Cavers, although a proponent of "territorialism" in the choice of law process, takes the position that if the issue in the case involved an incident of the guest-host relationship, "the function of supplying a rule to regulate that incident would seem more rationally allocated to a state other than the accident state if the former state is more closely connected with the relationship and also imposes a higher standard of liability." Cavers, Cipolla and Conflicts Justice, 9 Duquesne L. Rev. 360, 366-67 (1971) (footnote omitted); see D. Cavers, The Choice-of-Law Process 300-04 (1965).

34. 16 N.Y.2d at 125, 209 N.E.2d at 795, 262 N.Y.S.2d at 467. In Cashman v. Evans, 249 F. Supp. 273 (S.D.N.Y. 1966), a federal court relying on Dym held that the Alberta guest statute (Alb. Rev. Stat. c. 356, § 132 (1955)) barred an action by a Massachusetts guest against his New York host for injuries received in a two car accident in Alberta. The court stated that the presence of plaintiff in defendant's car in Alberta was not fortuitous since they were travelling through Canada together as part of a road show, and that because the trip was to begin and end in Alberta, the guest-host relationship could be said to have been formed in Alberta. 249 F. Supp. at 275. Further, the court concluded that Alberta had an interest in preventing the dissipation of the negligent defendant's assets. Id.

35. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

36. Id. at 291, 221 N.E.2d at 381, 274 N.Y.S.2d at 592.

37. Id.

38. Ont. Rev. Stat. c. 172, § 105(2) (1960).

39. 18 N.Y.2d at 291, 221 N.E.2d at 381, 274 N.Y.S.2d at 592.

40. Id. at 292, 221 N.E.2d at 381, 274 N.Y.S.2d at 593. The court assumed that arrangements for the Ontario visit had been made in New York. Id.

41. Id. at 291, 221 N.E.2d at 381, 274 N.Y.S.2d at 592.

choice of law question involving a guest statute is *Tooker v. Lopez*.[42] A New York domiciliary was killed in a Michigan accident while a guest in an automobile driven by a New York host.[43] The car was owned by the driver's father, a New York resident, and was registered and insured in New York.[44] In a wrongful death action brought on behalf of the decedent guest's estate, the court dismissed the defense of the Michigan guest statute,[45] stating that "Michigan [had] no interest in whether a New York plaintiff is denied recovery against a New York defendant where the car is insured [in New York]."[46]

In reaching its decision, the majority attempted to resolve what it viewed as "inconsistency" in prior guest statute cases.[47] The court stated that it is not important whether the accident is a single or multi-car accident, since it concluded that it had been "mistaken" in *Dym* in finding that one of the policies underlying guest statutes is the marshaling of the host's assets in favor of nonguests.[48] It also made clear that neither the length of the stay in the state of the accident[49] nor the expectations of the parties[50] is relevant in determining the applicable law. These statements caused Judge Burke, in his concurring

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42. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), noted in 38 Fordham L. Rev. 111 (1969).

43. Id. at 571, 249 N.E.2d at 395, 301 N.Y.S.2d at 520.

44. Id.

45. Mich. Comp. Laws Ann. § 257.401 (1966).

46. 24 N.Y.2d at 577, 249 N.E.2d at 398-99, 301 N.Y.S.2d at 525. The accident also seriously injured another passenger, who was a Michigan resident. Id. at 580, 249 N.E.2d at 400, 301 N.Y.S.2d at 528. The Tooker court, however, did not find it "necessary or desirable" to decide whether the Michigan guest could have successfully maintained a suit in a New York court, but simply stated that "it [was] not at all clear that Michigan law would govern . . . ." Id. at 580, 249 N.E.2d at 400, 301 N.Y.S.2d at 528. The three dissenting judges concluded that it was "implicit" in the majority decision that the Michigan passenger could not recover in New York. Id. at 597, 249 N.E.2d at 411, 301 N.Y.S.2d at 543.

In Hepp v. Ireland, 66 Civ. 2128 (S.D.N.Y., June 9, 1970), a case posing a problem similar to that suggested by the Michigan passenger in Tooker, an Illinois plaintiff brought a claim to recover for injuries sustained in Colorado while a passenger in a Kansas insured auto which the New York defendant had borrowed from the Kansas owner. Although Colorado, Illinois, and Kansas all had guest statutes, the court held that they did not bar plaintiff's recovery. Record at 7, 32-34.

47. 24 N.Y.2d at 572, 249 N.E.2d at 395, 301 N.Y.S.2d at 521.

48. Id. at 574-75, 249 N.E.2d at 397, 301 N.Y.S.2d at 523-24. The Michigan courts had suggested that the purpose of the Michigan guest statute was to protect the owner. Id. at 577 n.1, 249 N.E.2d at 399 n.1, 301 N.Y.S.2d at 525 n.1.

49. Id. at 577, 249 N.E.2d at 399, 301 N.Y.S.2d at 525. "Where the guest-host relationship 'arose' or is 'centered' is wholly irrelevant to policies reflected by the laws in conflict." Id. at 579 n.2, 249 N.E.2d at 400 n.2, 301 N.Y.S.2d at 527 n.2. Accord, Pfau v. Trent Aluminum Co., 55 N.J. 511, 263 A.2d 129 (1970); cf. Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970).

50. 24 N.Y.2d at 577, 249 N.E.2d at 399, 301 N.Y.S.2d at 526; see Miller v. Miller, 22 N.Y.2d 12, 20, 237 N.E.2d 877, 881, 290 N.Y.S.2d 734, 741 (1968).

opinion, to conclude that *Dym* was overruled[51] and that New York was committed to an interest analysis approach.[52]

Chief Judge Fuld, in his concurring opinion, attempted to lay down some guidelines for future litigants in multi-state highway accident cases. He suggested that when the guest-passenger and driver-host are domiciled in the same state, and the car is registered there, that state's law should control.[53] If the accident occurred in the domicile of either of the parties, that law should control, "in the absence of special circumstances."[54] In all other situations the applicable law should be "that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants."[55]

In *Pryor v. Swarner*,[56] the United States Court of Appeals for the Second Circuit was presented with a guest statute case involving the laws of three states. It determined that the following factors were important in analyzing the interests of the various states: the domicile of the parties, the place where the defendants' car was registered and insured, and the site of the accident.[57] The origin of the guest-host relationship and the fact that there was a second car involved were considered to be irrelevant in determining the applicable law.[58]

Looking to the interests of the three states, the court stated that because the case involved Florida defendants and because their "insurance premiums were calculated with Florida's guest statute in mind," Florida had a substantial interest in having its policy of protection of insurers applied.[59] Likewise, Ohio, as the site of both the accident[60] and the invitation to travel,[61] had an interest

51. 24 N.Y.2d at 591, 249 N.E.2d at 407, 301 N.Y.S.2d at 538; see 34 Albany L. Rev. 140 (1969); 38 Fordham L. Rev. 111 (1969); 45 N.Y.U.L. Rev. 146, 147-48 (1970).

52. 24 N.Y.2d at 591, 249 N.E.2d at 407-08, 301 N.Y.S.2d at 538; see 38 Fordham L. Rev. 111, 119 (1969); 45 N.Y.U.L. Rev. 146, 155 (1970). It has been suggested that Dym "was not an application of, but rather a perversion of state-interest conflicts analysis." R.J. Weintraub, Commentary on the Conflict of Laws 241 (1971).

53. 24 N.Y.2d at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 532 (concurring opinion). See generally, R. Leflar, American Conflicts Law § 103 (rev. ed. 1968); Ehrenzweig, "False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law, 53 Va. L. Rev. 847, 851 (1967).

54. 24 N.Y.2d at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 532. See Hancock v. Holland, 63 Misc. 2d 811, 313 N.Y.S.2d 455 (Sup. Ct. 1970).

55. 24 N.Y.2d at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 533.

56. 445 F.2d 1272 (2d Cir. 1971).

57. Id. at 1275. Judge Keating said in his concurring opinion in Macey that "[t]he only facts having any significant bearing on the applicable choice of law in guest statute cases are the residence of the parties and the place in which the automobile is insured and registered." 18 N.Y.2d at 295, 221 N.E.2d at 383, 274 N.Y.S.2d at 595.

58. 445 F.2d at 1275; see notes 48-50 supra and accompanying text.

59. 445 F.2d at 1277.

60. Id.

61. Id. at 1273.

in having its guest statute applied, since one of the policies underlying the statute was "that it is 'ungrateful' for a guest to seek recovery for mere negligence."[62] Regarding New York's interest, the court noted that, while the state's policy did allow recovery by a guest against his host upon a showing of ordinary negligence,[63] New York's only connection with the accident was that the plaintiff was a resident.[64] On the basis of these competing interests, the *Pryor* court concluded "that the New York courts would not apply New York's own internal law to allow recovery by the plaintiff against the common policy of the *lex loci* [*sic*] and the state where the defendants reside and obtained insurance."[65]

Although the *Pryor* court did not reach the issue of whether Ohio or Florida had the greater interest in the resolution of the controversy,[66] it did appear to hold that both Florida and Ohio had interests superior to those of New York.[67] The New York Court of Appeals has generally not considered the interests of the locus delicti to be very substantial, referring to the site of the accident as "purely adventitious"[68] and "not particularly significant."[69] These references, however, were made in the context of cases in which only two jurisdictions were involved, and all other contacts were with New York.[70] In any event, the only

62. Id. at 1277. See also note 31 supra.

63. 445 F.2d at 1276-77.

64. Id. at 1275. The court in Tooker specifically rejected the contention that the New York "choice-of-law rule . . . merely amounts to a rule which will always result in the application of New York law." 24 N.Y.2d at 580, 249 N.E.2d at 401, 301 N.Y.S.2d at 528.

65. 445 F.2d at 1277.

66. Id.

67. Id. The court's opinion, of course, might be construed as holding that New York's contact with the defendants or their conduct was not sufficient to justify application of New York law. See generally note 75 infra and accompanying text.

On the other hand, the use of the language "common policy" in the court's opinion might suggest that the court felt that the cumulative interests of Florida and Ohio were greater than those of New York. Such a reading of the holding, however, would introduce a new concept into the New York jurisprudence of choice of law—the concept that the interests of two states having similar laws can be added together to defeat the application of the law of a third state.

68. Babcock v. Jackson, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).

69. Macey v. Rozbicki, 18 N.Y.2d 289, 292, 221 N.E.2d 380, 381, 274 N.Y.S.2d 591, 593 (1966).

70. See Macey, 18 N.Y.2d at 292, 221 N.E.2d at 381, 274 N.Y.S.2d at 593; Babcock, 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750. See also Hancock v. Holland, 63 Misc. 2d 811, 313 N.Y.S.2d 455 (Sup. Ct. 1970); Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970).

In Kell v. Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), aff'd mem., 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (3d Dep't 1966), the court suggested that the site of the accident might be important. Plaintiff, an Ontario resident, was injured in a one car accident in New York. Id. at 993, 263 N.Y.S.2d at 648. Although the defendant was also a resident of Ontario, where his car was licensed and registered and where the guest-host relationship arose, the court held New York law applicable. Id. at 995, 263 N.Y.S.2d at 650. The identical factual situation was also presented in the subsequent case of Arbuthnot

policy which Ohio had an interest in protecting was its notion that it is ungrateful for a guest to seek compensation from his host even though the host has been negligent.[71] Although New York courts have recognized that this policy is one of the legislative purposes underlying guest statutes,[72] it does not appear that Ohio's policy should be considered applicable under an interest analysis approach when the issue involves the relationship between a Florida defendant and a New York plaintiff.[73]

Florida, on the other hand, did have a significant interest in the outcome of *Pryor*, since an award of damages would affect insurance premiums paid by Florida policy-holders.[74] Furthermore, Florida had a substantial contact with the defendants, whereas it might be argued that New York did not have a sufficient nexus with the defendants or their conduct to make it reasonable for New York to assert its interest.[75] On the other hand, *Miller v. Miller*,[76] decided

v. Allbright, 35 App. Div. 2d 315, 316 N.Y.S.2d 391 (3d Dep't 1970). The court, however, held that the Ontario guest statute was a defense, stating that Kell had been decided on a "procedural" ground. Id. at 316, 316 N.Y.S.2d at 392.

Under Judge Fuld's guidelines enunciated in Tooker, the law of the accident state should seemingly apply in a Pryor-type case. See 24 N.Y.2d at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 532-33. The Pryor court, however, did not proceed under Judge Fuld's guidelines, but rather looked at the relative interests of New York, Ohio, and Florida, stating that it could "treat the suggested results of the Chief Judge's hypotheticals only as a slender indication of what [the New York Court of Appeals] might do when confronted with actual cases falling within the scope of his 'interest analyses.'" 445 F.2d at 1276.

71. The "ungrateful guest" justification of guest statutes has been criticized on the ground that the host's immunity is immaterial where he has liability insurance, since he would in no event feel the effect of a judgment. A. Ehrenzweig, Conflicts of Laws § 220, at 577-78 (1962).

72. See Dym v. Gordon, 16 N.Y.2d 120, 124, 209 N.E.2d 792, 794, 262 N.Y.S.2d 463, 467 (1965).

73. See Tooker v. Lopez, 24 N.Y.2d 569, 574, 577, 249 N.E.2d 394, 397, 398-99, 301 N.Y.S.2d 519, 523, 525 (1969).

74. 445 F.2d at 1277. While insurance premiums do reflect the number of and cost of accidents caused by residents of a specified area, claims exceeding the coverage limits required by a state's financial responsibility law (generally $10,000 per person injured, $20,000 for personal injury per accident, $5,000 for property damage, e.g., Fla. Stat. Ann. § 324.021 (7) (1968)) are excluded in calculating the premiums for such insurance. See McNamara, Automobile Liability Insurance Rates, 35 Ins. Counsel J. 398, 405 (1968); Stern, Ratemaking Procedures for Automobile Liability Insurance, 52 Proceeding Cas. Act. Soc'y 139, 154-55 (1965). Furthermore, rates for greater coverage are generally the same in every state since they are determined from nationwide data. McNamara, supra, at 405-06; Stern, supra, at 155. Thus, the maximum effect the Pryor claim could have had on Florida premiums in the aggregate was $10,000, regardless of the type of policy held by the defendants. It has been persuasively shown that the actual effect would be significantly less. Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 Yale L.J. 554, 574-76 (1961).

75. See R.J. Weintraub, Commentary on the Conflict of Laws 248 (1971). The due process and full faith and credit clauses of the Constitution also impose limitations on a state's choice of laws rules. Professor Currie has concluded from his review of Supreme Court cases that whenever the forum has an interest in applying its own law, it may con-

by the New York Court of Appeals in 1968, may be read as suggesting that it would not only be reasonable for New York to assert its interest, but that its interest might be superior.

In *Miller*, a New York plaintiff brought a wrongful death action to recover for the death of her husband resulting from injuries sustained in an auto accident in Maine allegedly caused by the negligence of the decedent's host.[77] The defendants, who had been Maine residents at the time of the accident but had moved to New York before the commencement of the action,[78] interposed Maine's monetary limitation[79] on recovery in wrongful death actions.[80] Finding the limitation inapplicable, the court stated that it was "New York rather than Maine which [had] the most significant relationship with the issue in the case . . . and the most significant interest in the application of its law."[81]

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stitutionally do so. Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9, 22 (1958). His article, however, does not explore "whether the power of an interested state to apply its law is qualified if the party adversely affected has not in some fashion 'subjected' himself to that law." Id. at 72 n.283. Professor Sedler argues that "the forum may apply its own law on the ground that the plaintiff is a resident of that state where: (1) the fact of residency gives it an interest in applying its law on the issue as to which a conflict exists, and (2) the application of its law does not produce fundamental unfairness or defeat the legitimate expectations of the other party." Sedler, The Territorial Imperative: Automobile Accidents and the Significance of a State Line, 9 Duquesne L. Rev. 394, 403 (1971) (emphasis omitted). See generally Miller v. Miller, 22 N.Y.2d 12, 19-20, 237 N.E.2d 877, 881, 290 N.Y.S.2d 734, 740 (1968).

76. 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

77. Id. at 14, 237 N.E.2d at 878, 290 N.Y.S.2d at 735-36.

78. While the court noted that the change in domicile abrogated any interest of Maine in protecting its residents in the wrongful death action, it also recognized that the change did not affect Maine's interest in maintaining low insurance rates for its residents. Id. at 21-22, 237 N.E.2d at 882, 290 N.Y.S.2d at 741-42.

79. Ch. 165, § 10, [1954] Me. Laws 125, as amended, Me. Rev. Stat. Ann. tit. 18, § 2552 (Supp. 1972). Although the Maine statute was amended in 1965 to repeal the limitation on recovery in wrongful death actions (Ch. 255, § 2552, [1965] Me. Laws Spec. Sess. 348), the court said the amendment was not to be given retroactive effect. 22 N.Y.2d at 15 n.1, 237 N.E.2d at 878 n.1, 290 N.Y.S.2d at 736 n.1.

80. 22 N.Y.2d at 14, 237 N.E.2d at 878, 290 N.Y.S.2d at 736.

81. Id. at 22, 237 N.E.2d at 883, 290 N.Y.S.2d at 742-43. See Tjepkema v. Kenney, 31 App. Div. 2d 908, 298 N.Y.S.2d 175 (1st Dep't) (per curiam), appeal dismissed, 24 N.Y.2d 942, 250 N.E.2d 68, 302 N.Y.S.2d 580 (1969) (mem.). In Tjepkema, a New York resident was killed in Missouri when he collided with another car being driven by a Missouri resident. Although the defendant never left Missouri, the Missouri limitation on a wrongful death action (Mo. Rev. Stat. § 537.090 (Supp. 1967)) was held not to apply, since the plaintiff's intestate was a New York resident, the estate was being administered in New York, and the plaintiff (widow and administratix) and other distributees (children) were in New York. 31 App. Div. 2d at 908, 298 N.Y.S.2d at 176-77. But see Hancock v. Holland, 63 Misc. 2d 811, 313 N.Y.S.2d 455 (Sup. Ct. 1970). A New York domiciliary, while riding in a car as a guest of a Georgia resident, was injured in Georgia when the vehicle collided with another Georgia registered car. The Georgia "guest statute" (Ga. Code Ann. § 68-301 (1971)) was held to be a valid defense, the court stating that "Georgia simply [had] a superior connection with this particular accident and a superior interest in having its law applied." Id. at 813, 313 N.Y.S.2d at 458.

The *Miller* case, although indicating that New York has an interest in insuring that persons do not become public charges of the state,[82] may not be apropos to a non-death personal injury case.[83] The interest which a decedent's domicile has in a wrongful death action could well be considered something quite different and far more substantial than the interest of the plaintiff's domicile where no death occurs. In addition to being concerned with the compensation of decedent's next-of-kin, the decedent's domicile is also interested in the administration of the decedent's estate.[84] Nevertheless, variations on the *Tooker* fact pattern such as that presented in *Pryor* remain to be resolved by the New York Court of Appeals.

Constitutional Law—Jurisdiction of Military Courts—*O'Callahan* v. *Parker* Denied Retroactivity by Fifth Circuit.*—Petitioner, a member of the United States Air Force stationed in Wyoming, allegedly raped a civilian while off-base pursuant to a pass. He was taken into military custody and charged with a violation of Article 120 of the Uniform Code of Military Justice (UCMJ).[1] A general court-martial was convened in 1966 and convicted petitioner of the offense of rape.[2] After having exhausted the multiple review procedures provided by the Uniform Code of Military Justice,[3] he filed an application for a writ of habeas

82. One writer has suggested that where a "court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy . . . ." Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L.J. 171, 178. Other commentators propose "application of the better rule of law." R. Leflar, American Conflicts Law § 110 (rev. ed. 1968). Several courts have employed this approach to avoid the application of guest statutes. See, e.g., Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968). See generally Annot., 29 A.L.R.3d 603, 646-50 (1970).

83. The Miller decision was not discussed by the Pryor court.

84. See Long v. Pan American World Airways, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965); Tjepkema v. Kenney, 31 App. Div. 2d 908, 298 N.Y.S.2d 175 (1st Dep't) (per curiam), appeal dismissed, 24 N.Y.2d 942, 250 N.E.2d 68, 302 N.Y.S.2d 580 (1969) (mem.).

* The Second Circuit rule is to the contrary. United States ex rel. Flemings v. Chafee, No. 71-1997 (2d Cir., March 28, 1972).

1. 10 U.S.C. § 920 (1970). This article provides: "Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct." Id. § 920(a).

2. Gosa v. Mayden, 450 F.2d 753, 754 (5th Cir. 1971). The conviction was affirmed in United States v. Gosa, ACM No. 19,784 (decided May 22, 1967).

3. United States v. Gosa, 17 U.S.C.M.A. 648 (1967) (petition for grant of review denied); United States v. Gosa, 19 U.S.C.M.A. 327, 41 C.M.R. 327 (1970) (petition for reconsideration denied). The procedures for review are codified at 10 U.S.C. §§ 859-76 (1970).

corpus in the United States District Court for the Northern District of Florida.[4] Petitioner contended that his confinement was invalid in light of the intervening decision in *O'Callahan v. Parker*[5] in that the general court-martial which tried him lacked jurisdiction. The district court denied his application for habeas relief.[6] On appeal, the United States Court of Appeals for the Fifth Circuit affirmed on the ground that *O'Callahan v. Parker* was not entitled to retroactive effect. *Gosa v. Mayden*, 450 F.2d 753 (5th Cir. 1971).

A judicial decision which overrules a prior decision can either be accorded prospective or retrospective effect. A prospective application would mean that the overruled decision was valid until the court handed down the overruling decision and that all judgments relying upon the overruled decision would retain their efficacy. On the other hand, when a decision is given retroactive effect, the overruled decision is deemed void and all judgments relying upon that decision may be attacked.

Under the common law, judicial decisions were in all cases given retroactive effect.[7] The rationale behind this judicial philosophy was based on the premise that judges were "the discoverers, not the creators" of the law.[8] Thus, court decisions themselves were not the law, but rather, only evidence of a body of pre-existing law.[9] Under this theory, the overruled decision was at no time the law and, therefore, had no validity.[10] Thus, it followed that overruling decisions should naturally be given retroactive effect.

In 1866, in *Norton v. Shelby County*,[11] the United States Supreme Court demonstrated its adherence to this traditional view by stating: "An unconstitutional act is not a law; it confers no rights; it imposes no duties . . . it is, in legal contemplation, as inoperative as though it had never been passed."[12] In 1932, this concept was qualified in *Great Northern Railway v. Sunburst Oil & Refining Co.*,[13] where the Court was confronted with the "novel stand . . . that

4. Gosa v. Mayden, 305 F. Supp. 1186 (N.D. Fla. 1969), aff'd, 450 F.2d 753 (5th Cir. 1971).

5. 395 U.S. 258 (1969).

6. 305 F. Supp. at 1187.

7. See generally 1 K. Davis, Administrative Law Treatise § 5.09 (1958). Mr. Justice Holmes substantiated this principle when he declared: "Judicial decisions have had retrospective operation for near a thousand years." Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (dissenting opinion).

8. "The Law . . . is identical with the rules laid down by the judges, but those rules are laid down by the judges because they are the law, they are not the Law because they are laid down by the judges . . . the judges are the discoverers, not the creators, of the Law." J. Gray, The Nature and Sources of the Law 93 (2d ed. 1921).

9. Carpenter, Court Decisions and the Common Law, 17 Colum. L. Rev. 593 (1917).

10. 1 Blackstone, Commentaries *70.

11. 118 U.S. 425 (1886).

12. Id. at 442. Similar declarations were enunciated by the Court in following years. E.g., Chicago, I. & L. Ry. v. Hackett, 228 U.S. 559, 566 (1913); Ex parte Siebold, 100 U.S. 371, 376 (1880).

13. 287 U.S. 358 (1932). The principle of mandatory retroactivity had already been substantially eroded by some state courts. E.g., Jones v. Woodstock Iron Co., 95 Ala. 551,

the constitution of the United States is infringed by the refusal" of a state court to apply one of its decisions retroactively.[14] A unanimous Court disagreed with this contention by holding that "[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward."[15] Furthermore, the Court expressly stated that the United States Constitution had no voice on the issue of retroactivity.[16]

In 1940, the death blow to the common law rule of mandatory retroactivity was struck in *Chicot County Drainage District v. Baxter State Bank*.[17] The *Chicot* Court abrogated that traditional theory by conceding that "[t]he actual existence of a statute, prior to . . . a determination [of its constitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration."[18] Rather, each case had to be decided after an examination of its own peculiar aspects.[19]

Linkletter v. Walker[20] was the first significant discussion of retroactivity in the criminal law area. *Linkletter* involved the retroactivity of *Mapp v. Ohio*,[21] which held that the exclusion of evidence seized in violation of the search and seizure provisions of the fourth amendment is required of states by the due process clause of the fourteenth amendment.[22] The *Linkletter* Court, reiterating the *Sunburst* rationale, stated that "the Constitution neither prohibits nor requires retrospective effect."[23] It then set forth three factors to be considered in determining retroactivity: 1) the purpose of the new rule, 2) the reliance placed upon the old doctrine, and 3) the effect that a retrospective application of the new rule would have on the administration of justice.[24]

The Court determined that the purpose of the *Mapp* rule was to deter the police from engaging in lawless conduct,[25] not to protect defendants from being convicted of crimes they did not commit. Secondly, the states and the accused

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10 So. 635 (1892); State ex rel. May Dep't Stores Co. v. Haid, 327 Mo. 567, 38 S.W.2d 44 (1931); State v. Bell, 136 N.C. 674, 49 S.E. 163 (1904). It had also been criticized in various law review articles. E.g., Freeman, The Protection Afforded Against the Retroactive Operation of an Overruling Decision, 18 Colum. L. Rev. 230, 250-51 (1918); Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 426-27 (1924).

14. 287 U.S. at 364, aff'g 91 Mont. 216, 7 P.2d 927 (1932). The railroad commission of Montana decided that its rates were excessive and lowered them. Plaintiff-shipper sued defendant-railroad to recover payments made while the excessive rates were in effect. The Montana supreme court held that although these excessive rates could no longer be charged, plaintiff was not entitled to recovery. 91 Mont. at 218, 7 P.2d at 929.

15. 287 U.S. at 364.

16. Id.

17. 308 U.S. 371 (1940).

18. Id. at 374.

19. Id.

20. 381 U.S. 618 (1965).

21. 367 U.S. 643 (1961).

22. Id. at 655.

23. 381 U.S. at 629.

24. Id. at 636.

25. Id. at 636-37.

themselves were found to have substantially relied upon the previous standard.[26] Finally, the Court concluded that a retrospective application of *Mapp* "would tax the administration of justice to the utmost."[27] The Court indicated that in three prior criminal law decisions to which it had given retroactive effect,[28] "the principle that [the Court] applied went to the fairness of the trial—the very integrity of the fact-finding process."[29] Consequently, since "the fairness of the [Linkletter] trial [was] not under attack,"[30] the Court reached the conclusion that *Mapp* need not be applied retroactively.[31]

In 1966, the Court in *Tehan v. United States ex rel. Shott*[32] considered the retroactivity of *Griffin v. California*,[33] which held that adverse comment upon a defendant's failure to testify in a state criminal trial violates the constitutional privilege against self-incrimination.[34] After an examination of the three factors enunciated in *Linkletter*, the Court denied retroactivity.[35] It laid great stress upon the third consideration, stating that a retrospective application of *Griffin* would have "an impact upon the administration of [states'] criminal law so devastating as to need no elaboration."[36] But despite this emphasis, the crucial question remained whether the infringement hindered the ascertainment of truth. The Court held that the fifth amendment privilege against self-incrimination was not designed to enhance the ascertainment of truth but rather to protect "the right of each individual to be let alone."[37]

The following year the criteria set forth in *Linkletter* were again utilized by the Court in *Johnson v. New Jersey*,[38] where the Court found that *Escobedo v. Illinois*[39] and *Miranda v. Arizona*[40] need not be given retroactive effect.[41] At the

26. Id. at 637.

27. Id.

28. The three decisions were Jackson v. Denno, 378 U.S. 368 (1964) (right of accused to effective exclusion of coerced confession from trial held violative of fourteenth amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (denial of right of counsel to indigent defendant in criminal trial held violative of fourteenth amendment); Griffin v. Illinois, 351 U.S. 12 (1956) (state's denial of appellate review solely on account of defendant's inability to pay for transcript held violative of fourteenth amendment). The holdings in Jackson and Gideon were applied retroactively by the Court in the decision itself, while Griffin was applied retroactively in Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958) (per curiam).

29. 381 U.S. at 639.

30. Id.

31. Id. at 640.

32. 382 U.S. 406 (1966).

33. 380 U.S. 609 (1965).

34. Id. at 615.

35. 382 U.S. at 419.

36. Id. For a criticism of this third factor, see Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 950-51 (1962).

37. 382 U.S. at 416.

38. 384 U.S. 719 (1966).

39. 378 U.S. 478 (1964).

40. 384 U.S. 436 (1966).

41. 384 U.S. at 734.

outset, the Court pointed out that "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved."[42] Although the *Miranda* and *Escobedo* decisions were designed to enforce the privilege against self-incrimination, the Court found that their primary contribution was to safeguard the privilege in those situations where the abusive practice fell short of overt coercion.[43] Therefore, since prior case law adequately protected petitioner's rights against overtly coerced confessions,[44] the effect on the fact-finding process where the *Escobedo* and *Miranda* safeguards were lacking was not great enough to require retroactivity.[45]

Another significant retroactivity case was *DeStefano v. Woods*,[46] which refused retroactive application to *Duncan v. Louisiana*[47] and *Bloom v. Illinois*.[48] These two cases involved the right to jury trial in serious criminal[49] and serious criminal contempt cases,[50] respectively. The Court held that all three factors of the *Linkletter* test favored prospectivity in the *Duncan* situation.[51] Regarding the *Bloom* rule, the Court decided that, even if the purpose factor might be construed to favor retroactivity, the reliance and effect considerations clearly pointed toward a prospective application.[52]

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42. Id. at 728.

43. Id. at 729-30.

44. See, e.g., Haynes v. Washington, 373 U.S. 503 (1963); Reck v. Pate, 367 U.S. 433 (1961); Spano v. New York, 360 U.S. 315 (1959).

45. 384 U.S. at 730. The following year, United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), were denied retroactivity in Stovall v. Denno, 388 U.S. 293 (1967). Wade and Gilbert required the exclusion of identification evidence obtained by exhibiting the accused in a lineup in the absence of counsel. While admitting that the purpose of this new rule was aimed at enhancing the reliability of the fact-finding process, the Court nevertheless decided that the heavy reliance on the previous norms and the substantial impact upon the administration of justice had "overriding significance." Id. at 298-300.

46. 392 U.S. 631 (1968) (per curiam).

47. 391 U.S. 145 (1968).

48. 391 U.S. 194 (1968).

49. 391 U.S. at 157-58.

50. 391 U.S. at 201-02.

51. 392 U.S. at 633.

52. Id. at 634-35. During the 1968-69 term, the Court handed down four per curiam opinions which granted retroactivity to prior decisions. Berger v. California, 393 U.S. 314 (1969) (per curiam), gave retroactive effect to Barber v. Page, 390 U.S. 719 (1968) (absence of witness from jurisdiction does not justify use at trial of preliminary hearing testimony unless state made good-faith effort to secure witness' presence); Arsenault v. Massachusetts, 393 U.S. 5 (1968) (per curiam), gave retroactive effect to White v. Maryland, 373 U.S. 59 (1963) (absence of counsel when defendant pleaded guilty at arraignment held violative of fourteenth amendment); McConnell v. Rhay, 393 U.S. 2 (1968) (per curiam), gave retroactive effect to Mempa v. Rhay, 389 U.S. 128 (1967) (counsel required for felony defendant in proceeding for parole revocation and imposition of deferred sentencing by sixth amendment); Roberts v. Russell, 392 U.S. 293 (1968) (per curiam), gave retroactive effect to Bruton v. United States, 391 U.S. 123 (1968) (admission at joint trial of codefendant's extrajudicial confession implicating defendant violated defendant's right of cross-examination

In 1971, the Supreme Court set forth its most recent pronouncement on retroactivity standards in *Williams v. United States*,[53] wherein the Court was asked to determine the retroactivity of *Chimel v. California*,[54] which narrowed the scope of permissible searches incident to arrest.[55] In holding that *Chimel* was not to be applied retroactively, the *Williams* Court deemphasized the second and third considerations of *Linkletter*[56] and cogently summed up the crucial standard for retroactivity:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its *truth-finding function* and so raises serious questions about the *accuracy of guilty verdicts* in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.[57]

In *Gosa v. Mayden*,[58] the Fifth Circuit Court of Appeals has attempted to predict[59] whether the Supreme Court will apply its decision in *O'Callahan v. Parker*[60] retroactively. *O'Callahan* was a habeas corpus proceeding by a petitioner who had been convicted by a court-martial for attempted rape, housebreaking and assault.[61] The *O'Callahan* Court held that "since petitioner's crimes were not service connected, he could not be tried by court-martial but rather was entitled to trial by the civilian courts."[62]

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under the sixth amendment). In all these cases, retroactivity was granted because the new rules related to the fact-finding process. Berger v. California, supra at 315; Arsenault v. Massachusetts, supra at 6; McConnell v. Rhay, supra at 3-4; Roberts v. Russell, supra at 294-95. The Court never discussed reliance upon the old standards or the effect on the administration of justice—factors which possess prime importance in decisions which have denied retroactivity.

Two other decisions decided that term which denied retroactive application were Desist v. United States, 394 U.S. 244 (1969) (denying retroactivity to Katz v. United States, 389 U.S. 347 (1967)), and Fuller v. Alaska, 393 U.S. 80 (1968) (per curiam) (denying retroactivity to Lee v. Florida, 392 U.S. 378 (1968)).

53. 401 U.S. 646 (1971).

54. 395 U.S. 752 (1969).

55. Id. at 755.

56. 401 U.S. at 651-53. For the three Linkletter standards, see text accompanying note 24 supra.

57. 401 U.S. at 653 (footnote omitted) (emphasis added).

58. 450 F.2d 753 (5th Cir. 1971).

59. "The sole, inexorable issue presented by this appeal requires us to predict whether the Supreme Court of the United States will apply its decision in O'Callahan v. Parker . . . to comparable proceedings . . . [completed] prior to . . . the date that decision was announced." Id. at 754 (italics omitted) (citation omitted).

60. 395 U.S. 258 (1969). Certiorari was granted by the Supreme Court in Relford v. Commandant, 401 U.S. 355 (1971), for the purpose of deciding the retroactivity and scope of O'Callahan v. Parker, but the Court found that the crime in Relford had a service connection which O'Callahan lacked, and thus deemed a decision on retroactivity inappropriate.

61. 395 U.S. at 260.

62. Id. at 274. Relford v. Commandant, 401 U.S. 355, 365 (1971), enumerates twelve

Initially, the *Gosa* court examined the contention that lack of subject matter jurisdiction was the underlying basis of the *O'Callahan* decision. If this were true, a court would be confronted with the well-established principle of law that a decision by a court which lacks subject matter jurisdiction is void.[63] The question would then become whether such a jurisdictional defect necessitates full retroactive application of the *O'Callahan* decision, or whether the *Linkletter* standards for "selective retroactivity" continue to be applicable in this situation.[64]

Most of the courts which have faced this dilemma have chosen the latter course.[65] In *United States ex rel. Flemings v. Chafee*,[66] however, a federal district court sitting in New York ignored recent precedents and adhered to the traditional rule. The *Flemings* court decided that the Supreme Court's use of the phrase "lack of jurisdiction" was intended to mean lack of power over the subject matter[67] and rejected the theory that the *O'Callahan* limitation was merely functional or procedural.[68] The court based its decision on the language used by the *O'Callahan* Court,[69] which it reasoned was concerned with the fundamental differences between the civilian and military courts[70] and not with

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factors which would render a crime service connected. O'Callahan was another indication that the Supreme Court wished to curtail the jurisdiction of military courts as much as constitutionally permissible. Previous decisions which have limited the jurisdiction of the military courts by excluding categories of potential defendants include McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960) (overseas civilian-employee); Reid v. Covert, 354 U.S. 1 (1957) (civilian accompanying overseas serviceman); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) (discharged serviceman). For an analysis of O'Callahan v. Parker and its significance, see Birnbaum & Fowler, O'Callahan v. Parker: The Relford Decision and Further Developments in Military Justice, 39 Fordham L. Rev. 729 (1971); Birnbaum & Fowler, Military Appellate Decisions Following O'Callahan v. Parker, 38 Fordham L. Rev. 673 (1970).

63. See In Re Bonner, 151 U.S. 242 (1894); Ex parte Siebold, 100 U.S. 371 (1880).

64. Gosa v. Mayden, 450 F.2d 753, 758 (5th Cir. 1971).

65. In United States v. King, ACM No. 20361, 40 C.M.R. 1030, review denied, 19 U.S.C.M.A. 595, 40 C.M.R. 327 (1969), the Air Force Board of Review handled the problem by holding that the existence or nonexistence of jurisdiction was never in issue. It reasoned that the Supreme Court was "merely withhold[ing] the exercise of military jurisdiction over offenses which are not service-connected in a significant way." 40 C.M.R. at 1035. The lower court in Gosa conceded the fact that the Supreme Court had talked in terms of a lack of jurisdiction (how could it be denied?) but decided that the general retroactivity rules were applicable. Gosa v. Mayden, 305 F. Supp. 1186 (N.D. Fla. 1969), aff'd, 450 F.2d 753 (5th Cir. 1971); accord, Mercer v. Dillon, 19 U.S.C.M.A. 264, 265-66, 41 C.M.R. 264, 265-66 (1970). A federal district court sitting in Pennsylvania, which considered the retroactivity of O'Callahan, never discussed the issue. Thompson v. Parker, 308 F. Supp. 904 (M.D. Pa.) appeal dismissed, No. 18,868 (3d Cir., April 24, 1970).

66. 330 F. Supp. 193 (E.D.N.Y. 1971); accord, Mercer v. Dillon, 19 U.S.C.M.A. 264, 268-74, 41 C.M.R. 264, 268-74 (1970) (dissenting opinion).

67. 330 F. Supp. at 196.

68. Id. at 195-96.

69. Id. at 196.

70. Id.

mere procedural defects. The *Flemings* court thus held that, since *O'Callahan* was based on a lack of jurisdiction, the recent retroactivity cases were not "compelling precedents"[71] and *O'Callahan* must be given retroactive effect.[72] The *Flemings* decision was subsequently affirmed by the United States Court of Appeals for the Second Circuit.[73] The court of appeals concurred in the district court's reasoning by holding that "*O'Callahan* must be applied retroactively because that decision was grounded in the absence of jurisdiction to adjudicate . . . ."[74] The court held that recent precedents weren't applicable since they were not based on lack of jurisdictional power but rather on "abuse[s] of properly vested adjudicatory power."[75] The *Gosa* court expressly agreed[76] with the *Flemings* rationale that lack of jurisdiction was the basis of *O'Callahan* but nevertheless held that this did not "inevitably lead to the necessity for full retrospective application" of *O'Callahan* in light of the "more than half-decade of precedent for selective retroactivity . . . ."[77]

The fact that *O'Callahan* overruled a legislative enactment presented the *Gosa* court with a unique problem in that all the retroactivity precedents of the Supreme Court had involved the overruling of judicial decisions. Thus, the court had to determine whether the retroactivity standards were applicable to a decision which annulled legislative action. Noting that a "completely novel issue" was presented,[78] the court opted for the retroactivity criteria of *Linkletter*.[79]

The purpose of *O'Callahan* was phrased in two ways. Affirmatively, it was to secure "the constitutional right of grand jury presentment or indictment and petit jury trial to servicemen on active duty who were accused of crimes having no service connection."[80] The court decided that if the holding was stated in such a way, *DeStefano v. Woods*[81] indicated that *O'Callahan* would be given only prospective application by the Supreme Court.[82] It found *DeStefano* to be analagous to *O'Callahan* because the right to trial by jury was required in both.

Negatively, the purpose of the *O'Callahan* holding was that "[it] denied military jurisdiction which exceeded the least possible power which the Constitution reposed in Congress and did so to avoid numerous incidents and functions of military justice considered less satisfactory to the determination of guilt than procedures available in civilian courts that would occupy the juris-

71. Id. at 202.
72. Id. at 200.
73. United States ex rel. Flemings v. Chafee, No. 71-1997 (2d Cir., March 28, 1972).
74. Id. at 2418.
75. Id. at 2414.
76. 450 F.2d at 757.
77. Id. at 758.
78. Id. at 757.
79. Id. at 758; see text accompanying note 24 supra.
80. 450 F.2d at 763.
81. 392 U.S. 631 (1968) (per curiam).
82. 450 F.2d at 763.

dictional vacuum."[83] At first glance, this statement appears to fall into the *Williams* criterion[84] that rules of criminal procedure which are enacted to enhance the accuracy of guilty verdicts will be applied retroactively. After admitting that its conclusion would be largely a subjective one,[85] the court faced the problem of the *Williams* standard. It set forth six passages[86] which were extremely critical of the entire system of military justice. Then, somewhat paradoxically, it stated: "Our direct quotations here are solely for the purpose of demonstrating that, demeaning of military justice as these remarks may be . . . [t]here was no determination that the UCMJ carried a clear danger of convicting the innocent, nor . . . substantially impaired the truth-finding function."[87] Indeed, the court found that defendants under military justice have "many procedural rights which are even more conducive to fact accuracy than most civilian forums accord."[88] The court concluded that *O'Callahan* held "that a civilian court trial with grand and petit jury protections would tend to prevent arbitrariness and repression and be fairer."[89] It again relied on *DeStefano v. Woods* in stating that this belief was insufficient to "warrant retroactivity if other criteria point[ed] strongly to prospective application."[90]

The criterion of justified reliance on the old standard was held to clearly favor prospectivity since the court failed to find any indications that *O'Callahan* was foreshadowed in previous opinions.[91] The court handled the problem of the effect on the administration of justice with the same ease. The hundreds of thousands of possible appeals weighed heavily against a retroactive application of *O'Callahan*.[92]

83. Id.

84. See text accompanying note 57 supra.

85. 450 F.2d at 763.

86. Id. at 764.

87. Id. at 765.

88. Id. See generally Quinn, Some Comparisons Between Courts-Martial and Civilian Practice, 15 U.C.L.A.L. Rev. 1240 (1968). The noted trial attorney F. Lee Bailey has observed: "In my opinion, despite all the criticism leveled at the military, the odds are that a military court will produce a more accurate verdict in a disputed issue of fact than a civilian jury." F. Bailey, The Defense Never Rests 259 (1971).

89. 450 F.2d at 765.

90. Id.

91. Id. at 765-66.

92. Id. at 766. The Army has stated that one-half of its military prisoners might be affected by a retroactive application of O'Callahan v. Parker. It also estimated that 450,000 courts-martial dating from 1951 might be set aside. N.Y. Times, Sept. 14, 1969, § 1, at 75, col. 3.

An illustration of the types of actions which would result from a retroactive holding of O'Callahan is a petition by O'Callahan himself, under 28 U.S.C. § 1491 (1970), for his military pay from the date of his discharge to the date of the Supreme Court's decision in his case. The United States Court of Claims held that the six-year statute of limitations, 28 U.S.C. § 2501 (1970), barred his suit. The court stated that the statute began to toll at the time of his discharge (1961) and not at the time of the Supreme Court decision (1969). O'Callahan v. United States, 451 F.2d 1390 (Ct. Cl. 1971); see Crowe v. United States, 452 F.2d 1034 (Ct. Cl. 1971).

Subsequent to the *Gosa* decision, the Second Circuit, applying the *Linkletter* criteria in the *Flemings* case, reached an opposite result. Although the Second Circuit based its holding on the lack of jurisdiction of military courts to adjudicate non-service connected crimes, it went on in dictum to conclude that the application of the three-pronged test of *Linkletter* would still require *O'Callahan* to be applied retroactively.[93] The court expressly disagreed with the Fifth Circuit in regard to the purpose criterion of *Linkletter*. The Second Circuit held that the court-martial procedures employed in *O'Callahan* raised a "clear danger of convicting the innocent"[94] since they were not conducive to the effective presentation of a defense.[95] But perhaps of greater significance was the Second Circuit's belief that the impact of a retroactive holding would not be as "staggering" as the Fifth Circuit had predicted.[96] Finally, the court discussed the "far-reaching institutional considerations" which reinforced its conclusion that *O'Callahan* must be applied retroactively. It pointed out that since "the Supreme Court always has applied new rules announced in habeas corpus cases retroactively,"[97] *O'Callahan*—a habeas corpus proceeding—was also entitled to retroactive application.[98]

As *Williams v. United States* indicated, the fundamental question in a determination of retroactivity is whether there is a substantial chance that petitioner would have been acquitted if he was afforded his full constitutional privileges. In other words, did the deprivation of petitioner's rights deprive him of a fair trial? Thus, the issue becomes one of due process.

The Supreme Court will grant retroactivity if the old standard had a substantial chance of depriving *innocent* people of their constitutional rights and convicting them. However, the Court will not grant retroactivity if the old norm merely deprived *guilty* people of their rights by unconstitutionally convicting them. The purpose factor in the *Linkletter* test[99] remains important in this schema. If the purpose of the new rule is designed to improve the reliability

93. United States ex rel. Flemings v. Chafee, No. 71-1997, at 2418 (2d Cir., March 28, 1972).

94. Id. at 2423.

95. The court pointed to two deficiencies in court-martial procedures: First, that the officer assigned as counsel to a defendant was not required to have any legal training; and secondly, "the right to compulsory process for obtaining evidence and witnesses was, to a significant extent, dependent on the approval of the prosecution." Id. at 2422.

96. Id. at 2423-25. The Second Circuit relied on four factors in reaching this conclusion: (1) Many petitions would be eliminated if the offense involved was within the Relford standards for service-related crimes (see notes 60 and 62 supra), (2) each branch of the military had established procedures which would adequately handle the claims, (3) very few servicemen had actually sought collateral review of their convictions under O'Callahan, and (4) the administrative burden could be further reduced if Congress adopted a short statute of limitations.

97. Id. at 2426, citing Jackson v. Denno, 378 U.S. 368 (1964), and Gideon v. Wainwright, 372 U.S. 335 (1963).

98. United States ex rel. Flemings v. Chafee, No. 71-1997, at 2426-27 (2d Cir., March 28, 1972).

99. See text accompanying note 24 supra.

of the fact-finding process, it decreases the possibility that innocent people will be convicted. Therefore, under this analysis, *O'Callahan* would not be entitled to retroactive application since it was not designed to enhance the fact-finding processes of military trials. Furthermore, the substantial reliance by the military authorities on the old rule and the enormous impact on the administration of justice would militate against a ruling of retroactivity.

The fact remains that *Gosa* is unlike the previous retroactivity cases which have come before the Court. In those cases, the Court was solely concerned with functional and constitutional issues, while *O'Callahan* presented a jurisdictional issue. The *Flemings* rationale[100] is logically correct if the basis of the *O'Callahan* holding was that military courts lacked jurisdiction over non-service related crimes. If this were the case, recent retroactivity precedents would be clearly inapplicable to the *O'Callahan* situation. On the other hand, the *Gosa* result would avoid the calamitous effect on the military justice system which may result from a retroactive application of *O'Callahan.*

It is now the task of the Supreme Court to resolve the conflict between the circuits.[101] If the Court agrees with the Fifth Circuit's holding in *Gosa*, it should attempt to reconcile this holding with the principle that judgments rendered by a court which lacks jurisdiction are void—a task which the *Gosa* court avoided. Since the *O'Callahan* Court was not explicit in explaining its rationale, it is tenable that the Court will be able to achieve such a reconciliation by demonstrating that the underlying basis of *O'Callahan* was functional rather than jurisdictional. In so doing, the Court will have at least met the contention that the jurisdictional issue in *O'Callahan* necessitates mandatory retroactivity.

Criminal Law—Right to Appeal—Failure of Counsel to Advise Defendant of His Right to Appeal After a Plea of Guilty Held Insufficient Ground to Require a *Montgomery* Hearing.—Petitioners Lynn[1] and Saunders,[2] in un-

100. See text accompanying notes 66-75 supra.

101. Compare Schlomann v. Moseley, No. 433-70 (10th Cir., March 24, 1972), and Gosa v. Mayden, 450 F.2d 753 (5th Cir. 1971), and Thompson v. Parker, 308 F. Supp. 904 (M.D. Pa.), appeal dismissed, No. 18,868 (3d Cir., April 24, 1970), with United States ex rel. Flemings v. Chafee, No. 71-1997 (2d Cir., March 28, 1972).

1. Lynn was indicted for murder in the first degree. After proceeding to trial, the defendant chose to withdraw his plea of not guilty and enter a plea of guilty to the crime of manslaughter in the first degree. As a second felony offender, Lynn was sentenced on Dec. 28, 1951 to a term of not less than 10 years nor more than 30 years imprisonment. On May 29, 1969, more than 17 years after he had been sentenced, defendant submitted an application for a writ of error coram nobis alleging that he had entered a plea of guilty with the understanding that he would receive a sentence of no longer than 20 years, that counsel failed to inform him of his right to appeal and that until two recent decisions of the court he was unaware that he had such a right. People v. Lynn, 28 N.Y.2d 196, 199, 269 N.E.2d 794, 795, 321 N.Y.S.2d 74, 76 (1971).

2. Saunders was indicted for robbery in the first degree, grand larceny in the first degree

related cases pleaded guilty to manslaughter and robbery respectively. Subsequently, while serving their sentences, each applied for a writ of error coram nobis,[3] alleging that counsel had failed to advise them of their right to appeal.[4] The supreme court denied their petitions, distinguishing *People v. Montgomery*,[5] wherein the New York Court of Appeals held "that every defendant has a fundamental right to appeal his conviction . . . ."[6] The appellate division[7] and the New York Court of Appeals affirmed the denial. The court of appeals held that where a defendant has pleaded guilty, he must allege more than a failure to be informed of his right to appeal; he must also allege that he was not aware of his right to appeal, and that he had "a genuine appealable issue" which he might have raised had he been aware of his right to appeal. *People v. Lynn*, 28 N.Y.2d 196, 269 N.E.2d 794, 321 N.Y.S.2d 74 (1971).

The right to appellate review of criminal convictions was not available at

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and assault in the second degree. The defendant entered a plea of guilty to the crime of robbery in the second degree in satisfaction of all charges against him and on Feb. 6, 1962 was sentenced to a term of 5 to 10 years imprisonment. On Sept. 5, 1968, more than 6 years after he had been sentenced, defendant submitted a letter which the court treated as an application for a writ of error coram nobis alleging counsels failure to inform him of his right to appeal. Id. at 200, 269 N.E.2d at 795-96, 321 N.Y.S.2d at 77.

3. "A writ of error coram nobis is a common law writ of ancient origin devised by the Judiciary and used to bring before a court a judgment previously rendered by it for the purpose of review or modification, on account of some error of fact and not of law affecting the validity and regularity of the proceedings, and which was not brought into issue at the trial thereof. The writ differs from an ordinary writ of error in that it does not remove the case to a higher court for review and that it lies only for errors of fact not apparent of record, instead of only for errors of law apparent of record." People v. Martine, 103 N.Y.S.2d 85, 89-90 (Kings County Ct.), rev'd mem., 278 App. Div. 966, 105 N.Y.S.2d 673 (2d Dep't 1951), aff'd mem., 303 N.Y. 789, 103 N.E.2d 897 (1952); see People v. Wurzler, 300 N.Y. 344, 90 N.E.2d 886 (1950) (per curiam) (only the court in which defendant is tried and convicted has power to hear application for writ of error coram nobis); People v. Snelling, 33 Misc. 2d 735, 227 N.Y.S.2d 143 (Ct. Gen. Sess. 1962) (writ of coram nobis may not be used to review errors of law); People v. Hoffner, 191 Misc. 419, 76 N.Y.S.2d 916 (Queens County Ct. 1947) (motion for writ of coram nobis denied where record failed to indicate that verdict was induced by fraud or that constitutional rights of defendant were violated and there was no fact to be reviewed which had not already been reviewed by the appropriate court). See generally Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943) (reopening judgment of conviction after defendant had begun term of imprisonment). For a discussion of post-conviction relief in general and coram nobis relief in particular, see Cohen, Post-Conviction Relief in the New York Court of Appeals: New Wine and Broken Bottles, 35 Brooklyn L. Rev. 1 (1968).

4. 28 N.Y.2d at 199-200, 269 N.E.2d at 795-96, 321 N.Y.S.2d at 76-77.

5. 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969).

6. Id. at 132, 247 N.E.2d at 132, 299 N.Y.S.2d at 159. See text accompanying note 23 infra.

7. People v. Saunders, 35 App. Div. 2d 591, 313 N.Y.S.2d 564 (2d Dep't 1970) (mem.), aff'd, 28 N.Y.2d 196, 269 N.E.2d 794, 321 N.Y.S.2d 74 (1971); People v. Lynn, 35 App. Div. 2d 589, 314 N.Y.S.2d 346 (2d Dep't 1970) (mem.), aff'd, 28 N.Y.2d 196, 269 N.E.2d 794, 321 N.Y.S.2d 74 (1971).

common law[8] and is not guaranteed by the United States Constitution.[9] In *Griffin v. Illinois*[10] Justice Frankfurter wrote in a concurring opinion:

> The right to an appeal from a conviction for crime is today so established that this leads to the easy assumption that it is fundamental to the protection of life and liberty and therefore a necessary ingredient of due process of law. . . . [However,] . . . it is now settled that due process of law does not require a State to afford review of criminal judgments.[11]

The present system of criminal appeals in most states is a product of legislative enactments and judicial construction of the individual state, and as a result is far from uniform.[12] The dispute over the existence of a constitutional guarantee has become academic, since virtually all states have recognized the right to appellate review of convictions for significant crimes.[13]

In New York, the first statute granting the right to appeal from a criminal conviction was enacted in 1881;[14] its modern equivalent is codified in the

8. Hood, The Right of Appeal, 29 La. L. Rev. 498, 499 (1969); Note, Late Filing of Criminal Appeals, 17 Hastings L.J. 132 (1965).

9. The United States Constitution does not provide for the right of appellate review. The argument has been presented that such a right exists under the due process clause of the fifth and fourteenth amendments. However, this view has never been accepted by the Supreme Court. In McKane v. Durston, 153 U.S. 684, 687 (1894), the Court stated: "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review." See, e.g., Griffin v. Illinois, 351 U.S. 12, 18 (1956); Kohl v. Lehlback, 160 U.S. 293, 297-98 (1895); Andrews v. Swartz, 156 U.S. 272, 275 (1895). See also Carter v. Illinois, 329 U.S. 173, 175 (1946), where the Court stated that, except for limitations imposed by the federal criminal code, the prosecution of crime, including the establishment of systems of review in criminal cases, is within the discretion and power of the individual states. One author has pointed out that although the federal constitution does not guarantee a right of appeal, it does provide that the Supreme Court should have appellate jurisdiction in a very limited number of cases, thereby intimating that in some cases a litigant should have an absolute right to appeal to the Supreme Court. Hood, supra note 8, at 503.

10. 351 U.S. 12 (1956).

11. Id. at 20-21 (concurring opinion); see Douglas v. California, 372 U.S. 353, 365 (1963) (Harlan & Stewart, JJ., dissenting).

12. See ABA Project on Minimum Standards for Criminal Justice, Criminal Appeals § 1.1, commentaries a, b, c, d at 15-22 (Approved Draft, 1970). See also Note, Failure to File Timely Notice of Appeal in Criminal Cases: Excusable Neglect, 41 Notre Dame Law. 73, 77-80 (1965), for a discussion of treatment of the timely appeal problem by various states.

13. See, e.g., Cal. Penal Code §§ 1235, 1237, 1237.5, 1239 (West 1970); D.C. Code Ann. § 23-113 (1967); Fla. Stat. Ann. Rule Crim. Proc. 1.850 (1967); Ill. Rev. Stat. ch. 110A, §§ 601-05 (1969); Mass. Ann. Laws ch. 278, § 18 (1968); Minn. Stat. § 632.01 (1967); Ohio Rev. Code Ann. § 2953.02 (Page Supp. 1970); Pa. Stat. Ann. tit. 19, §§ 1181-82, 1188-89 (1964).

14. Law of June 1, 1881, ch. 442 [1881] N.Y. Laws 104th Sess. 601.

Criminal Procedure Law.[15] The early New York cases held the right to be exclusively statutory and therefore construed it strictly.[16] The leading contemporary New York case on the right to appeal is *People v. Montgomery*.[17] In *Montgomery* the defendant, a boy of fifteen, was tried and found guilty of second degree murder, receiving a sentence of 25 years to life in the state prison.[18] No appeal was taken from this conviction. Ten years later, Montgomery applied for a writ of error coram nobis,[19] alleging that due to his "indigency, ignorance and infancy at the time of his conviction,"[20] he was denied his right of appeal. He maintained that he was not informed either by court-appointed counsel or anyone else of his absolute right to appeal.[21] Furthermore, he claimed that since he was an indigent, the state had an obligation to inform him of this right.[22] Thus the court of appeals was faced with a question as to whether or not defendant's allegation that he was not informed of this right raised an issue of fact which required a hearing to determine the truth of the contention. In response the court said:

> The time has come for us to announce clearly that every defendant has a fundamental right to appeal his conviction and that, accordingly, basic fairness and due process require that the right not be dissipated either because the defendant was unaware of its existence or counsel failed to abide by a promise to either file or prosecute an appeal.[23]

The court qualified this broad statement, however, with the caveat that courts

15. N.Y. Crim. Pro. L. § 450.10 (McKinney 1971). The law states: "An appeal to an intermediate appellate court may be taken as of right by the defendant from the following judgment, sentence and order of a criminal court:

1. A judgment other than one including a sentence of death;
2. A sentence other than one of death, as prescribed in subdivision one of section 450.30;
3. An order, entered pursuant to section 440.40, setting aside a sentence other than one of death, upon motion of the People." Id.

This section provides the basic right to appeal from all criminal convictions. Id. § 450.70 provides for direct appeal to the court of appeals as a matter of right upon a sentence of death.

16. E.g., People v. Rossi, 5 N.Y.2d 396, 157 N.E.2d 859, 185 N.Y.S.2d 5 (1959); People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427, cert. dismissed, 326 U.S. 687 (1945); People v. Reed, 276 N.Y. 5, 11 N.E.2d 330 (1937); People v. Zerillo, 200 N.Y. 443, 93 N.E. 1108 (1911); People v. Green, 137 App. Div. 763, 122 N.Y.S. 571 (1st Dep't 1910) (per curiam).

17. 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969).

18. Id. at 131, 247 N.E.2d at 131, 299 N.Y.S.2d at 158.

19. Id., 299 N.Y.S.2d at 159.

20. Id., 247 N.E.2d at 131-32, 299 N.Y.S.2d at 159.

21. Id., 247 N.E.2d at 132, 299 N.Y.S.2d at 159. See text accompanying notes 9-15 supra.

22. 24 N.Y.2d at 131, 247 N.E.2d at 132, 299 N.Y.S.2d at 159. See Note, Late Filing of Criminal Appeals, 17 Hastings L.J. 132, 137-38 (1965), where the author discusses the plight of the indigent criminal defendant who often loses his right to appeal because assigned counsel fails either to advise him of his right to appeal or to aid him in perfecting that right.

23. 24 N.Y.2d at 132, 247 N.E.2d at 132, 299 N.Y.S.2d at 159.

should not try to "second guess counsel,"[24] since often the decision to file or not to file an appeal is part of the overall trial strategy. In further discussing the role of court appointed counsel, the court noted: "An indigent defendant cannot lose his right to appeal simply because the courts have deputized a lawyer to fulfill the function and he has failed properly to carry out his duties."[25] The court was cognizant of the fact that the defendant had no previous experience with the law, and therefore he could not have been presumed to have been aware of his right to appeal.[26] The court held that Montgomery should be accorded a hearing to determine whether in fact he had been informed of his right to appeal. If the hearing determined that he had not been so informed, then he had clearly been denied the equal protection of the law and should be resentenced to start the time for appeal running anew.[27]

The practical application of the broad *Montgomery* rule of right to appeal has resulted in diverse decisions among the various departments of the appellate division, particularly in regard to a defendant's right to appeal from a plea of guilty.[28] In *People v. Lo Piccolo*[29] the first department affirmed, without opinion, the denial of defendant's application for coram nobis relief where the defendant alleged that he had been unaware of his right to appeal and his assigned counsel had failed to inform him of this right.[30] In the original order denying the coram nobis application,[31] the lower court had stated: " 'The issue here presented is whether Montgomery, supra, should be interpreted as requiring a reinstatement of a defendant's right to appeal in every case in which a defendant asserts the magical words that he had not been advised of his right to appeal. Such pro forma application of Montgomery is clearly unwar-

24. Id.; accord People v. Bell, 36 App. Div. 2d 406, 321 N.Y.S.2d 212 (2d Dep't 1971).

25. 24 N.Y.2d at 133, 247 N.E.2d at 133, 299 N.Y.S.2d at 160.

26. Id. Judge Breitel, in a dissenting opinion joined by Judges Scileppi and Jasen, asserted that the majority had been swayed by the harsh sentence given to the young defendant. Although he acknowledged the fact that of the three co-defendants Montgomery fared the worst, he also noted that Montgomery was the "actual killer" and expressed his belief that his three court-assigned lawyers had "done quite well for him," observing that if the defendant had been convicted of first degree murder he would have faced the possibility of a death sentence. Id. at 135, 247 N.E.2d at 133-34, 299 N.Y.S.2d at 161-62. Judge Breitel concluded that Montgomery had chosen to forego his right to appeal, and that it was only in light of his co-defendant's successful appeal that Montgomery regretted his choice. He stated that "[t]he harsh sentence is no reason for condoning false applications or creating unwise rules of general application." Id. at 136, 247 N.E.2d at 135, 299 N.Y.S.2d at 163.

27. Id. at 134, 247 N.E.2d at 133, 299 N.Y.S.2d at 161.

28. See People v. Lynn, 28 N.Y.2d 196, 269 N.E.2d 794, 321 N.Y.S.2d 74 (1971), for a discussion of the conflict within and among the various departments. See also notes 29-52 infra.

29. 35 App. Div. 2d 1086, 316 N.Y.S.2d 971 (1st Dep't 1970) (mem.).

30. Record, vol. 347, Brief for Respondent at 4, People v. Lo Piccolo, 35 App. Div. 2d 1086, 316 N.Y.S.2d 971 (1st Dep't 1970) (mem.).

31. Id.

ranted.' "[32] *Lo Piccolo* is representative of the decisions of the first department on this question. Generally the court has affirmed, without opinion, the order of any lower court denying coram nobis relief where the defendant alleged the failure of his counsel to inform him of his right to appeal.[33]

In *People v. Powe*[34] the second department reviewed an order denying defendant's application for coram nobis in which he sought to be resentenced after completion of his term of imprisonment on the ground that counsel had failed to advise him of his right to appeal. The supreme court distinguished *Powe* from *Montgomery* on the factual basis that Powe had been convicted upon a plea of guilty and had completed serving his sentence before the application for coram nobis relief was submitted, whereas Montgomery had been convicted after a trial and was serving his sentence at the time of the application.[35] The second department, holding that those distinctions could not form a basis for denying defendant's application, reversed and ordered a hearing.[36] Similarly, in *People v. Nostro*,[37] the second department held that defendant's allegation that counsel had failed to advise him of his right to appeal from a conviction upon a plea of guilty was sufficient to require a hearing.[38] However, in *People v. Greene*,[39] the second department altered its earlier standard. In this case the allegation of a failure to be informed of a right to appeal from a conviction upon a plea of guilty was held insufficient.[40] The new standard required that the defendant allege: 1) that he was not informed of his right to appeal; 2) that he was not aware of his right to appeal; and 3) that he would have appealed had he been aware.[41]

The third department in *People v. Welsh*[42] held that a defendant's allegation of counsel's failure to advise him of his right to appeal after a plea of guilty raised an issue of fact sufficient to require a hearing.[43] Subsequently, in *People*

32. Id. at 4-5, quoting the same Judge's earlier opinion in People v. Albano, 162 N.Y.L.J., Nov. 24, 1969, at 17, cols. 5-8 (Sup. Ct. 1969).

33. See, e.g., Record, vol. 34, Brief for Respondent at 3, People v. Kancar, 36 App. Div. 2d 513, 317 N.Y.S.2d 992 (1st Dep't 1970), aff'd, 28 N.Y.2d 868, 271 N.E.2d 233, 322 N.Y.S.2d 257 (1971) (mem.); Record, vol. 51, Appendix for Appellant at A13, People v. Carlos, 26 N.Y.2d 797, 257 N.E.2d 664, 309 N.Y.S.2d 221 (1970) (mem.).

34. 34 App. Div. 2d 961, 312 N.Y.S.2d 3 (2d Dep't 1970) (mem.).

35. Id., 312 N.Y.S.2d at 3-4.

36. Id., 312 N.Y.S.2d at 4; accord, People v. Brown, 33 App. Div. 2d 1031, 309 N.Y.S.2d 120 (2d Dep't 1970) (mem.).

37. 33 App. Div. 2d 693, 306 N.Y.S.2d 191 (2d Dep't 1969) (mem.).

38. Id., 306 N.Y.S.2d at 192.

39. 35 App. Div. 2d 587, 313 N.Y.S.2d 551 (2d Dep't 1970) (mem.).

40. Id., 313 N.Y.S.2d at 552.

41. Id.; accord, People v. Seible, 36 App. Div. 2d 828, 321 N.Y.S.2d 421 (2d Dep't 1971) (mem.), holding that allegations in an application for a writ of error coram nobis that defendant was unaware of his right to appeal at the time of his conviction upon a plea of guilty and that he would have appealed if aware were sufficient to require a hearing. Id. at 828-29, 321 N.Y.S.2d at 422.

42. 35 App. Div. 2d 854, 315 N.Y.S.2d 256 (3d Dep't 1970) (mem.).

43. Id., 315 N.Y.S.2d at 257.

v. Ali,[44] the third department altered this test by adding the requirement "that during the time allowed for taking an appeal defendant disputed the validity of the judgment of conviction but was nevertheless prevented from prosecuting an appeal by reason of ignorance or improper advice as to his rights."[45]

In *People v. Haynes*[46] the fourth department reversed the lower court's denial of an application for a writ of error coram nobis,[47] asserting that a defendant should not be "required to prove that his appeal has substantial merit before he is entitled to the hearing"[48] and granted a hearing on the basis of defendant's allegation that he had not been informed of his right to appeal after a plea of guilty.[49] The court qualified this position in *People v. Murphy*,[50] however, holding that more than a mere allegation of a failure to be informed of the right to appeal is required.[51] In addition, a defendant must allege that "during the time allowed for taking an appeal he disputed the validity of the judgments of convictions, or that he had a valid ground for appeal."[52]

These cases clearly indicate a gradual shift in the two years following the *Montgomery* decision.[53] In the first department one standard was applied consistently throughout the period.[54] In each of the other departments, the appellate division altered its earlier standard and began to require more than the mere allegation that the defendant had not been advised by his counsel of his right to appeal after a plea of guilty.[55]

44. 35 App. Div. 2d 435, 317 N.Y.S.2d 377 (3d Dep't 1971) (per curiam).

45. Id. at 437, 317 N.Y.S.2d at 380. Two separate appeals were involved in this decision. In People v. Ali, the court held that although it was error to decide without a hearing whether defendant was advised by counsel of his right to appeal, a hearing was unnecessary because of defendant's failure to allege that he wished to appeal and would have done so had he been informed of his right. Id. In People v. Shaw, defendant alleged that he had asked his assigned counsel to appeal from a judgment entered upon a plea of guilty and was told it was not appealable. The court affirmed the denial of the application for coram nobis relief based on the "absence of verified allegations." Id. at 439-40, 317 N.Y.S.2d 382-83.

46. 33 App. Div. 2d 992 (4th Dep't 1970) (mem.).

47. People v. Haynes, 60 Misc. 2d 671, 303 N.Y.S.2d 568 (Monroe County Ct. 1969), rev'd, 33 App. Div. 2d 992 (4th Dep't 1970) (mem.).

48. 33 App. Div. 2d at 992.

49. Id.

50. 36 App. Div. 2d 684, 319 N.Y.S.2d 771 (4th Dep't 1971) (mem.).

51. Id. at 685, 319 N.Y.S.2d at 773.

52. Id.

53. Compare People v. Powe, 34 App. Div. 2d 961, 312 N.Y.S.2d 3 (2d Dep't 1970) (mem.), with People v. Greene, 35 App. Div. 2d 587, 313 N.Y.S.2d 551 (2d Dep't 1970) (mem.). Compare People v. Welsh, 35 App. Div. 2d 854, 315 N.Y.S.2d 256 (3d Dep't 1970) (mem.), with People v. Ali, 35 App. Div. 2d 435, 317 N.Y.S.2d 377 (3d Dep't 1971) (per curiam). Compare People v. Haynes, 33 App. Div. 2d 992 (4th Dep't 1970) (mem.), with People v. Murphy, 36 App. Div. 2d 684, 319 N.Y.S.2d 771 (4th Dep't 1971) (mem.).

54. See People v. Lo Piccolo, 35 App. Div. 2d 1086, 316 N.Y.S.2d 971 (1st Dep't 1970) (mem.); text accompanying notes 29-33 supra.

55. E.g., People v. Murphy, 36 App. Div. 2d 684, 319 N.Y.S.2d 771 (4th Dep't 1971) (mem.); People v. Ali, 35 App. Div. 2d 435, 317 N.Y.S.2d 377 (3d Dep't 1971) (per curiam); People v. Greene, 35 App. Div. 2d 587, 313 N.Y.S.2d 551 (2d Dep't 1970) (mem.).

The petitions of Lynn and Saunders presented the court of appeals with the opportunity to clarify the test which was to be applied in this area. In *Lynn* and *Saunders* the issue was more refined than in *Montgomery*, since it involved defendants who had waived the right to litigate their innocence and had chosen instead to plead guilty.[56] The question presented was whether a defendant's allegation that he was not informed by counsel of his right to appeal from a judgment entered upon a plea of guilty would be sufficient *in itself* to merit a hearing. The supreme court, in both *Lynn* and *Saunders*, denied the coram nobis applications without a hearing on the ground that they were distinguishable from *Montgomery* since they involved a plea situation, and the appellate division affirmed.[57] Thus the issue before the court of appeals was whether such a factual distinction could stand as the basis for denying a hearing.[58]

The court discussed the differences between a plea of guilty and a conviction after trial, relative to the right to appeal. The court said: "A plea of guilty 'is more than a confession which admits that the accused did various acts; it is itself a conviction [and] nothing [else] remains but to give judgment and determine punishment.' "[59] Furthermore, a plea of guilty is a decision by the defendant not to litigate the question of his guilt, and is the result of trial strategy which chooses to forego certain constitutional rights[60] in exchange for a lessening of the charges. "Considering trial strategies," the court said, "it seems somewhat absurd, as a general matter, to require that the defendant be so advised [of his right to appeal] where he is well satisfied with the bargain he has struck and stands to lose those very benefits on review."[61] In view of these circumstances, the court asserted that a defendant should not years later be allowed to assert that he was denied his right to appeal when the prosecution may not then be prepared to prove its case.[62] The court noted that a trial indicates that the defendant intends to litigate the legal or factual issues and it may be presumed that the defendant would continue to contest the court's findings through appellate review.[63] On the other hand, the court stated, in the plea situation a defendant "tacitly indicates that no further judicial inquiry

56. People v. Lynn, 28 N.Y.2d 196, 201-02, 269 N.E.2d 787, 796-97, 321 N.Y.S.2d 74, 78-79 (1971).

57. People v. Saunders, 35 App. Div. 2d 591, 313 N.Y.S.2d 564 (2d Dep't 1970) (mem.), aff'd, 28 N.Y.2d 196, 269 N.E.2d 794, 321 N.Y.S.2d 74 (1971); People v. Lynn, 35 App. Div. 2d 589, 314 N.Y.S.2d 346 (2d Dep't 1970) (mem.), aff'd, 28 N.Y.2d 196, 269 N.E.2d 794, 321 N.Y.S.2d 74 (1971).

58. 28 N.Y.2d at 201, 269 N.E.2d at 796, 321 N.Y.S.2d at 77.

59. Id., 269 N.E.2d at 797, 321 N.Y.S.2d at 78, quoting Boykin v. Alabama, 395 U.S. 238, 242 (1969).

60. 28 N.Y.2d at 201-02, 269 N.E.2d at 797, 321 N.Y.S.2d at 78. The court mentioned waiver of the right to confrontation, the privilege against self incrimination, and the right to trial by jury, citing Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Matter of D., 27 N.Y.2d 90, 261 N.E.2d 627, 313 N.Y.S.2d 704 (1970), appeal dismissed and cert. denied, 403 U.S. 926 (1971).

61. 28 N.Y.2d at 202, 269 N.E.2d at 797, 321 N.Y.S.2d at 78.

62. Id., 321 N.Y.S.2d at 78-79; see notes 1, 2 & 26 supra.

63. 28 N.Y.2d at 202, 269 N.E.2d at 797, 321 N.Y.S.2d at 79.

is required"[64] and it may be presumed that the defendant would "desire to forego appellate review."[65] The court concluded that the nature of the guilty plea dictated that a different result follow.[66] It ruled, therefore, that the test in a plea situation should be that "during the time allowed for taking an appeal, the defendant disputed the validity of the judgment of conviction but, by reason of ignorance or improper advice of counsel, was prevented from prosecuting an appeal."[67]

The court of appeals was presented with the opportunity in *Lynn* and *Saunders* to resolve the conflict which existed between the departments of the appellate division by establishing a uniform interpretation of *Montgomery* with respect to a defendant who pleaded guilty. One extreme which the court could have adopted would have been the literal application of the rule, namely to allow a hearing *solely* on defendant's allegation that he had not been informed of his right to appeal. The other extreme would have been to require the defendant to show that his appeal had substantial merit in his coram nobis petition before allowing a hearing. The former would certainly have allowed groundless appeals in pursuit of a technical right, whereas the latter would undoubtedly have precluded legitimate appeals. In a practical approach to the problem, the court chose the middle ground and demanded that the defendant allege that he disputed the validity of the judgment of conviction. This appears to be a sound rule since it questions the sincerity of the defendant's claim, requiring him to rebut the natural presumption that in pleading guilty he chose to forego appellate review. All the defendant need allege is a *dissatisfaction* with the conviction during the time that he would have been allowed to appeal. The mere claim of a technical right without a reason is a claim without substance and should be denied. The decision[68] should be hailed as a small victory for common sense and the integrity of the concept of right to appeal. The paramount consideration is the sincerity of defendant's petition. This is admirable, as "[t]he law deals with remedies, not rituals."[69]

64. Id.

65. Id.

66. Id.

67. Id. at 203, 269 N.E.2d at 798, 321 N.Y.S.2d at 80.

68. The court noted that there were situations where the mere allegation of a failure to be advised of the right to appeal would require a Montgomery hearing. This would include a "viable" claim of excessive sentence, citing People v. Rastorfer, 35 App. Div. 2d 703, 314 N.Y.S.2d 1012 (1st Dep't 1970) (mem.), as well as claims under sections 813-c and 813-g of the old Code of Criminal Procedure, (N.Y. Code of Crim. Proc. §§ 813-c, 813-g (McKinney 1958), superseded by N.Y. Crim. Pro. L. art. 710 (McKinney 1971)). 28 N.Y.2d at 203, 269 N.E.2d at 798, 321 N.Y.S.2d at 80.

69. People v. Haynes, 60 Misc. 2d 671, 673, 303 N.Y.S.2d 568, 570 (Monroe County Ct. 1969).

Domestic Relations—Contribution by Donee to Cost of Pre-Nuptial Gift Creates a Lien on the Gift to the Extent of Contribution but Does Not Defeat Right of Donor to Recover the Gift upon Failure of the Engagement.—Plaintiff-wife and defendant-husband were divorced in May, 1960 after seven years of marriage, yet resumed living together two months later with "the expectation that they would ultimately remarry."[1] This period of reconciliation extended until the spring of 1962 when the plaintiff moved out of the family home. During this time, the defendant purchased two parcels of real property. At the request of the defendant, title to both parcels was vested in " 'Elmer Gaden, Jr., and Dorothy J. Gaden, his wife . . . .' "[2] The sales necessitated loan commitments which were obtained by the defendant and then secured by promissory notes executed by both parties. Down payments were furnished solely by the defendant as were the subsequent principal and interest payments. In December, 1967 plaintiff, as a tenant in common, brought this suit for partition of both parcels based on her assumption of legal liability under the promissory notes. Defendant counterclaimed for the imposition of a constructive trust and for rescission, based on a claim that the creation of a tenancy in common was a gift conditioned upon remarriage of the parties.[3] The trial court dismissed the complaint and granted the counterclaim on the condition that plaintiff be released from all liability on the notes.[4] The appellate division reversed on the law, dismissed the counterclaim and granted partition.[5] On appeal, the New York Court of Appeals reversed, holding that the parcels of land in question were recoverable as pre-nuptial gifts under section 80-b of the New York Civil Rights Law[6] and that such recovery should be determined without regard to the fault of either party. *Gaden v. Gaden*, 29 N.Y.2d 80, 272 N.E.2d 471, 323 N.Y.S.2d 955 (1971).

At common law, New York traditionally granted the donor of an engagement gift a qualified right to sue for the return of the gift upon the cancellation of the prospective marriage.[7] The rationale underlying this right of recovery was that the gift was conditioned on the consummation of the contemplated marriage and that title to the gift reverted back to the donor upon the breaking of the engagement.[8] Although this remedy was also available to third party donors,[9]

1. Gaden v. Gaden, 29 N.Y.2d 80, 83, 272 N.E.2d 471, 473, 323 N.Y.S.2d 955, 957 (1971).
2. Id. at 83, 272 N.E.2d at 473, 323 N.Y.S.2d at 958.
3. Id. at 83-84, 272 N.E.2d at 473, 323 N.Y.S.2d at 958.
4. Id. at 84, 272 N.E.2d at 473, 323 N.Y.S.2d at 958.
5. Gaden v. Gaden, 34 App. Div. 2d 550, 309 N.Y.S.2d 612 (2d Dep't 1970) (mem.), rev'd, 29 N.Y.2d 80, 272 N.E.2d 471, 323 N.Y.S.2d 955 (1971).
6. N.Y. Civ. Rights Law § 80-b (McKinney Supp. 1971).
7. E.g., Wilson v. Riggs, 243 App. Div. 33, 34, 276 N.Y.S. 232, 233 (1st Dep't 1934), aff'd mem., 267 N.Y. 570, 196 N.E. 584 (1935); Beck v. Cohen, 237 App. Div. 729, 730-33, 262 N.Y.S. 716, 718-20 (1st Dep't 1933); see H. Clark, Jr., Domestic Relations § 1.6 (1968) [hereinafter cited as Clark]; Annot., 24 A.L.R.2d 579, 588-89 (1952). See also Annot., 75 A.L.R.2d 1365 (1961), for a discussion of rights in wedding gifts as between spouses.
8. Clark § 1.6.
9. Id. at 23.

it was generally considered to stem from the common law action for breach of promise to marry.[10] As such, the donor's right of return was subject to the same defenses available in a breach of promise suit.[11] The donor, therefore, could not recover where the cancellation had resulted from his or her own unjustifiable breach of promise to marry.[12]

The common law cause of action for breach of a marriage promise originated in seventeenth century England.[13] It was spawned by the essentially commercial function which marriages frequently served at that time, and was designed to afford relief to a party aggrieved by a broken engagement.[14] Engaged couples were considered parties to a contract and entitled to legal recognition of the rights and liabilities which traditionally flowed from that contract.[15] Despite the contractual form of the action, however, tort damages were recoverable,[16] including punitive damages in an aggravated case.[17] Fault was thus an important element in determining not only whether the plaintiff recovered but also the extent of his or her recovery.[18]

The early decisions of the lower New York courts construing rights in conditional gifts given in contemplation of an abortive marriage were divided on the question of whether such gifts were subject to an express or implied condition.[19] Those which adopted the former view presumed that all engagement gifts perfected by delivery were absolute in the absence of any showing that the donor and donee had, by means of an express condition, specifically contracted with reference to the gift.[20] Recovery was permitted only upon pleading and proof that the gift was made expressly conditional upon marriage, and that this condition had been accepted by the donee upon receipt.[21]

On the other hand, New York courts which adopted an implied condition

10. Id. § 1.5, at 18.

11. Id. § 1.3. Among the defenses recognized were fraud or unwillingness to marry on the part of the plaintiff, infancy on the part of the defendant, and mutual rescission of the engagement. Id.

12. Id. § 1.6, at 23.

13. Id. § 1.1, at 1; Feinsinger, Legislative Attack on "Heart Balm", 33 Mich. L. Rev. 979, 980 (1935).

14. Clark § 1.1, at 2.

15. Id.; see Annot., 24 A.L.R.2d 579, 582-85 (1952).

16. Southard v. Rexford, 6 Cow. 254 (N.Y. Sup. Ct. 1826). Damages were awarded in the sound discretion of the jury. Id. at 261.

17. Thorn v. Knapp, 42 N.Y. 474 (1870); Johnson v. Jenkins, 24 N.Y. 252 (1862). The award of punitive damages in a suit for breach of promise to marry is an exception to the rule that exemplary damages should only be allowed in tort actions. See McCormick, Damages § 111, at 402 (1935).

18. See Clark § 1.3.

19. See cases cited notes 20-22 infra.

20. Wertheimer v. Baum, 59 Misc. 527, 111 N.Y.S. 18 (App. T., 1st Dep't 1903); Stromberg v. Rubenstein, 19 Misc. 647, 44 N.Y.S. 405 (App. T., 1st Dep't 1897).

21. Wertheimer v. Baum, 59 Misc. 527, 528, 111 N.Y.S. 18, 19 (App. T., 1st Dep't 1908); Stromberg v. Rubenstein, 19 Misc. 647, 648-49, 44 N.Y.S. 405, 405-06 (App. T., 1st Dep't 1897).

theory held that only gifts delivered before the actual engagement were absolute.[22] A condition implied by law, however, would be attached to any gift given after the engagement.[23] Under this theory, a gift was recoverable unless there was a showing of an express intention on the part of the donor to make the gift absolute.[24] The net effect of this implied condition was that gifts were presumed conditional rather than absolute and the burden of rebutting that presumption was necessarily placed on the donee.[25] Moreover, in imposing an implied condition, these New York courts and the majority of American courts that have considered the question have taken notice of the practical circumstances surrounding engagements and the giving of engagement gifts.[26] Unlike seventeenth century England, engagements in the twentieth century do not ordinarily take place in a commercially contracted environment where parties are generally deemed to be dealing at arm's length.[27]

This split in New York authority was tentatively resolved in favor of the express condition requirement in 1924 when the issue first came before the appellate division in *Rosenberg v. Lewis*.[28] Relying on an implied condition theory, the plaintiff in *Rosenberg* sought to recover articles of jewelry given as engagement gifts to the defendant who then allegedly broke the engagement.[29] The appellate division, however, apparently endorsed the express condition doctrine when it dismissed the complaint on the grounds that the plaintiff failed to allege an agreement or understanding between the parties that the gifts would be returned if the engagement was broken. The court declared:

> Gifts of the kind referred to may be conditionally made, but to state a cause of action for their recovery the complaint must allege facts to show that there was an understanding that they were so presented to the donee. . . . The complaint fails to show that the defendant knew that any such condition attached to the gifts or that she agreed to return them if she failed to marry the plaintiff.[30]

22. See Antaramian v. Ourakian, 118 Misc. 558, 194 N.Y.S. 100 (App. T., 1st Dep't 1922) (gifts other than engagement rings held subject to an implied condition); Benedict v. Flannery, 115 Misc. 627, 189 N.Y.S. 104 (App. T., 1st Dep't 1921) (engagement rings subject to implied condition); Cushing v. Hughes, 119 Misc. 39, 195 N.Y.S. 200 (Sup. Ct. 1922) (money held subject to implied condition).

23. See cases cited note 22 supra.

24. See Clark § 1.6.

25. Id. at 22. "Most courts avoid too minute an examination of the probable intent of the parties as revealed by the circumstances of the gift, by holding that if the gift is made after the parties become engaged, it is in contemplation of their marriage, and is assumed to be conditioned upon the marriage's taking place." Id. (footnote omitted).

26. Id.; see, e.g., Humble v. Gay, 168 Cal. 516, 143 P. 778 (1914); Lumsden v. Arbaugh, 207 Mo. App. 561, 227 S.W. 868 (1921); Williamson v. Johnson, 62 Vt. 378, 20 A. 279 (1890); Burke v. Nutter, 79 W. Va. 743, 91 S.E. 812 (1917). See also notes 31-35 infra and accompanying text.

27. See note 50 infra and accompanying text.

28. 210 App. Div. 690, 206 N.Y.S. 353 (1st Dep't 1924). The court specifically relied on Stromberg v. Rubenstein, 19 Misc. 647, 44 N.Y.S. 405 (App. T., 1st Dep't 1897). 210 App. Div. at 692-93, 206 N.Y.S. at 354.

29. 210 App. Div. at 691, 206 N.Y.S. at 353.

30. Id., 206 N.Y.S. at 354.

Rosenberg appeared to be the law in New York until 1933 when the appellate division recognized the implied condition theory in *Beck v. Cohen*.[31] *Beck* dealt only with the return of an engagement ring following a breach by the donee of her promise to marry.[32] The court stressed the ring's special symbolism, and found an implied promise to return inherent in its nature.[33] The court held that:

> [A]n engagement ring is in the nature of a pledge for the contract of marriage and that if the recipient break the contract, she should return the ring. . . . Such a ring is a symbol hallowed by social usage. That it is a conditional gift seems inherent in its very purpose. Possession should be retained during the engagement, which it symbolizes, and is changed into firm ownership upon marriage. When the engagement fails, the symbol of its existence should be returned to him who gave it.[34]

In view of the court's emphasis on the symbolic nature of engagement rings, the implied condition in *Beck* might have been limited to cases involving similar property. The court, however, also cited with approval the "weight of authority" which held "that any gift to the lady to whom the donor is engaged to be married, made in contemplation of marriage, is conditional and upon breach of the marriage engagement by the recipient, the donor may recover the property."[35] This endorsement of a broad application of the implied condition theory, when coupled with the same court's sweeping condemnation of the strict application of contract principles to engaged parties in *Wilson v. Riggs*,[36] decided the following year and subsequently affirmed by the court of appeals, would indicate that New York regarded all pre-nuptial gifts as subject to an implied rather than an express condition, if such gifts had been bestowed after a formal engagement. In *Wilson*, the donor claimed that his engagement to the donee had been mutually rescinded.[37] The donee claimed that the New York rule on mutual rescission of contracts required that the court leave the parties as it found them, since there was no mutual agreement to the contrary, and deny return of the engagement ring.[38] Refusing to apply this rule, the court held that "principles of law which are used in the interpretation of business contracts . . . should [not] be applied to . . . an agreement of . . . marriage. . . ."[39] In the

31. 237 App. Div. 729, 262 N.Y.S. 716 (1st Dep't 1933).

32. Id. at 730, 262 N.Y.S. at 717.

33. Id. at 730-31, 262 N.Y.S. at 718.

34. Id. (citation omitted).

35. Id. at 731, 262 N.Y.S. at 718, citing e.g., Richmond v. Nye, 126 Mich. 602, 85 N.W. 1120 (1901); Cushing v. Hughes, 119 Misc. 39, 195 N.Y.S. 200 (Sup. Ct. 1922); Antaramian v. Ourakian, 118 Misc. 558, 194 N.Y.S. 100 (App. T., 1st Dep't 1922); Benedict v. Flannery, 115 Misc. 627, 189 N.Y.S. 104 (App. T., 1st Dep't 1921); Jacobs v. Davis, [1917] 2 K.B. 532.

36. 243 App. Div. 33, 276 N.Y.S. 232 (1st Dep't 1934), aff'd mem., 267 N.Y. 570, 196 N.E. 584, 274 N.Y.S. 1012 (1935).

37. Id. at 33-34, 276 N.Y.S. at 232-33.

38. Id., 276 N.Y.S. at 233; see Coletti v. Knox Hat Co., 252 N.Y. 468, 169 N.E. 648 (1930). For a comprehensive explanation of the mutual rescission rule, see J. Calamari & J. Perillo, Contracts § 339 (1970).

39. 243 App. Div. at 34, 276 N.Y.S. at 233.

court's opinion, the conditions which attached to the engagement gifts were enforceable despite the alleged mutual decision not to marry.[40]

This implied rejection of contract analysis in both *Beck* and *Wilson* was perhaps an attempt to justify recovery on the basis of the policy against unjust enrichment rather than on a breach of marriage contract ground.[41] Although exemption of engagement gifts from the strict contractual demands of express conditions greatly enhanced the donor's prospects of recovery, return of the gifts upon termination of the engagement was by no means guaranteed, since both *Beck* and *Wilson* recognized the continuing validity of fault on the part of the donor as an affirmative defense.[42] This position was illustrated by the New York municipal court in *Beer v. Hart*,[43] decided the same year as *Wilson*. The court refused to construe *Beck* as simply holding " 'no marriage, no ring . . . .' "[44] Instead the court, citing *Beck* itself as authority, held that recovery was subject to a further requirement of good faith on the part of the donor.[45] The court concluded that "[w]hether or not the lady may retain her ring depends entirely upon the determination of the question as to whether the engagement was unjustifiably breached by her act."[46]

The courts in New York thus adhered to the notion that those considerations of fault relevant to a breach of promise action for tort damages should also control the final disposition of the gifts.[47] If the donee could make out a prima

40. Id.

41. Id.

42. The Beck court stated: "It seems clear that if the engagement ring was delivered to the defendant [donee] as a token of a promise of marriage induced by fraud [of the donor] . . . he should not be permitted to reclaim his gift, for he is the one whose conduct prevented the marriage and her refusal to perform the engagement would be justified." 237 App. Div. at 733, 262 N.Y.S. at 720-21. Moreover, the same court in Wilson was of the opinion that: "Since the engagement was canceled by mutual consent, the principle applies that the ring was given and received upon the condition subsequent that it would be returned if the parties did not wed without the fault of either." 243 App. Div. at 34, 276 N.Y.S. at 232-33.

43. 153 Misc. 277, 274 N.Y.S. 671 (Mun. Ct. 1934).

44. Id. at 278, 274 N.Y.S. at 672. The breaching donor here sought to recover the gift on the basis of the language in Beck to the effect that " '[w]hen the engagement fails, the symbol of its existence should be returned to him who gave it'. . . ." Id.

45. Id. at 277-78, 274 N.Y.S. at 672.

46. Id. at 278, 274 N.Y.S. at 672, quoting the language of Beck that " '[t]he gift being conditional, the donor [who] would, by his conduct have rendered it impossible for the condition to be performed . . . [should] not be entitled to recover the ring.' " Id.

47. In declaring fault relevant in a gift case, the New York courts in Beck, Wilson and Beer necessarily drew the interpretation of fault as an "unjustifiable breach" from the common law breach of promise action. See Clark § 1.3 & § 1.6 and notes 11-12 supra and accompanying text. It should be noted here that most American decisions have held that the donor cannot, upon his own "unjustifiable breach" of the engagement, require the donee to return betrothal gifts. Annot., 24 A.L.R.2d 579, 592-95 (1952). See, e.g., Simonian v. Donoian, 96 Cal. App. 2d 259, 215 P.2d 119 (1950); Mate v. Abrahams, 62 A.2d 754 (N.J. Essex County Ct. 1948). But see Albanese v. Indelicato, 25 N.J. Misc. 144, 51 A.2d 110

facie case against the donor for breach of promise, this would suffice as a bar to the donor's recovery.[48]

The breach of promise action itself, however, had by this time come under widespread criticism as a relic of anachronistic social patterns and practices.[49] The theory underlying the action—that once a promise to marry had been made it should be kept at all costs—was directly opposed to the modern American concept of freedom of marriage choice.[50] Not only did this cause of action serve no useful purpose, but the easy availability of large tort damages[51] had also created a legally sanctioned breeding ground for fraud and blackmail, since the plaintiff's cause of action could generally be established through mere circumstantial evidence and character assassination.[52]

This criticism soon stiffened into strong legislative opposition in New York which climaxed in 1935 with the passage of Article 2-A of the Civil Practice Act[53]—the so-called "Heart Balm" Act. Enacted for the purpose of preventing "unjust enrichment" and the "perpetration of frauds,"[54] the statute abolished all causes of action "to recover sums of money as damage for . . . breach of contract to marry,"[55] and further provided that "[n]o contract to marry . . . shall operate to give rise . . . to any cause or right of action for the breach thereof."[56] Despite the statute's sweeping denunciation of suits based on the breach of a marriage promise, the status of gifts given in consideration of respective marriage promises was not mentioned in the act. This absence of any clear statutory language plus the statute's emphasis on preventing the "re-

(Jersey City Dist. Ct. 1947), which stated that an engagement ring must be returned to the donor upon termination of the engagement regardless of which party, if either, is to blame.

48. Wilson v. Riggs, 243 App. Div. 33, 34, 276 N.Y.S. 232, 232-33 (1st Dep't 1934), aff'd mem., 267 N.Y. 570, 196 N.E. 584 (1935); Beck v. Cohen, 237 App. Div. 729, 733, 262 N.Y.S. 716, 720-21 (1st Dep't 1933); Beer v. Hart, 153 Misc. 277, 278, 274 N.Y.S. 671, 672 (Mun. Ct. 1934); see Clark § 1.6.

49. See, e.g., Brown, Breach of Promise Suits, 77 U. Pa. L. Rev. 474 (1929); Feinsinger, Legislative Attack on "Heart Balm", 33 Mich. L. Rev. 979, 979-86 (1935); Wright, The Action for Breach of the Marriage Promise, 10 Va. L. Rev. 361 (1924).

50. See Clark § 1.1. But see Schultz v. Duitz, 253 Ky. 135, 69 S.W.2d 27 (1934), where the court took a particularly mercantilist view of the engagement relationship.

51. Juries have been notoriously generous in this area. See, e.g., Syfert v. Solomon, 95 Cal. App. 228, 272 P. 810 (1928) ($40,000 jury award reversed on appeal); Cleavenger v. Castle, 255 Mich. 66, 237 N.W. 542 (1931) ($450,000 damage award by jury—remittitur to $150,000 affirmed on appeal); Campbell v. Fitzsimons, 4 N.J. Misc. 937, 134 A. 898 (Sup. Ct. 1926) (per curiam) ($20,000 jury award affirmed on appeal). See generally C. McCormick, Damages § 111 (1935).

52. See Clark § 1.2, at 3; Feinsinger, Legislative Attack on "Heart Balm", 33 Mich. L. Rev. 979, 984-85 (1935).

53. N.Y. Civ. Prac. Act, ch. 263, art. 2-A, § 61-a, [1935] N.Y. Laws 158th Sess. 732.

54. Id.

55. Id. § 61-b.

56. Id. § 61-d. Sections 61-b and 61-d have been incorporated into section 80-a of the New York Civil Rights Law. N.Y. Civ. Rights Law § 80 (McKinney Supp. 1971).

covery of damages" led the early lower court decisions following passage of the act to ignore the statute and apply the common law rules for the recovery of gifts.[57]

This interpretation was subsequently checked when the issue of recovery of gifts under the Heart Balm statute reached the court of appeals in *Andie v. Kaplan*[58] and *Josephson v. Dry Dock Savings Institution*.[59] In both actions the court, in memorandum decisions, held that the statute barred a suit for return of pre-nuptial gifts upon breach by the donee of the promise to marry.[60] The apparent rationale of these two decisions was that in such a suit the breach of the underlying marriage contract in effect gave rise to the donor's cause of action and therefore was barred by the express wording of the statute.[61]

A split quickly developed in the lower New York courts over interpretation of *Andie* and *Josephson*. Some courts construed them as banning all suits for the return of gifts.[62] Others held that the application of the decisions should be limited to cases involving a breach by the donee and allowed suits where there had been a mutual rescission[63] or a subsequent agreement to return by the donee.[64] These courts reasoned that a breach of promise did not give rise to the donor's right of action in such cases since proof of a breach was not required to establish a common law right of recovery.[65]

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57. See Zawadzki v. Vandetti, 255 App. Div. 932, 9 N.Y.S.2d 219 (4th Dep't 1938) (mem.); Hutchinson v. Kernitzky, 23 N.Y.S.2d 650 (App. T., 2d Dep't 1940) (per curiam).

58. 288 N.Y. 685, 43 N.E.2d 82 (1942), aff'g mem., 263 App. Div. 884, 32 N.Y.S.2d 429 (2d Dep't).

59. 292 N.Y. 666, 56 N.E.2d 96 (1944), aff'g mem., 266 App. Div. 992, 45 N.Y.S.2d 120 (1st Dep't 1943).

60. Josephson v. Dry Dock Sav. Inst., 292 N.Y. at 666, 56 N.E.2d at 96; Andie v. Kaplan, 288 N.Y. at 685, 43 N.E.2d at 82.

61. Clark § 1.5, at 18. Andie and Josephson were generally followed in New York where the donor's right of return arose upon breach by the donee. Morris v. Baird, 269 App. Div. 948, 57 N.Y.S.2d 890 (2d Dep't 1945) (mem.); Alberelli v. Manning, 185 Misc. 280, 56 N.Y.S.2d 493 (App. T., 1st Dep't 1945) (per curiam).

62. See, e.g., Morris v. Baird, 269 App. Div. 948, 57 N.Y.S.2d 890 (2d Dep't 1945) (mem.); Hecht v. Yarnis, 42 N.Y.S.2d 596 (N.Y. City Ct. 1943), aff'd mem., 268 App. Div. 771, 50 N.Y.S.2d 170 (1st Dep't 1944). See also Grishen v. Domagalski, 191 Misc. 365, 366-67, 80 N.Y.S.2d 484, 485 (N.Y. City Ct. 1948), where the court, although denying recovery, severely questioned the validity of Andie and Josephson.

63. Unger v. Hirsch, 180 Misc. 381, 39 N.Y.S.2d 965 (N.Y. City Ct. 1943).

64. Spitz v. Maxwell, 186 Misc. 159, 59 N.Y.S.2d 593 (Sup. Ct. 1945).

65. In Unger v. Hirsch, 180 Misc. 381, 383, 39 N.Y.S.2d 965, 967 (N.Y. City Ct. 1943), the court found that: "Plaintiff's claim to recover in the instant case is therefore in no way based either upon the contract to marry or upon a breach of that contract.

Nor can the complaint in the instant case be construed as an attempt to evade the [Heart Balm] statute . . . ." In Spitz v. Maxwell, 186 Misc. 159, 160, 59 N.Y.S.2d 593, 594 (Sup. Ct. 1945), the court again held that: "An examination of the [Heart Balm statute] clearly indicates that the purpose and intent of the Legislature was to outlaw actions to recover damages for breach of contract to marry. . . . [Plaintiff's complaint] makes no such claim. It alleges that the parties mutually agreed to cancel their contract to marry." Recovery was

This conflict, as well as the unjust enrichment which resulted from denying any recovery to a faultless donor upon breach by the donee, led the 1947 New York Law Revision Commission to suggest a relaxation of the *Andie/Josephson* rule in the "proper case."[66] Though the Commission's proposed amendment was passed by the legislature,[67] it was vetoed by Governor Dewey.[68]

The split in authority thus continued[69] until 1965 when the legislature enacted section 80-b of the Civil Rights Law which removed the bar to recovery.[70] At the time it was passed, the legislation was considered by at least one commentator to be a resurrection of the full panoply of the common law rules relating to pre-nuptial gifts.[71] This position was also taken by the New York

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also generally permitted in cases involving a third party donor. E.g., Costas v. Marmarellis, 200 Misc. 912, 111 N.Y.S.2d 909 (App. T., 2d Dep't 1951) (per curiam).

66. 1947 Law Revision Comm'n Rep. 227; 1947 N.Y. Legis. Doc. No. 65(J). The proposal provided that: "This article shall not be deemed to prevent a court in a proper case from granting restitution for property or money transferred in contemplation of the performance of an agreement to marry which is not performed." Id. (emphasis deleted).

67. Sen. Int. No. 116, Pr. No. 116 [1947] 1 N.Y. Sen. J., 170th Sess. 44; Assem. Int. No. 120, Pr. No. 120 [1947] 1 N.Y.A.J., 170th Sess. 29.

68. Public Papers of Thomas E. Dewey 286 (1947). No message explaining the governor's disapproval of the bill accompanied his veto. See id.

69. Several courts disallowed recovery of gifts by holding that the action was based on a breach of promise to marry. See, e.g., Grunberg v. Grunberg, 199 Misc. 249, 99 N.Y.S.2d 771 (Sup. Ct. 1950); Reinhardt v. Schuster, 192 Misc. 919, 81 N.Y.S.2d 570 (App. T., 1st Dep't 1948) (per curiam); Nichols v. Gesselien, 191 Misc. 641, 78 N.Y.S.2d 2 (App. T., 1st Dep't 1948) (per curiam); Bressler v. Bressler, 133 N.Y.S.2d 38 (N.Y. Mun. Ct. 1954). Recovery, however, was permitted where the action was based on the breach by the donee of an agreement to return the gifts following the failure of the engagement. See Levy v. Gersten, 196 Misc. 255, 94 N.Y.S.2d 484 (N.Y. City Ct. 1949). See also Bates v. Engelman, 201 Misc. 288, 115 N.Y.S.2d 426 (N.Y. City Ct. 1951). In addition, where a plaintiff had been induced to change a bank account into a joint account, recovery of the money contributed was permitted following failure of the engagement upon the theory that no allegations concerning the marriage contract were necessary in order to recover the money which rightfully belonged to the plaintiff. See, e.g., Farone v. Bianchi, 10 App. Div. 2d 790, 198 N.Y.S.2d 521 (3d Dep't 1960) (mem.); Splendore v. Guglielmo, 205 Misc. 941, 129 N.Y.S.2d 374 (Sup. Ct. 1954); Warneck v. Kielly, 68 N.Y.S.2d 157 (Sup. Ct. 1946). But see Mastersanti v. Mascioli, 13 App. Div. 2d 865, 214 N.Y.S.2d 932 (3d Dep't 1961); Brandes v. Agnew, 275 App. Div. 843, 88 N.Y.S.2d 553 (2d Dep't 1949) (mem.); Hallstrom v. Erkas, 124 N.Y.S.2d 169 (Sup. Ct. 1953), where the courts refused to apply this rationale for recovery to cases involving transfers of real property interests made in contemplation of marriage. For a criticism of the harsh results of the statute see Note, The Heart Balm Act and Ante-Nuptial Gifts, 13 Brooklyn L. Rev. 174 (1947); Note, Avoidance of the Incidence of the Anti-Heartbalm Statutes, 52 Colum. L. Rev. 242 (1952); 48 Cornell L.Q. 186 (1962).

70. Law of June 7, 1965, ch. 333, § 2, [1965] N.Y. Laws 188th Sess. 1075, codified as amended, N.Y. Civ. Rights Law § 80-b (McKinney Supp. 1971).

71. Kharas & Koretz, Property, 1965 Survey of N.Y. Law, 17 Syracuse L. Rev. 247 (1966). Since the statute, by its terms, sought to remove the previous bars to recovery rather than create a new cause of action, this interpretation would seem, at first blush, to be a reasonable conclusion.

City civil court in *Goldstein v. Rosenthal*[72] which was the first decision to construe section 80-b. The court held that the donee upon her breach was required to return the ring to the plaintiff or pay him full value for the ring.[73] In so holding, the court noted that: "The new section [80-b] presumably restores the common-law rules which were in effect prior to the enactment of the anti-heart balm's [*sic*] statute."[74]

Since the common law's implied condition of return hinged on the existence of an underlying contract to marry and a further determination of whether failure of the engagement was due to the fault of the donor,[75] the ghost of the abolished tort action remained very much a part of New York law in this area. In *Lowe v. Quinn*,[76] decided by the court of appeals in 1971, breach of promise considerations were again deemed relevant and determinative of the rights in a pre-nuptial gift. The donor in *Lowe* had been married at the time the gift, an engagement ring, was given to the donee.[77] Both parties at that time had contemplated marriage following the donor's divorce.[78] The court held that, since public policy would not allow such a marriage contract to be enforced at common law, the implied condition attaching to gifts arising out of that contract was unenforceable.[79] The court reasoned that:

> An engagement ring "is in the nature of a pledge for the contract of marriage" . . . and, under the common law, it was settled—at least in a case where no impediment existed to a marriage—that, if the recipient broke the "engagement," she was required, upon demand, to return the ring on the theory that it constituted a conditional gift. . . . [A] different result is compelled where, as here, one of the parties is married. An agreement to marry under such circumstances is void as against public policy . . . and . . . the gift of the engagement ring [is] part and parcel of, [and] directly related to, [that] agreement to wed.[80]

The gift of the engagement ring was thus considered absolute, notwithstanding the alleged breach of the engagement by the donee.[81]

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72. 56 Misc. 2d 311, 288 N.Y.S.2d 503 (Civ. Ct. 1968). See Fetters, Property, 1968 Survey of N.Y. Law, 20 Syracuse L. Rev. 376, 381 (1969).

73. 56 Misc. 2d at 314, 288 N.Y.S.2d at 507.

74. Id.

75. See notes 31-48 supra and accompanying text.

76. 27 N.Y.2d 397, 267 N.E.2d 251, 318 N.Y.S.2d 467 (1971), aff'g 32 App. Div. 2d 269, 301 N.Y.S.2d 361 (1st Dep't 1969). See 38 Fordham L. Rev. 359 (1969).

77. 27 N.Y.2d at 399, 267 N.E.2d at 252, 318 N.Y.S.2d at 468.

78. Id.

79. Id. at 400-02, 267 N.E.2d at 252-53, 318 N.Y.S.2d at 468-70. The dissent argued vigorously that although the contract was against public policy, recovery should be allowed since the action sought neither to enforce the contract nor to obtain damages for its breach. Id. at 404, 267 N.E.2d at 255, 318 N.Y.S.2d at 472.

80. Id. at 400-01, 267 N.E.2d at 252-53, 318 N.Y.S.2d at 468-69 (citations omitted).

81. Id. The court noted that the same decision had been reached in other jurisdictions based on public policy and the equitable principle of clean hands. Id., 267 N.E.2d at 252, 318 N.Y.S.2d at 469; accord, e.g., Malasarte v. Keye, 13 Alas. 407 (1951); Morgan v. Wright, 219 Ga. 385, 133 S.E.2d 341 (1963) (unclean hands on the part of a man who gave an engagement ring to a married woman); Armitage v. Hogan, 25 Wash. 2d 672, 171 P.2d 830 (1946) (donor

In *Gaden v. Gaden*,[82] the issue raised by the defendant-husband's counterclaim was whether the tenancy in common was in fact a gift and therefore recoverable under section 80-b. The statute provides that: "Nothing in this article . . . shall be construed to bar a right of action for the recovery [of property] . . . when the sole consideration for [its] transfer . . . was a contemplated marriage which has not occurred . . . ."[83]

The appellate division was of the opinion that the plaintiff incurred a legal obligation by signing the promissory notes and thus furnished legal consideration.[84] The majority, therefore, concluded that the statute was inapplicable since plaintiff's promise of marriage was not the *sole consideration* for the gift.[85] Having found the statute irrelevant, the appellate division held that plaintiff was entitled to partition, the relief afforded to tenants in common by the common law.[86]

The court of appeals, however, rejected this common law contractual approach. Instead, the court sought to ascertain the meaning of the words "sole consideration" from a reading of the entire statute.[87] In addition to the "sole consideration" section, the statute provides that the trial court shall be granted the discretion, if "justice so requires . . . [to] award the [donee] a lien upon the [gift] for monies expended in connection therewith or improvements made thereto . . . ."[88]

The court, in holding for the defendant-donor, stressed this discretionary remedy of a lien as evidence that the statute necessarily included a gift of the type present in *Gaden*.[89] The court stated:

> [T]he statute specifically contemplates that the donee may contribute to some extent towards the gift in question. Making this contribution, however, does not defeat the don[or]'s right to the return of the gift under the statute, but rather only provides the donee with a lien to the extent of the contribution.[90]

The possibility of a lien on the property, then, led the court to construe the meaning of "sole consideration" as something other than what courts would consider "legal consideration."[91] According to the court, the "consideration"

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was a married man). But see Norman v. Burks, 93 Cal. App. 2d 687, 209 P.2d 815 (Dist. Ct. App. 1949), where the donor was permitted to recover—despite the fact that one of the parties was married at the time the gifts were given—on the ground that neither the engagement nor recovery of the gifts promoted divorce since a complete ground for divorce existed before the engagement was made.

82. 29 N.Y.2d 80, 272 N.E.2d 471, 323 N.Y.S.2d 955 (1971).

83. N.Y. Civ. Rights Law § 80-b (McKinney Supp. 1971).

84. Gaden v. Gaden, 34 App. Div. 2d 550, 551, 309 N.Y.S.2d 612, 615 (2d Dep't 1970) (mem.).

85. Id.

86. Id. at 550, 309 N.Y.S.2d at 613.

87. 29 N.Y.2d at 85-87, 272 N.E.2d at 474-75, 323 N.Y.S.2d at 960-61.

88. N.Y. Civ. Rights Law § 80-b (McKinney Supp. 1971).

89. 29 N.Y.2d at 86, 272 N.E.2d at 474-75, 323 N.Y.S.2d at 960.

90. Id. (footnote omitted).

91. 29 N.Y.2d at 86, 272 N.E.2d at 475, 323 N.Y.S.2d at 960.

described in the statute must be interpreted to mean "motive or reason" so that the statute would thus read " 'the sole [motivation or reason] for the transfer . . . was a contemplated marriage which has not occurred'."[92] The court found such to be the case in *Gaden* since from the facts "[i]t stretche[d] credulity to argue that the reason for including [plaintiff's] name on the deeds was to enable the defendant to obtain [the] necessary financing . . . ."[93] Thus, the court held the statute applicable so that the implied condition of return attached.[94]

Beyond this threshold question of whether an implied condition of return attached to the real property in *Gaden*, the court was faced with the further issue of whether the return of engagement gifts would continue to remain subject to the common law principles of fault.[95] The court, however, had no difficulty in abolishing this fault defense which had for so long been a part of the law of engagement gifts.[96] In eliminating the defense of fault, the decision pointed to the same criticisms of the breach of promise action which had led to the passage of the Heart Balm Act.[97] The act was viewed as part of a legislative scheme to avoid the litigation of fault "where the 'wounded' party appears in court to unfold his or her sorrows before a sympathetic jury"[98] in hopes of a large damage award. To allow this type of litigation, the court observed, "would only burden our courts with countless tales of broken hearts and frustrated dreams."[99]

As a further policy ground for removing fault from this area of the law, the court noted that this vestige of the breach of promise action violated modern notions as to the major purpose of the engagement period,[100] namely, "to allow a couple time to test the permanency of their feelings . . . ."[101] In the opinion of the court, "it would seem highly ironic to penalize the donor for taking steps to prevent a possibly unhappy marriage."[102]

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92. Id. This liberal interpretation of consideration was necessary, according to the court, in order "to give effect to the intention of the Legislature—to authorize actions seeking recovery of gifts given in contemplation of marriage." Id., 272 N.E.2d at 474, 323 N.Y.S.2d at 960.

93. Id. at 87, 272 N.E.2d at 475, 323 N.Y.S.2d at 960-61.

94. Id.

95. Id. at 87-88, 272 N.E.2d at 475, 323 N.Y.S.2d at 961.

96. Id. at 87-89, 272 N.E.2d at 475-76, 323 N.Y.S.2d at 961-62.

97. Id. at 88, 272 N.E.2d at 475-76, 323 N.Y.S.2d at 961-62.

98. Id., 272 N.E.2d at 476, 323 N.Y.S.2d at 961-62.

99. Id. at 89, 272 N.E.2d at 476, 323 N.Y.S.2d at 962 (footnote omitted).

100. Id. at 88-89, 272 N.E.2d at 476, 323 N.Y.S.2d at 962. The court also mentioned the fact that fault had "become largely irrelevant to modern divorce proceedings" as a further policy ground for declaring it irrelevant to the donor's right to recover engagement gifts. Id. at 88, 272 N.E.2d at 476, 323 N.Y.S.2d at 962. See Gleason v. Gleason, 26 N.Y.2d 28, 35, 256 N.E.2d 513, 516, 308 N.Y.S.2d 347, 351 (1970).

101. 29 N.Y.2d at 88, 272 N.E.2d at 476, 323 N.Y.S.2d at 962.

102. Id. The dissent, while agreeing with the legal principles laid down in the majority opinion, challenged their application to the facts in Gaden: "The 'gift' of the interest in the common dwelling was no more than a resumption of de facto marital relations, and, as

The *Gaden* court's conception of a conditional engagement gift thus represents both a logical departure from, and a significant change in, the New York law of pre-nuptial gifts. In holding that a donor may recover property transferred in contemplation of marriage despite the furnishing of traditional contract consideration by the donee, the court has taken a further step in formulating a distinct area of engagement law suited to the practical realities peculiar to that relationship. In denying the long accepted defense of fault, the court has realistically removed itself as the arbiter of broken engagements. *Gaden* has, in effect, struck a long overdue balance between the legislative purpose behind the "Heart Balm" statute and the blanket denial of a recovery of engagement gifts which the *Andie* and *Josephson* courts had fostered. The decision has not only generally eliminated the destructive contract and fault principles of the breach of promise action but has also strengthened the public policy against unjust enrichment by returning the parties to the position they occupied before the engagement without attempting to either reward or punish them.

Federal Rules of Civil Procedure—Class Actions—Discovery—Claims of Absent Members of Class Dismissed for Failure to Respond to Interrogatories.—A class action for fraud was brought against Midwestern United Life Insurance Company in the northern district of Indiana.[1] The court directed that notice pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure[2] be sent to all prospective members of the class. Prior to this order, Midwestern filed requests under Rules 33[3] and 34[4] for the production of certain documents and

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the husband honestly testified, he wanted the home in both their names to impress his wife with his good faith in the reconstruction of their marriage. The property disposition was no more a gift in sole consideration of an anticipated ceremonial marriage, than were the clothing, food, and whatever else the husband bought the wife during the two-year period while they cohabited and were not husband and wife de jure." Id. at 89-90, 272 N.E.2d at 477, 323 N.Y.S.2d at 963 (emphasis deleted).

1. Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673 (N.D. Ind. 1966).

2. Fed. R. Civ. P. 23(c)(2) provides: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

3. Id. R. 33 provides in part: "(a) Availability; procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served .... Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.... The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories .... The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

4. Id. R. 34 provides: "(a) Scope. Any party may serve on any other party a request

records and for answers to interrogatories by the named plaintiff and each member of her class. The court granted this request and ordered all class members to comply. Many, including movants, failed to submit to discovery although they had been notified of the court's order on several occasions. The district court ordered them to show cause why their claims should not be dismissed with prejudice for failure to answer the interrogatories. Pursuant to Rule 37, the court dismissed with prejudice the claims of those class members who failed to respond either to the interrogatories or the show-cause order.[5] Subsequently, the fraud action against Midwestern was tried and judgment was entered for plaintiffs.[6] The movants later filed a motion pursuant to Rule 60 to set aside the district court's order dismissing their claims.[7] The court denied the motion, and the United States Court of Appeals for the Seventh Circuit affirmed, stating that "absent class members may, under certain circumstances, be required to submit to discovery under Rules 33 and 34 . . . ."[8] Movants' failure to answer defendant's interrogatories—characterized by the court as "sideline sitting"[9]—was held to justify the dismissal of their claims with prejudice. *Brennan v. Midwestern United Life Insurance Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3399 (U.S. Feb. 22, 1972) (No. 71-778).

The discovery procedures contained in the Federal Rules[10] were formulated in order to avoid surprise at trial and provide for a "fair contest" in the courtroom, thus eliminating the game of "blindman's bluff."[11] In general the discovery

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(1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents . . . which are in the possession, custody or control of the party upon whom the request is served. . . . The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested."

5. Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1002 (7th Cir. 1971), cert. denied, 40 U.S.L.W. 3399 (U.S. Feb. 22, 1972) (No. 71-778). The court dismissed movants', cause of action under the provisions of Fed. R. Civ. P. 37(b)(2), which provides in part: "If a party . . . fails to obey an order to provide or permit discovery, including and [sic] order made under subdivision (a) of this rule . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . . (C) An order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . ."

6. Brennan v. Midwestern United Life Ins. Co., 286 F. Supp. 702 (N.D. Ind. 1968), aff'd, 417 F.2d 147 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970).

7. The movants proceeded under Fed. R. Civ. P. 60(b) which provides: "(b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . (6) any other reason justifying relief from the operation of the judgment."

8. 450 F.2d at 1004 (footnote omitted).

9. Id. at 1003.

10. Fed. R. Civ. P. 26-37.

11. United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958); see Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968); Greyhound Lines, Inc. v. Miller, 402 F.2d 134 (8th

procedures are used to narrow the issues, to obtain evidence for use at the trial, to secure information as to the existence of evidence and to ascertain who is in possession of the evidence.[12] In order to achieve the above purposes the Rules provide various means of obtaining discovery which include depositions, interrogatories to parties, production and inspection of documents and requests for admissions.[13] Each discovery Rule is intended to aid the court in the truth finding process.[14]

The Rules permitting discovery,[15] however, are restricted in the manner in which they may be used by the parties. Rules 27, 30 and 31 which govern depositions, provide that a party may take the testimony of *any person*.[16] On the other hand, Rule 33, which governs interrogatories, Rule 34, which governs the production of documents and physical objects and entry upon land for inspection, and the rules governing physical examinations[17] and requests for admissions,[18] provide that a party or the court may serve a request or order on any other *party*.[19]

In *Brennan v. Midwestern United Life Insurance Co.*[20] the movants—absent class members—ignored the district court's orders to submit to discovery under Rules 33 and 34. The district court, pursuant to Rule 37,[21] dismissed movants' claims with prejudice. Therefore, the case presented the Seventh Circuit with two questions: first, whether in a class action, identifiable absent members of the representative plaintiff's class may be required to submit to discovery under Rules 33 and 34;[22] and second, the propriety of a dismissal of their claims with prejudice for failure to respond.[23]

However, before turning to a discussion of these questions, it is necessary to examine the reasoning the court employed in reaching the merits of this case.[24]

Cir. 1968); Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir. 1964); Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921 (4th Cir. 1962); Tiedman v. American Pigment Corp., 253 F.2d 803 (4th Cir. 1958). "The elimination of the 'sporting theory' of justice, the simplification of procedure, and the prompt disposition of controversies on the merits are the great objectives of the new federal civil practice." Holtzoff, Instruments of Discovery Under Federal Rules of Civil Procedure, 41 Mich. L. Rev. 205 (1942). See also Pike & Willis, The New Federal Deposition-Discovery Procedure (pts. I & II), 38 Colum. L. Rev. 1179, 1436 (1938).

12. Holtzoff, supra note 11, at 205-06.

13. Fed. R. Civ. P. 26(a); see Holtzoff, supra note 11, at 206.

14. See Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921 (4th Cir. 1962); Tiedman v. American Pigment Corp., 253 F.2d 803 (4th Cir. 1958).

15. Fed. R. Civ. P. 26-37.

16. Id. RR. 27, 30 & 31.

17. Id. R. 35.

18. Id. R. 36.

19. Id. RR. 33-37; see Security Mut. Cas. Co. v. Rich, 20 F.R.D. 112 (W.D. Pa. 1956).

20. 450 F.2d 999 (7th Cir. 1971).

21. For the pertinent portion of Rule 37 see note 5 supra.

22. 450 F.2d at 1001.

23. Id.

24. The court noted that a Rule 60(b) motion invoking clauses (1), (2) and (3) of that rule must be brought within a one year time limit, while a motion invoking clauses (4), (5)

Movants sought appellate review of the district court's denial of their Rule 60(b) motion brought to vacate the dismissal of their claims.[25] Bypassing the restriction on appellate review[26] which would limit it to scrutiny of abuses of judicial discretion,[27] the court said: "[W]hile Rule 60(b) is not a substitute for an appeal and the finality of judgments ought not be disturbed except on very narrow grounds, a liberal construction should be given the rule to the end that judgments which are void or are vehicles of injustice should not be left standing."[28] Therefore, the decision to review the denial of movants' Rule 60(b) motion by the court was based on two considerations. First, that the order dismissing movants' claims may have been void[29] and second that movants' failure to promptly appeal the dismissal of their claims may otherwise have deprived them of any effective appellate review.[30]

The requisites for a valid judgment are that the court have jurisdiction over the subject matter and jurisdiction over the parties.[31] The district court clearly

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and (6) need only be filed within a "reasonable time." Id. at 1003. In rebutting Midwestern's argument "that the unreasonable two and one-half year interval between the dismissal of movants' claims and the filing of their Rule 60(b) motion foreclose[d] consideration of the merits of movants' challenge to the discovery ordered by the district court," the court said: "[O]ur function is not to determine whether the court was substantively correct in entering the judgment from which relief is sought but is limited to deciding whether the judge abused his discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely manner." Id.

25. Id.

26. See note 24 supra.

27. In Wojton v. Marks, 344 F.2d 222 (7th Cir. 1965), the court stated: "Plaintiff must rely on a claim for relief pursuant to Rule 60(b) (6) for 'any other reason justifying relief from the operation of the judgment.' This clearly lies within the sound discretion of the district court." Id. at 225. See also Ackermann v. United States, 340 U.S. 193 (1950); Wagner v. United States, 316 F.2d 871 (2d Cir. 1963). "The order denying the motion under Rule 60(b) is appealable . . . but the appeal brings up only the denial of the motion and not the judgement itself. . . . The catch-all clause of Rule 60(b) (6), authorizing the court to relieve a party from judgment for 'any other reason justifying relief,' cannot be read to encompass a claim of error for which appeal is the proper remedy . . . ." Id. at 872 (citation omitted). In Russell v. Cunningham, 279 F.2d 797 (9th Cir. 1960), the court remarked: "We realize that a Court has wide discretion in passing upon a motion under section 60(b) and that its action should not be set aside lightly without a clear showing of abuse of discretion." Id. at 804.

28. 450 F.2d at 1003. The Brennan court relied on Klapprott v. United States, 335 U.S. 601, modified, 336 U.S. 942 (1949), where the Supreme Court stated: "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Id. at 614-15.

29. 450 F.2d at 1003. "[I]f we accept movants' contention that the district judge erroneously assumed the power to direct interrogatories to 'absent' class members, it is at least arguable that the dismissal of movants' claims is void." Id. Fed. R. Civ. P. 60(b)(4) authorizes the vacation of a void judgment.

30. 450 F.2d at 1003.

31. 7 J. Moore, Federal Practice ¶ 60.25 [2], at 301 (2d ed. 1971) [hereinafter cited by

had jurisdiction over the subject matter since the plaintiff alleged that Midwestern had violated section 10(b) of the Securities Exchange Act of 1934.[32] The district court also had personal jurisdiction over the movants pursuant to Rule 23(c)(2) and (3) which rendered them bound by its judgment.[33] However, the majority in *Brennan* concluded that the issuing of an improper discovery order may have rendered the district court's judgment void and on this basis felt it appropriate to grant appellate review.[34]

The court then considered whether the movants had otherwise been deprived of effective appellate review.[35] A party who makes a voluntary choice not to appeal a decision will not normally be afforded a right of review under Rule 60(b)(6).[36] Nevertheless, the court determined that although the movants had chosen not to appeal the decision of the district court dismissing their claim with prejudice[37], under a liberal construction of Rule 60(b) the circumstances justified appellate review of the propriety of the discovery orders.[38]

After deciding that it could hear the merits of movants' challenge to the dismissal of their claims, the court turned to the question of whether an absent class member may be required to submit to discovery under Rules 33 and 34. The Rules state that one party may serve interrogatories and requests on another party to the action.[39] Therefore, it would appear that in order to decide whether Rules 33 and 34 were properly applied, the court of appeals would have to determine whether or not the movants in *Brennan* were parties to the action.

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volume as Moore]. "Many cases state two requisites for a valid judgment, that the court: have jurisdiction over the subject matter; and jurisdiction over the parties . . . ." Id. (footnotes omitted).

32. 15 U.S.C. § 78j(b) (1970). The district court's jurisdiction is granted by section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1970). "By jurisdiction over the subject matter the cases mean that the court must have jurisdiction or power to deal with the class of cases in which it renders judgment." 7 Moore, ¶ 60.25 [2], at 302. (footnote omitted).

33. C. Wright, Federal Courts § 72, at 314 (2d ed. 1970) [hereinafter cited as Wright]. "It is clearly contemplated that every judgment in every class action will bind all of the members of the class, except for those who have asked to be excluded in a (b)(3) action." Id. (footnote omitted). "[T]he rule is intended to provide due process to absentees and it plainly contemplates that they will be bound." Id.

34. 450 F.2d at 1003. But see 7 Moore ¶ 60.25 [2], at 304. "[I]f a court has the general power to adjudicate the issues in the class of suits to which the case belongs then its interim orders and final judgment, whether right or wrong, are not subject to collateral attack . . . ." Id. (footnotes omitted).

35. 450 F.2d at 1003.

36. Ackermann v. United States, 340 U.S. 193, 198 (1950); Annat v. Beard, 277 F.2d 554, 559 (5th Cir.), cert. denied, 364 U.S. 908 (1960). "Absent exceptional and compelling circumstances, failure to obtain relief through the usual channels of appeal is not another reason justifying relief." 7 Moore ¶ 60.27 [2], at 353 (footnote omitted).

37. 450 F.2d at 1003.

38. See notes 24-36 supra and accompanying text.

39. "Any party may serve upon any other party written interrogatories to be answered by the party served . . . ." Fed. R. Civ. P. 33(a). "Any party may serve on any other party a request (1) to produce . . . any designated documents . . . ." Id. R. 34(a).

The Rules provide that absent members of a class will be bound by a judgment of the court,[40] and are sometimes referred to as parties in that context.[41] On the other hand, the residence of absent class members not named as representative parties will not defeat federal jurisdiction based on diversity of citizenship and in this context they are not considered to be parties.[42] However, prior to *Brennan*, there was no authority as to whether absent class members are parties to an action for the purpose of applying Rules 33 and 34.

The *Brennan* court did not expressly decide whether absent class members should be considered parties for the purpose of these discovery rules, even though the movants raised the question in their argument.[43] The court bypassed this apparently crucial issue by treating the scope of Rules 33 and 34 as coextensive with the notice requirements of Rule 23.[44] Rule 23(d) provides that a district court may make appropriate orders to class members in order to insure "fair conduct of the action."[45]

At the outset of its discussion the court noted that a "paucity" of recorded precedent exists in this area.[46] The court cited cases where it was held that the notice requirement of Rule 23(d) allowed some form of discovery of class members.[47] In *Harris v. Jones*[48] members of the class were directed to file "simple statements of their claims upon furnished forms,"[49] pursuant to the power the court believed it had by virtue of Rule 23(d).[50] The court in *Harris* also entered an order to the effect that if such statements were not filed within the specified time the action could be dismissed with "prejudice as to defaulting members."[51]

40. Id. R. 23(c)(3). "The judgment, then, has res judicata effect as to all members of the class who have not opted out." 3B Moore ¶ 23.60, at 23-1202 (2d ed. 1969) (footnote omitted); accord, Wright § 72, at 314. See note 33 supra. See also Note, Federal Rules of Civil Procedure: Rule 23, The Class Action Device and its Utilization, 22 U. Fla. L. Rev. 631 (1970).

41. See 24 Sw. L.J. 354 (1970). "A judgment under the amended rule is res judicata as to all parties who have not chosen to withdraw." Id. at 357. See also Hansberry v. Lee, 311 U.S. 32, 42-43 (1940); Note, Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment, 52 Minn. L. Rev. 509, 516 (1967).

42. Wright § 72, at 314-15. "It has long been the rule that in a class action only the citizenship of the named representatives is to be considered, and that it is no objection to jurisdiction that other members of the class, not named as parties, are of such citizenship as would defeat diversity." Id. (footnote omitted); see Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). See also Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204, 1219-22 (1966).

43. 450 F.2d at 1004.

44. Id.; Fed. R. Civ. P. 23(d)(2).

45. Fed. R. Civ. P. 23(d)(2).

46. 450 F.2d at 1004.

47. Id., citing Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); Harris v. Jones, 41 F.R.D. 70 (D. Utah 1966). See also 3B Moore ¶ 23.55, at 23-1161.

48. 41 F.R.D. 70 (D. Utah 1966).

49. Id. at 74.

50. Id. at 74-75 n.9.

51. Id. at 75.

In *Minnesota v. United States Steel Corp.*,[52] Rule 23(c)(2) was held to require members of the class to give notice of their claims by returning "something in the nature of a verified proof of claim form . . . ."[53] The *Minnesota* court also stated in dictum that the defendants might be allowed to pose so-called "transaction" interrogatories to plaintiffs, but only after the proofs of claims were filed and the members of the class determined.[54] In *Philadelphia Electric Co. v. Anaconda American Brass Co.*[55] the court stated that it saw "no reason why those class-members who do not elect exclusion from the class may not be required to take some kind of *minimal affirmative action* as a condition of ultimate recovery."[56] It is clear that the above cases[57] do allow a limited form of discovery of absent class members through the notice provisions of Rule 23, but none of these cases sanctioned the use of Rules 33 and 34 to obtain this discovery.

Nonetheless the *Brennan* court extended the rationale of these decisions to permit the service of Rule 33 interrogatories on the movants.[58] In finding that the "spirit" of Rule 23 allowed the use of Rule 33 interrogatories, the majority apparently chose not to decide whether absent members of a class were in fact parties to the action. Instead, the court interpreted the "spirit" of Rule 23 to indicate that "if the trial judge determines that justice to all parties requires that absent parties furnish certain information . . . he has the power to authorize the use of Rules 33 and 34 discovery procedures."[59] By sanctioning the use of Rules 33 and 34 on that basis, the court dealt only with the extraordinary circumstances presented by the record before it,[60]—particularly movants' blatant "sideline sitting"—and no attempt was made to formulate a general rule governing the use of Rule 33 and 34 discovery methods.

Finding that Rule 33 and 34 discovery was properly employed, the court of appeals affirmed the district court's decision dismissing movants' claims with prejudice.[61] The dismissal of a claim with prejudice is one of the more drastic methods of dealing with a refusal to comply with discovery orders.[62] In most cases the court will not use this sanction unless there is a "serious showing of

52. 44 F.R.D. 559 (D. Minn. 1968).

53. Id. at 577.

54. Id. at 582 (dictum). This case involved a civil antitrust suit with a nominal plaintiff. The court did not say under what rule "the transaction" interrogatories were to be served.

55. 43 F.R.D. 452 (E.D. Pa. 1968).

56. Id. at 459 (emphasis added).

57. Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Philadelphia Elec. Co., v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); Harris v. Jones, 41 F.R.D. 70 (D. Utah 1966).

58. 450 F.2d at 1005.

59. Id.

60. See notes 1-8 supra and accompanying text.

61. 450 F.2d at 1004 n.2. But cf. Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y. 1970); Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333 (D.R.I. 1969).

62. See 4A Moore ¶ 37.03[2.-5], at 37-67 to 37-69 (2d ed. 1971). See also Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679 (S.D.N.Y. 1969), modified, 449 F.2d 51 (2d Cir. 1971), cert. granted, 40 U.S.L.W. 3398 (U.S. Feb. 22, 1972) (No. 827).

wilful default."[63] One method of deciding if the trial judge overstepped his discretion is to weigh the party's fault against the hardships encountered in complying with the discovery orders.[64] In view of the Seventh Circuit's disapproval of "sideline sitting,"[65] the majority must have concluded that movants' fault in failing to answer the interrogatories outweighed any hardship the movants could allege.[66]

The policy that apparently impelled the court to entertain the merits of this case[67] was to discourage absent members in class actions from reaping the benefits of a suit in which they wilfully refused to take part ("sideline sitting"). However, the decision loses much of its impact in view of some of the reasoning the court employed to reach its conclusion.

In view of the fact that the *Brennan* court relied on cases which were decided on the basis of Rule 23, it is uncertain whether the court assumed that absent class members are parties to the action for the purpose of Rules 33 and 34. Since the court believed that the "spirit" of Rule 23 authorized the use of both Rules in this case, it apparently did not think it was necessary to definitively state whether movants were parties. However, if the majority did not view the absent class members as parties, its holding that interrogatories were properly served on the movants would directly contradict the clear language of both Rules.[68] Therefore, it could be argued that the court must have viewed absent class members as parties to an action. However, the court went on to state that "absent class members should not be required to submit to discovery as a matter of course,"[69] and that it would be up to the discretion of the trial judge whether or not to allow discovery in a given instance.[70] Once it is decided that the use of interrogatories is a proper method of discovery, Rule 33 places no limitation on its use by one party against another. The employment of interrogatories as a means of discovery is a decision left to the party seeking the information.[71] Therefore, it may be contended that the court did not consider the movants to be parties to the action, because if it did, the unambiguous language of Rule 33 would not permit the court to place a limitation on the use of interrogatories. If the court thought that the movants were not parties, Rules 33 and 34 should have been unavailable to the defendant. If, however, the court was of the opinion that the absent class members were parties, the use of Rules 33 and 34

63. Gill v. Stolow, 240 F.2d 669, 670 (2d Cir. 1957); Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Colum. L. Rev. 480 (1958).

64. B.F. Goodrich Tire Co. v. Lyster, 328 F.2d 411, 415 (5th Cir. 1964).

65. 450 F.2d at 1005; see note 9 supra and accompanying text.

66. 450 F.2d at 1005.

67. See notes 24-36 supra and accompanying text.

68. See notes 3 & 4 supra.

69. 450 F.2d at 1005.

70. Id. See note 59 supra and accompanying text.

71. Wright § 86. "Where the person who has the information sought is a party, whether to use interrogatories . . . is a choice dependent on practical considerations." Id. at 380. (footnote omitted). The only limitation that was previously placed on the use of interrogatories pertained to the scope of the questions asked. Id. at 381. However this limitation no longer exists. 4A Moore ¶ 33.10, at 33-66.

should have been unrestricted. It is therefore submitted that the majority erred, whatever view of the movants' status it adopted.[72]

This judicial expansion of the scope of the federal discovery rules might be desirable, if not logically justified, in view of the policy considerations with which the court sought to deal in *Brennan*. The court must have believed that the movants' total inaction during the trial and subsequent attempt to benefit from the favorable judgment was such a blatant case of "sideline sitting" that justice demanded an extreme penalty. Therefore, it was permissible in the majority's view for the trial court to make limited use of Rules 33 and 34 if the judge in his discretion thought that justice would thus be served. However, such a vague standard, absent further qualification of the movants' status as parties, can hardly serve as a meaningful guideline for trial courts in similar situations.[73]

At best, *Brennan* should be given a very narrow interpretation[74] by courts dealing with similar issues in the future. If the case is given a broad interpretation or if the decision signals a trend toward wider discovery in class actions, corporate defendants may be afforded a tactic by which to diminish a particular class by disingenuously serving interrogatories on unadvised absent class members resulting in the dismissal of their claims with prejudice. Such a result would be at odds with the very purpose of a class action which is to "serve the interests both of judicial administration and of justice."[75] Fortunately, the *Brennan* court took great pains to limit the scope of its holding[76] and it is hoped that if judges find the *Brennan* reasoning persuasive, they will apply it only under the most extraordinary circumstances.

Negligence—Res Ipsa Loquitur Applied in Two-plane Aviation Disaster Against Multiple Defendants Although Instrumentality of Injury Not Under any Defendant's Exclusive Control.—Plaintiffs were passengers on Eastern Airlines Flight 853, which collided with Trans World Airlines Flight 42 over Carmel, New York, on December 4, 1965.[1] Suit in the District Court for the Southern District of New York was premised on diversity jurisdiction, and the trial resulted in a directed verdict[2] in favor of defendant Trans World Air-

72. The dissent was of the opinion that the "movants were not parties to the litigation." 450 F.2d at 1006.

73. Should a court deem it necessary to implement discovery orders similar to those in this case it might issue the order pursuant to Rule 23(c) and (d) and in this way avoid the confusion encountered by the Brennan court when it attempted to use Rules 33 and 34.

74. A broad application of the decision is possible only if it is construed as defining absent class members as parties. However, such an interpretation would be so plainly at variance with the language of Rules 33 and 34 as to render the Brennan decision completely untenable.

75. Wright § 72, at 306.

76. See note 9 supra and accompanying text.

1. Colditz v. Eastern Airlines, Inc., 329 F. Supp. 691 (S.D.N.Y. 1971).

2. Id. at 692.

lines and against defendant Eastern Airlines on the issue of liability, the jury thereafter awarding damages.[3] At a pretrial hearing, the district court, applying New York law, concluded that although the agent or instrumentality of injury was not within the exclusive control of either of the defendants, the defendants were the only parties arguably responsible for the accident, and therefore the doctrine of res ipsa loquitur[4] was applicable against both defendants.[5] *Colditz v. Eastern Airlines, Inc.*, 329 F. Supp. 691 (S.D.N.Y. 1971).

The plaintiff in a negligence action must ordinarily prove that the defendant breached a duty of care owed to him and that the breach of this duty was the proximate cause of the plaintiff's injury.[6] The mere fact that an accident or injury has occurred, absent further proof, is not evidence that anyone has been negligent.[7] Negligence, like any other fact, may be proved by circumstantial evidence.[8] Where direct evidence of specific acts of negligence is unavailable, but where the circumstances of the injury suggest negligence, the plaintiff may rely on the doctrine of res ipsa loquitur.[9] The conditions generally necessary for the

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3. Id.

4. The Latin phrase, which literally means "the thing speaks for itself," was derived from the English case of Byrne v. Boadle, 159 Eng. Rep. 299 (Ex. 1863), where a barrel of flour rolled out of a warehouse window and fell upon a passing pedestrian. The principle was later clarified by Chief Justice Erle in Scott v. London & St. Katherine Docks Co., 159 Eng. Rep. 665, 667 (Ex. 1865).

5. In a pretrial motion, defendants claimed that the suit was barred by the doctrine of collateral estoppel because the action had not been consolidated with an action brought by the crew of the Eastern plane. The court held that failure to consolidate did not estop the plaintiffs from asserting their claims. 329 F. Supp. at 694-95. The defendants renewed their motion at the end of plaintiff's case, and the motion was denied, the court concluding that the suit against Eastern was not precluded because in the prior suit against Eastern and Trans World Airlines, the issue of Eastern's liability was immaterial to the ultimate finding. Id. at 695; see White v. Trans World Airlines, 320 F. Supp. 655 (S.D.N.Y. 1970).

6. W. Prosser, Torts § 30 (4th ed. 1971) [hereinafter cited as Prosser].

7. Id. § 39, at 211; see Manley v. New York Tel. Co., 303 N.Y. 18, 100 N.E.2d 113 (1951).

8. Prosser § 39, at 212. See generally 1 J. Wigmore, Evidence § 25 (3d ed. 1940).

9. "A res ipsa loquitur case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it." Restatement (Second) of Torts § 328 D, comment b at 157 (1965); see Robinson v. Consolidated Gas Co., 194 N.Y. 37, 86 N.E. 805 (1909); Mercatante v. City of New York, 286 App. Div. 265, 142 N.Y.S.2d 473 (1st Dep't 1955); Curley v. Ruppert, 272 App. Div. 441, 71 N.Y.S.2d 578 (1st Dep't 1947); 2 G. Mottla, New York Evidence: Proof of Cases § 1211, at 378 (2d ed. 1966).

The doctrine is said to impart a common sense appraisal of the probative value of circumstantial evidence. United States v. Ridolfi, 318 F.2d 467, 470 (2d Cir. 1963); Panico v. American Export Lines, Inc., 213 F. Supp. 116, 118 (S.D.N.Y. 1962); Manley v. New York Tel. Co., 303 N.Y. 18, 25, 100 N.E.2d 113, 116 (1951). "When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of 'res ipsa loquitur;' when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence." Griffen v. Manice, 166 N.Y. 188, 196, 59 N.E. 925, 927 (1901) (emphasis omitted).

application of res ipsa loquitur are: (1) the event must not have been due to any voluntary action or contribution on the part of plaintiff; (2) the event must be of a kind which ordinarily does not occur in the absence of negligence; and (3) the event must be caused by an agency or instrumentality within the exclusive control of the defendant.[10] Some courts have suggested a fourth condition—that evidence or knowledge of the event be more accessible to the defendant than the plaintiff.[11]

Although almost all jurisdictions utilize the res ipsa loquitur principle, there is substantial disagreement with respect to the procedural effect which should be accorded it.[12] The majority view is to permit, but not compel, the trier of fact to

10. Panico v. American Export Lines, Inc., 213 F. Supp. 116, 119 (S.D.N.Y. 1962); Schneider v. United States, 188 F. Supp. 911, 914 (E.D.N.Y. 1960); see Prosser § 39, at 214; Richardson on Evidence § 93 (Prince ed. 1964).

11. Citrola v. Eastern Air Lines, Inc., 264 F.2d 815, 817-18 (2d Cir. 1959); Schneider v. United States, 188 F. Supp. 911, 914 (E.D.N.Y. 1960); Nahay v. Ta-E-Yetos Realty Corp., 36 Misc. 2d 1075, 1076-77, 234 N.Y.S.2d 90, 91-92 (Sup. Ct. 1962); Prosser § 39, at 214, 225.

Dean Prosser argues that superior knowledge is not an element in res ipsa loquitur. Prosser, Res Ipsa Loquitur in California, 37 Calif. L. Rev. 183, 202-04 (1949). Dean Wigmore refers to the element of superior knowledge as the "particular force and justice of the rule." 9 J. Wigmore, Evidence § 2509, at 382 (3d ed. 1940).

12. Prosser § 40, at 228. This confusion, according to Prosser, is the result of the merger of two distinctly different origins of the doctrine: one asserting that res ipsa loquitur presumes that the only reasonable conclusion which can be drawn from the circumstances of an unusual accident is that the defendant was probably at fault; the other asserting that, with respect to the special relationship between a common carrier and its passengers, the carrier had the burden of proving that it was not negligent. Id. § 39, at 213; see Prosser, Res Ipsa Loquitur in California, 37 Calif. L. Rev. 183, 184-85 (1949).

There has been further disagreement as to the effect of the plaintiff's allegations of specific negligence in his pleadings or the introduction of evidence of specific negligence at trial upon the use of res ipsa loquitur. Compare Bressler v. New York Rapid Transit Corp., 270 N.Y. 409, 1 N.E.2d 828 (1936), and Zaninovich v. American Airlines, Inc., 26 App. Div. 2d 155, 271 N.Y.S.2d 866 (1st Dep't 1966), and Cunningham v. Lence Lanes, Inc., 25 App. Div. 2d 238, 268 N.Y.S.2d 609 (3d Dep't 1966), and Goodheart v. American Airlines, Inc., 252 App. Div. 660, 1 N.Y.S.2d 288 (2d Dep't 1937), and Whitcher v. Board of Educ., 233 App. Div. 184, 251 N.Y.S. 611 (3d Dep't 1931), with Christensen v. Surface Transp. Corp. of New York, 283 App. Div. 349, 128 N.Y.S.2d 146 (1st Dep't 1954), and DeRoire v. Lehigh Valley R.R., 205 App. Div. 549, 199 N.Y.S. 652 (4th Dep't 1923). This controversy was settled in New York in the case of Abbot v. Page Airways, Inc., 23 N.Y.2d 502, 245 N.E.2d 388, 297 N.Y.S.2d 713 (1969), where the New York Court of Appeals indicated that merely because proof of specific negligence was unnesessary in cases where res ipsa loquitur was applied, specific proof was not necessarily inconsistent with the permissible inference raised by the application of the doctrine. Id. at 513, 245 N.E.2d at 394, 297 N.Y.S.2d at 721. The court concluded that merely because the plaintiff sought to bolster his case by introducing specific evidence of defendant's negligence, the plaintiff should not then be compelled to forego the benefit of res ipsa loquitur. Id. at 511, 245 N.E.2d at 393, 297 N.Y.S.2d at 720. Thus, the court allowed the plaintiff to plead and prove specific acts of negligence and to rely, at the same time, on the res ipsa principle. Id. at 514, 245 N.E.2d at 395, 297 N.Y.S.2d at 722.

"The view which now tends to prevail is that res ipsa loquitur may still be applied, to the extent that the inference to be drawn supports the specific allegation or the specific proof;

infer negligence from the circumstances of the case.[13] Thus the plaintiff survives a motion to dismiss since there is sufficient evidence to go to the jury, but the burden of proof is not thereby shifted to the defendant.[14] A second theory holds that more than a mere permissible inference is derived from the evidence in that it creates a presumption against the defendant, thereby requiring him to offer evidence sufficient to meet the presumption in order to avoid a directed verdict against him.[15] A third view is that the doctrine of res ipsa shifts to the defendant the ultimate burden of proof, requiring him to introduce evidence of greater weight than that of the plaintiff.[16]

New York is in the majority[17] with respect to the effect to be accorded res ipsa loquitur. Thus, where res ipsa is applied, the burden of proof does not shift to the defendant, but rather the plaintiff must still prove his case by a preponderance of the evidence.[18] The often quoted statement of the majority view was made by the United States Supreme Court in *Sweeney v. Erving*:[19]

> [*R*]*es ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. . . . When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.[20]

The application of res ipsa does not compel the defendant to offer an explanation.[21] If the trier of fact is justified in drawing the inference, then the burden of going forward shifts to the defendant.[22] Thus, under the majority view as

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and that where the specific allegation of negligence is accompanied by a general allegation, res ipsa loquitur may be relied on in support of the general allegation." Restatement (Second) of Torts § 328 D, comment m at 165 (1965).

13. Manhat v. United States, 220 F.2d 143, 145-46 (2d Cir.), cert. denied, 349 U.S. 966 (1955); Century Indem. Co. v. Arnold, 153 F.2d 531, 533 (2d Cir.), cert. denied, 328 U.S. 854 (1946); Schneider v. United States, 188 F. Supp. 911, 914 (E.D.N.Y. 1960); Calhoun v. Northeast Airlines, Inc., 180 F. Supp. 532, 533 (S.D.N.Y. 1959); Prosser § 40, at 229.

14. E.g., Calhoun v. Northeast Airlines, Inc., 180 F. Supp. 532, 533 (S.D.N.Y. 1959); Nahay v. Ta-E-Yetos Realty Corp., 36 Misc. 2d 1075, 1076, 234 N.Y.S.2d 90, 91 (Sup. Ct. 1962).

15. 2 Harper & James, Torts § 19.11, at 1103 (1956); Prosser § 40, at 230; Restatement (Second) of Torts § 328 D, comment m at 165 (1965).

16. Prosser § 40, at 230. Prosser cites "Colorado, Louisiana, and perhaps Mississippi" for this view of the res ipsa loquitur doctrine. Id.

17. E.g., George Foltis, Inc. v. City of New York, 287 N.Y. 108, 38 N.E.2d 455 (1941). For similar holdings in other jurisdictions see, e.g., Levine v. Union & New Haven Trust Co., 127 Conn. 435, 17 A.2d 500 (1941); Merriman v. Kraft, 144 Ind. App. 33, 242 N.E.2d 526 (1968).

18. E.g., Plumb v. Richmond Light & R.R., 233 N.Y. 285, 135 N.E. 504 (1922).

19. 228 U.S. 233 (1913).

20. Id. at 240.

21. E.g., Calhoun v. Northeast Airlines, Inc., 180 F. Supp. 532 (S.D.N.Y. 1959).

22. Id. at 533; Neuhoff v. Retlaw Realty Corp., 289 N.Y. 293, 295, 45 N.E.2d 450, 451-

expressed by the New York Court of Appeals in *George Foltis, Inc. v. City of New York*,[23] a plaintiff who brings himself within the res ipsa doctrine makes out a prima facie case which entitles him to go to the jury, but he still must persuade the jury that the defendant was negligent, even though the defendant has presented no explanation of the accident.[24]

The New York courts have traditionally required that, in order for the res ipsa loquitur principle to be applicable, the defendant had to be in "exclusive control" of the instrumentality causing the injury.[25] The defendant need not be in actual physical control of the instrumentality at the time of the accident, for the "exclusive control" is provided when the defendant has the right to control the instrumentality.[26] This exclusive control concept presents little problem where the action involves a single defendant. However, where multiple defendants are involved, it may be difficult to establish the negligence of a particular defendant. Unless there is vicarious liability or shared control, the usual rule is that the plaintiff does not make out a prima facie case against either of two or more defendants merely by showing that the plaintiff has been injured by the negligence of one of the defendants.[27]

An application of this rule can be found in the case of *Wolf v. American Tract Society*,[28] wherein the plaintiff was injured by a brick which fell from a building owned by the defendant. Also joined as defendants were some of the independent contractors who were working on the building at the time of the alleged negligence.[29] The New York Court of Appeals, indicating that the plaintiff had failed to establish the particular defendants responsible for his injury, concluded that, although the case was appropriate for the application of res ipsa, the better policy was to allow the plaintiff to go without redress rather than

52 (1942); Galbraith v. Busch, 267 N.Y. 230, 233, 196 N.E. 36, 38 (1935); Nahay v. Ta-E-Yetos Realty Corp., 36 Misc. 2d 1075, 1076, 234 N.Y.S.2d 90, 91 (Sup. Ct. 1962).

23. 287 N.Y. 108, 38 N.E.2d 455 (1941).

24. Id. at 118-19, 38 N.E.2d at 461-62. In Century Indem. Co. v. Arnold, 153 F.2d 531 (2d Cir.), cert. denied, 328 U.S. 854 (1946), Judge Swan stated that, under the previous law, a plaintiff could obtain a directed verdict if the defendant offered no explanation, but he felt that Foltis had changed the law. Id. at 532; see Hogan v. Manhattan Ry., 149 N.Y. 23, 43 N.E. 403 (1896). It is generally believed that neither the plaintiff nor the defendant can receive a directed verdict where res ipsa loquitur is applicable. 2 Harper & James, Torts § 19.11, at 1900 (1956).

Res ipsa is merely a rule to guide the appraisal of the probative force of evidence which enables the injured party to establish a prima facie case that the injury was caused by the defendant's negligence, and therefore the direction of a verdict in favor of the plaintiff would be unjustified. George Foltis, Inc. v. City of New York, 287 N.Y. 108, 119, 38 N.E.2d 455, 461 (1941).

25. See cases cited note 10 supra.

26. Jungjohann v. Hotel Buffalo, 5 App. Div. 2d 496, 173 N.Y.S.2d 340 (4th Dep't 1958); Cole v. Great Atl. & Pac. Tea Co., 44 Misc. 2d 694, 254 N.Y.S.2d 929 (Sup. Ct. 1964).

27. Prosser § 39, at 221.

28. 164 N.Y. 30, 58 N.E. 31 (1900).

29. Id. at 32-33, 58 N.E. at 31-32.

to hold a possibly innocent party liable.[30] A recent appellate division case, *Murphy v. City of New York*,[31] involved circumstances where persons independent of the defendants had access to the instrumentality of harm. In this case, plaintiff was injured when the metal door of a lamppost owned by the city struck him.[32] The court found that res ipsa was inapplicable against the city and an independent contractor whose duty it was to maintain the post because the general public also had access to the pole.[33]

Several New York cases have allowed some departures from this previously requisite element of exclusivity.[34] Thus, in *Schroeder v. City and County Savings Bank*,[35] the New York Court of Appeals extended the application of the res ipsa doctrine to defendants in successive control of the instrumentality of injury. In *Schroeder*, the plaintiff was injured when struck by a falling barricade which had been erected by one of two defendant contractors pursuant to a contract between the defendant owner and a lessee for improvement of the building.[36] At the time of the injury, the contractor employed by the owner had completed his work and thus had neither actual control nor a right to control the barricade. Nevertheless, the court allowed res ipsa against the owner and both contractors because they had all been in possession of the barricade either simultaneously or in succession and because a nondelegable duty of supervision remained in the owner.[37]

In a more recent New York Court of Appeals decision, *Corcoran v. Banner Super Market, Inc.*,[38] the traditional requirement of exclusive control was further eroded. In this case, plaintiff was injured when struck by a board which had been affixed in part to a building owned by the defendant and in part to a building owned by a person not made a party to the suit.[39] In concluding that res

30. Id. at 34, 58 N.E. at 32. "Cases must occasionally happen where the person really responsible for a personal injury cannot be identified or pointed out by proof . . . and then it is far better and more consistent with reason and law that the injury should go without redress than that innocent persons should be held responsible upon some strained construction of the law developed for the occasion." Id.

31. 19 App. Div. 2d 545, 240 N.Y.S.2d 883 (2d Dep't 1963) (mem.), aff'd mem., 14 N.Y.2d 532, 197 N.E.2d 781, 248 N.Y.S.2d 394 (1964).

32. Id., 240 N.Y.S.2d at 884.

33. Id. at 546, 240 N.Y.S.2d at 884-85. "It was not established that defendants or either of them had exclusive control of the post . . . and the situation was not one in which the facts as to the cause of the accident were necessarily accessible to the defendants and inaccessible to the plaintiff. . . . Under such circumstances, to charge defendants with negligence would be mere speculation, guess or surmise . . . ." Id. (citations omitted).

34. See notes 25-27 supra and accompanying text.

35. 293 N.Y. 370, 57 N.E.2d 57 (1944).

36. Id. at 373, 57 N.E.2d at 58.

37. Id. at 374, 57 N.E.2d at 59. The court did not mention plaintiff's failure to join the lessee as a defendant, but stated that it was the duty of the joined defendants to explain their conduct. Id.

38. 19 N.Y.2d 425, 227 N.E.2d 304, 280 N.Y.S.2d 385, modified, 21 N.Y.2d 793, 235 N.E.2d 455, 288 N.Y.S.2d 484 (1967), noted in 32 Albany L. Rev. 251 (1967).

39. Id. at 429, 227 N.E.2d at 305, 280 N.Y.S.2d at 386-87. The court concluded that

ipsa loquitur was applicable, the court stated that "[t]he exclusive control requirement is thus subordinated to [res ipsa loquitur's] general purpose, that of indicating that it *probably* was the defendant's negligence which caused the accident."[40] To support this proposition, the court cited the California case of *Ybarra v. Spangard*,[41] where the plaintiff sued a surgeon, several nurses, an anaesthetist and a hospital for injuries apparently incurred during an appendectomy.[42] The California supreme court applied res ipsa loquitur against all the defendants,[43] despite the fact that it was apparent that not all of the defendants were negligent, that all defendants did not have exclusive control of the plaintiff's treatment, and that neither the agent nor instrumentality of harm were singled out by the plaintiff.[44]

The use of the res ipsa loquitur doctrine against a common carrier in an action by one of its passengers for damages incurred in a collision is not novel to New York law.[45] However, its applicability is generally limited to a passenger proceeding against his carrier, and not against the other carrier involved in the accident.[46] In *Colditz v. Eastern Airlines, Inc.*,[47] however, the District Court for the Southern District of New York ruled that the doctrine was applicable against *both* defendants.[48] The court acknowledged that "[a]bsent either a special relationship or some basis for imposing joint responsibility, the applicability of *res ipsa loquitur* against multiple defendants where there is more than one possible agent or instrumentality of negligence [was] a question of first impression under New York decisional law."[49] The court noted that *Corcoran* had cited *Ybarra*, and was therefore a "strong indication that the New York Court of Appeals

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the owner of the abutting building was not a necessary party to the action since the application of res ipsa loquitur would be proper against either or both owners. Id. at 432-33, 227 N.E.2d at 307, 280 N.Y.S.2d at 389.

40. Id. at 432, 227 N.E.2d at 306, 280 N.Y.S.2d at 389 (footnote omitted).

41. 25 Cal. 2d 486, 154 P.2d 687 (1944). For materials concerning the application of res ipsa loquitur in medical malpractice cases see Adamson, Medical Malpractice: Misuse of Res Ipsa Loquitur, 46 Minn. L. Rev. 1043 (1962); Seavey, Res Ipsa Loquitur: Tabula in Naufragio, 63 Harv. L. Rev. 643 (1950); Thode, The Unconscious Patient: Who Should Bear the Risk of Unexplained Injuries to a Healthy Part of His Body?, 1969 Utah L. Rev. 1; Comment, Res Ipsa Loquitur: A Case for Flexibility in Medical Malpractice, 16 Wayne L. Rev. 1139 (1970); 56 Geo. L.J. 805 (1968).

42. 25 Cal. 2d at 487-88, 154 P.2d at 688.

43. Id. at 492, 154 P.2d at 691.

44. Id. at 492-93, 154 P.2d at 690-91.

45. See Loudoun v. Eighth Ave. R.R., 162 N.Y. 380, 56 N.E. 988 (1900).

46. Prosser § 39, at 222. But see Abbott v. Page Airways, Inc., 23 N.Y.2d 502, 245 N.E.2d 388, 297 N.Y.S.2d 713 (1969).

47. 329 F. Supp. 691 (S.D.N.Y. 1971).

48. Id. at 693.

49. Id. For cases supporting the inference of negligence from the occurrence of a single airplane crash see Citrola v. Eastern Airlines, Inc., 264 F.2d 815 (2d Cir. 1959); Lobel v. American Airlines, Inc., 192 F.2d 217 (2d Cir. 1951), cert. denied, 342 U.S. 945 (1952); Abbott v. Page Airways, Inc., 23 N.Y.2d 502, 245 N.E.2d 388, 297 N.Y.S.2d 713 (1969); Seaman v. Curtiss Flying Serv., 231 App. Div. 867, 247 N.Y.S. 251 (2d Dep't 1930) (mem.).

would approve invocation of the doctrine in a case such as this one."[50] The defendants, the court stated, were the only parties arguably responsible for the accident and therefore the res ipsa loquitur doctrine should be applied against both defendants.[51]

The *Colditz* court went on to acknowledge that under the majority rule, where the defendant offers no explanation of the event, the jury should nevertheless normally determine whether the inference of negligence is warranted.[52] The court, however, cited *George Foltis, Inc. v. City of New York*[53] which, although it "squarely overruled prior authority that the court may direct a verdict [where res ipsa is applied], left open the possibility that '[t]here may be cases where the *prima facie* proof is so convincing that the inference of negligence arising therefrom is inescapable if not rebutted by other evidence.' "[54] In directing a verdict against the defendant, the *Colditz* court thought it pointless to allow the jury to decide the case primarily because "of the high probability . . . of either operational negligence or defective functioning of the aircraft equipment for which the carrier as well as the manufacturer is held strictly liable."[55]

The effect of the *Colditz* decision with respect to multiple defendants should seemingly be limited to cases where a higher duty of care is required on the part of both defendants. A broad extension of the doctrine as implemented in *Colditz* would, in addition to amending traditional rules of New York evidence, in effect impose a stricter liability for negligence against all multiple defendants, where previously such liability was incurred only where a special relationship existed between the plaintiff and his carrier. The facilitation of plaintiff's burden of proof would seem to be unjustified against all multiple defendants, and should be limited in application to multiple defendants in circumstances only where a higher degree of care is imposed on the defendant by substantive law.

The procedural effect given to res ipsa by the *Colditz* court created a legal presumption of negligence rather than a permissible inference. The effect was to place the burden upon the defendant to come forward with evidence sufficient to negate the existence of the presumed fact, and the question of whether the presumption was rebutted was therefore an issue for the court to decide. The trier of fact was thereby precluded from rejecting the inference of negligence since a presumption "requires that a particular inference *must* be drawn from an ascertained state of facts."[56] As the *Colditz* court indicated, the New York Court of Appeals in *Foltis* did not preclude direction of a verdict where the proof is so convincing that an inference of negligence is inescapable.[57] Thus the

50. 329 F. Supp. at 693.

51. Id.

52. Id. at 694.

53. 287 N.Y. 108, 38 N.E.2d 455 (1941).

54. 329 F. Supp. at 694, quoting George Foltis, Inc. v. City of New York, 287 N.Y. 108, 121, 38 N.E.2d 455, 462 (1941).

55. Id.

56. Platt v. Elias, 186 N.Y. 374, 379, 79 N.E. 1, 2 (1906).

57. George Foltis, Inc. v. City of New York, 287 N.Y. 108, 121, 38 N.E.2d 455, 462 (1941).

Colditz decision has extended the res ipsa doctrine beyond the present perimeter of the law of New York and followed the *Foltis* dictum. This view is in accord with several other jurisdictions[58] which approve a directed verdict when "the inference of negligence is so clear that no reasonable man could fail to accept it . . . ."[59] The added effect given to res ipsa loquitur is justified because the burden of explanation is imposed only when the trier of fact would be unreasonable if it did not draw the permissible inference.

Securities Law—Rule 10b-5—Persons Not Corporate Insiders Censured for Use of Non-Public Information.—Twelve respondents, all investment partnerships or investment advisers, received non-public information from a broker-dealer concerning a sharp drop in Douglas Aircraft's forecasted earnings. The respondents knew that the broker-dealer was the prospective managing underwriter of that corporation's impending debenture offering and thereby had access to this inside information.[1] When the respondents subsequently sold and short sold the corporation's stock before the information became public,[2] the Securities and Exchange Commission's hearing examiner held[3] that such acts by a "tippee" were in violation of the anti-fraud provision of section 10(b) of the Securities Exchange Act of 1934[4] and Rule 10b-5.[5] The Commission[6] reviewed the find-

58. E.g., Whitley v. Hix, 207 Tenn. 683, 343 S.W.2d 851 (1961); Moore v. Atchison, T. & S.F. Ry., 28 Ill. App. 2d 340, 171 N.E.2d 393 (1960).

59. Prosser § 40, at 230. "In other words, the procedural effect of a res ipsa case is a matter of the strength of the inference to be drawn, which will vary with the circumstances of the case." Id.

1. Investors Management Co., SEC Securities Exchange Act Release No. 9267 (July 29, 1971) [1970-71 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,163, at 80,515-16 [hereinafter cited as SEC Securities Exchange Act Release No. 9267].

2. Id. at 80,516.

3. Id. at 80,515.

4. 15 U.S.C. § 78j (1970).

5. 17 C.F.R. § 240.10b-5 (1971) provides: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interestate [sic] commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit 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

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

The defendants were also found to be in violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1970). SEC Securities Exchange Act Release No. 9267, at 80,515. However, since the 1934 Act is the broader of the two statutes, and in "tippee" cases a violation of section 17(a) will also constitute a violation of section 10(b), a discussion of the latter will suffice.

6. It must be kept in mind that SEC decisions are quasi-judicial and do not carry the

ings on its own motion and affirmed, holding that the respondents were tippees and subject to the same standard as corporate insiders concerning non-public, undisclosed information. In finding violations[7] of the statute, the Commission comprehensively set forth the necessary elements for such a violation: 1) that the information be material and non-public; 2) that the tippee, regardless of whether he receives the information directly or indirectly, know or have reason to know that the information is non-public and had been obtained improperly; 3) that this information be a factor in his decision to effect the transaction.[8] The SEC did not, however, require that the defendant have a relationship with the corporation, but said one would be inferred if the other elements were present. *Investors Management Co.*, SEC Securities Exchange Act Release No. 9267 (July 29, 1971) [1970-71 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,163, at 80,514.

Prior to the passage of the federal securities acts in the 1930's, recovery was rare in cases involving insider trading and undisclosed information.[9] This was partially due to the fact that the plaintiff was required to sue in common law fraud and difficulty was often encountered in proving the requisite elements of scienter, reliance and causation.[10] However, recovery was occasionally granted when "special facts"[11] could be shown or when the defendant was a fiduciary.[12] The inadequacy of these remedies to cope with the morass of stock manipulations and frauds perpetrated during the 1920's prompted the passage[13] of the securities acts of 1933[14] and 1934.[15] The intent of Congress in enacting the anti-

same weight as a court holding. However, the importance of the Commission's expert opinion on securities law should not be underestimated as "it has developed many of the important precedents in the area." 2. A. Bromberg, Securities Law: Fraud—SEC Rule 10b-5 § 10.1, at 234 (1969) [hereinafter cited as Bromberg].

7. The censuring of the defendants in this case serves as a strong warning that harsher sanctions, such as suspension or revocation, may be imposed if similar violations occur in the future. See 15 U.S.C. § 780(b)(5) (1970).

8. SEC Securities Exchange Act Release No. 9267, at 80,519.

9. Steinfeld v. Nielsen, 15 Ariz. 424, 139 P. 879 (1914); Stout v. Cunningham, 33 Idaho 464, 196 P. 208 (1921); O'Neile v. Ternes, 32 Wash. 528, 73 P. 692 (1903); see Cahall v. Lofland, 12 Del. Ch. 299, 114 A. 224 (1921); Goodwin v. Agassiz, 283 Mass. 358, 186 N.E. 659 (1933); Poole v. Camden, 79 W. Va. 310, 92 S.E. 454 (1917); 3 L. Loss, Securities Regulation 1446-48 (2d ed. 1961) [hereinafter cited as 3 Loss].

10. 1 Bromberg § 2.7(1).

11. E.g., Strong v. Repide, 213 U.S. 419 (1909); Buckley v. Buckley, 230 Mich. 504, 202 N.W. 955 (1925).

12. Hotchkiss v. Fischer, 136 Kan. 530, 16 P.2d 531 (1932); accord, Oliver v. Oliver, 118 Ga. 362, 45 S.E. 232 (1903).

13. 1 Bromberg § 2.2(100); see Comment, The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors, 59 Yale L.J. 1120, 1120-21 (1950).

14. Securities Act of 1933, Pub. L. No. 22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-77bbbb (1970)).

15. Securities Exchange Act of 1934, Pub. L. No. 291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78jj (1970)).

fraud provisions contained in these acts was to place the buyer and seller of stocks in an equal bargaining position through complete disclosure.[16]

The wording of the anti-fraud provisions, especially section 10(b) of the Securities Exchange Act of 1934,[17] is very broad, as is the language in Rule 10b-5 established by the Securities and Exchange Commission (SEC) in 1942.[18] When first promulgated, Rule 10b-5 did not result in a great deal of controversy.[19] It was used more frequently, however, once its potential as a remedy in cases of insider trading had been recognized.[20] Although section 10(b) and Rule 10b-5 apply to many disclosure violations, their impact on insider and tippee trading involving non-public information has been felt most strongly in the past decade.[21]

Cases which have dealt with this type of Rule 10b-5 violation have focused on the issues of what persons fall under the ambit of Rule 10b-5[22] and whether the information was material.[23] These questions were particularly significant in *Investors Management*, although other issues were involved.[24] For example, the Commission was faced with the issues of whether the information was non-public[25] and whether the defendant had the required knowledge, actual or constructive, of that fact.[26] In resolving these issues, the SEC comprehensively enunciated the criteria it employed in reaching its conclusions.[27]

Prior to *Investors Management*, a definition of materiality had evolved in the courts. Rule 10b-5[28] was held to be violated when an insider failed

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16. See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 847-49 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963); Charles Hughes & Co. v. SEC, 139 F.2d 434, 437-38 (2d Cir. 1943), cert. denied, 321 U.S. 786 (1944); Investors Management Co., SEC Securities Exchange Act Release No. 9267, at 80,517. See generally Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970).

17. Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(b) (1970).

18. Kohler v. Kohler Co., 319 F.2d 634, 637 (7th Cir. 1963); SEC v. Gulf Intercontinental Fin. Corp., 223 F. Supp. 987, 993-94 (S.D. Fla. 1963). See generally SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963). The text of the rule may be found at note 5 supra.

19. 1 Bromberg § 2.2(420).

20. 3 Loss 1448-56. See, e.g., Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951); Fry v. Schumaker, 83 F. Supp. 476 (E.D. Pa. 1947); Kardon v. National Gypsum Co., 73 F. Supp. 798 (E.D. Pa. 1947).

21. See, e.g., SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); Cochran v. Channing Corp., 211 F. Supp. 239 (S.D.N.Y. 1962); 1 Bromberg § 2.2(460).

22. See cases cited notes 42-61 infra.

23. See cases cited notes 28-41 infra.

24. See notes 75-90 infra and accompanying text.

25. SEC Securities Exchange Act Release No. 9267, at 80,519-20; see cases cited notes 75-85 infra.

26. SEC Securities Exchange Act Release No. 9267, at 80,520-21; see cases cited notes 71-77 infra.

27. See SEC Securities Exchange Act Release No. 9267, at 80,514-15.

28. 17 C.F.R. § 240.10b-5 (1971).

to disclose a *material* fact to a purchaser or seller in a stock transaction.[29] This rule was firmly established in the case of *Speed v. Transamerica Corp.*,[30] where the corporation offered to buy its own shares without disclosing its true inventory. The court held that "[t]he rule is clear. It is unlawful for an insider . . . to purchase the stock . . . without disclosing *material* facts . . . ."[31] Until recently, information was regarded to be material if a reasonable man would have attached import to the information or if it would have affected his determination to complete the stock transaction.[32] This reasonable man test has been criticized by several commentators because it frequently presents a confusing question of fact.[33]

In *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*,[34] the question of materiality was one of the main issues. Here a few insiders knew that a certain mining area had much greater potential than was publicly known. Using this information, the insiders bought stock which subsequently rose in value as the true potential of the mining strike became general knowledge.[35] The district court defined material data as "information which, if known, would clearly affect 'investment judgment'. . . ."[36] The court went on to explain that this test must "necessarily be a conservative one, particularly since many actions under section 10(b) are brought on the basis of hindsight."[37] Using this construction of materiality, the lower court found that the undisclosed facts did not become material until a certain date, before which purchases by insiders did not violate the statute.[38] Instead of following this

29. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848-53 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); Painter, Rule 10b-5: The Recodification Thicket, 45 St. John's L. Rev. 699, 710-13 (1971) [hereinafter cited as Painter].

30. 99 F. Supp. 808 (D. Del. 1951).

31. Id. at 828-29 (emphasis added).

32. John R. Lewis Inc. v. Newman, 446 F.2d 800, 804 (5th Cir. 1971); List v. Fashion Park, Inc., 340 F.2d 457, 462-63 (2d Cir.), cert. denied, 382 U.S. 811 (1965); Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963); Ross v. Licht, 263 F. Supp. 395, 408 (S.D.N.Y. 1967); Speed v. Transamerica Corp., 99 F. Supp. 803, 829 (D. Del. 1951); Kardon v. National Gypsum Co., 73 F. Supp. 798, 800 (E.D. Pa. 1947). If the position is taken that the stock market is a collection of reasonable men a second, complementary test can be formulated: A "material fact" is one which "would have a significant effect on the market price of the company's stock." Fleischer, Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceeding, 51 Va. L. Rev. 1271, 1288 (1965) [hereinafter cited as Fleischer]; see In re Cady, Roberts & Co., 40 S.E.C. 907, 915 (1961); Painter 712.

33. E.g., Fleischer 1289-90; Painter, Inside Information: Growing Pains for the Development of Federal Corporation Law Under Rule 10b-5, 65 Colum. L. Rev. 1361, 1368-69 (1965); Painter 711.

34. 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

35. Id. at 847.

36. SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 280 (S.D.N.Y. 1966), modified, 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

37. Id.

38. Id. at 281-85. The first test core was drilled on November 12, 1963. Between that time and 7:00 P.M., April 9, 1964, the results of that drill core plus one other were held not to

restrictive construction, the United States Court of Appeals for the Second Circuit reversed the district court on this point and broadly construed the reasonable man test of materiality to encompass "any fact . . . which . . . *might* affect the value of the corporation's stock. . . ."[39] The court specifically stated that this test would include "those facts which affect the *probable* future of the company and those which *may* affect the desire of investors to buy, sell, or hold the company's securities."[40] Such a construction is seemingly broad enough to include all but the most trivial information. As one commentator viewed the result of this holding, "materiality depends upon the facts of each case, retroactively determined by the particular court in which you happen to be sued . . . ."[41] Therefore, prior to *Investors Management* the question of what facts were material was uncertain at best, and practically indefinable if *Texas Gulf Sulphur* was literally followed.

However, before the SEC in *Investors Management* could discuss the elements of an alleged violation, it had to find that the defendants as tippees came within the ambit of Rule 10b-5.[42] Although the traditional meaning of "insider" included only those persons having a direct relationship with the corporation—such as officers, directors, or controlling shareholders—the courts in recent years have expanded this definition to include many more persons.[43] A leading case where the coverage of Rule 10b-5 was at issue was *In re Cady, Roberts & Co.*[44] In this case defendant Robert Gintel, a broker-dealer, received word from his associate, who was a member of the board of Curtis Wright, of a dividend reduction by that corporation. Knowing that the news had not yet become public, Gintel effected sales of 2,000 shares and short sales of 5,000 shares.[45] In holding that Gintel violated section 10(b) and Rule

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be material, even though they were "unusually good and . . . excited . . . those who knew about it." Id. at 282. The results were too remote "to have had any significant impact on the market, i.e., to be deemed material." Id. at 283 (citation omitted). However, the completion of a third drilling on April 9th was held to be material as it constituted "real evidence that a body of commercially mineable ore might exist." Id. at 282. Therefore, it was only after April 9, 1964 that the defendants could violate Rule 10b-5. Id. at 285.

39. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

40. Id. (emphasis added). Using this construction, the court held the undisclosed information to have been material as of November 12, 1963. All subsequent stock transactions by those having knowledge were held to have violated Rule 10b-5. Id. at 852.

41. Painter 711; see Association of the Bar of the City of New York, Symposium: Insider Trading in Stocks, 21 Bus. Law. 1009, 1023-25 (1966); cf. Sandler & Conwill, Texas Gulf Sulphur; Reform in the Securities Marketplace, 30 Ohio St. L.J. 225, 249 (1969).

42. SEC Exchange Act Release No. 9267, at 80,519.

43. See 3 Loss 1445; cases cited note 76 infra.

44. 40 S.E.C. 907 (1961); see Comment, Insider Liability Under Securities Exchange Act Rule 10b-5: The Cady, Roberts Doctrine, 30 U. Chi. L. Rev. 121 (1962).

45. 40 S.E.C. at 909. The SEC made no attempt to define public or non-public information, since it was not at issue here with only the Board and Gintel knowing of the fact. See notes 75-81 infra and accompanying text.

10b-5, the Commission stated that the anti-fraud provisions covered "any person," not simply corporate insiders such as officers, directors, or controlling shareholders.[46] The *Cady, Roberts* panel established a two part test to determine whether a particular defendant was covered by the statute. According to this standard a court should look for

> first, the existence of a relationship [between the defendant and the corporation] giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.[47]

The Commission concluded that Gintel had such a relationship with the corporation through his business association with a director.[48] Moreover, his use of the information was unfair, and therefore the duties normally charged to a corporate insider would be "imposed" upon him as if he were an insider.[49] Thus, the SEC equated Gintel with a corporate insider since his relationship with the corporation gave him access to inside information, although technically, no traditional,[50] or direct relationship existed.

A few years later in *Ross v. Licht*,[51] a federal district court relied heavily on the test established by *Cady, Roberts* in determining that insiders also included close family relations and friends of corporate insiders.[52] More important, the court held in the alternative that if these close friends were not "insiders" they would at the very least be "tippees" and thereby "*subject to the same duty as insiders.*"[53] Tippees were defined as "persons given information by insiders in breach of trust."[54]

The definition of insider—and now tippee—liability was again broadened in *SEC v. Texas Gulf Sulphur Co.*[55] Here the court concluded that a corporate employee, other than an officer, could be considered an insider.[56] Then the court followed the lead of the alternative holding in *Ross v. Licht* by stating that although the tippees were not defendants in the action, their conduct would be "equally violative of the Rule" and "equally reprehensible" if the tippees

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46. 40 S.E.C. at 911; see Cochran v. Channing Corp., 211 F. Supp. 239, 242 (S.D.N.Y. 1962); Comment, The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors, 59 Yale L.J. 1120, 1143 (1950). The Commission further pointed out that the coverage of the anti-fraud provisions was very broad and included misleading and deceptive activities not sufficient to sustain a common law action for fraud. 40 S.E.C. at 910.

47. 40 S.E.C. at 912 (citation omitted).

48. Id.

49. Id.

50. Id.

51. 263 F. Supp. 395 (S.D.N.Y. 1967).

52. Id. at 409-10.

53. Id. at 410 (alternative holding).

54. Id.

55. 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

56. Id. at 848.

acted with actual or constructive knowledge that the material information was undisclosed.[57]

Thus, as these cases indicate, prior case law had created a definition of an insider which went far beyond the traditional meaning[58] but was still dependent to some extent on the finding of a relationship between the insider and the corporation.[59] Therefore, in holding that a tippee—or one who has no relationship with the corporation—can violate Rule 10b-5, the SEC in *Investors Management* went a step beyond previous decisions and expressly held what had theretofore only been suggested.[60] In order to abandon the relationship requirement for tippees, the SEC had to create a new requirement—the second element in a Rule 10b-5 violation—that a tippee knew or had reason to know that the information was non-public.[61] The impact of this new requirement is discussed below.[62]

The third element of a Rule 10b-5 violation, as defined by the SEC in *Investors Management*, is that the information given must be a factor in the decision to buy or sell the stock.[63] Although it was always necessary to allege that the information influenced the transaction, this question has never been at issue in prior cases since an inference usually arose that it was a factor in the decision. This occurred once a defendant significantly changed his security position in the corporation within a short time after receipt of the information.[64] Since defendants in prior 10b-5 cases invariably changed their positions shortly after receipt of inside information, the resulting inference disposed of the necessity of proving that the information precipitated the transaction.[65]

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57. Id. at 852-53 (dictum). The court also held that an insider violated Rule 10b-5 by merely passing information on to tippees, even though the insider never bought or sold stock himself. Id. at 852. In a companion case to Investors Management, the broker, Merrill, Lynch, was separately held to be in violation of Rule 10b-5 for passing the inside information to the defendants. Merrill, Lynch, Pierce, Fenner & Smith, SEC Securities Exchange Act Release No. 8459 (Nov. 25, 1968) [1968-69 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,629, at 83,347.

58. See note 42 supra and accompanying text.

59. However, some commentators have felt that the definition of insider had expanded enough to "include any person with material information not disclosed to the public." H. Henn, Corporations § 298, at 600 (2d ed. 1970); see 3 Loss 1451. But cf. N. Lattin, Corporations § 85, at 324-25 (2d ed. 1971).

60. SEC Securities Exchange Act Release No. 9267, at 80,519.

61. Id.

62. See notes 86-98 infra and accompanying text.

63. SEC Securities Exchange Act Release No. 9267, at 80,522.

64. See, e.g., In re Cady, Roberts & Co., 40 S.E.C. 907, 916 (1961). Some cases state the test of reliance as to whether a party to the transaction would have been influenced to act differently if the information was fully disclosed. List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir.), cert. denied, 382 U.S. 811 (1965); Ross v. Licht, 263 F. Supp. 395, 410 (S.D.N.Y. 1967).

65. See notes 99-101 infra and accompanying text. Such an inference was found in In re Cady, Roberts & Co., 40 S.E.C. 907, 916 (1961). This doctrine can also be used as evidence to show the materiality of the information, since if the tippee acts immediately upon its receipt, one could readily infer that at least the tippee considered it material. Id. at 911-12.

Although the cases prior to *Investors Management* dealt in detail with various elements of a 10b-5 violation, they did not give rise to a definitive formula which could be generally applied to unforeseen factual situations. The need for such a formula or outline became greater as this area of the law expanded. Therefore, in an attempt to clarify the law, the Commissioners in *Investors Management* first stated that a tippee did fall under Rule 10b-5, and next set out three concrete elements to guide a court in determining whether a violation has occurred.[66] At the outset, the SEC relied heavily on prior cases to find that, as tippees, the defendants fell under the scope of section 10(b) and Rule 10b-5.[67] It reasoned that the coverage of both the section and the rule was broad since the intent of the anti-fraud provisions was to prevent a "wide variety of securities activities which were found to have been improper in light of the statutory objectives."[68] Moreover, the Commission viewed prior case law, including *Cady, Roberts, Ross v. Licht* and *Texas Gulf Sulphur,* as having indicated that tippees might be in a position to violate Rule 10b-5.[69]

The SEC then defined the first element of a 10b-5 violation: that the information be material and non-public.[70] Regarding materiality, the Commission drew upon prior case law to establish a new test of materiality and set forth factors to be considered in applying that test.[71] The Commission held that a fact was material if "it 'was of such importance that it could be *expected to* affect the judgment of investors . . . to buy, sell or hold . . . [and, i]f generally known, . . . to affect *materially* the market price of the stock.' "[72] Therefore, the SEC modified the *Texas Gulf Sulphur* test [73] by substituting the words "expected to" and "affect materially" for "might affect." As a guide to determine whether a particular set of facts would meet this test, the SEC enumerated some of the parameters that a court should examine:

> Among factors to be considered in determining whether information is material are degree of its specificity, extent to which it differs from information previously publicly disseminated, and its reliability in light of its nature and source and circumstances under which it was received.[74]

Even though information is held to be material, the SEC's first element of a 10b-5 violation will not be fulfilled unless the data is also non-public.[75] Pre-

66. SEC Securities Exchange Act Release No. 9267, at 80,518-19.

67. Id. In particular the SEC stressed the persuasiveness of SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); Ross v. Licht, 263 F. Supp. 395 (S.D.N.Y. 1967); In re Cady, Roberts & Co., 40 S.E.C. 907 (1961).

68. SEC Securities Exchange Act Release No. 9267, at 80,518.

69. Id. at 80,518-19.

70. Id. at 80,519.

71. Id.

72. Id. (emphasis added).

73. See notes 34-41 supra and accompanying text.

74. SEC Securities Exchange Act Release No. 9267, at 80,514-15. Also, the recipient's immediate action upon receipt of the information is evidence of its materiality. Id. at 80,515; see Painter 711.

75. SEC Securities Exchange Act Release No. 9267, at 80,519.

viously, the requirement that the fact be non-public was easily fulfilled. In most cases, the defendants who had this knowledge either as insiders or tippees were few in number and all had a relationship of some sort with the corporation corresponding to their knowledge.[76] Therefore, in prior cases, information was obviously non-public because it was usually possessed by a small coterie of corporate insiders or their privies[77] until, as the *Texas Gulf Sulphur* court pointed out in dictum, "such information [was] effectively disclosed in a manner sufficient to insure its availability to the investing public."[78] However, since the information in *Investors Management* was made available to a substantially greater number of investors—50 investment advisors—the question arose whether the information had been given sufficient publicity.[79] Moreover, in view of the Commission's holding that tippees who have no connection with the corporation could be liable, coupled with the suggestion that innocent possession and use of non-public information could also violate Rule 10b-5,[80] the question of what is public and what is not becomes crucial. A fact is obviously non-public if it is only available to twenty people, but what of one hundred, one thousand, or even ten thousand?[81] The Commission did not attempt to draw a sharp demarcation between public and non-public, but substantially restated the *Texas Gulf Sulphur* dictum that: "Information is non-public when it has not been disseminated in a manner making it available to investors generally."[82]

The SEC then applied this rule to a factual situation presented in *Investors Management*. A few of the defendants had attended a luncheon of about fifty professional investors where rumors spread of the drop in earnings of Douglas.[83] The SEC observed that, according to its test, disclosure to this limited number of investors could not amount to enough publicity to place investors generally

76. See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969) (involving a small number of employees of the corporation); Kuehnert v. Texstar Corp., 286 F. Supp. 340 (S.D. Tex. 1968), aff'd, 412 F.2d 700 (5th Cir. 1969) (involving a friend of the corporation's president); Ross v. Licht, 263 F. Supp. 395 (S.D.N.Y. 1967) (information known only by controlling family and close family friends); Cochran v. Channing Corp., 211 F. Supp. 239 (S.D.N.Y. 1962) (involving some directors and a controlling shareholder); Kardon v. National Gypsum Co., 73 F. Supp. 798 (E.D. Pa. 1947) (where the defendants were brothers holding half of the corporation's stock).

77. See, e.g., Reed v. Riddle Airlines, 266 F.2d 314 (5th Cir. 1959) (only insider was corporation's president-general manager); Ross v. Licht, 263 F. Supp. 395 (S.D.N.Y. 1967) (insiders were four brothers who owned and ran the corporation and their close family friends); Cochran v. Channing Corp., 211 F. Supp. 239 (S.D.N.Y. 1962) (insiders were the three directors of the corporation).

78. 401 F.2d at 854.

79. SEC Securities Exchange Act Release No. 9267, at 80,519-20.

80. Id. at 80,519 n.18.

81. See Investors Management Co., SEC Administrative Proceeding File No. 3-1680 (June 26, 1970) [1969-70 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,832, at 83,928 (preliminary finding of facts and holding by Examiner Blair). Chief Examiner Blair noted that no definition of "non-public" had previously been determined by the courts or the SEC. Id. at 83,940.

82. SEC Securities Exchange Act Release No. 9267, at 80,519 (footnote omitted).

83. Id. at 80,520.

"in an equal position in the market place."[84] Apparently, everyone who attended the luncheon could have violated the rule if the other elements were present. Therefore, although the Commission decided that knowledge by fifty professional investors is not public knowledge, the decision does not indicate at what point information would be deemed public in a case where the data was more widely disseminated. Perhaps, as suggested by Commissioner Smith in his concurring opinion, the majority's definition of what is non-public means anything short of a public announcement.[85]

The second element of the SEC's outline of a 10b-5 violation was that the tippee "knew or had reason to know that the information was non-public and had been obtained improperly . . . ."[86] This scienter element was necessary in view of the SEC's extension of the scope of Rule 10b-5 to include tippees.[87] The SEC did not include the requirement of proving a relationship between the corporation and the tippee. This exclusion is more of a clarification than a step in a new direction. In *Cady, Roberts*, the relationship required was one which gave access to inside information from the corporation, not a technical relationship with the corporation *per se*.[88] The SEC stated essentially the same thing in *Investors Management*, although now no relationship need be alleged at all.[89] The Commission has clarified the relationship question by holding that "one who obtains possession of material, non-public corporate information, which he has reason to know emanates from a corporate source . . . *acquires a relationship* with respect to that information . . . ."[90]

Therefore, no actual connection or tie with the corporation need be proved over and above the possession of inside information and the knowledge, actual or constructive, of its non-publicity.[91] It is the possession and knowledge that is important, not the access to the information. In a footnote, the Commission commented that responsibility might even lie when one comes into possession innocently and then uses the information, if he has reason to know it is intended to be confidential.[92] The SEC did explain, however, that the more remote the defendant from the corporation, the greater the burden in proving the requisite knowledge on his part, and that this "requisite knowledge" would be

84. Id.

85. Id. at 80,524 (concurring opinion). In dictum, the court in Texas Gulf Sulphur lent strength to this "public announcement" theory. The court stated that, "at the minimum [the defendant] should have waited until the news could resonably have been expected to appear over the media of widest circulation, the Dow Jones board tape. . . ." 401 F.2d at 854. The Commission in Cady, Roberts utilized a similar theory. 40 S.E.C. at 915.

86. SEC Securities Exchange Act Release No. 9267, at 80,520.

87. See id.

88. See notes 43-49 supra and accompanying text.

89. SEC Securities Exchange Act Release No. 9267, at 80,520.

90. Id. (emphasis added).

91. This broadening of the coverage of "any person" was foreshadowed in Texas Gulf Sulphur, where the court held that any one in possession of material information came under the rule. 401 F.2d at 848; see Sandler & Conwill, Texas Gulf Sulphur; Reform in the Securities Marketplace, 30 Ohio St. L.J. 225, 238-39 (1969).

92. SEC Securities Exchange Act Release No. 9267, at 80,519 n.18.

determined by "an examination of all the surrounding circumstances."[93] Consideration should be given to the nature of the information, how it was obtained, who was the informant, and the tippee's sophistication in the area.[94] Employing this rationale, the Commission concluded that the defendants in this case possessed the requisite knowledge since the information was specific, all the defendants had a high degree of sophistication concerning securities, and they all knew the informant was an underwriter for the planned Douglas debenture.[95] This new test is definite, and yet can flex with different situations.[96] For example, harsh results may be avoided if courts in subsequent actions follow the SEC's guideline in requiring a heavy burden of proof where tippees appear to be remote from the source of information.[97] Now Rule 10b-5 can cover any person, insider or tippee, who has possession of inside information and knows or has reason to know of its corporate source or that it was obtained improperly.[98]

Finally, the SEC discussed its third element—that the information be a factor in the defendant's investment decision[99]—very briefly. The Commission simply applied the inference which arises when one sells or buys stock having knowledge of inside information,[100] and stated that the respondents had failed to rebut this inference.[101]

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93. Id. at 80,520.

94. Id. at 80,520-21.

95. Id. at 80,521.

96. The majority was concerned about a potential situation involving, e.g., industrial espionage or commercial bribery, and their construction of the statute was intended to include such cases. Id. at 80,519 n.18.

97. Id. at 80,521.

98. In a concurring opinion, Commissioner Smith cautioned against this broadening of the coverage of Rule 10b-5. He argued that the law should focus on the people having some relationship with the corporation—its "insiders and their privies"—and not mere possession. Id. at 80,523 (concurring opinion); see In re Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961). Otherwise, the majority's holding could become too broad to be workable. Smith felt that the tippee must at least know that the source of the information was the corporation and "that the material non-public information became available to them in breach of a duty owed to the corporation not to disclose or use [it]. . . ." SEC Securities Exchange Act Release No. 9267, at 80,521. The Commissioner concurred in holding the defendants liable, however, since the defendants knew of the relationship between Merrill, Lynch and Douglas (i.e. the corporate source), and Smith considered this element essential to the defendant's violation. In essence, Smith wanted to return to a rule similar to that of Cady, Roberts where some semblance of a corporate relationship was required. This criticism by Commissioner Smith has been suggested by one well known commentator. Painter 708-09. Painter suggested that to be covered by Rule 10b-5, a person needs more than mere possession of non-public facts, he needs "possession plus knowledge, actual or constructive, of [the] company source, or knowledge that the information comes from someone in an 'access' relationship to a company source. . . ." Id. at 709.

99. SEC Securities Exchange Act Release No. 9267, at 80,522.

100. See notes 63-65 supra and accompanying text. According to this inference, when a person possesses inside information, it is deemed to be a factor in his decision if he immediately changes his position upon receipt of such information. See note 65 supra.

101. SEC Securities Exchange Act Release No. 9267, at 80,522. The Commission noted

By expressly holding that all tippees may be subject to section 10(b) and Rule 10b-5, the SEC has made a logical and welcome advance from the rationale employed in earlier cases. Moreover, by expressly including tippees within the scope of 10(b) and 10b-5,[102] the SEC has brought another area of potential abuse under the strict anti-fraud provisions of the securities laws. Since a tippee can take unfair advantage of his superior knowledge in a securities transaction as easily as a traditional insider can, the decision will certainly further the congressional policy against all stock manipulations. Morever, the SEC was able to effectuate this policy without radically departing from prior case law. The express inclusion of tippees, who have no formal connection with the corporation, advances rather than contradicts the rationale of cases like *Cady, Roberts, Ross v. Licht* and *Texas Gulf Sulphur.*

The SEC's three-step formula for evaluating possible 10b-5 violations should also serve the intent of Congress[103] by furnishing federal judges with an easily ascertainable standard by which they may conclude sooner and with a greater degree of certainty whether a particular set of facts amounts to unlawful conduct. Again, the SEC wisely adhered to the spirit of previous decisions in arriving at its formula, as most of the elements are at least suggested by prior cases. The Commission's formula is a successful attempt to integrate many factors which courts have been considering in interpreting Rule 10b-5 as a standard of wide application. Therefore, *Investors Management* is a welcome continuation of the judicial trend to stretch the borders of Rule 10b-5[104] to include the innumerable "manipulative or deceptive device[s] or contrivance[s]"[105] in securities transactions, which Congress sought to abolish. Moreover, this

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that the hearing examiner had dismissed the proceedings with respect to one respondent (Investors Management Co., SEC Administrative Proceeding File No. 3-1680 (June 26, 1970) [1969-70 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,832, at 83,961), crediting its defense that the employee who received the Merrill, Lynch information did not inform his superior that that information constituted the basis of his recommendation to sell the firm's Douglas holdings. Id. n.28. However, the Commission cautioned that "in future cases we [will] view as suspect and subject to close scrutiny a defense that there was no internal communication of material non-public information and its source by a member of a broker-dealer firm or other investment organization who received it, where a transaction of the kind indicated by it was effected by his organization immediately or closely thereafter." Id.

102. Id. at 80,519.

103. " 'The concept of a free and open market for securities necessarily implies that the buyer and seller are acting in the exercise of enlightened judgment as to what constitutes a fair price. Insofar as the judgment is warped by false, inaccurate, or incomplete information regarding the corporation, the market price fails to reflect the normal operation of supply and demand.' " SEC Securities Exchange Act Release No. 9267, at 80,517, quoting S. Rep. No. 1455, 73d Cong., 2d Sess. 68 (1934).

104. This trend has been followed in such recent cases as Chasins v. Smith, Barney & Co., 438 F.2d 1167 (2d Cir. 1970); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); Hogan v. Teledyne, Inc., 328 F. Supp. 1043 (N.D. Ill. 1971); Gould v. American Hawaiian S.S. Co., 319 F. Supp. 795 (D. Del. 1970).

105. Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970); see Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970).

trend indicates that the federal courts are likely to accept the SEC's formulation as a rule of thumb for future decisions.[106]

Securities Regulation—Investment Company Act of 1940—Mutual Funds—Investment Adviser's Sale of Influence to Secure Appointment of Successor Held Breach of Common Law Fiduciary Obligations and Section 15(a).—Plaintiffs were shareholders of the Lazard Fund, Inc., a mutual fund registered under the Investment Company Act of 1940.[1] In 1967, Lazard Freres & Co., an investment banking firm which had organized the Fund and had thereafter acted as its adviser, sought to terminate its advisory contract.[2] To achieve this end it entered into a series of agreements with Dun & Bradstreet, Inc. The first of these provided for the replacement of Lazard as adviser by a Dun & Bradstreet subsidiary.[3] In a separate agreement it was specified that Lazard would receive 75,000 shares of Dun & Bradstreet common stock in return for certain continuing advisory services and for a period of noncompetition in the mutual fund industry. This exchange was conditioned, however, upon shareholder approval of the new advisory contract, as required by section 15(a) of the Act.[4] Approval was thereafter secured and the agreements effected. Plaintiffs brought this derivative action for an accounting, alleging that the value of the Dun and Bradstreet common stock[5] was far in excess of that of

106. See cases cited note 104 supra; accord, Superintendent of Ins. v. Bankers Life and Cas. Co., 404 U.S. 6 (1971).

1. Act of Aug. 22, 1940, ch. 686, tit. I, 54 Stat. 789, as amended, 15 U.S.C. § 80a (1970).

2. Rosenfeld v. Black, 445 F.2d 1337, 1339 (2d Cir. 1971) petition for cert. filed sub nom. Lazard Freres & Co. v. Rosenfeld, 40 U.S.L.W. 3321 (U.S. Dec. 10, 1971) (No. 71-771). At this time the Fund was experiencing a shrinkage due to accumulating redemptions. Lazard felt that these losses could be offset, and the best interests of Fund shareholders thereby advanced, by a continuous offering of Fund shares. As it was not in keeping with Lazard's "traditional policies" to establish the organization necessary to carry out such a project, it accordingly decided to withdraw altogether from the mutual fund industry. Id.

3. The mechanics of this replacement were as follows: Moody's Investors Service, Inc., a wholly-owned subsidiary of Dun & Bradstreet, Inc., would organize Moody's Capital Fund, Inc., a shell corporation with nominal capital, which would be merged with the Fund on a share-for-share basis; the new fund's adviser would be Moody's Advisors & Distributors, Inc., which was in turn a wholly-owned subsidiary of Moody's Investors Service, Inc. Id.

4. Section 15 provides in part that "[i]t shall be unlawful for any person to serve or act as investment adviser of a registered investment company, except pursuant to a written contract . . . approved by the vote of a majority of the outstanding voting securities of such registered company . . . ." 15 U.S.C. § 80a-15(a) (1970). Section 2(a)(28) of the Act defines the term person to include "a natural person or a company." Id. § 80a-2(a)(28) (1970).

5. Plaintiffs' allegations that Dun & Bradstreet, Inc. common stock was selling over the counter for more than $37 per share at the time of the signing of the agreements was not disputed. 445 F.2d at 1340. Its market value of nearly $3,000,000, or $600,000 per year for the five year period of noncompetition, is compared in plaintiffs' appeal brief to the $500,000

Lazard's obligations and that the stock was actually given in consideration of Lazard's assistance in bringing about the appointment of the new adviser—in effect a sale of office.[6] The district court granted summary judgment upon defendants' motion.[7] The United States Court of Appeals for the Second Circuit reversed and remanded, holding that a sale of influence by an investment adviser in obtaining shareholder approval of its successor violates common law fiduciary duties which were impliedly incorporated into section 15(a) of the Investment Company Act. *Rosenfeld v. Black*, 445 F.2d 1337 (2d Cir. 1971), *petition for cert. filed sub nom. Lazard Freres & Co. v. Rosenfeld*, 40 U.S.L.W. 3321 (U.S. Dec. 10, 1971) (No. 71-771).

It is well settled that with respect to mutual fund shareholders, the investment adviser stands as a fiduciary.[8] However, in the words of the late Mr. Justice Frankfurter, "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. . . . What obligations does he owe as a fiduciary?"[9] Those obligations owed by the investment adviser are found in the common law by analogizing the adviser's role to that of the trustee, partner or joint venturer, and corporate director.[10] They are also found in the Investment Company Act to the extent that it imposes new duties, and incorporates those which existed prior to its enactment.[11]

A reading of the reports of both houses on the hearings which preceded the Act's enactment reveals congressional concern with, among other abuses, the "trafficking in control" of investment companies which had by that time become flagrant.[12] This concern is reflected in the policy statement of the Act,

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which had been Lazard's average annual advisory fee. Brief for Appellants at 8, Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971). The immediate value of the shares to Lazard was reduced somewhat, however, by virtue of an escrow arrangement which provided that the shares would be released in agreed upon installments and that they would not earn dividends until their release. 445 F.2d at 1340.

6. Id. at 1341-42. Plaintiffs also made proxy fraud claims alleging that defendants' proxy statement did not fairly summarize the agreement between Dun & Bradstreet, Inc. and Lazard in that it had failed to represent that the 75,000 shares of common stock were being passed to Lazard at least in part as consideration for the use of its influence, and in that the presentation of the shares as having only $1 par value "not only gave the stockholders no conception of how much Lazard was obtaining but tended to mislead them." Id. at 1349.

7. Rosenfeld v. Black, 319 F. Supp. 891 (S.D.N.Y. 1970), rev'd, 445 F.2d 1337 (2d Cir. 1971).

8. See, e.g., SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191 (1963), citing Professor Loss' reference to "the delicate fiduciary nature of an investment advisory relationship." 2 L. Loss, Securities Regulation 1412 (2d ed. 1961). See also SEC v. Insurance Securities, Inc., 254 F.2d 642, 650 (9th Cir.), cert. denied, 358 U.S. 823 (1958).

9. SEC v. Chenery Corp., 318 U.S. 80, 85-86 (1943).

10. See, e.g., H. Henn, Corporations § 235 (2d ed. 1970).

11. See Greene, Fiduciary Standards of Conduct Under the Investment Company Act of 1940, 28 Geo. Wash. L. Rev. 266, 269 & n.9 (1959).

12. See, e.g., Hearings on S. 3580 Before a Subcomm. of the Sen. Comm. on Banking and Currency, 76th Cong., 3d Sess. pt. 1, at 38 (1940) (statement of Robert E. Healy, Comm'r, SEC); S. Rep. No. 1775, 76th Cong., 3d Sess. 7-8 (1940); H.R. Rep. No. 2639,

section 1(b), subsection 6 of which declares that the interests of investors are adversely affected "when the control or management [of investment companies] is transferred, without the consent of their security holders . . . ."[13] Section 15 therefore mandates a written advisory contract which "provides, in substance, for its automatic termination in the event of its assignment"[14] by the investment adviser. Such contracts must be approved by the shareholders of the investment company.[15] Beyond these provisions, the Act is devoid of explicit reference to the transfer of advisory contracts. Apparently the sentiment in Congress was that given these safeguards, advisory contracts would cease to be marketable.[16] In recent years, however, judicial[17] and scholarly[18] attention has focused upon an increasing number of transactions in which "sales" are alleged to have occurred. In this context essentially two positions have evolved. Proponents of the first argue that in any case of an alleged sale, whether of the advisory office itself[19] or of influence[20] in securing the approval of an advisory successor, the only matter cognizable under the Act is the fact of approval.[21] As the district court said in granting summary judgment in the instant case: "[W]here . . . a majority of the stockholders approve a new advisory contract . . . the management's conduct in arranging such a substitution does not violate the Act, regardless how it is labelled."[22] Opponents of this theory, on the other hand,

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76th Cong., 3d Sess., 7-9 (1940). See generally SEC, Report on Investment Trusts and Investment Companies pt. III (1940).

13. 15 U.S.C. § 80a-1(b)(6) (1970).

14. Id. § 80a-15(a)(4) (1970). The term assignment includes "any direct or indirect transfer . . . of a contract . . . by the assignor, or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor . . . ." Id. § 80a-2(a)(4) (1970).

15. Id. § 80a-15(a) (1970).

16. See generally Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. (1940).

17. See SEC v. Insurance Securities, Inc., 254 F.2d 642, 651 (9th Cir.), cert. denied, 358 U.S. 823 (1958); Goodman v. Von Der Heyde, [1969-1970 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,541, at 98,490 (S.D.N.Y. Dec. 22, 1969) (mem.); Rome v. Archer, 41 Del. Ch. 404, 197 A.2d 49 (Sup. Ct. 1964); Krieger v. Anderson, 40 Del. Ch. 363, 182 A.2d 907 (Sup. Ct. 1962).

18. See, e.g., Comment, Termination of Management Contracts Under The Investment Company Act of 1940, 63 Colum. L. Rev. 733 (1963), wherein the commentator states: "Transactions in control are becoming more commonplace and the efficacy of the termination provisions will undoubtedly attract increasing attention." Id. at 742 (footnote omitted).

19. A sale of the advisory office itself was alleged in SEC v. Insurance Securities, Inc., 254 F.2d 642 (9th Cir.), cert. denied, 358 U.S. 823 (1958). See text accompanying notes 36, 37 & 38 infra.

20. While plaintiffs had framed their complaint in terms of a sale of office, the court in Rosenfeld v. Black rendered its decision with respect to a sale of influence. See text accompanying notes 1-7 supra.

21. See, e.g., Jaretzki, The Investment Company Act: Problems Relating to Investment Advisory Contracts, 45 Va. L. Rev. 1023, 1034-35 (1959).

22. 319 F. Supp. at 897.

maintain that, as fiduciaries, investment advisers are required to abstain from certain kinds of conduct while assisting in the determination of their successors.[23] They claim that a "narrow and preemptive view" of the Act, such as that expressed above, would abrogate the common law rights of shareholders which the Act, as remedial legislation, should be liberally construed to incorporate.[24] Advocates of this view point to subsection 2 of section 1(b) which states that the interests of investors are likewise adversely affected

> when investment companies are organized, operated, [and] managed . . . in the interests of directors, officers [and] investment advisers . . . rather than in the interests of all classes of such companies' securities holders.[25]

A sale of office or of influence, it is maintained, is an instance of this sort of impropriety, and one which the Act ought to be interpreted to eliminate.[26]

The controversy itself is of fairly recent origin.[27] In 1942 the Securities and Exchange Commission issued a release[28] stating that receipt of consideration for the transfer of an advisory contract, whatever the form of the transaction, would constitute a "gross abuse of trust" under section 36[29] of the Act. Not until 1956, however, was such a transfer challenged under that section.[30]

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23. 445 F.2d at 1345; cf. Comment, Mutual Funds and the Investment Advisory Contract, 50 Va. L. Rev. 141, 150-55 (1964).

24. Comment, Protecting the Interests of Mutual-Fund Investors in Sales of Management-Corporation Control, 68 Yale L.J. 113, 116 (1958); see Eisenberg & Phillips, Mutual Fund Litigation—New Frontiers for the Investment Company Act, 62 Colum. L. Rev. 73, 101-04 (1962); Greene, Fiduciary Standards of Conduct Under the Investment Company Act of 1940, 28 Geo. Wash. L. Rev. 266, 269-72 (1959); Comment, Termination of Management Contracts Under the Investment Company Act of 1940, 63 Colum. L. Rev. 733, 741-42 (1963); Note, 13 Sw. L.J. 376, 378-9 (1959).

25. 15 U.S.C. § 80a-1(b)(2) (1970). This section is cited by the proponents of liberal application of section 15 and section 36 remedies. See note 24 supra.

26. See note 24 supra. Section 1(b) concludes with the declaration that the "policy and purposes of this subchapter, in accordance with which the provisions of this subchapter shall be interpreted, are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors." 15 U.S.C. § 80a-1(b) (1970).

27. In fact, mutual fund litigation on the whole is a phenomenon of the recent past. See Eisenberg & Phillips, supra note 24, at 74.

28. Opinion of the General Counsel, Investment Company Act Release No. 354 (May 11, 1942).

29. Section 36, as it then read, provided that: "The Commission is authorized to bring an action . . . alleging that a person serving or acting in one or more of the following capacities has been guilty . . . of gross misconduct or gross abuse of trust in respect of any registered investment company for which such person so serves or acts: (1) as . . . investment adviser . . . ." Act of Aug. 22, 1940, ch. 686, tit. 1, 54 Stat. 789, 841, as amended, 15 U.S.C. § 80a-35 (1970).

30. SEC v. Insurance Securities, Inc., 146 F. Supp. 778 (N.D. Cal. 1956), aff'd, 254 F.2d 642 (9th Cir.), cert. denied, 358 U.S. 823 (1958).

Indeed, until that date, with the exception of *Aldred Investment Trust v. SEC*,[31] a First Circuit case decided in 1945, no court had ever applied section 36.[32] In *Aldred*, the trustees of a common law trust were found guilty of "gross abuse of trust" for having surreptitiously altered their investment policy in order to acquire controlling interest in a race track. The court stated that section (1)(b) of the Act "in effect codifies the fiduciary obligations placed upon officers and directors of investment companies"[33] and that such fiduciary obligations had been calculatedly denied.[34] Consequently, it was held that the defendants could properly be enjoined from serving as officers and trustees, and further, that the appointment of a receiver was appropriate, since section 36 "invokes the equity power of the Federal Court . . . to do justice and grant full relief."[35]

The SEC seized upon this language in *SEC v. Insurance Securities, Inc.*,[36] alleging that the sale of a controlling block of shares by the corporate adviser of a mutual fund for a premium far above the net asset value of shares transferred was violative of "historic equitable principles" and hence—under the authority of *Aldred*—a "gross abuse of trust" within the meaning of section 36.[37] The Ninth Circuit, while not commenting directly upon the *Aldred* case, assailed the SEC's position upon two fronts. The court first dealt with the two equitable principles allegedly violated by the defendants:

> One of these is that a personal trustee, corporate officer or director, or other person standing in a fiduciary relationship with another, may not sell or transfer such office for personal gain.
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> . . . .
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> The second principle . . . is that a person occupying a fiduciary relationship with another will not be permitted to exploit such relationship for personal gain, and in such manner as to deprive the other of assets to which he is entitled.[38]

Discussing these equitable principles, the court reasoned first that, in view of the automatic termination clause in the Act (section 15(a)(4)) the office of investment adviser was categorically incapable of being sold or transferred—for any attempt to do such would end the contract and its accompanying obligations.[39]

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31. 151 F.2d 254 (1st Cir. 1945), cert. denied, 326 U.S. 795 (1946).

32. 146 F. Supp. at 781 n.9. The court stated that "[t]he only case cited by SEC involving the application of Section 36 (and indeed the only case we have been able to find) is Aldred Investment Trust v. Securities and Exchange Comm. . . ." Id. (citation omitted).

33. 151 F.2d at 260.

34. Id.

35. Id. at 261.

36. 254 F.2d 642 (9th Cir.), cert. denied, 358 U.S. 823 (1958).

37. Id. at 649.

38. Id. at 650.

39. Id. This argument has been characterized by the SEC as "unrealistic". Report of the SEC on Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 150-52 (1966). As one commentator has put it, although "operation of

Further, the court found that the price received for the controlling stock in excess of its net asset value could not constitute an asset of the fund.[40]

In its other approach, the court concluded that section 36 was inapplicable because section 15, which deals expressly with the matter of advisory contracts, did not forbid the questioned conduct.[41] In turn the court assumed that section 15 had not been violated because, like section 1(b), it was entirely silent as to the "price paid for the transfer of control."[42]

With respect to this argument, absence of affirmative language did not forestall the Second Circuit, sitting en banc, from finding in *Brown v. Bullock*[43] that section 15 compels a standard of fiduciary conduct not lower than that "prevailing generally."[44] The court based this conclusion upon section 1(b)(2)'s declared intent to reverse conditions whereby "investment companies are organized, operated, managed . . . in the interest of . . . investment advisers . . . rather than in the interest of all classes of such companies' security holders . . . ."[45] The court held that the requirement of section 15(a) of at least annual directorial approval (in lieu of that of a majority of the outstanding security holders) of the advisory contract[46] requires "not merely ceremonial performance of the act of approval but its performance in a meaningful fashion . . . ."[47]

Much of the reasoning of *Brown* was carried into the *Rosenfeld* case. Recalling its finding in *Brown* of an implied "uniform federal standard of directorial responsibility"[48] under provisions of section 15, the Second Circuit stated in *Rosenfeld* that:

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section 15(a)(4) . . . theoretically ended the fiduciary relationship . . . the renewal of the contract was a manifestation of the dominance and control over the investors upon which the director-defendants' fiduciary status was based." Comment, Protecting the Interests of Mutual-Fund Investors in Sales of Management-Corporation Control, 68 Yale L.J. 113, 125 (footnote omitted); see Note, The Mutual Fund Industry: A Legal Survey, 44 Notre Dame Law. 732, 962 (1969).

40. 254 F.2d at 651; see text accompanying notes 57 & 58 infra.

41. 254 F.2d at 649 n.12. The court said: "Under § 15 of the act, a service contract which had been automatically terminated under paragraph (a) (4) can be reinstated by a vote of the investors. No exception is made in the case of an assignment in connection with which a substantial consideration was received in excess of net asset value. If this is permissible under § 15, it ought not to be subject to injunctive restraint under § 36." Id.

42. 254 F.2d at 649.

43. 294 F.2d 415 (2d Cir. 1961) (en banc).

44. Id. at 421.

45. 15 U.S.C. § 80a-1(b)(2) (1970).

46. Section 15(a)(2) provides that the service contract "shall continue in effect for a period more than two years from the date of its execution, only so long as such continuance is specifically approved at least annually by the board of directors or by vote of a majority of the outstanding voting securities of such company . . . ." Id. § 80a-15(a)(2).

47. 294 F.2d at 420-21.

48. 445 F.2d at 1345.

[i]t is wholly consistent with that view to say that when Congress [in § 15(a)] required stockholder approval of a contract with a new investment adviser, it intended that the retiring adviser's use of the proxy machinery to procure appointment of the new adviser must conform to the standards of abnegation of personal gain that equity had long imposed.[49]

Hence the court's application of what it referred to as "the established prophylactic rule."[50] As its terms suggest, its rationale is one of prevention:[51] "Possibility of profit" is foreclosed the adviser because given such possibility, "the retiring adviser might recommend a successor who [is] less qualified or more expensive than other candidates, and who might be on the lookout for ways to recoup his 'succession fee' at the expense of the Fund."[52]

Actually, the rule employed by the *Rosenfeld* court is one which equity had long imposed upon corporate directors[53] and trustees.[54] The decision in *Rosenfeld* breaks new ground in the establishment of, in this instance, a trust relationship as between the investment adviser and fund shareholders. Here the adviser is conceived of as managing fund investments "quite as a trustee would do."[55] Consequently he is found to owe a trustee's obligations.[56] A concomitant of this finding is the court's refutation of the argument advanced in *Insurance Securities* that the "premium" paid for controlling shares was not improper because it was not a fund *asset*.[57] In *Rosenfeld* the question of whose asset the adviser receives is considered inapt.

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49. Id.

50. Id.

51. The court pointed out that the prophylactic rationale is one of "removing the temptation for the outgoing adviser to use his influence to recommend a successor, one of whose qualifications is willingness to compensate the retiring adviser for his help . . . ." Id. at 1346 n.12. As another court has put it, the rule "does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation." Guth v. Loft, Inc., 23 Del. Ch. 255, 270, 5 A.2d 503, 510 (Sup. Ct. 1939).

52. 445 F.2d at 1345 (footnote omitted).

53. See, e.g., Essex Universal Corp. v. Yates, 305 F.2d 575 (2d Cir. 1962); Kratzer v. Day, 12 F.2d 724 (9th Cir. 1926); Snyder v. Epstein, 290 F. Supp. 652 (E.D. Wis. 1968); Caplan v. Lionel Corp., 20 App. Div. 2d 301, 246 N.Y.S.2d 913 (1st Dep't), aff'd mem., 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964); Porter v. Healy, 244 Pa. 427, 91 A. 428 (1914); Gaskell v. Chambers, 53 Eng. Rep. 937 (Ch. 1858).

54. See, e.g., Forbes v. McDonald, 54 Cal. 98 (1876); Sugden v. Crossland, 65 Eng. Rep. 620 (Ch. 1856).

55. 445 F.2d at 1343 (footnote omitted).

56. See Greene, Fiduciary Standards of Conduct Under The Investment Company Act of 1940, 28 Geo. Wash. L. Rev. 266, 269 (1959), wherein the author states with reference to section 1(b) that "the basic tenets underlying the law of trusts and trusteeship can be unmistakably recognized in the admonition of this declaration of policy." Id.

57. 445 F.2d at 1343. The "premium" was characterized in the Ninth Circuit's opinion

It is wholly immaterial that the prospect of receiving future management fees if it had continued as an adviser would have been an asset of Lazard rather than of the Fund; the same would be true of a trustee's right to receive future commissions . . . .[58]

Moreover, the standard of conduct prescribed is found to be mandated by section 15 rather than by section 36.[59] This comes as somewhat of a surprise, for in the past the argument had always been waged in terms of the latter provision.[60] "Words and remedies," the court points out, "such as [those in section 36] were clearly addressed to highly reprehensible conduct . . . we would not dream of suggesting, much less holding, that [the defendants'] actions were so culpable."[61] Assuming that the conduct countenanced in *Insurance Securities* was no more "reprehensible" than that prohibited in *Rosenfeld*, it would seem logical to conclude that *in terms of section 36* a similar result would have been reached in the Second Circuit had the *Insurance Securities* facts been before that court.[62] Beyond this, however, and despite pains taken by the Second Circuit to distinguish the two cases,[63] they seem irreconciliable.

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as a reflection of "the value which the [adviser] does and will derive from the [advisory] fees paid, and expected to be paid, by Trust Fund." 254 F.2d at 646 (footnote omitted).

58. 445 F.2d at 1343.

59. Speaking of the SEC's recent Investment Company Report, the court acknowledged that "[t]he SEC's belief that the unamended Act did not adequately protect fund shareholders against sales of the management organization rested upon a realistic assessment of its own power under § 36 . . . ." Id. at 1348.

60. Indeed, plaintiffs in both the Insurance Securities and Rosenfeld cases sought recovery under the Act solely in terms of section 36. 254 F.2d at 644; Brief for Appellants at 24, Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971). Although section 36, both in its original form and as amended, provides only that "[t]he Commission is authorized to bring an action . . ." 15 U.S.C. § 80a-35(a) (1970) that section and others in the Act have been construed as implying a private right of action for fund shareholders. See Brown v. Bullock, 294 F.2d 415 (2d Cir. 1961); Schwartz v. Eaton, 264 F.2d 195 (2d Cir. 1959); Taussig v. Wellington Fund, Inc., 187 F. Supp. (D. Del. 1960), aff'd, 313 F.2d 472 (3d Cir.), cert. denied, 374 U.S. 806 (1963); Cogan v. Johnston, 162 F. Supp. 907 (S.D.N.Y. 1958). Contra, Brouk v. Managed Funds, Inc., 286 F.2d 901 (8th Cir. 1961), vacated on other grounds, 369 U.S. 424 (1962).

61. 445 F.2d at 1346 (citations omitted).

62. The court's analysis and findings with respect to section 36 of the Act are academic not only because higher standards of conduct are found to be imposed elsewhere in the Act but also because, as the court notes, the section had been amended by the time its decision was handed down. Id. at 1348. Section 36 reads, in its present form, as follows: "The Commission is authorized to bring an action . . . alleging that a person serving or acting in one or more of the following capacities has engaged . . . in any act or practice constituting a breach of fiduciary duty involving personal misconduct in respect of any registered investment company for which such person so serves or acts—(1) as . . . investment adviser . . . ." 15 U.S.C. § 80a-35(a) (1970). With respect to the amended section, the court speculated that "Congress could well have thought it had handled the problem created by the Insurance Securities decision by expanding the SEC's powers under § 36 . . . ." 445 F.2d at 1348.

63. The Rosenfeld court stated that "we do not find it necessary at this time to determine

The *Rosenfeld* decision speaks throughout of "profit" received by the retiring adviser in exchange for the exercise of influence, whereas it has been argued that influence was not a factor in *Insurance Securities*.[64] Even assuming the truth of this, if it is postulated that control of the proxy machinery is virtually tantamount to acquisition of shareholder approval of the advisory contract of the controlling party,[65] then this distinction disappears. What is being paid for in both cases is simply the opportunity to accede to the managerial position with its concurrent advantages. This so, there remains, as between the two cases, only that distinction which consists of the manner in which the retiring adviser's "profit" is distributed to it. Under the prophylactic rule, however, if one simply may not profit, the question of *how* one may profit is of course not reached.[66] It seems therefore that the *Rosenfeld* decision leaves little chance for retiring management to derive compensation for the " 'elements of value in the [managerial] relationship which they may have built up over the years' "—[67] a condition which has caused, to say the least, concern in the mutual fund industry.[68] Perhaps this reaction may best be met with the wisdom of one whose

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whether the difference between a transaction such as that here before us and the sale of a controlling block in a corporate adviser at a price reflecting the expectation of profits under a renewed contract with the corporation which the sellers were to aid in procuring, is sufficiently substantial to warrant a different result in this latter case . . . ." 445 F.2d at 1346.

64. Plaintiffs in the Rosenfeld case made this argument in order to distinguish the Insurance Securities case and thereby avoid the obvious onus of falling under its rule. Brief for Appellants at 28-29, Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971). However, it does appear that influence was in fact exercised by the outgoing adviser in Insurance Securities. See Comment, Protecting the Interests of Mutual-Fund Investors in Sales of Management-Corporation Control, 68 Yale L.J., 113, 118 n.13 & n.16 (1958). The author states that "[t]he sale of control did not occur until after the transferors had utilized the investment organization's proxy machinery to frame the reinstatement issue, comment favorably upon the purchasers of control, solicit investor votes, and recommend the renewal of the service contract." Id. at 125 (footnote omitted).

65. According to Professor Loss, "[t]he widespread distribution of corporate securities with the concomitant separation of ownership and management, puts the entire concept of the stockholders' meeting at the mercy of the proxy instruments." 2 L. Loss, Securities Regulation 857-58 (2d ed. 1961) (footnote omitted).

66. The court in a note made reference to an article by Alfred Jaretzki, Jr., The Investment Company Act: Problems Relating to Investment Advisory Contracts, 45 Va. L. Rev. 1023, 1030-34 (1959), in which the author had explored "[s]ome difficulties in applying the principle prohibiting profit in the transfer of advisory office to the sale of controlling stock in a corporate investment adviser. . . ." The court characterized Professor Jaretzki's criticisms as "inapposite" even in a sale of stock situation because it had based its decision upon a "prophylactic rationale" rather than section 36. 445 F.2d at 1346 n.12.

67. 445 F.2d at 1347 (footnote omitted).

68. See N.Y. Times, Sept. 12, 1971, § 3, at 3, cols. 1-5, in which the situation was labelled "a new and fundamental crisis." According to the Times: "Analysts calculate that among the consequences potential damages could be assessed on the industry as a whole at upwards of $100-million." The Times also quoted SEC Chairman William J. Casey as having said that "if this decision stands so that anybody starting a new mutual fund or manage-

lead Judge Friendly has seen fit to follow; one whose oft repeated words bear repeating once again.

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.[69]

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ment company will have no prospect of building up any equity, I would think it would effectively stop people from starting new companies . . . ." Id.

69. Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, J.).