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Case Notes

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CASE NOTES

Civil Procedure—Res Judicata Held Inapplicable to Section 1983 Action Where Issues of Procedural Due Process Were Not Raised in Prior State Litigation—Plaintiff's probationary appointment as a teacher in the New York City public school system was terminated by the Board of Education for reasons of mental unfitness and incompetence. The Board had based its action on reports damaging to plaintiff submitted by the principal of his school and the findings of medical examinations conducted by staff psychologists and physicians. As a result of the Board's finding of mental unfitness, plaintiff was disqualified from teaching elsewhere in the school system. Plaintiff had unsuccessfully contested his firing in two separate state court proceedings,¹ alleging that the charges against him were without basis in fact and were motivated by the personal dislike of his former principal, who, he maintained, had chosen to pursue a vendetta against him. Thereafter, plaintiff brought suit in the District Court for the Eastern District of New York seeking reinstatement, back pay and damages, and asserting for the first time that he was denied procedural due process in that, prior to his discharge, written reasons were not given supporting the Board's action and an evidentiary hearing was not held. The suit was brought under 42 U.S.C. § 1983² which provides a civil remedy for the deprivation of federally guaranteed rights or privileges by one acting under color of state law. Res judicata was raised as a defense and the district court dismissed the complaint. The Court of Appeals for the Second Circuit reversed, holding that the defense-of res judicata was unavailable where procedural due process claims arising under section 1983 had not been previously litigated. *Lombard v. Board of Education*, 502 F.2d 631 (2d Cir. 1974).

Section 1983³ provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The congressional purposes of this section, as defined by the Supreme Court in *Monroe v. Pape*,⁴ were threefold: (1) to override certain kinds of state laws;

1. These proceedings were brought pursuant to N.Y. C.P.L.R. §§ 7801-06 (McKinney 1963), which permits an action to be brought against officers of the state. The final disposition of one of them has been reported. *Lombard v. Board of Educ.*, 40 App. Div. 2d 1081, 337 N.Y.S.2d 1003 (2d Dep't 1972) (mem.), leave to appeal denied, 31 N.Y.2d 648, 341 N.Y.S.2d 1027 (1973).

2. 42 U.S.C. § 1983 (1970).

3. *Id.*

4. 365 U.S. 167, 173-74 (1961) (Chicago policemen who abused their authority held to have acted "under color of" state law for purposes of § 1983 claims against them). This case is primarily responsible for § 1983's position as a major source of federal litigation. See Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983*, *Comity and the Federal Caseload*, 1973 *Law & Soc. Order* 557, 563. See generally Chevigny, *Section*

(2) to provide a federal remedy where state law was inadequate; and (3) to "provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."⁵ In addition, however, the Court, noting that the statute "is cast in general language,"⁶ gave broad scope to section 1983, stating: "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."⁷

Expressly relying on this statement, the court in *Lombard* refused to apply *res judicata*⁸ to procedural due process claims which had not been submitted to and decided by the state court.⁹ It was conceded that had the "constitutional issue . . . actually [been] raised in the state court . . . the litigant has made his choice and may not have two bites at the cherry."¹⁰ Nevertheless, the court did not view the problem as one of *res judicata*, despite the fact that section 1983 provides an alternative to the state forum, rather than a second forum, in which to litigate.¹¹ The court found three policy reasons for this holding.

1983 Jurisdiction: A Reply, 83 Harv. L. Rev. 1352 (1970); Note, Limiting the Section 1983 Action in the Wake of *Monroe v. Pape*, 82 Harv. L. Rev. 1486 (1969).

5. 365 U.S. at 174.

6. *Id.* at 183.

7. *Id.* see *McNeese v. Board of Educ.*, 373 U.S. 668, 671-72 (1963).

8. *Res judicata* (or claim preclusion, as it is sometimes called), and the related doctrine of collateral estoppel (issue preclusion), are methods of attaching finality to competent judicial judgments by precluding redundant litigation. *Res judicata* "provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' " *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) (citation omitted). However, where a new cause of action is alleged, and the parties are the same, the doctrine of collateral estoppel will bar relitigation of only those issues that were necessary to the determination of the prior suit. *Id.* at 597-98. The distinction between *res judicata* and collateral estoppel has been described by the Supreme Court: "[U]nder the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326 (1955). The court in *Lombard* discusses *res judicata*, since the plaintiff's complaint under § 1983 alleges essentially the same cause of action that was litigated in the state court. The applicability of collateral estoppel, however, is also discussed. 502 F.2d at 637. See note 32 *infra* and accompanying text. See also Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law*, 39 Mich. L. Rev. 1 (1940), for historical background. See generally McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims* (pt. II), 60 Va. L. Rev. 250, 251-59 (1974) [hereinafter cited as *Federalism and Section 1983*].

9. 502 F.2d at 635.

10. *Id.* at 636-37.

11. *Id.* at 636. If the federal issues could not have been raised in the prior action, *res judicata* cannot apply. *Robbins v. Police Pension Fund*, 321 F. Supp. 93, 97 (S.D.N.Y. 1970).

First, as indicated,¹² to require the plaintiff to raise his constitutional claim in the state action would be contrary to section 1983's goal of providing a supplementary federal remedy.¹³ Yet, the Supreme Court has never decided a case in which the plaintiff pursued a state court action to final judgment without raising constitutional questions and then attempted to litigate constitutional claims arising out of the same cause of action in federal court under section 1983.¹⁴ A state court, of course, has full power to hear all issues in dispute, including constitutional ones.¹⁵ The federal courts have almost uniformly applied *res judicata* to bar section 1983 actions brought subsequent to state court proceedings on the same cause of action.¹⁶

12. As a general rule, § 1983 "does not provide the springboard for an unhappy state litigant to raise his federal claims *de novo* in federal court." *PI Enterprises, Inc. v. Cataldo*, 457 F.2d 1012, 1015 (1st Cir. 1972) (civil rights suit to have town ordinance declared invalid precluded by a prior state adjudication of the constitutional issues). See *Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3282 (U.S. Nov. 2, 1974) (No. 74-524).

13. In line with the establishment of § 1983 as a supplementary federal remedy, the Supreme Court has abolished the requirement that state remedies must be exhausted prior to bringing a § 1983 suit. E.g., *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (dictum) (no exhaustion of state judicial remedies required for relief from violations of first and fourteenth amendment rights); *Damico v. California*, 389 U.S. 416 (1967) (constitutional challenge to state welfare law and regulations required no exhaustion of administrative remedies); *McNeese v. Board of Educ.*, 373 U.S. 668, 671-72 (1963) (no exhaustion of state administrative remedies required before seeking relief from school segregation). The Second Circuit has interpreted the Supreme Court decisions as requiring that adequate state administrative remedies must be exhausted prior to a § 1983 action. *Plano v. Baker*, No. 74-1527, at 98-99 (2d Cir. Oct. 11, 1974); *Blanton v. State Univ.*, 489 F.2d 377, 384 (2d Cir. 1973); *Eisen v. Eastman*, 421 F.2d 560, 567-69 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); see *Federalism and Section 1983*, at 271-76; Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. Chi. L. Rev. 537 (1974); Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 Colum. L. Rev. 1201 (1968). See also *The Supreme Court, 1973 Term*, 88 Harv. L. Rev. 210 n.42 (1974).

14. See generally *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973).

15. *Palmore v. United States*, 411 U.S. 389, 400-03 (1973); *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 479 (1936); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-41 (1816); cf. Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 Va. L. Rev. 1360 (1967). See generally ALI Study of the Division of Jurisdiction Between State and Federal Courts 163-69 (official draft 1965).

16. E.g., *Lovely v. Laliberte*, 498 F.2d 1261 (1st Cir. 1974), cert. denied, 43 U.S.L.W. 3306 (U.S. Nov. 25, 1974) (§ 1983 suit alleging deprivation of first amendment rights precluded by prior state action in which constitutional issues were not raised); *Francisco Enterprises, Inc. v. Kirby*, 482 F.2d 481 (9th Cir. 1973), cert. denied, 415 U.S. 916 (1974) (determination by state court of limited jurisdiction foreclosed bringing same cause of action under Civil Rights Act); *Johnson v. Department of Water & Power*, 450 F.2d 294, 295 (9th Cir. 1971) (*per curiam*), cert. denied, 405 U.S. 1072 (1972) (civil service employee contesting his discharge: "[W]here, as here, the same facts have been the subject of state actions and final judgments have been entered there, the principle of *res judicata* applies."); *Lackawanna PBA v. Balen*, 446 F.2d 52, 53 (2d Cir. 1971) (*per curiam*) (fourteenth amendment claims held barred by prior state adjudication: "The Civil Rights Act . . . does not permit a second bite at the cherry."); *Taylor v. New York City Transit Authority*, 433 F.2d 665 (2d Cir. 1970) (state judicial affirmance of administrative agency's

Second, the court reasoned that the choice of forum permitted by section 1983 should be applied flexibly so as to permit the state court to decide issues of state statutory construction and federal courts to decide issues involving constitutional rights.¹⁷ This proposition is sound insofar as it is the accepted practice of the federal court to retain jurisdiction when it is required to withhold adjudication of federal claims, under the abstention doctrine,¹⁸ until

discharge of city employee held to bar a subsequent due process claim under § 1983); *Scott v. California Sup. Ct.*, 426 F.2d 300, 301 (9th Cir. 1970) (per curiam) (§ 1983 suit: "California had jurisdiction and [complainant] lost his case there. . . . It is a clear situation of res judicata."); *Coogan v. Cincinnati Bar Ass'n*, 431 F.2d 1209 (6th Cir. 1970) (per curiam) (prior state court judgment that plaintiff's disbarment was valid foreclosed litigation under § 1983 of issues that were not raised in the prior action, but might have been); *Frazier v. East Baton Rouge Parish School Bd.*, 363 F.2d 861 (5th Cir. 1966) (per curiam) (teacher discharge case: § 1983 action barred by prior state suit even though constitutional issues were not litigated); *Mertes v. Mertes*, 350 F. Supp. 472 (D. Del. 1972), *aff'd*, 411 U.S. 961 (1973) (mem.) (procedural due process issues that could have been raised in prior state action barred under § 1983); cf. *Kabelka v. City of New York*, 353 F. Supp. 7 (S.D.N.Y. 1973) (discharged city employee: due process claims actually litigated in state proceeding held conclusive in § 1983 suit); *Morey v. Independent School Dist.*, 312 F. Supp. 1257 (D. Minn. 1969), *aff'd*, 429 F.2d 428 (8th Cir. 1970).

However, at least two cases have not applied res judicata to § 1983 claims where it would seem appropriate, preferring to view the issue as the narrower one of collateral estoppel despite the apparent identity of parties and claims. As a result, constitutional issues that could have been raised in the prior action were litigated under § 1983. *Miller v. Board of Educ.*, 452 F.2d 894 (6th Cir. 1971) (per curiam) (issue of whether plaintiff had constitutional right to public employment decided in federal court although it could have been raised in the state action); *Jenson v. Olson*, 353 F.2d 825 (8th Cir. 1965) (first amendment claims that could have been raised in prior action between the same parties nevertheless decided by federal court under § 1983); *accord*, *Chism v. Price*, 457 F.2d 1037, 1039 (9th Cir. 1972) (previously decided factual issues precluded, but constitutional issues not previously raised decided on the merits); *Avins v. Mangum*, 450 F.2d 932 (2d Cir. 1971) (dictum: collateral estoppel found applicable although res judicata would seem appropriate).

The Supreme Court has admitted in dictum that "res judicata has been held to be fully applicable to a civil rights action brought under § 1983." *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973) (citations omitted). However, Mr. Justice Brennan, dissenting in *Rodriguez*, expressed his doubts on this issue: "[I]n view of the purposes underlying enactment of the Act—in particular, the congressional misgivings about the ability and inclination of state courts to enforce federally protected rights . . . that conclusion may well be in error." *Id.* at 509 n.14 (Brennan, J., dissenting). See generally Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 Okla. L. Rev. 185 (1974).

17. 502 F.2d at 636.

18. The abstention doctrine, first formulated in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941), has been characterized as a "well-established procedure . . . aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. . . . In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Harrison v. NAACP*, 360 U.S. 167, 176 (1959). The abstention doctrine, in conjunction with the exhaustion requirement, see note 13 *supra*, may cause difficulties for the § 1983 plaintiff who seeks a federal forum and who raises

potentially dispositive state issues are decided by state courts.¹⁹ Nevertheless, in terms of judicial economy, the holding invites litigants not to raise constitutional issues in the state courts, thereby giving those litigants an extra bite at the "cherry [sic]."²⁰

Third, *Lombard* found res judicata inapplicable because to deny appellant a section 1983 cause of action at this juncture would leave him without a remedy, since his failure to raise constitutional issues in the state court action necessarily precluded him from appealing the state court judgment to the Supreme Court.²¹ Moreover, the court noted that while "other opinions which in language support an extension of the res judicata rule [they] did not involve a claim of deprivation of procedural due process . . ."²² There is, however, a recent Second Circuit holding to the contrary,²³ and besides, application of res judicata always precludes further litigation of the case.²⁴ Furthermore, there is no basis in law for placing procedural due process in an exalted position when other courts have applied res judicata principles in similar factual situations involving equally important constitutional rights.²⁵ While *Lombard* viewed the appellant as remediless,²⁶ in fact, as the court itself intimates,²⁷ he may have had a cause of action for malpractice against his attorney of record in the state court proceeding, for under prior law, the constitutional issues should have been raised in that action.²⁸

both federal and state issues. For a discussion of these difficulties in a § 1983 context and their effect on preclusion see Federalism and-Section 1983, at 265-71. See also H. Friendly, *Federal Jurisdiction: A General View* 95 (1973).

19. The court cited two cases that demonstrate the Second Circuit's treatment of the abstention doctrine: *Reid v. Board of Educ.*, 453 F.2d 238 (2d Cir. 1971) (proper action for district court in abstention situation was to retain jurisdiction pending state court determination of state issues); *Coleman v. Ginsberg*, 428 F.2d 767 (2d Cir. 1970) (retention of jurisdiction pending state court interpretation of state law better than dismissal of complaint).

20. 502 F.2d at 637. The *Fordham Law Review* Editors split five to five on the issue of whether the court intended to use the word "apple." See *Minutes of Meeting of the Board of Editors*, Nov. 1, 1974, at 15, col. 3 (R. Cirillo ed.); cf. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 *Harv. L. Rev.* 1190, 1240 n.206 (1974).

21. 502 F.2d at 636. Moreover, plaintiff had, in the state court action, asserted that his dismissal was arbitrary and capricious, *id.* at 635, the hallmarks of a due process allegation.

22. *Id.* at 636.

23. See note 28 *infra*.

24. "The [prior] judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); see *Tutt v. Doby*, 459 F.2d 1195, 1197 (D.C. Cir. 1972); *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.*, 430 F.2d 38, 45 (5th Cir. 1970).

25. E.g., *Lovely v. Laliberte*, 498 F.2d 1261 (1st Cir. 1974), cert. denied, 43 U.S.L.W. 3306 (U.S. Nov. 25, 1974) (freedom of speech); *Francisco Enterprises, Inc. v. Kirby*, 482 F.2d 481 (9th Cir. 1973), cert. denied, 415 U.S. 916 (1974) (freedom of association).

26. 502 F.2d at 636.

27. "[A]ppellant [may have] inadvertently or through his lawyer's mistake failed to raise the constitutional claim" *Id.*

28. In its opinion, the court in *Lombard* did not discuss *Taylor v. New York City Transit Authority*, 433 F.2d 665 (2d Cir. 1970). That case, decided in the same circuit as *Lombard*,

After eliminating the *res judicata* issue, the court then viewed the issue as whether appellant had "waived" his constitutional right to raise his federal claims in federal court.²⁹ "Waiver" requires proof of "an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived."³⁰ Treating the issue in these terms further encourages litigants to withhold their procedural due process claims in the state action and injects an element that is traditionally foreign to *res judicata* doctrine.³¹

The court then considered collateral estoppel (issue preclusion), and found the action not barred for the same reasons advanced for not applying *res judicata*. In addition, the court suggested that the state court decision upholding his discharge did not necessarily rest on a finding of mental incompetence,³² but that the state court holding in effect let stand a finding that he was mentally incompetent "without giving him an opportunity in *any* tribunal to confront his accusers in an evidentiary type of hearing."³³ Presumably, however, the state court proceedings did afford him precisely this opportunity,³⁴ even if the Board of Education hearing was, as the court avers,³⁵ less than fair.

specifically held that procedural due process claims not raised in the prior state proceeding were barred under the doctrine of *res judicata* in a § 1983 action. *Id.* at 668. Not only, therefore, did Taylor point up the consequences of not raising the constitutional claims in the state action, but it also conclusively showed that procedural due process claims do not enjoy a preferred position with respect to *res judicata*. See note 22 *supra* and accompanying text.

29. 502 F.2d at 636.

30. Ballentine's Law Dictionary 1356 (3d ed. 1969) (citation omitted). "Waiver" usually entails an informed choice. See, e.g., *United States ex rel. Williams v. Brantley*, No. 73-1883, at 5 (7th Cir. Aug. 29, 1974). For a discussion of waiver in habeas corpus contexts, see *Pope v. Swenson*, 395 F.2d 321, 322-24 (8th Cir. 1968).

31. The issue of "waiver" usually arises in cases where a party is alleged to have waived his right to seek relief on a particular legal theory because he had previously elected to pursue a remedy inconsistent with that theory. As such, waiver is not a *res judicata* principle, but rather falls under the rubric of election of remedies. See generally 1B J. Moore, *Federal Practice* ¶ 0.405, at 761-65 (2d ed. 1974). The question of waiver may also arise where a plaintiff's § 1983 complaint is dismissed for failure to exhaust state administrative remedies when those remedies are no longer available. See *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969), discussed in *Federalism and Section 1983*, at 293-95.

32. For collateral estoppel to apply, the issues must have been necessary to the holding in the prior action. *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876), approved, *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). Thus, even if an issue was not raised and litigated in the prior action, if it was necessarily assumed by the court's holding, further litigation thereon may be precluded.

33. 502 F.2d at 637.

34. Article 78 proceedings are brought before the New York Supreme Court, which is comprised of courts of general jurisdiction empowered to conduct full evidentiary trials. The fact that Lombard's petitions were denied without an evidentiary hearing does not mean he was denied the opportunity for one. Moreover, the state court judge, in denying one of Lombard's petitions, specifically stated: "The court is also of the opinion that the hearing accorded petitioner was proper" *Lombard v. Board of Educ.*, 502 F.2d at 635, quoting from the unreported state court denial of Lombard's petition. See also note 1 *supra*.

35. 502 F.2d at 637; see note 34 *supra*.

On the merits, the court acknowledged that since appellant did not have tenure, his expectation of continued employment was not a property interest protected by the due process clause of the fourteenth amendment.³⁶ Lombard was, however, deprived of a constitutionally protected liberty, it was held, in that the circumstances of his dismissal not only deprived him of further employment within the New York City school system but also imposed a "stigma" which "[i]f . . . unsupportable in fact . . . does grievous harm to appellant's chances for further employment, as indeed the record demonstrates, and not only in the teaching field."³⁷ This stigma was a result of the court's conclusion that Lombard's dismissal was based on the finding that Lombard was mentally unfit to teach.³⁸ The court relied on *Board of Regents v. Roth*³⁹ in stating:

[W]here the appellant's "good name, reputation, honor, or integrity is at stake" or "the State, in declining to re-employ [the respondent], imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities," . . . he may claim a deprivation of "liberty" under the due process clause of the fourteenth amendment.⁴⁰

On this basis, the court concluded that a full hearing, including the confrontation of adverse witnesses, was required. The case was remanded for a trial to determine whether or not Lombard's constitutional rights had been violated.⁴¹

By rejecting a mechanical application of res judicata principles in favor of a balancing test, the court in *Lombard* adopted a salutary approach towards reconciling the interests of litigants to the problems inherent in dual adjudicatory systems possessing concurrent jurisdiction. But the result the court reaches is weakened for several reasons. First, even for those section 1983 cases where procedural due process claims do in fact raise "fundamental" issues, there is no authority supporting the assertion that these claims merit special consideration denied to other equally "fundamental" claims.⁴² Second, broad statements to the effect that plaintiffs need only withhold their federal claims in state courts to be assured of a federal forum in a subsequent section 1983 action⁴³ are contrary to the great weight of authority and tend to

36. 502 F.2d at 637. The court cited *Canty v. Board of Educ.*, 470 F.2d 1111 (2d Cir. 1972), cert. denied, 412 U.S. 907 (1973) (probationary teacher not entitled to full due process hearing); see *Board of Regents v. Roth*, 408 U.S. 564, 572-75 (1972).

37. 502 F.2d. at 637. But see note 38 infra.

38. The committee which recommended the plaintiff's dismissal based its decision on his allegedly illogical and disconnected conversation, and the findings of the employer's medical department. 502 F.2d at 634. Yet, there were four other charges made against Lombard, any of which would have been grounds for his dismissal. *Id.* Thus, the stigma resulting from his discharge is not at all clear, particularly since he was found not to be disabled by HEW. *Id.*

39. 408 U.S. 564 (1972).

40. 502 F.2d at 637 (citation omitted).

41. *Id.* at 638.

42. See note 25 supra and accompanying text.

43. "To apply res judicata to a remedy which 'need not be first sought and refused' in the state court, and which actually was not sought would be to overrule the essence of *Monroe v. Pape* and *Lane v. Wilson*, 307 U.S. 268, 274 . . . (1939)." 502 F.2d at 635. "Nor is the plaintiff

weaken the precedential value of the opinion.⁴⁴ Finally, the court's decision, avowedly preserving the plaintiff's right to choose a federal forum for his federal claims, did not consider the fact that plaintiff did exercise his choice by choosing the state court in the first instance.

William Goodwin

Criminal Law—Involuntary Confessions—Threatened Loss of Private Economic Benefits Can Be Sufficient Coercion to Render Confession Involuntary.—After extensive questioning by the police concerning his possible involvement in a murder, petitioner was released due to insufficient evidence. Two months later, petitioner submitted to a polygraph examination in connection with an application to secure employment with a private company, during which he admitted that he had withheld information from the police concerning the murder. The company interrogator immediately informed the police who suggested that petitioner be given another polygraph examination which they would monitor. Petitioner submitted to the second examination after only two days on the job, on the company interrogator's representation that the second test was necessary in order to qualify for the position. Upon careful questioning, he admitted complicity in the murder and was arrested by the police who had taped the conversation. He pleaded guilty in state court to a reduced charge of first degree assault and was sentenced to serve five to ten years in prison. Upon petition to federal district court for a writ of habeas corpus, petitioner argued that the manner of interrogation which resulted in his admissions was in violation of his fifth amendment right to remain silent. The District Court for the Western District of New York denied the petition. The Court of Appeals for the Second Circuit held that economic coercion imposed by a private employer may result in testimony inadmissible because of the fifth amendment prohibition against involuntary confessions. The court affirmed the district court's denial, however, finding that petitioner's claim of threatened loss of his laborer's job did not allege a sufficiently substantial economic hardship to constitute economic coercion.¹

required to make the attack . . . in the state court, for section 1983 gives him an independent supplementary cause of action, and he may choose the federal court as the preferred forum for the assertion of constitutional claims of violation of due process." *Id.* at 636.

44. See note 16 *supra*. Another problem, not discussed in this Case Note nor by the court, is the applicability, if any, of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) (district court lacks jurisdiction to review state court determinations on constitutional questions). The *Rooker* doctrine has been applied to § 1983 claims (See *Tang v. Appellate Div.*, 487 F.2d 138, 142 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974), but there, the constitutional issue clearly was litigated in the state court action.).

1. The court also rejected petitioner's claim that the failure of the police to administer *Miranda* warnings rendered his confession inadmissible, finding that petitioner was not in police custody at the time of the second interrogation. *United States ex rel. Sannay v. Montanye*, 500 F.2d 411, 416 (2d Cir. 1974), petition for cert. filed, No. 74-5183, U.S., Aug. 14, 1974. In

United States ex rel. Sanney v. Montanye, 500 F.2d 411 (2d Cir. 1974), *petition for cert. filed*, No. 74-5183, U.S., Aug. 14, 1974.

The fifth amendment's self-incrimination clause² protects an individual from being compelled to give information in a criminal case which is either directly self-incriminatory or " 'which would furnish a link in the chain of evidence needed to prosecute' " him.³ In modern practice the right has been extended to all types of proceedings in which answers elicited from an accused later may be used against him in a criminal proceeding,⁴ and there is general agreement that, for this reason, the principle transcends the narrow focus first attributed to it in England and in the American colonies.⁵ The Supreme Court has defined the prime policy considerations⁶ in determining proper

addition, petitioner claimed that the transmission of his conversation with the interrogator to the police violated his fourth amendment rights. The court also rejected this claim because there was no trespass and the statements were made voluntarily without any "constitutional expectation of privacy." *Id.* (citing, *inter alia*, *United States v. White*, 401 U.S. 745 (1971)).

2. U.S. Const. amend. V provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"

3. *Malloy v. Hogan*, 378 U.S. 1, 11 (1964), quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951); see *United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973) (codefendant in narcotics case correctly asserted privilege since there was danger that his testimony under cross-examination might provide clues to other illegal transactions). But cf. *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (exchange of use immunity for otherwise privileged testimony held sufficient to compel relinquishment of fifth amendment right). While in theory the granting of use immunity prohibits testimony from being used to furnish the link needed to prosecute, it may not, in fact, accomplish this goal. See Comment, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 Vill. L. Rev. 470, 477-85 (1974); 25 U. Fla. L. Rev. 394, 399-400 (1973); 48 Wash. L. Rev. 711, 719-24 (1973).

4. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

5. McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193, 194-95 [hereinafter cited as McKay]. For discussion of the Anglo-American background of the privilege against self-incrimination and its successor, the right to remain silent, see C. McCormick, *Evidence* § 114 (2d ed. 1972) [hereinafter cited as McCormick]; 8 J. Wigmore, *Evidence* § 2250 (McNaughton rev. ed. 1961) [hereinafter cited as Wigmore]; Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1-23 (1949); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763, 788-89 (1935). "[B]y 1967 the Supreme Court had held that the privilege means at least the following: In criminal proceedings the accused is protected from the time the inquiry 'has begun to focus on a particular suspect,' through 'custodial interrogation,' and during the trial at which, even though the defendant may decline to take the stand, the prosecution may not comment on his silence." McKay 195 (footnotes omitted).

6. There is disagreement regarding the policies underlying the privilege because its ramifications depend upon the factual context in which it is invoked. See McCormick § 118, at 253-54; Wigmore § 2251. Wigmore sets forth twelve policy considerations but narrows them to those considered in notes 8-10 *infra* and accompanying text. *Id.* at 310-18. See generally Ellis, *Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 Iowa L. Rev. 829 (1970) [hereinafter cited as Ellis]; Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968) [hereinafter cited as Friendly]; McKay 206-14; 58 Calif. L. Rev. 988, 993 (1970).

application of the fifth to include protecting an individual's privacy,⁷ insuring that the prosecution independently acquire evidence to meet its burden of proof,⁸ fostering a basic respect for all defendants in the administration of justice⁹ and maintaining the integrity and dignity of the judicial process.¹⁰ Traditionally, the privilege has been balanced against the other public interests.¹¹ Specifically, courts have attempted to protect the constitutional rights of the citizen¹² without unduly hindering the police in their duty to solve and deter crimes.¹³

The early cases dealing with involuntary confessions dealt with the use of overt physical force.¹⁴ The Supreme Court has since extended the types of coercion which are proscribed by the Constitution to include any type of duress¹⁵ or deception¹⁶ that deprives an individual of his power to make a completely voluntary decision to speak.

Most claims of coercion have involved police interrogations. These cases may be divided into two categories depending on whether the court was

7. *Bellis v. United States*, 94 S. Ct. 2179, 2184-85 (1974); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964); see *Griswold, The Right to Be Let Alone*, 55 Nw. U.L. Rev. 216 (1960); *McKay* 210-14.

8. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964); *United States v. Wong*, No. 74-1636, at 3-4 (9th Cir. Sept. 23, 1974); *United States v. Wright*, 489 F.2d 1181, 1195 (D.C. Cir. 1973); see *Couch v. United States*, 409 U.S. 322, 328 (1973).

9. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *United States v. Grunewald*, 233 F.2d 556, 591 (2d Cir. 1956) (Frank, J., dissenting), rev'd, 353 U.S. 391 (1957); see E. *Griswold, The Fifth Amendment Today* 7-8 (1955); *McCormick* § 118.

10. *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415 (1966); see *Michigan v. Tucker*, 94 S. Ct. 2357, 2366 n.23 (1974); *Couch v. United States*, 409 U.S. 322, 328 (1973); *McKay* 209-10.

11. *Michigan v. Tucker*, 94 S. Ct. 2357, 2367 (1974); *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-26 (1973); *Spevack v. Klein*, 385 U.S. 511, 522-23 (1967); see *Ellis* 829, 856.

12. *Michigan v. Tucker*, 94 S. Ct. 2357, n2362 (1974); *Boyd v. United States*, 116 U.S. 616, 635 (1886); see *United States v. Wright*, 489 F.2d 1181, 1192 (D.C. Cir. 1973); *McKay* 210-14.

13. *Berger v. New York*, 388 U.S. 41, 73 (1967) (Black, J., dissenting); see *Culombe v. Connecticut*, 367 U.S. 568, 587 (1961); *Friendly* 691.

14. *Brown v. Mississippi*, 297 U.S. 278 (1936). While *Brown's* holding was based on due process, subsequent holdings have made clear that the requirement of voluntary confessions is derived from the privilege against self-incrimination. See *Malloy v. Hogan*, 378 U.S. 1 (1964); *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). See also *Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (police held guns to suspect's head and ordered him to confess).

15. *Garrity v. New Jersey*, 385 U.S. 493, 497-98 (1967); see *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973) (consent to search must be voluntarily given and this is determined from the totality of the circumstances).

16. See *Spano v. New York*, 360 U.S. 315, 323 (1959); *United States v. Bennett*, 495 F.2d 943 (D.C. Cir. 1974). In *Watts v. Indiana*, 338 U.S. 49 (1949), the Court stated: "There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point when this Court should not be ignorant as judges of what we know as men." *Id.* at 52. In *United States ex rel. Everett v. Murphy*, 329 F.2d 68, 70 (2d Cir.), cert. denied, 377 U.S. 967 (1964), Judge Smith stated: "A confession induced by police falsely promising assistance on a charge far less serious than the police knew would actually be brought is not to be considered a voluntary confession."

concerned more with protecting the individual's rights or eliminating improper or unscrupulous police practices. In dealing with the former concern, courts have examined the subjective response of the person claiming that his confession was coerced, giving particular attention to age,¹⁷ ethnic background,¹⁸ physical state,¹⁹ mental competence,²⁰ educational level,²¹ lack of prior experience with police procedures,²² and the presence or absence of physical punishment.²³ "The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances."²⁴ Any number of these factors may be combined to show that

17. E.g., *Gallegos v. Colorado*, 370 U.S. 49, 52-55 (1962) (14 year old boy held incommunicado for five days); *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948) (15 year old boy questioned by teams of police and held incommunicado for three days); see *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

18. See, e.g., *Grant v. Wainwright*, 496 F.2d 1043, 1047 (5th Cir. 1974) (confession of black murder suspect questioned extensively by relays of white policemen held involuntary). See also *Beecher v. Alabama*, 389 U.S. 35 (1967) (confession of black chain gang escapee accused of raping a white woman held involuntary).

19. E.g., *Greenwald v. Wisconsin*, 390 U.S. 519, 520 (1968) (illness—high blood pressure requiring medication twice a day; confession involuntary); see *Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (injury—suspect questioned while bullet was in his leg; confession invalid); *Townsend v. Sain*, 372 U.S. 293, 299-303 (1963) (medication—addict-suspect suffering from withdrawal symptoms was drugged with injections of phenobarbital); *United States v. Bennett*, 495 F.2d 943 (D.C. Cir. 1974) (per curiam) (intoxication—self-incriminating testimony of defendant made while intoxicated but before he was taken into custody was admissible); *United States v. Guaydaran*, 470 F.2d 1173 (9th Cir. 1972) (per curiam) (medication—confession inadmissible when drugged defendant had to be lifted from floor to get his attention for purpose of Miranda warnings).

20. See, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 620 (1961) (confession of 33 year old mental defective with low I.Q. and mental age held inadmissible); *Fikes v. Alabama*, 352 U.S. 191, 193 (1957) (confession of defendant who had completed only two years of schooling in eight years held inadmissible); *United States v. Blocker*, 354 F. Supp. 1195, 1200-01 (D.D.C. 1973) (defendant's mental deficiency considered as one factor for suppressing confession). See also *United States v. Stabler*, 490 F.2d 345, 350-51 (8th Cir. 1974) (defendant's mental competency correctly considered as one factor, but trial court's finding of voluntariness held not to be erroneous).

21. See, e.g., *Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (per curiam) (confession involuntary; suspect's low educational level held to be a factor); *United States v. Blocker*, 354 F. Supp. 1195, 1198-1200 (D.D.C. 1973) (same).

22. E.g., *Lynum v. Illinois*, 372 U.S. 528, 534 (1963).

23. See, e.g., *Reck v. Pate*, 367 U.S. 433, 436-39 (1961) (suspect beaten by police while he was sick and deprived of food; confession involuntary). See also *United States v. Dionisio*, 410 U.S. 1, 6 (1973).

24. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973); *United States v. Clark*, 499 F.2d 802, 807 (4th Cir. 1974) (confession held involuntary where defendant was questioned by F.B.I. agents despite his statement that he would not speak without an attorney present); see *Clewis v. Texas*, 386 U.S. 707 (1967) (after careful examination of the entire record petitioner's confession was held to be involuntary). In *Procunier v. Atchley*, 400 U.S. 446, 452-54 (1971), the Court held that before it would examine the effect of individual factors on the voluntariness of a confession, defendant would have to make a prima facie showing that his allegations, if true, would compel a finding of coercion.

coercion was present.²⁵

When a court is primarily concerned with discouraging improper methods of law enforcement, as well as safeguarding individual rights, certain police procedures have been held coercive without regard to the subjective characteristics or responses of particular defendants.²⁶

Improper police practices are not the only methods²⁷ the state has used to compel admissions or confessions. The courts have recognized that the state's use of economic sanctions also may have coercive effects which render involuntary a person's confession in violation of the fifth amendment. Cases involving economic coercion may be divided into two separate, but overlapping, categories: first, those dealing with public employees²⁸ or private individuals in employment regulated or licensed by a public authority²⁹ threatened with job forfeiture for refusal to answer questions notwithstanding their fifth amendment privilege; second, those concerning private individuals or firms subjected to loss of public economic benefits—for example, contracts—upon their invocation of the fifth amendment.³⁰

25. See, e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Spano v. New York*, 360 U.S. 315 (1959); *Grant v. Wainwright*, 496 F.2d 1043 (5th Cir. 1974).

26. Such procedures include unreasonable length of interrogation (*Watts v. Indiana*, 338 U.S. 49, 52-53 (1949) (five days of interrogation); *United States v. Masullo*, 489 F.2d 217, 221 (2d Cir. 1973)); holding suspect incommunicado (*Darwin v. Connecticut*, 391 U.S. 346, 347-48 (1968) (defendant's attorney barred from contact with client); *Haynes v. Washington*, 373 U.S. 503, 504 (1963) (suspect refused permission to call wife or lawyer until he confessed); see *Michigan v. Tucker*, 94 S. Ct. 2357, 2366 (1974)); use of physical force (*Beecher v. Alabama*, 389 U.S. 35, 36 (1967)); see *United States v. White*, 493 F.2d 3, 5 (5th Cir. 1974)); use of pressure to change suspect's story (*Clewis v. Texas*, 386 U.S. 707 (1967)); failure to inform suspect of his legal rights (*Greenwald v. Wisconsin*, 390 U.S. 519, 520 (1968) (per curiam); *Randall v. Estelle*, 492 F.2d 118, 120 (5th Cir. 1974)); keeping suspect in poor physical environment (*Brooks v. Florida*, 389 U.S. 413 (1967) (per curiam) (prisoner kept in "sweatbox" without window or toilet for two weeks)); and the use of deceptive promises and practices to obtain confession (*Leyra v. Denno*, 347 U.S. 556, 559-60 (suspect requested medical doctor but police provided psychiatrist who induced the suspect to confess); *United States ex rel. Everett v. Murphy*, 329 F.2d 68, 69-70 (2d Cir.), cert. denied, 377 U.S. 967 (1964) (police told defendant that victim was all right and promised help in return for a confession when victim actually was dead); see *Holloway v. United States*, 495 F.2d 835, 838 (10th Cir. 1974) (dictum) (trickery and cajolery would be sufficient to invalidate a confession)).

27. For example, prison inmates have argued that it is a coercive practice for their testimony before a parole board to be used against them in later proceedings. *Palmigiano v. Baxter*, 487 F.2d 1280, 1289-90 (1st Cir. 1973), vacated & remanded, 94 S. Ct. 3200 (1974); *Fowler v. Vincent*, 366 F. Supp. 1224, 1227-28 (S.D.N.Y. 1973).

28. *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir. 1973), cert. denied, 416 U.S. 956 (1974); *Sherar v. Cullen*, 481 F.2d 945 (9th Cir. 1973) (IRS employee); *Kalkines v. United States*, 473 F.2d 1391 (Ct. Cl. 1973) (U.S. Customs employee); *Fitzgerald v. Cawley*, 368 F. Supp. 677 (S.D.N.Y. 1973).

29. *In re Ruffalo*, 390 U.S. 544 (1968) (lawyer); *Spevack v. Klein*, 385 U.S. 511 (1967) (lawyer); *Lurie v. Florida State Bd. of Dentistry*, 288 So. 2d 223 (Fla. 1973); *State ex rel. Vining v. Florida Real Estate Comm'n*, 281 So. 2d 487 (Fla. 1973).

30. *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (architects working on city projects); *People v.*

The principal case dealing with economic coercion is *Garrity v. New Jersey*,³¹ in which the state attempted to force police officers to testify concerning the practice of fixing traffic tickets. A New Jersey statute³² provided that the officers could be dismissed for failure to answer. The Supreme Court reversed the officers' convictions, holding that statements compelled under threat of removal from office violated the fifth amendment privilege against self-incrimination. Moreover, noted the Court in the broadest terms, this protection extended "to all, whether they are policemen or other members of our body politic."³³

Spevack v. Klein,³⁴ decided the same day as *Garrity*, extended the fifth amendment privilege to lawyers in bar disciplinary proceedings. Justice Douglas, speaking for the Court, concluded "that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."³⁵ A lower court has extended the Court's reasoning by holding that exclusion from a field of public employment may not be enforced simply because an individual refuses to waive his fifth amendment right.³⁶

In *Gardner v. Broderick*,³⁷ the Court reaffirmed the holding in *Garrity*, concerning the prohibition of the use of economic coercion to compel testimony, but further stated that if the policeman had been granted immunity from criminal prosecution the testimony validly could be compelled.³⁸ The most recent lower court cases concerned with economic coercion have followed this approach.³⁹ It is not the loss of job that is crucial but whether the threat of discharge was used to coerce a defendant to relinquish his fifth amendment right.

The second line of cases that has made use of economic coercion an unwarranted compulsion abridging the fifth amendment right has concerned public contractors. In the leading case, *Lefkowitz v. Turley*,⁴⁰ the Court held that loss of state contracts as a penalty for invocation of the fifth amendment

Avant, 33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y.S.2d 161 (1973) (contractors engaged in snow removal in Albany).

31. 385 U.S. 493 (1967).

32. N.J. Rev. Stat. § 2A:81-17.1 (Supp. 1965).

33. 385 U.S. at 500.

34. 385 U.S. 511 (1967).

35. Id. at 514.

36. *Raphael v. Conrad*, 371 F. Supp. 256, 259 (S.D. Ind. 1974) (per curiam) (lobbyist denied state certification).

37. 392 U.S. 273 (1968). In *Gardner*, the Court reversed a policeman's discharge for refusal to sign a waiver of immunity respecting his grand jury testimony about performance of his official duties.

38. Id. at 278.

39. *Confederation of Police v. Conlisk*, 489 F.2d 891, 893 (7th Cir. 1973), cert. denied, 416 U.S. 956 (1974); *Fitzgerald v. Cawley*, 368 F. Supp. 677, 680 (S.D.N.Y. 1973).

40. 414 U.S. 70 (1973). In *Lefkowitz*, architects were summoned to testify before a grand jury regarding charges of conspiracy, bribery and larceny in connection with public contracting. Id. at 75-76.

constituted economic coercion, and affirmed the decision of the three judge district court that New York's contractor-disqualification statute was invalid. The district court had held that "disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of . . . Fifth Amendment rights."⁴¹ The Supreme Court further indicated that it could see no "difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor."⁴² To require a public employee to choose between his job or contract and his right to remain silent interjects a factor which substantially affects the voluntary nature of his election to give self-incriminatory testimony. All citizens, including public employees or licensees, however, may be compelled to testify in exchange for a grant of immunity;⁴³ the government may not expect more of public employees or licensees than private citizens in regard to the relinquishment of the fifth amendment.

In *United States ex rel. Sanney v. Montanye*,⁴⁴ the issue of economic coercion in the area of purely private employment arose as one of first impression. While *Garrity*, *Gardner* and *Lefkowitz* all dealt with public employees, public contractors or public licensees, the language used in those cases does not reflect a determination by the Supreme Court to restrict its reasoning to loss of public benefits. In *Garrity*, the Court stated:

The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice . . . is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice."⁴⁵

And in *Gardner*, the Court again spoke in universal rather than restrictive terms: "In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment."⁴⁶ The same recognition—that the essence of the issue is not whether the economic coercion emanates from the state but whether the economic coercion, induced by state action,⁴⁷ overcomes the free will of the

41. *Lefkowitz v. Turley*, 342 F. Supp. 544, 549 (W.D.N.Y. 1972), *aff'd*, 414 U.S. 70 (1973).

42. 414 U.S. at 83.

43. See, e.g., *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968); *People v. Avant*, 33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y.S.2d 161 (1973).

44. 500 F.2d 411 (2d Cir. 1974), petition for cert. filed, No. 74-5183, U.S., Aug. 14, 1974.

45. 385 U.S. at 497 (citation omitted).

46. 392 U.S. at 279.

47. When the company interrogator informed the police of his first conversation with petitioner Sanney, he was acting on his own behalf as a public citizen. In conducting the second polygraph examination at police request, however, he was acting on their behalf and, hence, as an agent of the state. 500 F.2d at 413-14. The district attorney in the state court proceeding conceded this fact and this established the existence of state action. Brief for Appellant at 4, *United States ex rel. Sanney v. Montanye*, 500 F.2d 411 (2d Cir. 1974). Despite the finding that the state's agent was the interrogator, the Second Circuit held that Miranda warnings were not required because petitioner was not "in custody" when interrogated, reasoning that he was free to leave the company interrogator's office at any time. *Id.* at 416 (relying on *United States v.*

accused—also seems apparent in *Lefkowitz*.⁴⁸

The holding of the court in *Sanney* accepts this principle. The court admitted the possibility that, under the appropriate factual circumstances, threatened loss of private employment would be found to have deprived a criminal defendant of his free choice to confess or to remain silent. Judge Mansfield, writing for the majority, stated:

Nor do we perceive any consequence flowing from the fact that the threat in the present case was conveyed through a private employer, admittedly acting as an agent for the police, rather than through a person on the public payroll. The state's involvement is no less real for having been indirect and no less impermissible for having been concealed. The state is prohibited in either event from compelling a statement through economically coercive means, whether they are direct or indirect.⁴⁹

In his dissent, Judge Feinberg agreed with the majority that the interrogation of *Sanney* was characterized by government action and that the government may not employ economic coercion to elicit incriminating statements.⁵⁰ The majority and minority in *Sanney* disagreed, however, as to whether the specific loss threatened was of sufficient magnitude to raise the issue of economic coercion as a matter of law.⁵¹

The majority first applied a test of substantiality in deciding whether or not private economic coercion would trigger the exclusionary rule barring the use of coerced confessions.⁵² This test, in effect, would require the trial court to decide whether the threatened loss to the accused is of the type that could intimidate a defendant into relinquishing his right to remain silent rather than face loss of his job.

A statement challenged on the ground that it was obtained as the result of economic sanctions must be rejected as involuntary only where the pressure *reasonably appears* to have been of *sufficiently appreciable size and substance* to deprive the accused of his "free choice to admit, to deny, or to refuse to answer."⁵³

Viviano, 437 F.2d 295 (2d Cir.), cert. denied, 402 U.S. 983 (1971) and *United States v. Hall*, 421 F.2d 540 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970)). This view is consonant with that of the majority of jurisdictions. See Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.C.L. Rev. 699, 709 (1974).

Having found that no *Miranda* warnings were necessary, the court was able to reach the issue of economic coercion. If the court had held that the loss of petitioner's job was a substantial coercive factor invalidating his confession, however, it seems that this same holding would have required that petitioner be advised of his *Miranda* rights (see note 1 *supra*) in as much as the threat of substantial economic loss presumably would have operated to deprive petitioner of his freedom to leave the state agent's office, as well as his freedom to refuse to answer questions, and, hence, petitioner would have been "in custody."

48. 414 U.S. 70 (1973). The Court stated: "[T]he State must recognize . . . that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence." *Id.* at 85.

49. 500 F.2d at 415.

50. *Id.* at 417 (Feinberg, J., dissenting).

51. *Id.* at 415; *id.* at 417 (Feinberg, J., dissenting).

52. *Id.* at 415.

53. *Id.* (emphasis supplied) (citation omitted).

Noting that petitioner had been employed for only two days at the time of the second interrogation, at which the damaging admissions were made, the majority found that "the threat of discharge from a job as a driver's assistant . . . can hardly be labelled a 'substantial economic sanction' rendering his statement involuntary."⁵⁴ To this, Judge Feinberg vehemently dissented, stating: "I reject both the notion that a menial job is somehow beneath constitutional notice and the not unrelated idea that discharge from recently begun employment *must* be an insubstantial loss."⁵⁵

To the extent that the losses involved in *Garrity*, *Spevack* and *Lefkowitz* were more than discharge from a manual job with hourly wages, the majority's factual distinction between those cases and *Sanney* is accurate.⁵⁶ But in none of the prior cases did the Court enter into a discussion of the financial means of the defendant or of the relative degree of economic deprivation therein involved compared to that attendant upon other potential job losses. In fact, the prior Court cases, indicated that the loss of the job and accompanying benefits was sufficient, without more, to raise the inference that defendant had been compelled to relinquish his voluntary choice to speak or to remain silent.

Thus, from an apparently objective test set forth in the cases from which its holding derived, the *Sanney* court formulated a partly objective and partly subjective analysis which would require application of the rule on an ad hoc basis. *Sanney* necessitates that consideration be given to the specific type of coercion involved and the manner in which it was exercised, with particular attention to the defendant's characteristics, such as age, ethnic background, physical state, mental competence, educational level, prior experience with police procedures, and the presence or absence of physical punishment.⁵⁷

54. *Id.*

55. *Id.* at 417 (Feinberg, J., dissenting).

56. *Id.* at 415-16. A further factual distinction exists, inasmuch as the testimony in *Garrity*, *Spevack* and *Lefkowitz* was sought in judicial proceedings while that in *Sanney* was sought in a police investigation. The testimony in the former cases could have been compelled provided that the defendants were granted immunity from criminal prosecution. *Sanney* was not questioned in a judicial proceeding and, as such, the alternative protection afforded by a grant of immunity was not available to him. See note 2 *supra*.

57. See notes 17-23 *supra*. In *Sanney* there is little discussion of these subjective characteristics. The majority and minority opinions cite the opinions of the company interrogator regarding petitioner's physical and mental state. Judge Mansfield interpreted a statement of the interrogator that petitioner appeared to be " 'getting a sense of relief or release from having told me this,' " as evidence of a will not overborne. 500 F.2d at 416. The dissenting judge indicated that the interrogator's statements that petitioner " 'was worried about losing his job' " and was " 'kind of completely crushed or emotional' " signified that *Sanney's* confession was not a product of a completely free will. *Id.* at 417 (Feinberg, J., dissenting). Little weight can be accorded these hearsay and opinion statements. Furthermore, petitioner's state of mind after the confession, as opposed to that at the time of the confession, is unimportant. What is at issue is how the confession was obtained. Judge Feinberg also concluded that petitioner was of marginal intelligence and was emotionally troubled. *Id.* In raising these considerations, Judge Feinberg permitted himself to be drawn into the majority's formulation of a partly objective and partly subjective test which must always be applied on an ad hoc basis.

It is clear that the *Sanney* court was correct in limiting the use of private economic coercion claims to situations in which the coercive effect is more than minimal.⁵⁸ But, at the time that a person has acquired a job commitment, he has assured himself of the means of earning a livelihood, whether or not that position carries with it fringe benefits in the form of a pension, a license or an opportunity to engage in related activities for profit. Threatened loss of that job certainly will mean more to some than to others, but it is inappropriate for the court to say, as it did in *Sanney*, that threatened deprivation of a job as a "transient manual laborer" cannot give rise to the same inference of economic coercion which destroys voluntariness that loss of a job as a policeman, sanitation worker, public contractor or attorney creates under the objective test of the earlier cases.

Sanney extended the reasoning of the earlier cases into the area in which the state is acting as the interrogator but not the dispenser of the economic benefit involved. In view of the broad language of the earlier cases, and the essence of voluntariness embodied in the fifth amendment, the extension is both just and correct. But the burdens which the holding in *Sanney* imposes upon a defendant who seeks to take advantage of the extension—establishing that his loss was of sufficient magnitude and, in fact, did overcome his free will—may prove insuperable in the ordinary case. In terms of judicial administration, the issues to be determined by the trial court leave too great an area for abuse by individual judges—to be tested only by the "clearly erroneous" rule of appellate review of discretionary rulings—with too little opportunity for the formulation of acceptable judicial guidelines. While some authorities have stressed the overriding importance of the public interest in solving crimes⁵⁹ as a factor in setting rules for the application of the safeguards of the fifth amendment, others have emphasized that, ultimately, the "determination of the benefits which [society] feel[s] it is fair to accord the defendant is affected by the costs imposed thereby upon society."⁶⁰

It is submitted that the cost imposed upon society in prohibiting the use in criminal proceedings of confessions procured by private economic coercion is minimal.⁶¹ The concept that, under appropriate circumstances, economic factors can subvert free will as much as physical punishment, has been clearly propounded by the Court. Its extension to encompass those private acts which are engaged in at the insistence of the police is supported in both law and reason. What now is needed is a more objective and realistic test to determine when a claimant has demonstrated that the threat to him was sufficient to give rise to an inference that his confession or admission was coerced.

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58. See *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973).

59. See generally *Friendly* 679-81.

60. *Ellis* 851.

61. *Id.* at 852-56.

Federal Courts—Obligatory Appeals—Supreme Court Summary Disposition Upholding Lower Court Held Controlling in Second Circuit.—Three teenaged girls brought a habeas corpus action in federal court challenging their adjudication, pursuant to section 712(b) of the New York Family Court Act, as Persons in Need of Supervision (PINS).¹ The district court dismissed the action on the ground that the plaintiffs had not exhausted their state remedies. The Court of Appeals for the Second Circuit reversed, holding that the claim of unconstitutional vagueness was ripe for federal adjudication, but ordered the lower court to dismiss on the merits. The court of appeals found that the United States Supreme Court had upheld the constitutionality of the New York statute when it summarily dismissed an appeal taken from a New York Court of Appeals decision that had rejected an identical constitutional claim. *Mercado v. Rockefeller*, 502 F.2d 666 (2d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3257 (U.S. Oct. 21, 1974) (No. 74-459).

Thus, the Second Circuit, for the second time in less than a month,² reaffirmed its rule that summary disposition of a case within the obligatory jurisdiction of the Supreme Court³ is binding authority on lower courts.⁴ "Summary disposition" as used in this Case Note is limited to the Court's disposition of obligatory appeals upholding the lower court without plenary consideration and without written opinion.⁵ In such cases, the Court will

1. " 'Person in need of supervision' means a male less than sixteen years of age and a female less than eighteen years of age who does not attend school . . . or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." N.Y. Family Ct. Act § 712(b) (McKinney Supp. 1974). The age distinction between males and females has been held unconstitutional by the New York Court of Appeals. In re Patricia A., 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972), discussed at text accompanying notes 29-33 *infra*. Plaintiffs alleged that the statute was vague and overbroad, that it punished a status, and that it violated their right to due process by depriving them of liberty without serving any legitimate state purpose. *Mercado v. Rockefeller*, 502 F.2d 666, 668 (2d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3257 (U.S. Oct. 21, 1974) (No. 74-459).

2. See *Doe v. Hodgson*, 500 F.2d 1206 (2d Cir. 1974), discussed at notes 53-56 *infra* and accompanying text.

3. The Supreme Court's obligatory jurisdiction includes, *inter alia*, appeals taken from decisions holding federal or state laws unconstitutional and from state court decisions that challenged state laws do not violate the federal constitution. 28 U.S.C. §§ 1252, 1254(2), 1257(1), (2) (1970). When presented with such an appeal, the Court is without the discretionary power it possesses to avoid deciding cases brought on petitions for certiorari. It can, however, reach a decision without accepting briefs on the merits or permitting oral argument, by deciding the case without opinion based on examination of the jurisdictional statement which must be filed with each appeal (U.S. Sup. Ct. R. 13(2), 15). See R. Stern & E. Gressman, *Supreme Court Practice* § 4.28 (4th ed. 1969) [hereinafter cited as Stern & Gressman].

4. The Second Circuit had previously followed this rule in *Doe v. Hodgson*, 478 F.2d 537 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973), application pursuant to Fed. R. Civ. P. 60(b)(6) denied, 500 F.2d 1206 (2d Cir. 1974); *Heaney v. Allen*, 425 F.2d 869 (2d Cir. 1970); *Port Authority Bondholders Protective Comm. v. Port of N.Y. Authority*, 387 F.2d 259 (2d Cir. 1967).

5. Other summary dispositions will not be treated herein. For example, the Supreme Court may reverse an obligatory appeal summarily without plenary consideration. Stern & Gressman § 5.19. The Court occasionally disposes of an appeal without opinion after having allowed full briefing and oral argument. E.g., *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47

simply "affirm" an appeal from a federal court or "dismiss for want of a substantial federal question" an appeal from a state court.⁶ The result is the same in either instance: the decision below is left standing with no explanation by the Supreme Court of the reasoning of its decision. However, when the Court decides an obligatory appeal, even if without opinion, it reaches the merits of the case.⁷ Consequently, the question of precedential weight arises. But before a lower court can grant precedential value, it faces the difficult task of interpreting a holding without opinion.⁸

Because of the difficulties of interpreting any summary disposition and the doubts that have been raised as to whether such holdings actually reflect consideration of the merits, the question of their proper precedential value becomes difficult to answer.⁹ In its recent decision in *Edelman v. Jordan*,¹⁰ the Supreme Court may have opened the door to a resolution of the issue. There the Court held that the eleventh amendment of the Constitution bars the retroactive payment of benefits to one who has successfully challenged the denial of grants under a state aid program supported by federal funds. Writing for the majority, Justice Rehnquist acknowledged that the Court had previously summarily affirmed three district court decisions requiring such retroactive payments.¹¹ He said that

(1971). In addition, the Court sometimes summarily affirms or reverses the decision of a lower court after having granted certiorari but without oral argument. See Stern & Gressman § 5.12. In the aforementioned instances, precedential considerations attach. A summary affirmance of the decision of the inferior court by an equally divided Supreme Court (e.g., *Radich v. New York*, 401 U.S. 531 (1971)), allows the decision of the court below to stand, but denies it all precedential value. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960) (separate opinion of Brennan, J.), and cases cited therein; Stern & Gressman § 5.4. See generally Note, Supreme Court Per Curiam Practice: A Critique, 69 Harv. L. Rev. 707 (1956). The Court will also dismiss obligatory appeals without argument for a variety of jurisdictional and other reasons. Stern & Gressman §§ 5.20-22.

6. The difference in terminology seems more apparent than real, and is accounted for by history. See, e.g., Stern & Gressman § 5.6; Note, Supreme Court Per Curiam Practice: A Critique, 69 Harv. L. Rev. 707, 709-15 (1956); 68 Colum. L. Rev. 785 (1968).

7. "Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . ." *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) (separate opinion of Brennan, J.); see Stern & Gressman § 4.28, at 197.

8. The problem of interpreting "opinions that do not opine" has been discussed in Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1, 3-4 (1957); Hart, The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 98-101 (1959); cf. Frankfurter & Landis, The Business of the Supreme Court at October Term, 1930, 45 Harv. L. Rev. 271, 281 (1931).

9. See A. Bickel, The Least Dangerous Branch 126-27 (1962); H.M. Hart & H. Wechsler, The Federal Courts and the Federal System 574-76 (1953); Bickel, The Supreme Court, 1960 Term, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40 (1961). See also M. Shapiro, Law and Politics in the Supreme Court (1964); H. Wechsler, Toward Neutral Principles of Constitutional Law, in Principles, Politics and Fundamental Law 14 (1961); Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1 (1964); Note, Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent, 52 B.U.L. Rev. 373 (1972).

10. 415 U.S. 651 (1974).

11. *Id.* at 670 n.13, citing *Sterrett v. Mothers' & Children's Rights Org.*, 409 U.S. 809 (1972) (mem.), *aff'g* unreported order and judgment of N.D. Ind. 1972, on remand from *Carpenter v.*

summary affirmances . . . obviously . . . are not of the same precedential value as would be an opinion of this Court treating the question on the merits.¹²

Both before and since *Edelman*, other circuits have held differing views of the precedential value of Supreme Court summary adjudications, although the rigid position of the Second Circuit generally is not followed.¹³ In refusing to be bound by a summary affirmance of a decision of a three-judge court adverse to a petition identical to the one before it, the Ninth Circuit held, prior to *Edelman*, that "[a] summary affirmance without opinion in a case within the Supreme Court's obligatory appellate jurisdiction has very little precedential significance."¹⁴ The Sixth Circuit cited *Edelman* in deciding that a summary affirmance was not "controlling precedent" when it decided an identical question contrary to the Supreme Court's disposition.¹⁵

Other circuits have not been willing to go so far. Seven years before *Edelman*, the Fourth Circuit considered the merits of a case before deciding it in accord with a summary disposition, declaring that, "we cannot disregard [its] strong implications"¹⁶ More recently, the Fifth Circuit decided a case in accord with a summary disposition; citing *Edelman*, it described

Sterrett, 405 U.S. 971 (1972) (mem.); State Dep't of Health & Rehab. Servs. v. Zarate, 407 U.S. 918 (1972) (mem.), aff'g 347 F. Supp. 1004 (S.D. Fla. 1971); Wyman v. Bowens, 397 U.S. 49 (1970), aff'g per curiam Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1969).

12. 415 U.S. at 671. The passage cited continues as follows: "[T]hese three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. . . . Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of those cases to the extent that they are inconsistent with our holding today." *Id.* Although these words attribute some unspecified quantity of precedential value to summary dispositions, they then take this little away by implying that the merits may not be reached. Perhaps the passage is merely an acknowledgment of the fact that "[p]lenary consideration can change views strongly held, and on close, reflective analysis precedents may appear inapplicable to varying fact situations." *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 248 (1959) (separate opinion of Brennan, J.); see note 57 *infra*. In his dissent in *Richardson v. Ramirez*, 94 S. Ct. 2655, 2685 n.27 (1974), however, Justice Marshall repeats approvingly the portion of *Edelman* excerpted in the text accompanying this note.

13. The Seventh Circuit's formerly rigid position, *Ahern v. Murphy*, 457 F.2d 363, 365 (7th Cir. 1972) ("We agree with the Second Circuit," citing *Port Authority Bondholders Protective Comm. v. Port of N.Y. Authority*, 387 F.2d 259, 262 (2d Cir. 1967)), may be undergoing a change. It was its reliance on a summary disposition in reaching its holding in *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973), rev'd sub nom. *Edelman v. Jordan*, 415 U.S. 651 (1974) that led it to reach a result different from that reached by the Supreme Court after a full examination. Recently, in *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir. 1974), the Seventh Circuit, *id.* at 1397, quoted from the words of *Edelman* set out in text accompanying note 12 *supra*.

14. *Dillenburg v. Kramer*, 469 F.2d 1222, 1225 (9th Cir. 1972), citing *Frankfurter & Landis, The Business of the Supreme Court at October Term, 1929*, 44 Harv. L. Rev. 1, 12-14 (1930).

15. *Jordan v. Gilligan*, 500 F.2d 701, 707-08 (6th Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3240 (U.S. Oct. 9, 1974) (No. 74-403).

16. *Wyley v. Warden*, 372 F.2d 742, 745 (4th Cir.), cert. denied, 389 U.S. 863 (1967); see *Joseph v. Blair*, 482 F.2d 575, 579-80 (4th Cir. 1973), cert. denied, 416 U.S. 955 (1974).

summary dispositions as "highly persuasive—if not controlling—authority, which [it is] not free simply to disregard,"¹⁷ and added that they put the Court's "imprimatur of approval on the result, if not on all the reasoning, below."¹⁸

In these situations, the Second Circuit looks at the decision below and at the issues it believes were presented to the Court on appeal; the summary disposition of a particular claim will be considered to have foreclosed a similar claim presented to the Second Circuit.¹⁹ Often this procedure leads to a correct result—the dismissal of a meritless claim.²⁰ On occasion, however, the rigidity of the rule leads the Second Circuit to look for firm guidance where only uncertainty exists. Although it is an extreme example of this, *Mercado v. Rockefeller*²¹ highlights the problems that generally arise.

In *Mercado*, the Second Circuit held that the petitioners' claim was identical to the one involved in *In re Negron*.²² There, Tomasita Negron, a fifteen-year-old girl, had been adjudged a PINS by the family court after a fact-finding hearing and was ordered to spend up to eighteen months at the New York Training School. This order was affirmed without opinion by both the appellate division²³ and the New York Court of Appeals.²⁴ Since the constitutional attacks on the statute had been presented to, and presumably rejected by, the New York Court of Appeals,²⁵ Negron appealed as of right to the United States Supreme Court.²⁶ The Court dismissed the appeal,²⁷ in effect allowing the original determination of the family court to stand.²⁸ With no written opinion at any level, the *Mercado* court had to look elsewhere to ascertain what the Supreme Court had decided in *Negron*.

The Second Circuit looked first to dictum in a case decided by the New York Court of Appeals the same day it affirmed *In re Tomasita N[e]g[ro]n*, *In re Patricia A.*²⁹ There, the New York court held that the age distinction between males and females in the PINS statute³⁰ was an unconstitutional

17. *Rios v. Dillman*, 499 F.2d 329, 334 n.8 (5th Cir. 1974).

18. *Id.* at 334.

19. See cases cited in note 4 *supra*.

20. See Note, Supreme Court Per Curiam Practice: A Critique, 69 Harv. L. Rev. 707, 709, 712-15 (1956).

21. 502 F.2d 666 (2d Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3257 (U.S. Oct. 21, 1974) (No. 74-459).

22. 409 U.S. 1052 (mem.), dismissing appeal from *In re Tomasita N.*, 30 N.Y.2d 927, 287 N.E.2d 377, 335 N.Y.S.2d 683 (1972), *affg* mem. 37 App. Div. 2d 698, 322 N.Y.S.2d 646 (1st Dep't 1971) (mem.).

23. See note 22 *supra*.

24. See note 22 *supra*.

25. See the jurisdictional summary given in 30 N.Y.2d at 928, 287 N.E.2d at 377-78, 335 N.Y.S.2d at 683-84.

26. See 28 U.S.C. § 1257(2) (1970).

27. 409 U.S. 1052 (1972) (mem.).

28. See text accompanying note 7 *supra*.

29. 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972) (noted in 41 Fordham L. Rev. 703 (1973)).

30. See note 1 *supra*.

violation of equal protection. The court also referred to the claim in *Patricia A.* of unconstitutional vagueness, pointing out that Negron had made the same constitutional attack in her "companion appeal,"³¹ and concluded that the terms of the statute, "habitual truant,"³² "incorrigible," "ungovernable," "habitually disobedient," and beyond "lawful control," were sufficiently definite.³³

The *Mercado* court next turned to a later decision of the New York Court of Appeals, *In re Ellery C.*³⁴ There the court held that PINS may not be placed in institutions where juvenile delinquents are confined. It said that *Negron* was not authority to the contrary, because that case did not treat the issue of the validity of Negron's confinement order since she had already been released.³⁵ *Ellery C.* limited and explained *Negron* as "[h]aving decided that the PINS statute was not subject to successful constitutional attack on due process grounds"³⁶

Therefore, only after examining dicta in the New York decisions in *Patricia A.* and *Ellery C.* could the *Mercado* court conclude that the New York Court of Appeals in *Negron* had upheld the PINS statute against the same constitutional attack of vagueness made in *Mercado*.³⁷ It considered the "dictum" in *Patricia A.* to be the "holding" of *Negron*.³⁸ Although *Patricia A.* did address the vagueness question, *Ellery C.* spoke only generally of a "due process attack" in *Negron*. In any event, neither case was decided on the issue of vagueness and neither was controlling in *Mercado*, since only *Negron* reached the Supreme Court. Moreover, *Ellery C.* certainly did not influence the Supreme Court in *Negron*, since *Ellery C.* was decided a year after *Negron*.

If the Supreme Court's disposition was an adoption of the New York holding, then ascertaining that holding was important to the *Mercado* court. Although it is reasonable to conclude that the New York court did decide *Negron* on the issue of vagueness, it is impossible to be certain in the absence of an opinion.³⁹ The district court in *Mercado* believed that "uncertainty" and "substantial doubt"⁴⁰ existed on the question of whether New York had decided the vagueness issue in *Negron*. This is why it dismissed the complaint and said that the *Mercado* plaintiffs had not exhausted their state remedies.⁴¹

31. 31 N.Y.2d at 85, 286 N.E.2d at 433, 335 N.Y.S.2d at 34.

32. The wording of the statute has since been amended to substitute the words "does not attend school in accord with the provisions of part one of article sixty-five of the education law" N.Y. Family Ct. Act § 712(b) (McKinney Supp. 1974). See also note 1 *supra*.

33. 31 N.Y.2d at 87, 286 N.E.2d at 434, 335 N.Y.S.2d at 35-36.

34. 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973).

35. *Id.* at 592, 300 N.E.2d at 425-26, 347 N.Y.S.2d at 54.

36. *Id.* at 592, 300 N.E.2d at 425, 347 N.Y.S.2d at 54.

37. 502 F.2d at 672.

38. *Id.* at 670.

39. See note 8 *supra* and accompanying text.

40. 363 F. Supp. 489, 492 (S.D.N.Y. 1973), *rev'd*, 502 F.2d 666 (2d Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3527 (U.S. Oct. 21, 1974) (No. 74-459).

41. "But the existence of . . . other claims, when coupled with the substantial doubt that on

Believing that it had determined the holding of the New York Court of Appeals in *Negron*, however, the Second Circuit in *Mercado* next examined the issues presented by *Negron* to the United States Supreme Court.⁴² Recognizing that summary dispositions are "somewhat opaque,"⁴³ and require careful analysis to discover what issues were actually before the Court, it noted that the void for vagueness issue was among those in *Negron*'s jurisdictional statement.⁴⁴ Concluding after lengthy discussion that the vagueness claim had been properly presented for review to the Supreme Court, the *Mercado* court was

satisfied that the summary dismissal of the appeal was dispositive of appellant *Negron*'s claim, the claim which has been rejected by the New York Court of Appeals, that the statute was too vague to be constitutional.⁴⁵

After declaring itself "bound by that holding,"⁴⁶ the Second Circuit found the vagueness claim of the *Mercado* plaintiffs to be meritless.

Mercado went to great lengths to interpret the meaning of *Negron*. Yet no decision without opinion is "an adequate guide to bench and bar."⁴⁷ Certainly jurisdictional statements tell what was presented to the Supreme Court, but they do not reveal what the Court itself considered and which factors it found dispositive.⁴⁸ It has been noted that the summary procedure itself "necessarily entails risks of imperfect presentation"⁴⁹ of a case to the Court because the traditional safeguards of "plenary briefs, oral argument and decision accompanied by reasons"⁵⁰ are lacking. In addition, the Court's enormous caseload⁵¹ has raised questions as to whether the Court actually decides all

the allegedly 'exhausted' point [i.e. vagueness] 'a further state proceeding would be unavailing,' . . . makes this an unsuitable case for holding that the state courts may be bypassed for 'futility.'" *Id.* (citation omitted).

42. 502 F.2d at 672.

43. *Id.* at 673, quoting *Gibson v. Berryhill*, 411 U.S. 564, 576 (1973). *Gibson* referred to a summary disposition containing citations to two cases. *Id.*

44. 502 F.2d at 673; see Brief for Plaintiffs at 54-56, *Mercado v. Rockefeller*, 363 F. Supp. 489 (S.D.N.Y. 1973), rev'd, 502 F.2d 666 (2d Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3527 (U.S. Oct. 21, 1974) (No. 74-459). The court decided that the fact that Tomasita *Negron* had pleaded guilty below and might have failed to raise constitutional claims at the family court hearing did not operate to waive these claims at the appellate level. 502 F.2d at 671-72.

45. 502 F.2d at 673.

46. *Id.*

47. Ulman & Spears, "Dismissed for Want of a Substantial Federal Question: A Study in the Practice of the Supreme Court in Deciding Appeals from State Courts, 20 B.U.L. Rev. 501, 530 (1940).

48. "One difficulty of appraisal arises out of the very nature of the summary opinion. Since the Court's reasoning processes are not fully set forth, the observing critic can never be wholly confident that he has taken into account all possible reasons for the Court's choice of a summary statement." Sacks, *The Supreme Court*, 1953 Term, Foreword, 68 Harv. L. Rev. 96, 99-100 (1954).

49. Note, *Supreme Court Per Curiam Practice: A Critique*, 69 Harv. L. Rev. 707, 718 (1956).

50. *Id.*, quoting Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 Harv. L. Rev. 579, 601 (1940).

51. During the 1943 term, 1,118 cases were on the Supreme Court's docket; in the 1953 term,

appeals (*i.e.* reaches the merits), or whether it sometimes uses discretion to avoid decision, acting in much the same way that it does when denying a petition for certiorari.⁵² The case of *Tomasita Negron*, with no opinion below and a variety of peripheral issues, would seem to be the kind of case that the Court might wish to avoid.

Although the Second Circuit clearly refuses to change its rule with respect to summary dispositions, it has expressed dissatisfaction with the consequences of such adherence. In *Doe v. Hodgson*,⁵³ the court reluctantly considered itself bound by a summary disposition of the Supreme Court, later admitting that if it did not feel so bound it would have decided the case differently.⁵⁴ This blind adherence to the rule seems particularly unjustifiable in *Doe*, which appears easily distinguishable from the summary disposition by which it felt bound.⁵⁵ Addressing itself to the passage on summary affirmances in *Edelman*, the court of appeals declared, however:

At most, it seems to suggest that the Court itself would feel less bound by principles of *stare decisis* in dealing with issues already decided by a summary affirmance. But we continue to believe that the privilege of disregarding even summary Supreme Court holdings rests with that court alone.⁵⁶

1,453; and in the 1963 term, 2,768. Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 613 (1972) [hereinafter cited as Study Group]. In the 1973 term, 5,079 cases were on the docket. Review of the Supreme Court's Work: Statistics, 43 U.S.L.W. 3085, 3086 (U.S. 1974). Of the 3,876 cases disposed of during the 1973 term, only 161 were accompanied by full opinions. *Id.*

52. The influence of discretion on the Supreme Court's obligatory jurisdiction was first discussed in Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1929*, 44 Harv. L. Rev. 1, 12-14 (1930) ("The play of discretion is inevitable, and . . . the pressure of [the] docket is bound to sway its exercise. . . . [T]he administration of Rule [15] operates to subject the obligatory jurisdiction of the Court to discretionary considerations not unlike those governing certiorari.") (italics omitted). See A. Bickel, *The Least Dangerous Branch*, 126-27 (1962); Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 46-47 (1961). "It has often been observed that the dismissal of an appeal, technically an adjudication of the merits, is in practice often the substantial equivalent of a denial of certiorari." Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 74 n.365 (1964).

53. 478 F.2d 537 (2d Cir.), cert. denied, 414 U.S. 1096 (1973), application pursuant to Fed. R. Civ. P. 60(b)(6) denied, 500 F.2d 1206 (2d Cir. 1974). In this case, the Second Circuit affirmed the district court's determination that the Supreme Court's summary affirmance of *Romero v. Hodgson*, 403 U.S. 901 (1971), *aff'g mem.* 319 F. Supp. 1201 (N.D. Cal. 1970), bound it to dismiss an attack in *Doe* by migrant workers on federal and state statutes that operated to exclude them from the benefits of social welfare legislation. "Were we writing on a clean slate, we would take very seriously the assertion that on these facts the statutory exclusions cannot be sustained. But given *Romero*, the slate is not clean; plaintiffs must obtain any further writings on it in this case from the Supreme Court." 478 F.2d at 540 (italics omitted).

54. *Doe v. Hodgson*, 500 F.2d 1206, 1207 (2d Cir. 1974).

55. The *Romero* case involved only the plaintiff's exclusion from unemployment compensation (319 F. Supp. at 1201), while *Doe* concerned a broad attack on all features of social legislation (478 F.2d at 538-40). The *Doe* migrants also raised the question of whether their exclusion amounted to a suspect classification, which should be judged by the strict scrutiny standard (478 F.2d at 540), an issue not considered by *Romero*.

56. 500 F.2d at 1207-08.

The questionable validity of the Second Circuit approach as illustrated by *Mercado* and the divergence of views among the circuits suggest the need for some guidelines either from the Court or from Congress. A solution is available in the recommendation of the *Report of the Study Group on the Caseload of the Supreme Court* for the abolition of the Court's obligatory jurisdiction.⁵⁷ Requiring all cases to be brought on certiorari would allow the Court to leave standing the decisions of a lower court merely by denying the petition for certiorari. This would be, in effect, an "affirmance" as are summary dispositions now,⁵⁸ but no precedential effect would attach.⁵⁹ It is doubtful that this would measurably increase the volume of cases brought to the Supreme Court. The uncertainties of the precedential value properly to be given such dispositions and the difficulties of divining their meaning currently encourage litigants to pursue their cases in hopes of persuading the Court that their issues and facts are distinguishable and, hence, not foreclosed by the effect of the obscure Supreme Court summary disposition.⁶⁰

Whether or not Congress acts on the proposals of the *Study Group*, it is time for the Second Circuit to re-evaluate the viability of its rule. The dissatisfaction it expressed in *Doe*, the difficulties it encountered in determining the holding of *Negron*, the questions raised by Justice Rehnquist's language in *Edelman*, and the fact that other circuits are reconsidering their positions, all make such re-evaluation appropriate.⁶¹ These other circuits have been willing, both before and after *Edelman*, to deny binding authority to a Supreme Court summary disposition, the meaning of which can never be

57. Study Group 595-605, 611-12. Justice Brennan has expressed strong support of this proposition, noting that appeals consume a disproportionate amount of the Court's time. "Since the policy considerations that gave rise to the distinction between review by appeal and review by writ of certiorari have long since lost their force, I support most enthusiastically the proposal to abandon the appellate jurisdiction and leave a writ of certiorari as the only means of obtaining review by the Supreme Court." Brennan, *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473, 474 (1973).

58. See text accompanying note 7 *supra*; Note, *Impact of the Supreme Court's Summary Disposition Practice on its Appeals Jurisdiction*, 27 Rutgers L. Rev. 952 (1974).

59. - "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923); see the separate opinion of Justice Frankfurter with respect to the denial of certiorari in *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950); Stern & Gressman § 5.7.

60. "To earnest litigants, orders without reasons entered without plenary hearing do not carry the same conviction as a reasoned opinion." Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 Harv. L. Rev. 579, 605 (1940). The fact that the Supreme Court subsequently has reversed the apparent holdings of certain summary dispositions also encourages litigants to approach the Court. See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974) (compelling retroactive payment of state benefits violates the eleventh amendment, although this practice had been summarily upheld in the cases cited at note 45 *supra*); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (durational residence requirements for voting held invalid after having been summarily upheld in *Drueding v. Devlin*, 380 U.S. 125 (1965), *aff'g* 234 F. Supp. 721 (D. Md. 1964)); *Loving v. Virginia*, 388 U.S. 1 (1967) (unconstitutionality of state miscegenation law previously upheld summarily in *Naim v. Naim*, 350 U.S. 985 (1956)).

61. See generally Study Group 595-605, 611-12.

known with certainty. It appears, however, that the Second Circuit will continue to apply its rule unless and until the Supreme Court instructs otherwise.⁶²

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Securities—Possible Antitrust Violation Held Insufficient to Warrant Injunction Against Tender Offeror or Duty of Disclosure to Target Shareholders—Missouri Portland Cement Company (MP), the country's twentieth largest cement producer, sold portland cement throughout eleven states. Cargill, Inc., a large, privately held company engaged in a variety of bulk commodity businesses, established the "Salt Group" to study prospects for entry into the cement business. The Salt Group recommended a tender offer or purchase of an established company. Cargill approached the management of MP with an offer to acquire the company. Upon MP's rejection, Cargill announced a cash tender offer to purchase all of the outstanding shares of MP common in order to acquire control of MP and either operate it as a subsidiary or merge it with Cargill.

Two days later, MP filed suit in district court under section 16 of the Clayton Act,¹ seeking an injunction against the Cargill tender offer. MP's suit was based on two separate claims: that Cargill's acquisition of MP would violate section 7 of the Clayton Act,² and that Cargill had violated section 14(e) of the Securities Exchange Act of 1934³ by misrepresentations and nondisclosure of material facts to MP stockholders.⁴ Counterclaims by Cargill

62. Port Authority Bondholders Protective Comm. v. Port of N.Y. Authority, 387 F.2d 259, 262-63 n.3 (2d Cir. 1967).

1. Section 16 of the Clayton Act, 15 U.S.C. § 26 (1970) provides for injunctive relief against threatened loss due to antitrust violations.

2. Section 7 of the Clayton Act, 15 U.S.C. § 18 (1970) provides in part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

3. Securities Exchange Act of 1934 § 14(e), 15 U.S.C. § 78n(e) (1970) provides in part:

"It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."

MP also alleged violations of § 14(d) of the Williams Act, 15 U.S.C. § 78n(d) (1970) (unlawful to make tender offer for more than 5% of any class of equity security without specified disclosures to shareholders and the SEC), which will not be discussed in this Case Note.

4. These were: "(1) Cargill had not sufficiently disclosed its financial condition; (2) it had offered to supply financial information privately to some MP stockholders; (3) it misrepresented

alleged that MP had misrepresented material facts in its public pronouncements opposing the tender offer.⁵ The district court held that MP had raised "serious antitrust issues [necessitating] further investigation,"⁶ but rejected all seven of MP's securities law violation claims.⁷ A temporary injunction was issued pending trial of the antitrust questions.⁸ On appeal, the Second Circuit concluded that MP had failed to demonstrate a probability of success on the merits of its section 7 claim.⁹ As a result, the temporary injunction was

that it did not intend to change the business; (4) it misrepresented to MP's management that it would not make a tender offer; (5) it failed to disclose the means of financing the tender offer; (6) it failed to disclose its own belief that MP shares were worth substantially more than the \$30 offered; and (7) it failed to disclose that its acquisition of MP would violate § 7 of the Clayton Act." *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 871 n.42 (2d Cir.), cert. denied, 95 S. Ct. 150 (1974). Only the last-mentioned claim will be discussed here. For discussions of the general problem of disclosure to tender offerees, see Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 611-25 (1973); Kennedy, *Tender Moment*, 23 Bus. Law. 1091, 1110-14 (1968); Schmults & Kelly, *Disclosure in Connection with Cash Take-Over Bids: The New Regulations*, 24 Bus. Law. 19 (1968).

5. 498 F.2d at 873-74.

6. *Missouri Portland Cement Co. v. Cargill, Inc.*, 375 F. Supp. 249, 263 (S.D.N.Y.), aff'd in part, rev'd in part & remanded, 498 F.2d 851 (2d Cir. 1974), cert. denied, 43 U.S.L.W. 3190 (U.S. Oct. 15, 1974). The court of appeals ordered an expedited appeal because Cargill already had acquired approximately 19% of the total outstanding shares of MP at a cost of more than \$8,000,000. 498 F.2d at 855.

7. 375 F. Supp. at 267-68. The court of appeals sustained this ruling on all seven Williams Act claims. 498 F.2d at 875. However, on the counterclaims, the district court sustained one of Cargill's securities law claims, viz., that MP made a material misrepresentation when it implied that its shareholders would not be able to take advantage of an improved offer by Cargill, and enjoined MP from making further public pronouncements without the consent of Cargill or the approval of the court. 375 F. Supp. at 269-70. The court of appeals affirmed as to liability but reversed the issuance of the injunction as too severe a remedy. 498 F.2d at 875.

8. 375 F. Supp. at 270.

9. In examining the anticompetitive effect of the tender offer, the courts first must define the contours of the market which will be affected. The issue of the relevant geographic market was not raised by Cargill on appeal to the Second Circuit. 498 F.2d at 858 n.10. The district court found that four metropolitan areas (St. Louis, Kansas City, Memphis, and Omaha) constituted the relevant geographic market. 375 F. Supp. at 253. That court rejected Cargill's argument that the proper geographic market for portland cement in this case was the eleven-state area in which MP sold cement. *Id.* The court of appeals accepted the district court's finding for the purposes of the appeal, but instructed the district court to give careful consideration on remand to the issue of whether metropolitan areas are proper geographic markets for portland cement. 498 F.2d at 858 n.10. In questioning the district court's determination of relevant market, the Second Circuit relied upon *United States Steel Corp. v. FTC*, 426 F.2d 592 (6th Cir. 1970), which approved the FTC's finding that the relevant geographic market for portland cement was regional while the proper market for ready-mix concrete was metropolitan. It does not seem probable in the present case that an examination of the eleven-state area will produce a result different from that reached by the district court after examination of the four metropolitan areas, since, as the court of appeals pointed out, competition in both areas is limited to a few large producers, including *Missouri Portland*. 498 F.2d at 855-56, 858 n.10. See generally *United States v. Marine Bancorporation, Inc.*, 94 S. Ct. 2856 (1974); *United States v. Connecticut Nat'l Bank*, 94 S. Ct. 2788 (1974); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

lifted¹⁰ and the tender offer was permitted to resume. The court further concluded that in light of the improbability of a section 7 violation, Cargill was under no section 14(e) duty to disclose possible antitrust problems to MP shareholders. *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 95 S. Ct. 150 (1974).¹¹

Examination of Cargill's tender offer embroiled the Second Circuit in two section 7 theories of anticompetitive effect, namely potential competition and entrenchment.¹² The Supreme Court in *United States v. Penn-Olin Chemical Co.*¹³ had formulated the potential competition theory as a guideline for

10. 498 F.2d at 872-73. The Second Circuit's standard for determining issuance of a preliminary injunction against the continuance of a tender offer was set forth in *Sonesta Int'l Hotels Corp. v. Wellington Associates*, 483 F.2d 247 (2d Cir. 1973), as "a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Id.* at 250 (emphasis deleted). MP claimed that "even if the [section 7] analysis is sound, the district judge nevertheless acted properly in issuing the injunction" 498 F.2d at 866. The court rejected MP's contention. *Id.* at 867-70.

11. 498 F.2d at 866. The case was remanded for the framing of a temporary injunction allowing the "resumption of the [tender] offer pending final determination of the antitrust issues under terms and conditions consistent with [the court's] opinion." *Id.* at 875. The day following MP's petition for certiorari, Mr. Justice Douglas granted a stay of the Second Circuit's mandate, effectively reinstating the district court's injunction of the tender offer. Two weeks later, the full Court vacated the stay over Mr. Justice Douglas' dissent. 94 S. Ct. 3210 (1974).

12. The potential competition theory examines the present procompetitive effect of the acquiring firm's presence at the edge of the market, and the loss of potential competition which may occur if the firm enters the market by merger or acquisition instead of *de novo*. See notes 18-21 *infra* and accompanying text. The entrenchment theory considers whether the acquiring firm's "deep pocket" of financial and other resources will have a disruptive effect upon competition within the relevant market. See notes 21-30 *infra* and accompanying text. For applications of the entrenchment theory, see *United States Steel Corp. v. FTC*, 426 F.2d 592, 604 (6th Cir. 1970) (vertical acquisition of largest nonintegrated customer for portland cement by largest supplier thereof violative of § 7 due to acquiring firm's ability to extend credit and withstand temporary losses); *General Foods Corp. v. FTC*, 386 F.2d 936, 938-39 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968) (acquisition of steel wool pad producer by large producer and distributor of packaged food would have disruptive effect on balanced duopoly in steel wool market); *Ekco Prods. Co. v. FTC*, 347 F.2d 745, 751 (7th Cir. 1965) (acquisition of a small corporation with virtual monopoly by a large, diversified corporation held violative of § 7).

A related theory scrutinizes a large firm's "toehold acquisition" of a small plant or company and the expansion of it in order to obtain a significant market share. See Fox, *Toehold Acquisitions, Potential Toehold Acquisitions and Section 7 of the Clayton Act*, 42 ABA Antitrust Section 573 (1973); Comment, *Toehold Acquisitions and the Potential Competition Doctrine*, 40 U. Chi. L. Rev. 156 (1972). The court in *Missouri Portland* determined that no attractive toehold prospects were available to Cargill. Thus this theory would not support a finding of probable illegality. 498 F.2d at 864-65.

13. 378 U.S. 158, 173 (1964). Other Supreme Court cases interpreting § 7 were discussed by the *Missouri Portland* court but were found factually inapposite. These included *Ford Motor Co. v. United States*, 405 U.S. 562 (1972) (vertical merger); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (geographic market extension merger); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (merger involving both horizontal and vertical aspects). For

section 7 actions involving mergers or acquisitions between noncompetitors. *Penn-Olin* was a unique situation in that two companies, neither of which was interested in entering the sodium chlorate market as an *individual* competitor, attempted to accomplish entry by a joint venture.¹⁴ The Court held that section 7 applied to joint ventures as well as to mergers,¹⁵ and that the joint venture could be viewed as anticompetitive because of the elimination of the procompetitive effect of the firm that would have been left on the edge of the market had the other firm entered individually.¹⁶ The Second Circuit in *Missouri Portland* found that *Penn-Olin* required that a company have a prior, permanent commitment to an industry in order to be a potential competitor, which Cargill did not have to the cement industry.¹⁷

*United States v. Falstaff Brewing Corp.*¹⁸ developed the potential competition theory more fully. The Court considered the effect upon potential competition of a geographic market extension merger.¹⁹ Instead of entering the New England market de novo, Falstaff, the nation's fourth largest beer producer, sought to acquire the largest seller of beer in that market. The Court remanded for the trial court to consider the elimination of potential competition based on the loss of Falstaff's "edge of the market" position as a possible de novo entrant.²⁰ The test became a two-fold inquiry: whether the acquiring firm was a potential competitor, and, if so, whether it exerted a beneficial influence on competition while on the edge of the market.²¹

overviews of § 7 analysis, see Handler, *The Twentieth Annual Antitrust Review—1967*, 53 Va. L. Rev. 1667 (1967); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313 (1965); Comment, *A Survey of Antitrust Law in the Fifth Circuit*, 11 Houston L. Rev. 640 (1974); Note, *Conglomerate Mergers*, 45 Notre Dame Law. 698 (1970); 51 Marq. L. Rev. 205 (1968).

The court also considered a recent Tenth Circuit case factually similar to *Missouri Portland* but did not adopt that court's reasoning or result. *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972), cert. denied, 416 U.S. 909 (1974) (conglomerate merger held violative of § 7). For criticisms of the *Kennecott* decision, see Note, *Antitrust: Conglomerate Mergers and Section 7 of the Clayton Act*, 33 Md. L. Rev. 96 (1973); Note, *United States v. Falstaff Brewing Corporation: Potential Competition Re-examined*, 72 Mich. L. Rev. 837, 858-61 (1974); 86 Harv. L. Rev. 772 (1973).

14. 378 U.S. at 165-67.

15. *Id.* at 168.

16. *Id.* at 173-74.

17. "Penn-Olin provides little comfort to MP. . . . Cargill has no permanent commitment to the cement industry of the sort that both Pennsalt and Olin had to chemicals such as sodium chlorate." 498 F.2d at 861.

18. 410 U.S. 526 (1973). For discussions of this case, see Note, *United States v. Falstaff Brewing Corp.—Potential Competition Under § 7 of the Clayton Act*, 38 Albany L. Rev. 348 (1974); Note, *United States v. Falstaff Brewing Corporation: Potential Competition Re-examined*, 72 Mich. L. Rev. 837 (1974).

19. 410 U.S. at 532-33. Von Kalinowski defines this term as "a merger in which the participating corporations sell the same products or are in similar businesses but in different geographic areas." 16A von Kalinowski, *Business Organizations: Antitrust Laws and Trade Regulation* § 17.01, at 17-3 (1971) [hereinafter cited by volume as von Kalinowski].

20. 410 U.S. at 537.

21. *Id.* at 534 n.13.

Missouri Portland distinguished *Falstaff* on the apparent grounds that Cargill, unlike *Falstaff*, was neither in the cement industry at the time of the tender offer, nor considered de novo entry feasible. Thus, concluded the court, the cement industry could not reasonably fear Cargill's potential de novo entry, and therefore Cargill did not exert a present procompetitive influence.²²

The *Missouri Portland* court also rejected MP's entrenchment argument. The Supreme Court had developed this theory in *FTC v. Procter & Gamble Co.*²³ to deal with a product extension merger.²⁴ Procter & Gamble, a large diversified manufacturer of low-price household products, had acquired the assets of the leading manufacturer of household liquid bleach, Clorox. This acquisition involved the substitution of a powerful firm with substantial advertising and marketing resources for a smaller firm dominant in its own market. The Court held that the acquisition had a disruptive effect upon price competition and raised the barriers to future entry—hence barriers to potential competition—in that industry.²⁵ The Second Circuit distinguished *Procter & Gamble* on the basis of a finding of fact that there was “no close similarity in products, customers, or marketing techniques”²⁶ between Cargill and MP. As an alternative ground, the court attempted to show Procter & Gamble to be a more dangerous “powerful acquiring firm” than Cargill.²⁷ This discussion proceeded from the indisputable premise that “the ‘entrenchment’ theory seems to require more than simply a showing that the acquiring firm has a deep pocket.”²⁸ In this light, the court termed the danger of Cargill's

22. 498 F.2d at 863.

23. 386 U.S. 568 (1967).

24. *Id.* at 577-78. A product extension merger has been defined as “a merger in which the products of the acquired company are complementary to those of the acquiring company and may be produced with similar facilities, marketed through the same channels and in the same manner, and advertised by the same media.” 16A von Kalinowski § 17.01, at 17-2 to 17-3. See generally Note, The Use of Legal Presumptions in Implementing Section 7 of the Clayton Act, 17 Am. U.L. Rev. 76 (1967); 51 Marq. L. Rev. 205 (1968); 42 St. John's L. Rev. 259 (1967).

25. “The major competitive weapon in the successful marketing of bleach is advertising. Clorox was limited in this area by its relatively small budget and its inability to obtain substantial discounts. By contrast, Procter's budget was much larger; and, although it would not devote its entire budget to advertising Clorox, it could divert a large portion to meet the short-term threat of a new entrant. Procter would be able to use its volume discounts to advantage in advertising Clorox. Thus, a new entrant would be much more reluctant to face the giant Procter than it would have been to face the smaller Clorox.” 386 U.S. at 579.

26. 498 F.2d at 862.

27. *Id.*

28. *Id.* at 865. Past decisions have given some indication of what factors besides deep pockets are needed. *Stanley Works v. FTC*, 469 F.2d 498, 520 (2d Cir. 1972), cert. denied, 412 U.S. 928 (1973) (Mansfield, J., dissenting) (increased costs of advertising and sales promotion for potential competitors); *United States Steel Corp. v. FTC*, 426 F.2d 592, 603-04 (6th Cir. 1970) (sheer size and financial resources one element to be considered); *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 229-30 (D.C. Cir. 1962) (size and financial resources of acquiring firm would enable it to engage in price competition ruinous to much smaller competitors); *Smith-Victor Corp. v. Sylvania Elec. Prods., Inc.*, 242 F. Supp. 315, 320 (N.D. Ill. 1965) (prior engagement in relevant market taken into account).

entrenchment "more metaphorical than real,"²⁹ and concluded that there was insufficient probability of a section 7 violation to meet the injunctive standard.³⁰

It appears arguable that the *Missouri Portland* decision read the prior cases with an eye on the policy implications of allowing a target company to utilize the antitrust laws as part of its defensive arsenal.

Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust violation has been shown. Such cases require a balancing of public and private interests of various sorts.³¹

To prevent use of the antitrust laws for this purpose, the court arguably will treat such requests for a temporary injunction with a good deal of skepticism; it will not, at least in this situation, apply section 7 in an expansive manner.

The *Missouri Portland* court's treatment of MP's entrenchment argument is illustrative. That court's conclusion that Cargill possessed deep pockets and nothing else must be read together with the Salt Group's conclusion that much of Cargill's distribution, marketing and production experience in salt could be applied to portland cement.³² In addition, Cargill believed that it could utilize its considerable capacity for bulk commodity transportation to secure competitive advantages in the portland cement market.³³ Thus, the court arguably could have analogized to the "deep pocket plus" situations presented by *Procter & Gamble* and other entrenchment cases.³⁴ However, the court apparently determined that such an approach would encourage abusive use of the antitrust laws.

Having concluded that the standards for injunctive relief—probable success on the merits and possible irreparable harm or serious issues going to the merits accompanied by a likelihood of hardships upon the party seeking the injunction³⁵—were not met, the court turned to the securities law issues. Again, the court appeared reluctant to place obstacles in the way of the tender offeror, and arguably concluded that its resolution of the request for injunctive relief under the antitrust laws was dispositive of the issue of Cargill's duty to disclose to MP investors that an antitrust issue existed. In cases such as *Missouri Portland*, once a court has measured the possibility of a section 7 violation, it must then determine whether that quantum of possibility requires disclosure under section 14(e) of "basic facts so that outsiders may draw

29. 498 F.2d at 865.

30. *Id.* at 865-66; see note 10 *supra*.

31. 498 F.2d at 854.

32. 375 F. Supp. at 256 n.2.

33. Cargill's transportation capacity is discussed at *id.* at 254. In its report to the Cargill Board, the Salt Group noted that "[c]ement is a basic bulk commodity which would enable Cargill to utilize its transportation expertise, both in relation to land and water." *Id.* at 256 n.2.

34. See notes 12, 23-28 *supra* and accompanying text.

35. 498 F.2d at 866; cf. *Broder v. Dane*, [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,875 (S.D.N.Y. Nov. 21, 1974).

upon their own evaluative experience [sic] in reaching their own investment decisions"³⁶

The test of materiality to decide which "basic facts" must be disclosed has been phrased by the Second Circuit as whether "any of the stockholders who tendered their shares would probably not have tendered their shares"³⁷ if the fact in question had been disclosed. As stated in *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*:³⁸

Account must be taken of all the surrounding circumstances to determine whether the fact under consideration is of such significance that a reasonable investor would weigh it in his decision whether or not to invest.³⁹

Courts have previously considered the materiality of the possibility of an antitrust violation. Perhaps the most important case in this area is *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.*⁴⁰ There, G&W, a large, diversified conglomerate, made a cash tender offer to purchase 15 percent of the outstanding shares of A&P, one of the nation's largest retail supermarket chains. A&P alleged that G&W's other holdings, as well as those of one of its directors, were such that consummation of the tender offer would violate section 7.⁴¹ After holding that A&P had demonstrated sufficient likelihood of success on its section 7 claim to justify a preliminary injunction against continuance of the tender offer,⁴² the court declared that "[i]t . . . appears that G&W omitted to state certain material facts indicating that there

36. *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 697 (2d Cir. 1973), quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). The legislative history makes clear that the purpose of this section was protection of investors and that "[t]his provision would affirm the fact that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal." H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968). See also *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973); *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969). For discussion of the purposes and judicial interpretations of the Williams Act, see Griffin & Tucker, *The Williams Act*, Public Law 90-439—Growing Pains? Some Interpretations with Respect to the Williams Act, 16 How. L.J. 654 (1971); Young, *Judicial Enforcement of the Williams Amendments: The Need to Separate the Questions of Violation and Relief*, 27 Bus. Law. 391 (1972).

37. *Symington Wayne Corp. v. Dresser Indus., Inc.*, 383 F.2d 840, 843 (2d Cir. 1967); see *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 362-63 (2d Cir.), cert. denied, 414 U.S. 910 (1973); *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 948 (2d Cir. 1969); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 860-62 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969) (rule 10b-5); *List v. Fashion Park, Inc.*, 340 F.2d 457, 462 (2d Cir.), cert. denied, 382 U.S. 811 (1965) (rule 10b-5). For a discussion of the similarity of the § 14(e) materiality test to that under rule 10b-5, 17 C.F.R. § 240.10b-5 (1974), and rule 14a-9, 17 C.F.R. § 240.14a-9 (1974), see Comment, *Chris-Craft and Section 14(e): The Expansion of Lead Underwriters' Liability*, 42 Fordham L. Rev. 820, 826-27 (1974).

38. 480 F.2d 341 (2d Cir.), cert. denied, 414 U.S. 910 (1973).

39. *Id.* at 363.

40. 476 F.2d 687 (2d Cir. 1973).

41. *Id.* at 689-91.

42. *Id.* at 695.

are substantial antitrust obstacles to G&W's purchasing a large portion of A&P's shares."⁴³ The court went on to hold that A&P had demonstrated a "probability of success" on this claim under section 14(e):⁴⁴

The facts that, at the time it announced its tender offer, an antitrust action had not been commenced against G&W, and that its liability was uncertain, does not excuse G&W's failure to disclose all . . . relevant circumstances so that A&P shareholders could weigh them in reaching their decision whether or not to tender their shares. . . . Those "basic facts" bearing upon G&W's possible liability for antitrust violations were of obvious concern to those A&P shareholders who retained part of their holdings.⁴⁵

The disclosure of possible antitrust problems does not place a great burden of speculation or prediction upon a tender offeror. In *Elco Corp. v. Microdot Inc.*,⁴⁶ which involved nondisclosure of possible violations of section 7 in connection with a horizontal merger,⁴⁷ the court stated:

At a minimum, the present record makes it appear that the facts . . . raised serious and substantial questions about the legality of the transaction. If so, they held the potential of effecting the judgment of Elco's stockholders on whether and how much to tender. These basic facts could have been stated without speculation on future events. They were not stated.⁴⁸

The purpose of the Williams Act is full and fair disclosure.⁴⁹ When it is

43. *Id.* at 697. These facts were that the chief executive of G&W owned a controlling interest in Bohack, and that G&W owned several companies which were actual or potential suppliers of A&P and planned to take advantage of its acquisition of A&P to expand those operations. *Id.*

44. *Id.*

45. *Id.* This is consistent with earlier holdings under § 14(e) that prospective or conditional events must be disclosed to tender offerees if the occurrence of the event would be a material fact. "Where the event, if it should occur, could influence the stockholder's decision to tender, the chance that it might well occur is a factor that should be disclosed to the investor . . ." *Sonesta Int'l Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 251 (2d Cir. 1973) (nondisclosure, inter alia, of the fact that consummation of the merger might cost target company its listing on the New York Stock Exchange); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), cert. denied, 414 U.S. 910 (1973) (nondisclosure of offeror's anticipated sale of asset at substantial loss). Remarks in prior § 14(e) cases had given more comfort to tender offerors. See *Susquehanna Corp. v. Pan Am. Sulphur Co.*, 423 F.2d 1075, 1086 (5th Cir. 1970) (offeror "not required to make predictions of future behavior . . . which may cause the offeree or the public investor to rely on them unjustifiably."); cf. *Electronic Speciality Co. v. International Controls Corp.*, 409 F.2d 937, 948 (2d Cir. 1969).

46. 360 F. Supp. 741 (D. Del. 1973).

47. In *Elco*, *Microdot*, a manufacturer of metal plate connectors, made a tender offer to acquire about 51% of the common stock of *Elco Corporation*, a competitor. *Id.* at 744-46.

48. *Id.* at 752-53. As in *Gulf & Western*, the *Elco* court concluded that there was sufficient probability of success on the § 7 claim to justify a preliminary injunction on that basis alone. *Id.* at 750-55; see notes 40-45 *supra* and accompanying text. The basic facts in *Elco* were that *Elco* and *Microdot* were in direct competition in the metal plate connector market and in potential competition for the sale of electronic connectors in other markets. 360 F. Supp. at 752.

49. See note 36 *supra* and accompanying text. See generally *Brown*, *The Scope of the Williams Act and Its 1970 Amendments*, 26 *Bus. Law.* 1637 (1971); *Note*, *The Scope of Section 14(d): What Is A Tender Offer?*, 34 *Ohio St. L.J.* 375, 379 (1973); 45 *Tul. L. Rev.* 195, 201 (1970).

doubtful whether a fact is material, a tender offeror should always give the shareholders the benefit of the information.⁵⁰ The *Missouri Portland* district court distinguished *Gulf & Western*⁵¹ and *Elco*⁵² on the basis of a finding in those cases that the probability of an antitrust violation was "clearly apparent at the time of the offer."⁵³ The Second Circuit adopted this "clearly apparent" test.⁵⁴

Even though the court in *Gulf & Western* had found a probability of antitrust obstacles, that court nowhere indicated that such obstacles had to be "clearly apparent" at the time of the tender offer. In fact, the court stated that only "[t]hose 'basic facts' bearing on G&W's *possible liability* for antitrust violations"⁵⁵ were of concern to shareholders and required disclosure. The *Missouri Portland* court never reached the core of the "basic facts" issue, *i.e.*, whether the possible liability for antitrust violations was a basic fact requiring *express* disclosure.⁵⁶ Instead, the court concentrated on the threshold question of what quantum of probability would constitute a material fact under section 14(e).

Missouri Portland is a clear statement that the Second Circuit will permit a tender offer to be retarded by its antitrust implications only in the egregious case. On the one hand, the case can be viewed as a commendable recognition that a temporary injunction is often fatal to a tender offer and should be entered only when the target's antitrust objections are of significant merit. On the other hand, only time will tell whether there is now one section 7 for tender offers, and another, more onerous section 7 for other methods of merger and acquisition. Since the Federal Trade Commission has challenged

50. "If there is a choice between the interests of the shareholder or the bidder, Congress has already decreed that the interests of the shareholder must prevail." Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 635 (1973).

51. *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687 (2d Cir. 1973); see notes 40-45 *supra* and accompanying text.

52. *Elco Corp. v. Microdot Inc.*, 360 F. Supp. 741 (D. Del. 1973); see notes 46-48 *supra* and accompanying text.

53. 375 F. Supp. at 268, quoted with approval in 498 F.2d at 872 n.44. The court did not attempt to distinguish these cases on the basis that in both the probability of a § 7 violation was held sufficient to warrant injunctive relief in its own right, apart from nondisclosure claims under § 14(e). Nor did the court discuss the question of whether a § 14(e) violation can occur despite denial of injunctive relief on the § 7 claim. Apparently this result is possible insofar as the "possibility" test of *Gulf & Western* seems less onerous than either substantive branch of the Sonesta injunctive relief standard ("probability of success on the merits" or "sufficiently serious questions constituting a fair ground for litigation"). Compare note 10 *supra* with notes 40-45 *supra* and accompanying text. However, the adoption in *Missouri Portland* of a "clearly apparent" standard under § 14(e) may mean that a § 14(e) violation will not occur unless the defendant has also violated § 7.

54. 498 F.2d at 872-73; see Comment, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. Rev. 991 (1973). The *Missouri Portland* court did concede that the issuance of a complaint by the FTC should be disclosed. 498 F.2d at 873.

55. 476 F.2d at 697 (emphasis added).

56. See notes 40-48 *supra* and accompanying text.

Cargill's attempted takeover of MP,⁵⁷ it arguably follows that the Second Circuit too readily disposed of MP's claims. Moreover, the court's willingness to allow the tender offeror not to disclose the possibility of antitrust violations, notwithstanding its own resolution of the request for injunctive relief under section 7, appears ill-reasoned. The court correctly notes that the basis, if any, of the antitrust violations were "known . . . to the target . . . [and] can safely be left for the latter's riposte."⁵⁸ However, that basis was not necessarily well-known to the holders of MP stock, and it is these investors whom Congress desired to keep informed. To place the feet of the target in two cement blocks may well create imbalances in the economy and injustice to the individual investor.⁵⁹

Claire V. Eagan

Securities—Investment Advisers Act of 1940—Private Right of Action for Damages Allowed Against an Investment Adviser and His Accountant.—Plaintiffs, limited partners of a partnership organized for the purpose of investing in securities, brought suit against two general partners and the partnership's outside accountants, seeking damages under, *inter alia*, section 206 of the Investment Advisers Act of 1940,¹ alleging that the general partners had engaged in fraudulent practices in the conduct of the business of the partnership. On defendant's motion to dismiss, the court, noting that the section 206 claim for damages raised a question of first impression, held that that section could be the basis for a private right of action. Defendant accountants, charged with aiding and abetting the dissemination of false and misleading financial statements, moved for a rehearing, arguing that even if a private cause of action exists under section 206, the specific language of the section limits its applicability solely to investment advisers. The court disagreed, and held that they could be held jointly liable with the investment

57. See Wall St. J., Nov. 1, 1974, at 5, col. 1. MP was decided in June.

58. 498 F.2d at 873 (footnote omitted).

59. See generally SEC Securities Exchange Act Release No. 11003 (Sept. 9, 1974).

1. Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (1970) provides in pertinent part: "It shall be unlawful for any investment adviser, by use of the mails, or any means or instrumentality of interstate commerce, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client" Section 206 of the Act refers only to transactions by "any investment adviser," a term defined by § 202(a)(11). As defined, the term includes, with certain exceptions, "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities" 15 U.S.C. § 80b-2(a)(11) (1970).

advisers. *Bolger v. Laventhol, Krekstein, Horwath & Horwath*, 381 F. Supp. 260 (S.D.N.Y. 1974).

The Investment Advisers Act of 1940² and the Investment Company Act of 1940³ were the result of an extensive study and report by the SEC concerning investment trusts, investment companies and investment advisers.⁴ Little was known about the number or activities of investment advisers; in fact, one of the primary purposes of the Advisers Act was to discover more about this profession and its practices.⁵ The SEC report and recommendations were submitted to Congress, and a Senate committee draft proposed a licensing requirement for all investment advisers, a prohibition against misrepresentation and fraudulent activities, and a grant of investigative powers to the SEC.⁶ During congressional hearings on the bill, the provision for investigative powers was criticized⁷ and ultimately was deleted. In its final form, the Act specifically defined several unlawful practices⁸ and included section 206,⁹ which proscribed fraudulent practices in general terms. The primary tool of enforcement was the injunction, which the SEC could obtain in federal district court by showing violation of the Act.¹⁰ Additionally, the SEC had the power to revoke or suspend the registration of an investment adviser, but only after an injunction had been issued or he had been found guilty of certain crimes.¹¹ The Act remains the only major securities act which does not provide a private right of action.¹² Furthermore, section 206—unlike other securities antifraud provisions—was not litigated extensively,¹³ and no

2. 15 U.S.C. §§ 80b-1 to 80b-21 (1970).

3. *Id.* §§ 80a-1 to 80a-52. The two acts are part of a single piece of legislation. The Investment Company Act of 1940 and the Investment Advisers Act of 1940 constitute titles I and II, respectively, of the Act of Aug. 22, 1940, ch. 686, 54 Stat. 789.

4. SEC, *Investment Trusts and Investment Companies*, H.R. Doc. No. 477, 76th Cong., 2d Sess. (1939).

5. The SEC reported to Congress that, in connection with its study of investment advisers, it had been unable to ascertain their number or the amount of funds under their control. S. Rep. No. 1775, 76th Cong., 3d Sess. 21 (1940). §§ 203-204, the registration and reporting provisions of the Act, 15 U.S.C. §§ 80b-3, 4 (1970), were designed to elicit such information.

6. S. 3580, 76th Cong., 3d Sess. 98-101 (1940).

7. See Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking & Currency, 76 Cong., 3d Sess., pt. 2, at 718-19 (1940).

8. Act of Aug. 22, 1940, ch. 686, tit. II, 54 Stat. 852. See § 205, 15 U.S.C. § 80b-5 (1970) (certain investment advisory contracts illegal); § 207, 15 U.S.C. § 80b-7 (1970) (material misstatements); § 208, 15 U.S.C. § 80b-8 (1970) (unlawful representations).

9. Section 206, 54 Stat. 852, as amended, 15 U.S.C. § 80b-6 (1970).

10. Section 209(e), 54 Stat. 854, as amended, 15 U.S.C. § 80b-9(e) (1970).

11. Section 203(d), 54 Stat. 851, as amended, 15 U.S.C. § 80b-3(e) (1970).

12. Examples of specific provisions for civil liabilities include, e.g., §§ 11, 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l (1970); § 323 of the Trust Indenture Act of 1939, 15 U.S.C. § 77www (1970); §§ 9(e), 16(b), 18 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78l(e), 78p(b), 78r (1970); §§ 16(a), 17(b) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79p(a), 79q(b) (1970); and § 30(f) of the Investment Company Act of 1940, 15 U.S.C. § 80a-29(f) (1970).

13. In 1959, one commentator observed that since the promulgation of the Act in 1940, civil and administrative proceedings under its provisions averaged only one or two per year. Loomis,

cases recognized a private right of action under its provisions.¹⁴ For this and other reasons, the Act was widely criticized.¹⁵

In 1960 Congress adopted proposals submitted by the SEC.¹⁶ The SEC was granted the power to suspend or revoke registrations upon finding that an adviser had violated the Act¹⁷ and was given extensive rulemaking authority to declare specific activities to be fraudulent or deceptive practices.¹⁸ Section 206 was extended to all investment advisers, whether registered or not,¹⁹ and the grounds for denial of registration were expanded significantly.²⁰ Despite the fact that no provision for civil liability was included in the amendments, the SEC remained convinced that private liability was important for effective enforcement of the Act. As early as 1951, an opinion of the General Counsel of the SEC²¹ stated that "the anti-fraud provisions of the SEC statutes are violated by the employment of any legend, hedge clause or other provision which is likely to lead an investor to believe that he has in any way waived any right of action he may have"²² Among other statutes, the opinion referred specifically to section 206 of the Investment Advisers Act.²³

In 1961, shortly after the effective date of the Advisers Act amendments, a private action for damages under section 206 came before the Eighth Circuit in *Brouk v. Managed Funds, Inc.*²⁴ Recognizing the dearth of express provisions in either statute respecting private civil liability, the court con-

The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940, 28 Geo. Wash. L. Rev. 214, 248 (1959).

14. See 24 SEC Ann. Rep. 162 (1959).

15. E.g., Dean, Twenty-five Years of Federal Securities Regulation by the Securities and Exchange Commission, 59 Colum. L. Rev. 697, 705-06 (1959). Professor Loss has described the Act as little more than a continuing census of investment advisers in the United States. 2 L. Loss, Securities Regulation 1393 (2d ed. 1961). The SEC commented on its insufficient enforcement powers in no uncertain terms: "Since, with its limited powers under the Act, the Commission can only set the machinery of the law in operation after violations have been established, the Act should not be relied on as a measure to prevent such fraudulent practices, except, of course, to the extent that any law which provides criminal penalties may act in and of itself as a deterrent to crime." 10 SEC Ann. Rep. 184 (1944).

16. Act of Sept. 13, 1960, Pub. L. No. 86-750, 74 Stat. 885. Section 216 of the Investment Advisers Act provides that the SEC shall submit an annual report which shall include recommendations for further legislation as it may find advisable. 15 U.S.C. § 80b-16 (1970).

17. Act of Sept. 13, 1960, Pub. L. No. 86-750, § 2, 74 Stat. 885.

18. Id. § 9, 74 Stat. 887.

19. Id. §§ 8-9, 74 Stat. 887.

20. Id. § 3, 74 Stat. 885.

21. 16 Fed. Reg. 3387 (1951).

22. Id. (emphasis added).

23. Id. The SEC previously had expressed the view that investment advisers were required to serve the interests of their clients with undivided loyalty. 11 Fed. Reg. 10,997 (1945); see *Hughes v. SEC*, 174 F.2d 969 (D.C. Cir. 1949). Cases already had established a similar duty at common law. E.g., *Ridgely v. Keene*, 134 App. Div. 647, 119 N.Y.S. 451 (2d Dep't 1909) (plaintiff investment adviser could not recover on contract requiring him to influence his clients to purchase stock in which defendant stockbrokers were interested).

24. 286 F.2d 901 (8th Cir. 1961), vacated as moot, 369 U.S. 424 (1962) (per curiam).

cluded that no such liability could be implied as to investment company directors.²⁵ However, the *Brouk* decision did not comport with the trend toward implication of private remedies for securities violations²⁶ and the Eighth Circuit later disapproved of the case in dictum.²⁷

Apart from an uninformative per curiam decision²⁸ in 1955, section 206 received its first extensive judicial treatment in *SEC v. Capital Gains Research Bureau, Inc.*²⁹ There, the SEC sought a preliminary injunction under section 206 to prevent an investment adviser from engaging in "scalping,"³⁰ or to require him to disclose the practice to his clients. The Court recognized a fiduciary relationship between an investment adviser and his client, which imposes on an adviser "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients."³¹ Reversing the court of appeals,³² the Court held that the securities laws do not require proof of intent to injure in order to enjoin a practice which acts as a fraud or deceit, noting that "Congress intended the Investment Advisers Act of 1940 to be construed like other securities legislation 'enacted for the purpose of avoiding frauds,' not technically and restrictively, but flexibly to effectuate its remedial purposes."³³

The cases cited³⁴ by the *Capital Gains* Court dealt with section 17(a) of the

25. *Id.* at 906. Section 30(f) of the Investment Company Act of 1940 does provide for private civil liability in very limited circumstances. 15 U.S.C. § 80a-29(f) (1970).

26. See note 39 *infra*.

27. *Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 793 (8th Cir. 1967). Today it is widely recognized that an implied private cause of action for a violation of the Investment Company Act exists. *Moses v. Burgin*, 445 F.2d 369, 373 (1st Cir.), cert. denied, 404 U.S. 994 (1971); *Herpich v. Wallace*, 430 F.2d 792, 815 (5th Cir. 1970); *Esplin v. Hirschi*, 402 F.2d 94, 103 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969); *Taussig v. Wellington Fund Inc.*, 313 F.2d 472, 476 (3d Cir.), cert. denied, 374 U.S. 806 (1963); *Brown v. Bullock*, 294 F.2d 415, 420-21 (2d Cir. 1961).

28. *Seipel v. SEC*, 229 F.2d 758 (D.C. Cir. 1955) (per curiam) (injunction against § 206 violations affirmed without discussion).

29. 375 U.S. 180 (1963), noted in 5 B.C. Ind. & Com. L. Rev. 838 (1964); 42 N.C.L. Rev. 954 (1964); 9 St. Louis U.L.J. 135 (1964); 38 Tul. L. Rev. 778 (1964); 19 U. Miami L. Rev. 148 (1964).

30. "Scalping," in its simplest form, occurs when an investment adviser or other person purchases a security, subsequently recommends its purchase to investors, and then sells in the hope of realizing a short-run profit due to investor interest he has generated in the security. SEC, Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess. pt. 5, at 58 (1963).

31. 375 U.S. at 194 (footnotes omitted); see 19 U. Miami L. Rev. 148, 152 (1964).

32. 300 F.2d 745 (2d Cir. 1961), *aff'd* on rehearing, 306 F.2d 606 (2d Cir. 1962) (en banc), *rev'd & remanded*, 375 U.S. 180 (1963).

33. 375 U.S. at 195 (footnote omitted); see 37 S. Cal. L. Rev. 359, 366 (1964); 19 U. Miami L. Rev. 148, 152 (1964). But see *Blau v. Lehman*, 368 U.S. 403, 410-13 (1962), where the Court warned against excessive judicial expansion of the securities laws to accomplish objectives believed to be beneficial. Essentially, this was the reasoning of the court of appeals in *Capital Gains*. 306 F.2d at 609.

34. The Court cited *Speed v. Transamerica Corp.*, 235 F.2d 369 (3d Cir. 1956) (§ 10(b)); *Norris & Hirschberg, Inc. v. SEC*, 177 F.2d 228 (D.C. Cir. 1949) (§§ 17(a) and 10(b)); *Hughes v.*

Securities Act,³⁵ section 10(b) of the Exchange Act³⁶ and rule 10b-5 thereunder,³⁷ rather than with section 206. Several commentators have pointed out that section 206 was patterned after section 17(a) and have argued that cases construing these provisions should be applied to section 206.³⁸ This would mean the implication of a private right of action under section 206.³⁹

During the 1960s, the SEC continued its attempts to establish civil liability to injured investors for violations of section 206. In a special study⁴⁰ submitted to Congress in 1963, the Commission recommended that the reckless or false distribution of investment advice be subject to express civil liability.⁴¹ Subsequently, several private actions which included claims under section 206 came before the courts. However, each of these cases was decided on other grounds, and the merits of the section 206 claims never were reached.⁴²

Two later decisions may be construed as conferring a private cause of action under section 206. In *Courtland v. Walston & Co.*,⁴³ an investor brought suit against the estate of a deceased registered representative, alleging

SEC, 174 F.2d 969 (D.C. Cir. 1949) (same); *Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943), cert. denied, 321 U.S. 786 (1944) (§ 17(a)); *Archer v. SEC*, 133 F.2d 795 (8th Cir.), cert. denied, 319 U.S. 767 (1943) (same); *SEC v. Torr*, 15 F. Supp. 315 (S.D.N.Y. 1936), rev'd on other grounds, 87 F.2d 446 (2d Cir. 1937) (same).

35. 15 U.S.C. § 77q(a) (1970).

36. Id. § 78j(b) (1970).

37. 17 C.F.R. § 240.10b-5 (1974).

38. 3 L. Loss, *Securities Regulation* 1515 (2d ed. 1961); 38 Tul. L. Rev. 778, 781 (1964); 71 Yale L.J. 1342, 1346 (1962); see *SEC v. Capital Gains Research Bureau, Inc.*, 300 F.2d 745, 752 (2d Cir. 1961), aff'd on rehearing, 306 F.2d 606 (1962) (en banc), rev'd & remanded, 375 U.S. 180 (1963).

39. While the Supreme Court has only recently held, in *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971), that a private action exists under § 10(b), lower courts have long recognized the remedy. See notes 59-61 *infra*. Holding that a private cause of action exists under § 17(a) are *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 787 n.2 (2d Cir. 1951) (dictum); *Dorfman v. First Boston Corp.*, 336 F. Supp. 1089, 1095 (E.D. Pa. 1972); *Dack v. Shanman*, 227 F. Supp. 26, 28-29 (S.D.N.Y. 1964); *Pfeffer v. Cressaty*, 223 F. Supp. 756, 757 (S.D.N.Y. 1963); *Thiele v. Shields*, 131 F. Supp. 416, 419 (S.D.N.Y. 1955). Contra, *Hardy v. Sanson*, 356 F. Supp. 1034, 1038 (N.D. Ga. 1973); *Dyer v. Eastern Trust & Banking Co.*, 336 F. Supp. 890, 905 (D. Me. 1971). See also *Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 790 (8th Cir. 1967); *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757 (D. Colo. 1964).

40. Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess. (1963).

41. Id., pt. 5, at 60.

42. *Kutner v. Gofen & Glossberg*, [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,109 (7th Cir. 1971) (unwise investment or mismanagement fails to constitute fraud under the statute); *Kauffman v. Dreyfus Fund*, 434 F.2d 727 (3d Cir. 1970), cert. denied, 401 U.S. 974 (1971) (shareholders of a mutual fund do not have a personal cause of action for damages allegedly sustained by their corporation); *Jones Memorial Trust v. Tsai Inv. Servs., Inc.*, 367 F. Supp. 491 (S.D.N.Y. 1973) (mismanagement of research and recommendation of investments did not constitute fraud) (alternative holding); *Skydell v. Mates*, 59 F.R.D. 297 (S.D.N.Y. 1972) (denial of class action status); *Schlusberg v. Werly*, 274 F. Supp. 758, 759-60 (S.D.N.Y. 1967) (jurisdiction over private action assumed but not decided for purposes of venue discussion).

43. 340 F. Supp. 1076 (S.D.N.Y. 1972).

violations of the securities acts, including section 206. The district court held that the practice of recommending securities to customers prior to the appearance of the recommendations in weekly market letters was a fraudulent and deceptive device.⁴⁴ Quoting section 10(b) of the Securities Exchange Act and section 206, the court stated that rule 10b-5, "together with the foregoing statutory authority, is now . . . considered to support private litigation for practically any sin of omission or commission which may be imagined in connection with the purchase or sale of a security."⁴⁵ Unfortunately, the court never clarified which "foregoing statutory authority" it had in mind.

*Young v. Seaboard Corp.*⁴⁶ was less equivocal. The complaint alleged violations of section 10(b) of the Exchange Act, section 17 of the Investment Company Act⁴⁷ and section 206. In denying defendants' motion to dismiss the complaint, the court discussed in detail only section 10(b), but stated in passing that "the claims of plaintiffs under . . . the Investment Advisers Act . . . appear sufficient to withstand the present motion to dismiss."⁴⁸ However, two very recent cases departed from the unexplained holding in *Young*. The Southern District of Florida, in *Greenspan v. Campos Del Toro*,⁴⁹ held that no cause of action for damages exists under the Act.⁵⁰ The court observed that whereas the jurisdictional section of the Investment Company Act⁵¹ gives district courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this subchapter or the rules, regulations, or orders thereunder,"⁵² the jurisdictional section of the Investment Advisers Act, section 214, refers only to "suits in equity" and makes no mention of "actions at law."⁵³ The court stated its belief that if any implied right of action exists under the Act, an injunction would be the only available remedy.⁵⁴ Shortly thereafter, the Southern

44. Id. at 1082.

45. Id. at 1083.

46. 360 F. Supp. 490 (D. Utah 1973).

47. 15 U.S.C. § 80a-17 (1970).

48. 360 F. Supp. at 497.

49. Civil No. 73-638 (S.D. Fla. May 17, 1974) [hereinafter cited as Slip Opinion].

50. Id. at 2.

51. 15 U.S.C. § 80a-43 (1970).

52. Slip Opinion at 1-2, quoting 15 U.S.C. § 80a-43 (1970) (emphasis added).

53. Slip Opinion at 2. Section 214, 15 U.S.C. § 80b-14 (1970) provides in pertinent part: "The district courts of the United States . . . shall have jurisdiction of violations of this subchapter or the rules, regulations, or orders thereunder, and . . . of all suits in equity to enjoin any violation . . . thereunder."

54. This reasoning appears to represent an application of the doctrine that enumeration in a statute of certain of a class of things raises an inference the lawgiver intended to exclude those things not enumerated—*expressio unius est exclusio alterius*. This doctrine was employed recently by the Supreme Court in *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974). There, the Court examined § 307(a) of the Amtrak Act, 45 U.S.C. § 547(a) (1970), which, *inter alia*, provides a right of action to private parties in cases involving labor agreements. The Court inferred from this limited right of action a congressional intent to withhold a private right of action in other types of cases. The Court further supported this conclusion by pointing out that the House of Representatives had rejected a draft provision

District of California, in *Gammage v. Roberts, Scott & Co.*,⁵⁵ held that no private cause of action existed under the Act.⁵⁶

The opinion in *Bolger*⁵⁷ cited neither *Greenspan* nor *Gammage*, and undoubtedly the court was unaware of these cases.⁵⁸ In departing from their reasoning, the court did not rely specifically on the "statutory tort"⁵⁹ or "void contract"⁶⁰ analysis characteristic of many implied civil liability cases. Instead, it relied on the more generalized reasoning of *J.I. Case Co. v. Borak*,⁶¹ which in finding an implied private right of action under an antifraud provision⁶² similar to section 206, declared that "under the circumstances here

authorizing suit by any aggrieved party regardless of the gravamen of the action 414 U.S. at 458-60. The court in *Greenspan* pointed to no similar legislative history.

55. [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,761 (S.D. Cal. June 25, 1974).

56. *Id.* at 49,505 (alternative holding). The court in *Gammage* discussed its holding only briefly and its reasoning appears unsound, since it relied heavily on *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970), cert. denied, 401 U.S. 974 (1971), which never reached the merits of the § 206 complaint, and *Brouk v. Managed Funds, Inc.*, 286 F.2d 901 (8th Cir. 1961), vacated as moot, 369 U.S. 424 (1962) (per curiam), which was subsequently criticized and disapproved by the same court. See notes 31, 46 *supra* and accompanying text.

57. *Bolger v. Laventhol, Krekstein, Horwath & Horwath*, 381 F. Supp. 260 (S.D.N.Y. 1974).

58. The *Greenspan* decision formed the basis for the subsequent motion for reargument in *Bolger*. *Id.* at 267-68. *Gammage* was decided only one day before *Bolger*.

59. The "statutory tort" doctrine provides a remedy to a plaintiff damaged by another's violation of a statute. In *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), the court relied on § 286 of the Restatement of Torts in establishing implied civil liability under rule 10b-5: "The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if: (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect." 69 F. Supp. at 513. See, e.g., *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654, 658 n.12 (7th Cir. 1973), cert. denied, 94 S. Ct. 1979 (1974), noted in 42 *Fordham L. Rev.* 688 (1974); *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90, 97 (10th Cir.), cert. denied, 404 U.S. 1004 (1971); *Common Cause v. Democratic Nat'l Comm.*, 333 F. Supp. 803, 810-11 (D.D.C. 1971). See also *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213 (1944); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39-40 (1916).

60. Section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b) (1970), which expressly voids any contract in violation of the Act, has been construed to give the aggrieved party an action for damages, as well as other remedies. E.g., *Eastside Church of Christ v. National Plan, Inc.*, 391 F.2d 357, 362 (5th Cir.), cert. denied, 393 U.S. 913 (1968); *Goldstein v. Groesbeck*, 142 F.2d 422, 426-27 (2d Cir.), cert. denied, 323 U.S. 737 (1944); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946); see generally 3 L. Loss, *Securities Regulation* 1757-63 (2d ed. 1961). Section 215(b) of the Advisers Act, 15 U.S.C. § 80b-15(b) (1970), is virtually identical with § 29(b).

61. 377 U.S. 426 (1964), noted in 64 *Colum. L. Rev.* 1336 (1964); 50 *Cornell L.Q.* 370 (1965); 59 *Nw. U.L. Rev.* 809 (1965).

62. Rule 14a-9, 17 C.F.R. § 240.14a-9 (1973), was promulgated by the SEC pursuant to the rulemaking authority contained in § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1970). The rule provides in part: "No solicitation [for proxies] shall be made by means of any . . . communication, written or oral, containing any statement which . . . is false or misleading with respect to any material fact"

it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."⁶³ This led the *Bolger* court to inquire whether a damage action under section 206 would comport with congressional intent and effectuate the purposes of the section.⁶⁴ The court answered in the affirmative, relying on the broad language in *Capital Gains*⁶⁵ and the Senate⁶⁶ and House Reports⁶⁷ accompanying the Advisers Act. The opinion concluded that:

Based on the foregoing expressions of legislative purpose, it is clear that plaintiffs . . . who were defrauded out of substantial sums of money by their investment advisers, fall squarely within the class of persons whom . . . Section 206 [was] intended to protect.⁶⁸

The court next confronted the argument which had prevailed in *Greenspan*, namely that section 206 provided no private remedy at law, as distinct from equitable relief.⁶⁹ The court observed that section 22 of the Securities Act,⁷⁰ section 27 of the Exchange Act⁷¹ and section 44 of the Investment Company Act⁷² grant district courts jurisdiction over "all suits in equity and actions at law,"⁷³ but that section 214 of the Advisers Act⁷⁴ omitted any reference to "actions at law." Nonetheless, the court held that a right of action for damages as well as injunctive relief was implied in the Act.⁷⁵ The opinion reasoned that since the Advisers Act was the only one of these statutes which did not provide for any civil liability,⁷⁶ such language was unnecessary and its absence did not imply congressional intent to withhold jurisdiction over implied remedies at law.⁷⁷ Accordingly, the court concluded that a cause of

63. 377 U.S. at 433.

64. 381 F. Supp. at 263, citing *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974).

65. See notes 33-37 *supra* and accompanying text.

66. "The nature of the functions of investment advisers . . . their potential influence on security markets and the dangerous potentialities of stock market tipsters imposing upon unsophisticated investors, convinces this Committee that protection of investors requires the regulation of investment advisers on a national scale." 381 F. Supp. at 263, quoting S. Rep. No. 1775, 76th Cong., 3d Sess. 21 (1940).

67. "[T]he Advisers Act was designed to: ' . . . protect the public from the frauds and misrepresentations of unscrupulous tipsters . . . and to safeguard honest investment advisers against the stigma of the activities of these individuals . . . ' " 381 F. Supp. at 263, quoting H.R. Rep. No. 2639, 76th Cong., 3d Sess. 28 (1940).

68. 381 F. Supp. at 263.

69. See notes 49-54 *supra* and accompanying text.

70. 15 U.S.C. § 77v (1970).

71. *Id.* § 78aa.

72. *Id.* § 80a-43.

73. 381 F. Supp. at 264.

74. 15 U.S.C. § 80b-14 (1970); see note 53 *supra*.

75. 381 F. Supp. at 265.

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

77. 381 F. Supp. at 264-65.

action for damages would lie under section 206 against all defendants, and denied defendants' motion to dismiss the complaint.⁷⁸

As applied to the defendant general partners, who admitted, for purposes of the motion, to being statutory investment advisers,⁷⁹ *Bolger* represents nothing more than the extension to one more securities statute of the well-entrenched trend towards implied civil liability. However, on rehearing the court squarely held that accountants who aid and abet investment advisers in violating section 206 are jointly liable for damages.⁸⁰ This holding is more controversial, in view of the specific wording of the Act.

The court was unimpressed with defendant accountants' argument that, whereas section 10(b) of the Exchange Act states that it shall be unlawful for "any person"⁸¹ to employ a manipulative or deceptive device or contrivance, section 206 refers only to investment advisers, and thus could not embrace accountants. Such a reading of the statute, the court said, would be "pedantic and technical."⁸² It declared that the alleged fraudulent activities by the accountants

were inexorably intertwined with the fraud being perpetrated against the limited partners by [the] investment advisers. To deny to these investors, who were injured by this combined fraudulent conduct, a cause of action against all of the wrongdoers would leave the plaintiffs with half a remedy and would run afoul of the Supreme Court's repeated admonition that the securities laws are to be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes."⁸³

The Investment Advisers Act refers to and differentiates between "persons,"⁸⁴ "persons associated with an investment adviser,"⁸⁵ and "investment advisers."⁸⁶ Notably, section 206 refers only to "any investment adviser." In extending aiding and abetting liability under section 206 to accountants, the court in effect interpreted the words "any investment adviser" to include "any person." Concededly, there is support in the Second Circuit for the proposition that a party may be liable for aiding and abetting a securities violation even though he would be outside the scope of the statute were he the

78. *Id.* at 265.

79. *Id.*

80. *Id.* at 268.

81. 15 U.S.C. § 78j(b) (1970).

82. 381 F. Supp. at 268.

83. *Id.*, quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963). Perhaps significantly, the court, in refusing to dismiss the claim against the accountants, alternatively stated that in any event there were properly pendent common law claims. 381 F. Supp. at 268.

84. 15 U.S.C. § 80b-2(a)(16) (1970). " 'Person' means a natural person or a company." *Id.*

85. *Id.* § 80b-2(a)(17). "The term 'person associated with an investment adviser' means any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser" *Id.*

86. The definition specifically excludes, *inter alia*, accountants, brokers, engineers, lawyers and teachers whose performance of such services is "solely incidental to the practice of [their] profession." 15 U.S.C. § 80b-2(a)(11) (1970).

only defendant sued.⁸⁷ On the other hand, other cases appear to restrict aiding and abetting liability to the range of defendants expressly delineated in the statute.⁸⁸ The *Bolger* court contributed nothing to the judicial precision desirable in securities law when it failed to confront this issue of first impression under section 206.

The *Bolger* court arguably could have reached the same conclusion without ignoring the limitations of the statutory definition of investment advisers if it had relied on section 209 of the Advisers Act⁸⁹ in order to hold the defendant accountants liable for damages. Section 209(e) provides, *inter alia*, for injunctive and criminal penalties for "aiders and abettors"⁹⁰ of violations of the Act.

87. Speaking to the liability of the president of defendant issuer for his part in a distribution of unregistered stock in violation of § 5 of the Securities Act, 15 U.S.C. § 77e (1970), the Second Circuit declared that "[e]ven if he did not directly cause the Progress Report to be transmitted . . . he aided and abetted the furtherance of the unlawful scheme by the major participants." *SEC v. North Am. Research & Dev. Corp.*, 424 F.2d 63, 81 (2d Cir. 1970). The Second Circuit developed this idea further in *SEC v. Spectrum, Ltd.*, 489 F.2d 535 (2d Cir. 1973). There, while discussing the liability of a lawyer for the issuance of a misleading opinion letter in connection with an illegal distribution of unregistered stock, the court held that "[the district court] properly recognized that if Schiffman's opinion letter were in fact used to sell unregistered Spectrum stock . . . although his status as an 'underwriter' might be uncertain, he could be liable, nevertheless, as an aider and abettor to Marder's illicit venture." *Id.* at 541 (footnotes omitted).

88. A series of cases under § 12(2) of the Securities Act, 15 U.S.C. § 77l(2) (1970) (antifraud provision providing remedy for those in privity of contract with defendant) appears to restrict aiding and abetting liability to those who are either in privity with plaintiff or who control or are controlled by a defendant in privity, as expressly provided in § 15 of the Act, 15 U.S.C. § 77o (1970). *Barlas v. Bear, Stearns & Co.*, [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,674, at 95,478 (N.D. Ill. 1966); *Winter v. D. J. & M. Inv. & Constr. Corp.*, 185 F. Supp. 943, 946 (S.D. Cal. 1960); see *Jackson Tool & Die, Inc. v. Smith*, 339 F.2d 88 (5th Cir. 1964); cf. *Zachman v. Erwin*, 186 F. Supp. 681 (S.D. Tex. 1959). But cf. *Hochfelder v. Ernst & Ernst*, 503 F.2d 1100, 1105-11 (7th Cir. 1974) (aiding and abetting standards under rule 10b-5 and the common law); *Buchholtz v. Rernard*, 188 F. Supp. 888 (S.D.N.Y. 1960). It is possible to read the *Barlas* line of cases as simply holding that no extrastatutory aiding and abetting doctrine exists. This would place them in conflict with more recent authority recognizing the doctrine in securities law. See *Ruder, Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597 (1972).

89. Section 209, 15 U.S.C. § 80b-9(e) (1970), which deals with enforcement of the Act, reads in pertinent part: "Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter . . . or that any person has aided, abetted, counseled, commanded, [or] induced . . . such a violation, it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices"

90. See note 88 *supra*. The general federal "aider and abettor" statute, 18 U.S.C. § 2(a) (1970), provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or produces its commission, is punishable as a principal." On facts somewhat similar to those in *Bolger*, the court in *ICC v. Blue Diamond Prods. Co.*, 93 F. Supp. 688 (S.D. Iowa 1950), applied this statute. There, the Interstate Commerce Commission sought to enjoin defendant manufacturer from inducing violation of a federal law regulating motor carriers. Rejecting defendant's contention that the provisions of the statute applied only to motor carriers themselves, the court said: "[S]ince the defendant in this action may be prosecuted criminally for

Significantly, the section extends to "any person" rather than investment advisers alone. Since, for purposes of the motion to dismiss, the accountant defendants admitted to aiding and abetting the adviser defendants in violating the Act,⁹¹ the section appears applicable. As discussed above, the implication of private rights of action for damages under the securities laws is firmly established. Consequently, the court could have found an implied right of action under section 206 as against the investment adviser and under section 209 as against the accountants, although the language of section 209 is not readily subject to as broad a reading as is, for example, section 10 of the 1934 Act.⁹²

Bolger represents a determination that section 206 stands on the same footing as other antifraud provisions in the securities acts. Whether it will settle the running debate concerning implied civil liability under section 206 remains to be seen. In the meantime, however, the *Bolger* court may have created another debate over the aiding and abetting question. The one certainty *Bolger* provides is that section 206 is likely to assume more prominence in future antifraud complaints.

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the violations alleged in the complaint . . . no good reason appears why this rule should not be applied with like force in a civil proceeding to restrain the same violations." *Id.* at 690.

91. 381 F. Supp. at 262.

92. Compare § 209, set out in note 89 *supra*, which refers specifically to the SEC as the proper party in an action, with the broad language of section 10, 15 U.S.C. § 78j (1970), which simply declares that certain actions by "any person" are "unlawful." Plaintiffs could not sue under § 10 because they had not purchased or sold securities. See *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952); 42 Fordham L. Rev. 688 (1974). For a discussion of the problem of implying a private right of action, see Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 Fordham L. Rev. 441 (1974).