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Case Notes

CASE NOTES

Constitutional Law—Class Action Suit to Invalidate Divorce Residency Requirement Not Moot, But Statute Is Upheld.—Plaintiff moved from New York to Iowa in August of 1972. In September, 1972, she petitioned for divorce. An Iowa court dismissed her suit for lack of jurisdiction because, under state law, a petitioner in a divorce action must have been a state resident for at least one year.[1] Plaintiff then sought declaratory and injunctive relief in a federal district court on the grounds that Iowa's durational residency requirement violated her rights to equal protection and due process. After certifying the suit as a class action pursuant to rule 23(c)(1),[2] a three-judge court upheld the Iowa statute.[3] Plaintiff appealed, but by the time the litigation reached the Supreme Court she had satisfied the Iowa statute and had obtained a divorce in another state. The Supreme Court held that the case was not moot because it was a certified class action of a type which would evade review "at the behest of any single challenger;"[4] that the state interests in insulating divorce decrees from collateral attack and in not becoming a "divorce mill" were sufficient to justify a classification based upon recent interstate migration, and that the one-year residency requirement did not deny Mrs. Sosna an individualized determination of residency, or access to the courts, in a manner inconsistent with the due process clause.[5] *Sosna v. Iowa,* 95 S. Ct. 553 (1975).

1. The Mootness Issue

Article III, section two, of the Constitution limits the subject matter jurisdiction of the federal judiciary to the resolution of "cases" and "controversies."[6] The doctrine of mootness is one of several[7] which the Supreme Court has developed in order to determine whether a particular dispute constitutes a "case" or "controversy" within the meaning of the Constitution.[8]

1. Iowa Code Ann. § 598.6 (Cum. Pamphlet 1974).

2. Fed. R. Civ. P. 23(c)(1). The class Mrs. Sosna represented included those Iowa residents who desired to obtain divorces and were barred by the statute. Sosna v. Iowa, 95 S. Ct. 553, 556 (1975).

3. Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa 1973), aff'd, 95 S. Ct. 553 (1975).

4. 95 S. Ct. at 558.

5. See Vlandis v. Kline, 412 U.S. 441 (1973) (irrebuttable presumption of non-residence for students seeking in-state tuition rates held unconstitutional); Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce fee requirement effectively denying indigents access to courts held unconstitutional). An examination of the due process issues is beyond the scope of this Case Note. See generally Bezanson, Some Thoughts on the Emerging Irrebuttable Presumption Doctrine, 7 Ind. L. Rev. 644 (1974).

6. U.S. Const. art. III, § 2; e.g., Richardson v. Ramirez, 418 U.S. 24, 36 (1974); DeFunis v. Odegaard, 416 U.S. 312, 315-17 (1974); North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam); see II J. Story, Commentaries on the Constitution of the United States § 1646 (5th ed. 1891).

7. See Flast v. Cohen, 392 U.S. 83, 95 (1968). See also id. at 95 nn.10-13 (collection of leading cases dealing with other case or controversy doctrines).

8. "A lawsuit which is, or has become, moot is neither a case nor a controversy in the

Although no precise definition exists, a case is generally regarded as moot when, due to events occurring subsequent to the filing of the complaint, a judicial resolution of the issues it involves will no longer affect the legal rights and relationships of the parties.[9] The doctrine requires that a live case or controversy exist at all stages of the litigation, up to and including the time the Supreme Court reviews the case.[10]

There are several ways in which a case may become moot.[11] In a case such as *Sosna,* in which the validity of a durational residency requirement is

constitutional sense and no federal court has the power to decide it." Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Pa. L. Rev. 125, 125-26 (1946). The case or controversy limitation is one of several bases upon which the mootness doctrine may be justified. The others are not of constitutional dimension and are less frequently mentioned in modern cases. See Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1383-84 (1973) [hereinafter cited as Monaghan]; notes 52-53 infra.

9. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969) (suit to compel House of Representatives to seat a member kept live after seating of member by existence of claim for back pay); "Mootness is, therefore, the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan 1384. See Liner v. Jafco, Inc., 375 U.S. 301, 306 (1964) (injunction prohibiting construction workers from picketing—owner's having posted indemnification bond saved case from mootness after building had been completed); California v. San Pablo & T.R.R., 149 U.S. 308, 314 (1893) (where the state statute made payment of tax liability into bank the equivalent of payment to the state, offer of such payment rendered suit by state for taxes moot); Note, Cases Moot of Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772, 774 (1955).

10. DeFunis v. Odegaard, 416 U.S. 312, 319 (1974); Roe v. Wade, 410 U.S. 113, 125 (1973) (discussed in text accompanying notes 15-18 infra); cf. Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974). When a case becomes moot the Supreme Court will ordinarily reverse or vacate the judgments of the lower courts and remand with a direction to dismiss. See United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950). See generally Comment, Disposition of Moot Cases by the United States Supreme Court, 23 U. Chi. L. Rev. 77 (1955).

11. See, e.g., United States v. New Jersey State Lottery Comm'n, 95 S. Ct. 941 (1975) (per curiam) (change in statute); Steffel v. Thompson, 415 U.S. 452 (1974) (end of Vietnam war rendered war protester's suit moot); Johnson v. New York State Educ. Dep't, 409 U.S. 75 (1972) (per curiam) (suit by school children to obtain books held moot when books were obtained); Golden v. Zwickler, 394 U.S. 103 (1969) (suit concerning distribution of handbills opposing a candiate for House of Representatives rendered moot when candidate became state judge); Doremus v. Board of Educ., 342 U.S. 429 (1952) (challenge to Bible reading in public schools rendered moot by plaintiff's graduation from high school); Atherton Mills v. Johnson, 259 U.S. 13 (1922) (challenge by minor to tax imposed on employers of minors held moot when plaintiff reached majority); Allen v. Sisters of St. Joseph, 490 F.2d 81 (5th Cir. 1974) (suit to compel hospital to perform sterilization operation mooted when plaintiff obtained operation elsewhere).

Habeas corpus and similar proceedings were once thought to be rendered moot upon the release of the prisoner. E.g., St. Pierre v. United States, 319 U.S. 41 (1943). Courts now permit such suits to continue because of the continuing civil disabilities which attend a criminal conviction. E.g., Sibron v. New York, 392 U.S. 40 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968). Where, however, such a challenge is not aimed at the conviction itself, but at the length of the sentence imposed, completion of the sentence will moot the case. E.g., North Carolina v. Rice, 404 U.S. 244 (1971).

challenged by one who wishes to obtain a divorce, questions of mootness could arise when the requirement is satisfied[12] or when the divorce is obtained.[13]

The Supreme Court has established an exception within the doctrine of mootness for cases which are "capable of repetition, yet evading review."[14] In the case of *Roe v. Wade*[15] a pregnant woman sought to challenge the constitutionality of a state abortion law. By the time her case reached the Supreme Court her pregnancy had been terminated, and the case appeared to be moot. The Court said that the case was capable of repetition because "[p]regnancy often comes more than once to the same woman . . . ."[16] The issue Roe sought to litigate would evade review because "the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete."[17] Thus, her controversy was capable of repetition, yet evading review,[18] and therefore not moot.

In class actions prior to *Sosna* questions regarding mootness focused upon the class representative. A class action required, and still requires, a named representative with a live case or controversy at the time the suit is filed.[19] If a class action were begun with more than one representative, subsequent mootness as to some representatives would not render it moot so long as one named representative continued to present a live controversy.[20] Left unre-

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12. Sosna v. Iowa, 95 S. Ct. 553, 557 (1975). However, there do not appear to be any cases holding such a case moot. See Shiffman v. Askew, 359 F. Supp. 1225, 1227-28 (M.D. Fla. 1973), aff'd sub nom. Markes v. Askew, 500 F.2d 577 (5th Cir. 1974) (same equal protection challenge as that involved in Sosna directed at a six month requirement—not moot because capable of repetition, yet evading review).

13. See Alton v. Alton, 347 U.S. 610 (1954).

14. Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911) (plaintiff ordered by ICC to cease and desist giving rate preferences to third party for two years—suit to enjoin order reached Supreme Court after the order expired) ("The questions involved in the orders of the Interstate Commerce Commission are usually continuing . . . and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review . . . ."). This is not an exception to the doctrine of mootness in the sense that it permits the Court to decide a moot case. It is rather a rule which, if applicable to the facts of a case which appears moot, will lead to the conclusion that the case is, in fact, not moot. This rule is not to be confused with a similar one under which a "[m]ere voluntary cessation of allegedly illegal conduct" which might "reasonably be expected to recur" will not moot a case because the mootness is sham in nature. United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968).

15. 410 U.S. 113 (1973).

16. Id. at 125.

17. Id.

18. Id.

19. O'Shea v. Littleton, 414 U.S. 488, 494 (1974), citing Bailey v. Patterson, 369 U.S. 31, 32-33 (1962) (per curiam) (equal protection challenge to breach-of-peace statutes by litigants who failed to allege a threat of enforcement) and Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973) (per curiam); see Richardson v. Ramirez, 418 U.S. 24, 39 (1974).

20. Goosby v. Osser, 409 U.S. 512, 514 n.2 (1973) (challenge by prisoners to denial of right to vote not mooted merely "because some of the named petitioners have lost their status as class members . . . ."); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648,

solved, however, was the question of whether a mootness inquiry was limited to the class representatives or whether the class had a sufficiently independent status to be the subject of a separate mootness inquiry and to survive the subsequent mooting of every representative's suit.[21] In addition, there remained the question of when, if at all, the class could take on this independent status, and who, if anyone, could continue to represent the class.

The *Sosna* Court acknowledged that "[i]f appellant had sued only on her own behalf, both the fact that she now satisfies the one-year residency requirement and the fact that she has obtained a divorce elsewhere would make this case moot and require dismissal."[22] Mrs. Sosna's case could not be considered live for it was not sufficiently likely that Mrs. Sosna would move away from Iowa, later relocate there, and seek a divorce within one year of her return.[23] Despite the mootness of Mrs. Sosna's claim, however, it was clear that the controversy between the defendant and the class she sought to represent remained live. If the Court could focus on that controversy instead of Mrs. Sosna's, the case would not be moot.

In holding that the class action could continue, the Court placed major reliance upon *Dunn v. Blumstein*[24] where a voter brought a class action suit

657 (4th Cir. 1967) (class action brought by doctor challenging discriminatory hiring practices not mooted when he accepted a position on hospital staff).

21. Several prior cases indicated that the class could be treated independently. E.g., Richardson v. Ramirez, 418 U.S. 24, 36, 40 (1974) (inconclusive due to "unusual procedural history" of case in state courts); DeFunis v. Odegaard, 416 U.S. 312, 317-19 (1974) (per curiam) (dictum—case was not a class action); Johnson v. New York State Educ. Dep't, 409 U.S. 75, 79 n.7 (1972) (per curiam) (Marshall, J., concurring); Brockington v. Rhodes, 396 U.S. 41, 43 (1969) (per curiam) (suit to obtain ballot position mooted after election was held—Court suggested that if the case had been a class action the result might have been different). Several lower courts had considered the issue. In Thomas v. Clarke, 54 F.R.D. 245 (D. Minn. 1971) (mem.), the court was able to state that, "[i]t is well settled that the mooting of the named representative's claim does not render the whole suit moot." Id. at 252. An examination of the cases cited therein reveals much dicta and little solid authority. An opposite position was taken in Watkins v. Chicago Housing Authority, 406 F.2d 1234, 1236-37 (7th Cir. 1969), and was equally unsupported. See also Bledsoe, Mootness and Standing in Class Actions, 1 Fla. St. U.L. Rev. 430 (1973) [hereinafter cited as Bledsoe]; Monaghan 1385; Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 390-95 (1974) (analysis of Ramirez and DeFunis); Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672, 1689 (1970).

22. 95 S. Ct. at 557.

23. Id. The Court will seldom engage in such speculation merely to save a case from mootness. See DeFunis v. Odegaard, 416 U.S. 312, 319 (1974) ("DeFunis will never again be required to run the gantlet of the Law School's admission process . . . ."); O'Shea v. Littleton, 414 U.S. 488, 497 (1974) (similar reasoning in a standing context); SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 406 (1972) ("we find that 'the allegedly wrongful behavior [refusal to include shareholder proposal in proxy statement] could not reasonably be expected to recur.' ") (quoting United States v. Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)); Hall v. Beals, 396 U.S. 45, 49-50 (1969) (per curiam). Compare Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973) (per curiam) with id. at 544 (Marshall, J., dissenting) (class action by worker for unemployment insurance settled by class representative—majority, in remanding for consideration of mootness, apparently rejected dissent's contention that case was capable of repetition because worker might later by employed and subsequently unemployed).

24. 405 U.S. 330 (1972).

challenging a durational residency requirement that denied him the right to vote in the 1970 election. The case reached the Supreme Court after the election had been held. Though the issue of mootness had not been litigated,[25] the *Dunn* Court said that the case was "capable of repetition, yet evading review,"[26] and that, "Blumstein has standing to challenge [the laws in question] as a member of the class of people affected by the presently written statute."[27]

The principal distinction between *Dunn* and *Sosna* is that the named plaintiff's claim in *Dunn* was said to be "capable of repetition," whereas Mrs. Sosna's was not.[28] This concept does not focus on the public generally; it refers to the litigants specifically.[29] Implicit in *Dunn* is the conclusion that Blumstein might leave the state and later return and wish to vote within one year. The *Dunn* Court was apparently willing to speculate to save the suit from mootness; the *Sosna* Court would not.[30]

Without addressing itself to this distinction, the *Sosna* Court shifted the focus of its inquiry from the representative to the class. This made the concept of capacity for repetition irrelevant for there continued to exist, within the class, individuals whose controversies had not yet become moot. Evasion of review, however, remained relevant. The Court said:

> [A] case such as this, in which . . . the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs.[31]

The Court then added the following caveat:

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25. In his dissent in Sosna, Justice White gave three reasons why Dunn provided little support for the Sosna holding: 1) the entire mootness question in Dunn was treated in a footnote; 2) the parties in Dunn had not argued the issue; 3) the Dunn Court had not explored the "ramifications for the question of mootness in a class action setting." 95 S. Ct. at 565 (White, J., dissenting). Since questions of mootness involve the subject matter jurisdiction of the Court, they can be raised sua sponte.

26. 405 U.S. at 333 n.2.

27. Id. This was an attempt to distinguish Hall v. Beals, 396 U.S. 45 (1969), in which the Court held that where a challenged durational residency requirement was shortened, those plaintiffs who would not have been affected by the new statute lacked standing. Since none of the named representatives would have been so affected, the case was held moot.

28. 95 S. Ct. at 557.

29. In DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam), the Court refused to extend the application of the concept beyond DeFunis himself even though new law school applicants were constantly being affected by the allegedly illegal admissions policy. The discussion of mootness in the Dunn footnote, 405 U.S. at 333 n.2, is not sufficiently detailed to indicate whether the Court focused solely upon Blumstein's individual claim. It seems clear, however, that the Court must have done so, since later applications of the concept emphasize the capacity of repetition of the individual's claim, rather than those of others in his position. Compare Sosna v. Iowa, 95 S. Ct. 553, 557 (1975), with DeFunis v. Odegaard, supra at 318-19 (1974).

30. 95 S. Ct. at 557; see note 23 supra and accompanying text. It requires considerably less speculation to imagine that Blumstein would leave the state and later return and wish to vote than it does to imagine that Mrs. Sosna would leave the state, remarry, and later return to seek a divorce within one year.

31. 95 S. Ct. at 558.

[T]he same exigency that justifies this doctrine serves to identify its limits. In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy . . . the plaintiff's personal stake in the litigation [must] continue throughout the entirety of the litigation.[32]

Thus, evasion of review "at the behest of any single challenger" was viewed as a concept capable of saving a class action from mootness where the class and the defendant remain at odds, but there is no other basis upon which to keep the suit live.

The reason *Dunn* appeared to support the result in *Sosna* is that *Dunn* can be, and, in view of the speculation implicit in *Dunn's* holding, perhaps should have been, analyzed in terms of the reasoning in *Sosna*. *Dunn* was a class action involving an issue that would evade review at the behest of any single challenger, and when Blumstein's suit appeared to have become moot there still existed, between his class and the defendant, a live controversy. The difference between the language in the two cases is due to *Dunn's* having been decided on a narrower ground—since Blumstein's individual suit was adjudged to be capable of repetition, the Court did not have to shift its focus from his claim to that of the class he sought to represent.

Once the *Sosna* Court had concluded that, for the purposes of a mootness inquiry, the class could be treated independently of its representative, and that a live controversy "may exist . . . between a named defendant and a member of the class . . . even though the claim of the named plaintiff has become moot,"[33] it turned to the question of when it may be so treated.

Under rule 23(c) of the Federal Rules of Civil Procedure the district court must determine whether a suit may be maintained as a class action.[34] This determination, referred to as "certification,"[35] confers upon members of the class rights and burdens similar to those of actual litigants.[36] The *Sosna* Court chose the time of certification as the time at which the class acquires a status independent of its representative for the purpose of determining mootness.[37] This seems a logical choice in view of the amorphous character of some classes prior to that time,[38] but it raises a problem.

The "exigency" which "justifies" the *Sosna* rule is the rapidity with which

32. Id. at 558-59.

33. Id. at 559.

34. Fed. R. Civ. P. 23(c)(1).

35. 95 S. Ct. at 557.

36. Once a class action is certified the members of the class become bound by a judgment on the merits, and the suit may not be settled or dismissed without court approval. Id. at 557 n.8; Fed. R. Civ. P. 23(c)(2), 23(c)(3), 23(e). The interests of the class must be "fairly and adequately" protected by the class representative. Id. 23(a)(4). Members of the class may "enter an appearance through . . . counsel" in some cases. Id. 23(c)(2)(C). Whether or not such an appearance is entered, class members will be bound unless they request exclusion from the class under rule 23(c)(2)(A). Advisory Committee's Note on the Proposed Rule of Civil Procedure, 39 F.R.D. 98, 105 (1966) [hereinafter cited as Advisory Committee's Note].

37. 95 S. Ct. at 557.

38. See Board of School Comm'rs v. Jacobs, 95 S. Ct. 848 (1975) (per curiam); O'Shea v. Littleton, 414 U.S. 488, 494 n.3 (1974).

certain types of cases become moot.[39] It is possible that in some cases circumstances would be so "exigent" that the claims of the named plaintiffs would become moot before the district court certified the suit as a class action. Assuming, in such cases, that the litigation proceeds to the point of certification, the question would arise "whether the certification can be said to 'relate back' to the filing of the complaint . . . ."[40]

The Court's concept of relation back is presumably derived from rule 15(c) which makes amendments to a pleading relate back to the time the pleading was originally filed.[41] Unless certification can be said to relate back to the filing of the complaint in a class action, the *Sosna* rule, which applies only to certified class actions, would be inapplicable to those cases in which its use is most justified. The *Sosna* Court suggested that the relation back device could, on occasion, be used, and explained that whether it could be used would "depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review."[42]

Although the Court did not mention it, relation back would be consistent with an existing rule that a class action is "presumptively valid" until the district court makes a negative determination.[43] In addition, it has been suggested that certification should always precede a mootness inquiry because prior to that time the court does not know which claims are actually before it.[44] If this suggestion were followed, the problem of relation back would be avoided for no court would ever consider the constitutional issue of mootness in a class action prior to its certification.

The essence of the holding in *Sosna*, that the members of the class may be treated independently in determining mootness, raises the even more significant problem of the degree of precision courts must now achieve in their rule 23 findings. This did not become apparent until after *Sosna* was decided. In *Board of School Commissioners v. Jacobs*,[45] a high school student posed a first amendment challenge to various rules and regulations relating to student

39. See 95 S. Ct. at 558 n.9.

40. 95 S. Ct. at 559 n.11.

41. Fed. R. Civ. P. 15(c).

42. 95 S. Ct. at 559 n.11 (dictum).

43. For a discussion of the presumptive validity of class actions prior to certification see Bledsoe 446-51. The doctrine finds some support in the Advisory Committee's Note which states that "[a] negative determination means that the action should be stripped of its character as a class action." Advisory Committee's Note 104. It has been said that these words mean that a purported class action is not to be stripped of its character as such until a negative determination is made. E.g., Washington v. Wyman, 54 F.R.D. 266, 271 (S.D.N.Y. 1971). But see Board of School Comm'rs v. Jacobs, 95 S. Ct. 848 (1975) (per curiam) (discussed at notes 45-54 infra and accompanying text).

44. See Bledsoe 450. Bledsoe's suggestion, the doctrine of presumptive validity and the relation back device each create a substantial conceptual difficulty regarding the source of the district court's subject matter jurisdiction to certify a class action at the behest of one who no longer has an interest in the action. The theories seem simple enough, but their application involves the erection of fictions to circumvent a constitutional limitation. See 95 S. Ct. at 564 (White, J., dissenting).

45. 95 S. Ct. 848 (1975) (per curiam).

publications. The suit was certified as a class action in a casual manner, and, although the plaintiff prevailed on the merits in both the district court and the court of appeals, the judgment did not "include and describe those whom the court [found] to be members of the class,"[46] as required by rule 23(c)(3). The school sought and obtained certiorari, but by the time the suit reached the Supreme Court the student had graduated. The Court held that *Sosna* was inapplicable because certification had been inadequate.[47] The Court explained:

> The need for definition of the class purported to be represented by the named plaintiffs is especially important in cases like this one where the litigation is likely to become moot as to the initial named plaintiffs prior to the exhaustion of appellate review.[48]

The Court might have remanded for a more careful certification of what was probably an entirely proper class action, and for a consideration of the issue of relation back, or it might have held that the class was "presumptively valid" since no negative determination had been made. Instead it vacated the judgment of the court of appeals and remanded with instructions to dismiss as moot.[49]

The problem with the *Jacobs* holding is that the lower court in *Sosna* arguably had been no more careful in making its rule 23 findings than had the lower court in *Jacobs*.[50] The difference between the results might be explained in terms of a procedural issue in *Jacobs* that was not present in *Sosna*. The district court in *Jacobs* had denied a motion[51] by the school board to appoint a guardian ad litem for the minor plaintiffs pursuant to rule 17(c),[52] and the court of appeals affirmed.[53] If the Supreme Court had reversed on the merits, members of the unnamed class of plaintiffs could have attacked the final judgment alleging that their interests had not been

46. Fed. R. Civ. P. 23(c)(3).

47. 95 S. Ct. at 850. Justice Douglas, dissenting, argued that the manner in which Jacobs had been certified was almost indistinguishable from that in Sosna. Id. at 851 (Douglas, J., dissenting).

48. Id. at 850. Although the words of Fed. R. Civ. P. 23(c)(1) do not appear to indicate that a definition is contemplated, the Advisory Committee's Note reveals that the intent of the section is "to give clear definition to the action." Advisory Committee's Note 104. Fed. R. Civ. P. 23(c)(3) clearly contemplates a definition of the class.

49. 95 S. Ct. at 850. See generally Comment, Disposition of Moot Cases by the United States Supreme Court, 23 U. Chi. L. Rev. 77 (1955). Contrasting markedly with the strict requirements of Jacobs is the Sosna Court's discussion of the adequacy of Mrs. Sosna's representation of the class. The Court said: "[W]here it is unlikely that segments of the class . . . would have interests conflicting with [Mrs. Sosna's], and where the interests of that class have been competently urged at each level of the proceeding . . . the test of Rule 23(a) is met." 95 S. Ct. at 559 (footnote omitted). So lenient a requirement would be surprising had the parties not stipulated that Mrs. Sosna was an adequate representative. Id. at 556. See generally 15 B.C. Ind. & Com. L. Rev. 1326 (1975).

50. See 95 S. Ct. at 851 (Douglas, J., dissenting).

51. Jacobs v. Board of School Comm'rs, 349 F. Supp. 605, 607 (S.D. Ind. 1972), aff'd, 490 F.2d 601 (7th Cir. 1973), vacated as moot, 95 S. Ct. 848 (1975).

52. Fed. R. Civ. P. 17(c).

53. Jacobs v. Board of School Comm'rs, 490 F.2d at 603-04.

adequately protected.[54] Since the action was moot as to the named plaintiffs, and the Court could not make a determination which would be binding on the rest of the class, vacation appeared appropriate.

If the Court is to view the class independently of its representative, it must tighten the requirements of rule 23 to prevent the policies behind the rule and the doctrine of mootness from being undermined.[55] For example, in determining whether a representative will "fairly and adequately protect the interests of [his] class"[56] it would be relevant to consider whether the representative has or had a "personal stake"[57] in the outcome and whether there exists a "concrete adverseness"[58] between the class representative and the defendant.[59] Similarly, strict adherence to the certification requirement and the requirement that the court's judgment describe the members of the class can help insure that the class itself actually presents a live controversy.

It has been suggested that in cases such as *Sosna* the litigation could be suspended for a "reasonable period of time" in order that a new class representative, one whose controversy remains live, can be found to replace the original representative.[60] This procedure has been followed in lower court cases with some success,[61] and it would doubtless restore adverseness to those cases in which the representative's personal stake has become diminished. The obvious problem with this alternative in cases such as *Sosna* would be the finding of substitute representatives from within a class of unknown bona fide new state residents. In most cases, however, this alternative would be feasible, and in any case the difficulty might be justified if it provided a higher degree of "concrete adverseness . . . upon which the court so largely depends for illumination . . . ."[62]

54. See id.; Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35, 39 (5th Cir. 1958) (judgment against minors reversed on ground of failure to appoint).

55. Dissenting in Jacobs, Justice Douglas complained that the Court appeared to be embarking "upon a program of scrupulous enforcement of compliance" with the requirements of rule 23. 95 S. Ct. at 851 (Douglas, J., dissenting).

56. Fed. R. Civ. P. 23(a)(4).

57. Baker v. Carr, 369 U.S. 186, 204 (1962). "Personal stake" is ordinarily associated with the doctrine of standing, but it is also one of the policies underlying the doctrine of mootness. See Monaghan 1383-86; Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672, 1677 (1970). Notice, in this regard, that Justice White's dissent in Sosna is largely a discussion of what he viewed to be Mrs. Sosna's lack of standing.

58. Baker v. Carr, 369 U.S. 186, 204 (1962). Like "personal stake," the policy of "adverseness" underlies the doctrine of mootness as well as that of standing. See Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772, 773 (1955).

59. It might be argued that a representative whose controversy has become moot is not typical of a class whose controversy has not. See Bledsoe 460-61; cf. Watkins v. Chicago Housing Authority, 406 F.2d 1234, 1236 (7th Cir. 1969) ("It must be a novel theory, at least one to which we do not subscribe, that named plaintiffs without the right to further represent themselves can continue to represent unnamed parties allegedly in a similar situation.").

60. Bledsoe 461.

61. E.g., Washington v. Wyman, 54 F.R.D. 266 (S.D.N.Y. 1971); Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969). See also Bledsoe 461 nn.149-50 and accompanying text. This is essentially the procedure followed at the state level in Richardson v. Ramirez, 418 U.S. 24, 38 (1974).

62. Baker v. Carr, 369 U.S. 186, 204 (1962).

The *Sosna* holding is valuable for the distinctions it draws between the Court's inquiry under article III and that under rule 23. Confusion naturally arises because both are meant to assure full presentation, to the Court, of opposing sides of an issue. *Sosna* holds that at certification a class becomes, in effect, a party to the litigation[63] and should be the focus of a mootness inquiry. This is consistent with the purpose of article III—to ensure the existence of an actual controversy between the parties to a suit. Rule 23, on the other hand, ensures that the interests of the class are adequately represented.

2. The Equal Protection Issue

Any classification based on length of residence in a state places a burden on the right of interstate travel. In examining state residency requirements, the Court has employed a two-step analysis, inquiring into both the nature of the classification and the state's justification for its use: does the classification have enough of an impact to "penalize"[64] interstate travel,[65] and, if so, is it necessary to promote a compelling state interest. If no penalty is imposed, the state need only show a rational relationship to a legitimate state interest.[66]

Whether a state has imposed a penalty depends upon the importance of the benefit or right withheld. If the benefit is deemed to be a basic "necessity of life"[67] such as welfare (*Shapiro v. Thompson*[68]) or medical aid (*Memorial Hospital v. Maricopa County*[69]), or if the right is a "fundamental" one such as the right to vote (*Dunn v. Blumstein*[70]), the right to travel is penalized. "Necessities of life" and fundamental rights include neither higher education[71]

63. 95 S. Ct. at 557.

64. The term was first used in Shapiro v. Thompson, 394 U.S. 618, 634 (1969), and has been carried forward in subsequent cases. E.g., Memorial Hosp. v. Maricopa County, 415 U.S. 250, 257 (1974). For a criticism of this term, and a good pre-Sosna analysis of the divorce residency requirement see Comment, Durational Residency Requirements for Divorce, 123 U. Pa. L. Rev. 187 (1974).

65. The right to travel interstate is a "basic" right. Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (and cases cited therein). Its historical development is traced in Z. Chafee, Three Human Rights in the Constitution 162-213 (1956); Note, Shapiro v. Thompson: Travel, Welfare and the Constitution, 44 N.Y.U.L. Rev. 989, 989-993 (1969); Note, The Right to Travel—Quest For a Constitutional Source, 6 Rutgers Camden L.J. 122, 123-26 (1974).

66. See generally San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 36-40 (1973); McGowan v. Maryland, 366 U.S. 420, 425-28 (1961). The test was applied to durational residency requirements in Sturgis v. Washington, 368 F. Supp. 38, 41 (W.D. Wash.), aff'd mem., 414 U.S. 1057 (1973); Suffling v. Bondurant, 339 F. Supp. 257, 260 (D.N.M.), aff'd mem. sub nom. Rose v. Bondurant, 409 U.S. 1020 (1972); Starns v. Malkerson, 326 F. Supp. 234, 239-41 (D. Minn. 1970), aff'd mem., 401 U.S. 985 (1971).

67. This phrase also originated in Shapiro v. Thompson, 394 U.S. 618, 627 (1969), and reappears in later cases. E.g., Memorial Hosp. v. Maricopa County, 415 U.S. 250, 259 (1974).

68. 394 U.S. 618, 627 (1969).

69. 415 U.S. 250, 259 (1974).

70. 405 U.S. 330, 336 (1972).

71. Sturgis v. Washington, 368 F. Supp. 38, 41 (W.D. Wash.), aff'd mem., 414 U.S. 1057 (1973); Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970), aff'd mem., 401 U.S. 985 (1971).

nor admission to the practice of law,[72] and their denial imposes no penalty. If a penalty has been imposed, the state must show that the residency requirement is necessary to promote a compelling state interest.[73]

The Court has held that mere budgetary[74] or administrative[75] concerns are not compelling state interests while the prevention of fraud on the state is.[76] Even if the state can show a compelling interest, it must still demonstrate that its residency requirement is necessary to promote that interest. If there exist "other mechanisms . . . which would have a less drastic impact on constitutionally protected interests,"[77] then the state will be required to use them, either in lieu of or in conjunction with a durational residency requirement.[78]

Justice Rehnquist's opinion in *Sosna* did not apply the above analysis. Instead the Court relied upon factual distinctions between the justifications offered in *Sosna* and those offered in *Shapiro, Dunn* and *Maricopa County*.

Several factors, of varying degrees of importance, led to the conclusion that "Iowa's residency requirement may reasonably be justified on [other] grounds . . . ."[79] Of major importance was the consideration that domestic relations laws are "regarded as a virtually exclusive province of the States."[80] This factor was bolstered by "more than a century" of precedent disclaiming federal authority over the subject of divorce.[81] Another factor of some significance was the existence of durational residency requirements for divorce in 48 states,[82] the most common period imposed being one year.[83] To uphold the *Sosna* claim, then, the Court would have been required to overturn the statutes of a majority of the states in an area historically reserved for the states themselves. Such an historical fact is not "to be lightly cast aside,"[84] for, as the Court has said in a related contest, "[i]f a thing has been practised

72. See Suffling v. Bondurant, 339 F. Supp. 257, 258-59 (D.N.M.), aff'd mem. sub nom. Rose v. Bondurant, 409 U.S. 1020 (1972).

73. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262 (1974).

74. Id. at 263 (1974); Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

75. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 267 (1974); Dunn v. Blumstein, 405 U.S. 330, 349-51 (1972).

76. See Memorial Hosp. v. Maricopa County, 415 U.S. 250, 268 (1974) (interest in preventing fraud called "valid" in a context indicating that if the means chosen by the state had not been overbroad, the compelling state interest test would have been met); Dunn v. Blumstein, 405 U.S. 330, 345 (1972).

77. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 268 (1974). Compare Dunn v. Blumstein, 405 U.S. 330, 353 (1972).

78. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 267-68 (1974); Dunn v. Blumstein, 405 U.S. 330, 347-54, 357-60 (1972).

79. 95 S. Ct. at 561.

80. Id. at 559.

81. Id. at 559-60, citing Simms v. Simms, 175 U.S. 162, 167 (1899); Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877); Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859).

82. 95 S. Ct. at 560.

83. Id. See, e.g., N.Y. Dom. Rel. Law § 230 (McKinney Supp. 1974) (in some cases the requirement is increased to two years).

84. Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) (first amendment challenge to religious property tax exemption).

for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ."[85] Having laid this foundation for its opinion the Court began to examine Iowa's justification for its residency requirement.

The principal justification offered by the Court for the requirement was that it insulates the state's divorce decrees from collateral attack in other states.[86] Jurisdiction to grant a divorce is founded upon domicile,[87] and "a finding of domicile in *ex parte* proceedings . . . is not binding upon another State" under the full faith and credit clause "in the face of 'cogent evidence' to the contrary."[88] A durational residency requirement "provides a greater safeguard against successful collateral attack than would a requirement of bona fide residence alone"[89] because it makes a finding of lack of domicile, and thus lack of jurisdiction, by another state less likely.[90] The Court held that the state's interest in creating this safeguard "requires a different resolution of the constitutional issue presented than was the case in *Shapiro* . . . *Dunn* . . . and *Maricopa County* . . . ."[91]

The Court also examined two other justifications for the residency requirement. Since divorce jurisdiction is founded upon domicile, the granting of a divorce by a state in which a spouse has been present only a short time would amount to "officious intermeddling in matters in which another State has a paramount interest."[92] The Court explained:

> A State such as Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there as short a time as appellant had when she commenced her action in the state court after having long resided elsewhere.[93]

The final justification for the Iowa requirement involved the consequences

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85. Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) (statute requiring proof of negligence in trespass actions relating to party walls upheld).

86. 95 S. Ct. at 562.

87. Id. at 561, citing Williams v. North Carolina, 325 U.S. 226, 229 (1945); Andrews v. Andrews, 188 U.S. 14 (1903); Bell v. Bell, 181 U.S. 175 (1901). It has been said that "[t]he sterile conceptualism of the dogma of domicile is obsolete. It has no place in a modern domestic relations law." Foster, Recognition of Migratory Divorces: Rosenstiel v. Section 250, 43 N.Y.U.L. Rev. 429, 450 (1968).

88. 95 S. Ct. at 561-62, citing Williams v. North Carolina, 325 U.S. 226, 236 (1945). Where a party has been personally served or makes a personal appearance he or she is barred from making this collateral attack on jurisdiction. Johnson v. Muelberger, 340 U.S. 581, 587 (1951); Sherrer v. Sherrer, 334 U.S. 343, 352 (1948). As Justice Marshall points out in his dissent, Iowa's residency requirement applies to all divorces, not merely ex parte divorces. 95 S. Ct. at 570. Mr. Sosna had been personally served while in Iowa visiting his children, and he made a special appearance to challenge jurisdiction. Id. at 555. Thus, Mrs. Sosna's divorce decree, had she obtained one, would not have been susceptible to collateral attack.

89. 95 S. Ct. at 562.

90. Id. at 561-62 & n.21. But see id. at 571 (Marshall, J., dissenting).

91. Id. at 562.

92. Id. at 561.

93. Id.

of granting a divorce. A divorce can affect not merely the marital relationship, but also property rights and the custody and the support of children.[94] "With consequences of such moment riding on a divorce decree issued by its courts, Iowa may insist that one seeking to initiate such a proceeding have the modicum of attachment to the State required here."[95]

The dissent of Justice Marshall, the author of *Dunn* and *Maricopa County*, in which Justice Brennan, the author of *Shapiro*, joined, bears witness to the departure which *Sosna* represents. As Justice Marshall correctly notes, the Court's failure to employ the analysis developed in prior cases

> suggests a new distaste for the mode of analysis [the Court has] applied to this corner of equal protection law. In its stead, the Court has employed what appears to be an *ad hoc* balancing test, under which the State's . . . interest in ensuring that its divorce plaintiffs establish some roots in Iowa is said to justify the one-year residency requirement.[96]

The Court might easily have applied the analysis found in prior cases without altering *Sosna's* result.[97] It might have held that obtaining a divorce within one's first year of residence is not a basic necessity of life or a fundamental right and that its denial does not "penalize" the right to travel.

94. Id.

95. Id. Justice Marshall argued that the importance of these matters compelled an opposite result because declining to exercise jurisdiction "freezes them in an unsatisfactory state," and thus constitutes a hardship which long-time residents would not be required to bear. Id. at 569 n.3 (Marshall, J., dissenting).

96. Id. at 567 (Marshall, J., dissenting). The two-tier analysis (rational relation to legitimate state interest: necessary for compelling state interest) of prior cases has been criticized for its rigidity. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 17-18 (1972); The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 117 (1974); see Comment, Equal Protection in Transition: An Analysis and a Proposal, 41 Fordham L. Rev. 605, 611-14 (1973).

97. State Courts have done so. E.g., Whitehead v. Whitehead, 53 Hawaii 302, 492 P.2d 939 (1972); Davis v. Davis, 297 Minn. 187, 210 N.W.2d 221 (1973); Porter v. Porter, 112 N.H. 403, 296 A.2d 900 (1972); Sternshuss v. Sternshuss, 71 Misc. 2d 552, 336 N.Y.S.2d 586 (Sup. Ct. 1972); Coleman v. Coleman, 32 Ohio St. 2d 155, 291 N.E.2d 530 (1972); Stottlemyer v. Stottlemyer, 224 Pa. Super. 123, 302 A.2d 830 (1973); Place v. Place, 129 Vt. 326, 278 A.2d 710 (1971) (6 month statute). But see State v. Adams, 522 P.2d 1125 (Alas. 1974), noted in 5 Cumberland-Samford L. Rev. 331 (1974).

The majority of federal courts that have dealt with the issue struck down the statutes. E.g., McCay v. South Dakota, 366 F. Supp. 1244 (D.S.D. 1973), vacated after Sosna, 95 S. Ct. 819 (1975) (mem.); Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1973), vacated after Sosna, 95 S. Ct. 819 (1975) (mem.); Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D. Hawaii 1973) (striking down the 1 year statute upheld in Whitehead, supra), rev'd after Sosna, No. 73-2654 (9th Cir., Feb. 5, 1975); Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971), supplemented, 54 F.R.D. 198 (1972) (per curiam). But see Shiffman v. Askew, 359 F. Supp. 1225 (M.D. Fla. 1973) (6 month statute), aff'd sub nom. Makres v. Askew, 500 F.2d 577 (5th Cir. 1974). It has been said that ad hoc balancing would not be likely to change substantive results. The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 118 (1974). See also Note, State Durational Residence Requirements For Divorce: How Long is Too Long?, 31 Wash. & Lee L. Rev. 359 (1974) (written just prior to Sosna).

Such a holding would have been reasonable, for obtaining a divorce within a year of one's arrival in a state is not a benefit for which there is as significant or as immediate a need as there might be for welfare or medical aid. Nor does the right to obtain a divorce occupy as important a place in the hierarchy of constitutionally protected rights as does the right to vote.[98] The absence of a penalty would, under prior cases, have made an application of the traditional "rational basis" standard of equal protection review appropriate.

The *Sosna* Court's ad hoc equal protection balancing test has the disadvantage of leaving behind nothing more than a series of "different resolution[s]."[99] In *Sosna,* for example, the closest the Court came to applying a usable standard was when it twice used, in a casual manner, the word "reasonably."[100] For this reason, Justice Marshall's "spectrum"[101] approach, under which "the degree of care with which the Court will scrutinize . . . classifications [depends] on the . . . importance of the interest . . . affected and the . . . basis upon which the . . . classification is drawn,"[102] seems preferable. It promises to achieve flexibility without ignoring the need for definite standards and a principled analysis.

Thomas I. Sheridan III

Constitutional Law—Procedural Due Process—Reports of *Fuentes'* Demise "Greatly Exaggerated"—Georgia Garnishment Statute Held Unconstitutional.—On August 20, 1971, respondent Di-Chem, Inc., brought suit in state court against petitioner North Georgia Finishing, Inc., alleging an indebtedness on goods sold and delivered. Seeking a statutory provisional remedy, Di-Chem also filed an affidavit[1] and bond for a writ of garnishment,[2]

98. Compare Boddie v. Connecticut, 401 U.S. 371, 383 (1971), with Dunn v. Blumstein, 405 U.S. 330, 336-37 (1972).

99. 95 S. Ct. at 562.

100. Id. at 561.

101. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98, 99 (1973) (Marshall, J., dissenting).

102. Id. at 99. Compare Memorial Hosp. v. Maricopa County, 415 U.S. 250, 253 (1974), with Dunn v. Blumstein, 405 U.S. 330, 335 (1972), and Sosna v. Iowa, 95 S. Ct. 553, 567 (1975) (Marshall, J., dissenting).

1. "The affidavit asserted the debt and 'reason to apprehend the loss of said sum or part thereof unless process of Garnishment issues.' " North Ga. Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719, 721 (1975), quoting Di-Chem's affidavit. The amount claimed was $51,279.17. Id. n.2.

2. Although Ga. Code Ann. § 46-101 (1974) speaks in terms of "garnishment," the procedure appears to operate also in the manner of an attachment. See Ga. Code Ann. § 46-102 (1974). Compare Sniadach v. Family Fin. Corp., 395 U.S. 337, 338 (1969). Under the Georgia statute, "plaintiff or his attorney must make an affidavit before 'some officer authorized to issue an attachment, or the clerk of any court of record in which the said garnishment is being filed or in which the main case is filed, stating the amount claimed to be due in such action . . . .' § 46-102. To protect defendant against loss or damage in the event plaintiff fails to recover, that section

naming the petitioner's bank as garnishee. A court clerk issued a summons of garnishment to the bank, which was served the same day. Three days later the petitioner filed bond in superior court "conditioned to pay any final judgment in the main action up to the amount claimed,"[3] and the court discharged the bank as garnishee. Subsequently, the trial court overruled petitioner's motion to dismiss the writ of garnishment and discharge its bond, rejecting the argument that Georgia's statutory procedure violated the debtor corporation's right to due process.[4] The Georgia Supreme Court upheld the constitutionality of the statute.[5] On appeal, the United States Supreme Court reversed, holding that the garnishment procedure violated petitioner's right to procedural due process. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975).

Di-Chem presents the most recent Supreme Court opinion in the continuing judicial dialogue concerning the proper scope of procedural due process in the area of prejudgment remedies.[6] "Prior to [1969], decisions of the Court consistently sustained the constitutionality of prejudgment seizure of property subject to litigation, reasoning that ultimate adjudication on the merits would assure a defendant's rights."[7]

Sniadach v. Family Finance Corp.[8] was the first Supreme Court decision which refused to follow this rule. In that case, a court clerk issued a writ of garnishment upon the ex parte request of a creditor who was about to bring suit on a note. The writ operated to freeze one-half of the debtor's wages, the funds to be released only if the debtor prevailed on the merits of the suit. Emphasizing the absence of both notice and hearing, the Supreme Court held

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also requires plaintiff to file a bond in a sum double the amount sworn to be due." 95 S. Ct. at 721.

3. 95 S. Ct. at 721; see Ga. Code Ann. § 46-401 (1974). This procedure for a debtor's bond in response to the attachment will be referred to as a "counterbond."

4. North Georgia Finishing also invoked the equal protection clause of the fourteenth amendment. 95 S. Ct. at 721.

5. North Ga. Finishing, Inc. v. Di-Chem, Inc., 231 Ga. 260, 201 S.E. 2d 321 (1973), rev'd, 95 S. Ct. 719 (1975). The Supreme Court granted certiorari in 417 U.S. 907 (1974), fifteen days after its decision in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). After the decision of the Georgia Supreme Court, a three judge federal court declared the same statutes unconstitutional on the authority of Fuentes v. Sheven, 407 U.S. 67 (1972). Morrow Elec. Co. v. Cruse, 370 F. Supp. 639, 642 (N.D. Ga. 1974).

6. This Case Note deals with the constitutionality of prejudgment attachments of property as creditors' remedies, as distinguished from attachments for the purpose of obtaining jurisdiction in a state court, referred to as foreign attachments. Foreign attachments present different state interests; see Fuentes v. Shevin, 407 U.S. 67, 91 n.23 (1972). The constitutionality of foreign attachments was upheld in Ownbey v. Morgan, 256 U.S. 94 (1921). See generally Comment, Foreign Attachment After Sniadach and Fuentes, 73 Colum. L. Rev. 342 (1973).

7. Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 645 (S.D.N.Y. 1974), prob. juris. noted, 43 U.S.L.W. 3550 (U.S. Apr. 15, 1975) (No. 74-859), discussed in text accompanying note 45 infra.

8. 395 U.S. 337 (1969). For a discussion of pre-Sniadach decisions, see Note, Procedural Due Process—The Prior Hearing Rule and the Demise of Ex Parte Remedies, 53 B.U.L. Rev. 41, 42-46 (1973) [hereinafter cited as Note, The Prior Hearing Rule].

the state statute unconstitutional.[9] Although *Sniadach* paid deference to past decisions[10] by observing that garnishment might "well meet the requirements of due process in extraordinary situations,"[11] the decision firmly established the right of a wage-earner not to be deprived of his wages without adequate preliminary procedures to safeguard his interests.[12] However, it was unclear whether the decision was limited to wages and other necessities.[13]

A year later, in *Goldberg v. Kelly*,[14] the Court set forth a balancing test to determine what interests should be afforded due process protection, and the nature of the procedural due process required.[15] Subsequent decisions utilizing this test[16] suggest that the interests protected under the procedural due process requirements of the fourteenth amendment need not be of such

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9. 395 U.S. at 337-39 (facts), 342 (holding). See Note, Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp.: A Constitutional Fly in the Creditor's Ointment, 34 Albany L. Rev. 426 (1970); 4 Suffolk U.L. Rev. 585 (1970); 72 W. Va. L. Rev. 165 (1970).

10. See, e.g., Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (administrative decision to make multiple seizures of misbranded and harmful drugs without a prior hearing does not violate procedural due process); Fahey v. Mallonee, 332 U.S. 245 (1947) (conservator's taking possession of a savings and loan association without prior hearing upheld in light of the history and custom of banking); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) (execution by superintendent of banks against stockholders of an insolvent bank upheld where stockholders had failed to pay assessments); Ownbey v. Morgan, 256 U.S. 94 (1921) (condition that a defendant post bond equal to the value of the property seized in a foreign attachment before he is allowed to appear in defense of the action held constitutional). It has been suggested that Ownbey v. Morgan should not be considered controlling. Comment, Foreign Attachment After Sniadach and Fuentes, 73 Colum. L. Rev. 342, 346 (1973).

11. 395 U.S. at 339. "But in the present case no situation requiring special protection to a state or creditor interest is presented . . . ." Id.

12. "[A] prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." Id. at 341-42.

13. Note, Mitchell v. W.T. Grant Co.—The Repossession of Fuentes, 5 Memphis St. U.L. Rev. 74, 77 (1974) [hereinafter cited as Note, Repossession of Fuentes].

14. 397 U.S. 254 (1970). Goldberg held unconstitutional a New York procedure permitting the termination of welfare benefits without prior notice or hearing. Id. at 266; see Comment, Due Process and the Right to a Prior Hearing in Welfare Cases, 37 Fordham L. Rev. 604 (1969).

15. Quoting Cafeteria Workers, Local 473 v. McElroy, 367 U.S. 886, 895 (1961), the Court in Goldberg stated that " 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise . . . interest that has been affected by governmental action.' " 397 U.S. at 263. See text accompanying notes 43, 44 & 59 infra.

16. See Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father's interest in caring for his child held superior to the state's interest in prohibiting the domestic relationship); Lindsey v. Normet, 405 U.S. 56 (1972) (tenant's interest in housing insufficient to outweigh state's interest in summary eviction procedure); Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license without opportunity for hearing held unconstitutional); Boddie v. Connecticut, 401 U.S. 371 (1971) (state procedure which denied indigents judicial dissolution of their marriage due to their inability to pay court fees held unconstitutional).

significance that their deprivation would "as a practical matter drive a wage-earning family to the wall."[17]

In *Fuentes v. Shevin*,[18] the Court broadened part of the *Goldberg* test by expanding the types of interests and deprivations which are significant enough to require the protection of procedural due process. In *Fuentes*, the seven-Justice Court[19] scrutinized the prejudgment remedies of Florida and Pennsylvania; each state statute authorized ex parte writs of replevin upon a creditor's conclusory allegation of ownership. Although the creditors were required to post bond as security for the consumer goods attached, the statutes made no provision for prior notice and hearing.[20] The Court, through Justice Stewart, ruled that the procedural due process requirement of a prior hearing clearly was not "limited to the protection of only a few types of property interests."[21] The four-Justice majority stated that "it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment."[22] Such deprivation, absent prior notice and hearing, would be permitted only in "special situations demanding prompt action."[23] Although the decision expanded the post-*Sniadach* boundaries in which deprivations of property interests operated to trigger protective measures of procedural due process, *Fuentes* did not propose any particular form which these protective measures might take beyond prior notice and hearing. *Fuentes'* heavy emphasis on debtor protection[24] thus lessened the Court's flexibility in this area.[25] A creditor was hard

17. Sniadach v. Family Fin. Corp., 395 U.S. 337, 341-42 (1969).

18. 407 U.S. 67 (1972); see The Supreme Court, 1971 Term, 86 Harv. L. Rev. 52, 85-95 (1972); Note, The Prior Hearing Rule 49-59; 41 Fordham L. Rev. 1051 (1973).

19. Justices Powell and Rehnquist, both newly sworn in, did not participate. 407 U.S. 67, 97 (1972); see text accompanying note 66 infra.

20. 407 U.S. at 74-78.

21. Id. at 89. Citing Sniadach and Goldberg, the Court stated: "Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life . . . ." Id. at 88.

22. Id. at 84-85. "The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." Id. at 86.

23. Id. at 93. Thus, the Court would permit ex parte seizure upon a showing of immediate danger that the debtor will destroy or conceal goods, provided the statute is narrowly drawn to meet only this situation. Id.

24. "Most simply stated, the rule developed by Fuentes is that except in the most extraordinary of situations, any state authorized deprivation of any significant property interest must be preceded by notice and the opportunity for a hearing." Note, The Prior Hearing Rule 51 (emphasis omitted).

25. Many observers regarded the decision as "one which, due to the substantive evil of ex parte seizure orders running against the relatively poor members of society, was weighted so strongly in favor of the debtor as almost inevitably to tip the balance in favor of some form of prior adversary hearing." The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 77 (1974) [hereinafter cited as 1973 Term]. The inflexibility of Fuentes was illustrated by subsequent

pressed, in light of *Fuentes*, to show that his or the state's interest justified any prejudgment seizure.[26]

Late last term, in an attempt to return to a flexible approach—in this context one which could afford varying types of procedural safeguards so as to satisfy the different factual and legal conditions presented by future cases—the Supreme Court decided *Mitchell v. W.T. Grant Co.*[27] Justice White, speaking for the four-Justice plurality, upheld a Louisiana statute that allowed lienholders to obtain writs of sequestration[28] to forestall waste or alienation of encumbered property without affording debtors any prior notice or hearing.[29] Thus, at least on its face, *Mitchell* appeared to be a radical departure from the basic principle of *Fuentes*.[30] However, the Court in *Mitchell* set forth five separate aspects of the Louisiana procedure which distinguished the statute from those at issue in *Fuentes* and refused to overrule prior law.[31]

Initially, the writ of sequestration examined in *Mitchell* could not issue on the creditor's "conclusory allegations" of ownership. Instead, the creditor was required to file an affidavit alleging "specific facts" regarding the nature and amount of the claim, as well as the grounds relied upon for the issuance of the writ.[32] *Mitchell* noted that the Florida statute struck down in *Fuentes* had required only a conclusory allegation that the creditor had a right to possession.[33] The second distinguishing factor was that the Louisiana writ could

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decisions which uniformly required notice and hearing. See, e.g., Turner v. Colonial Fin. Corp., 467 F.2d 202 (5th Cir. 1972); Dorsey v. Community Stores Corp., 346 F. Supp. 103 (E.D. Wis. 1972); Sena v. Montoya, 346 F. Supp. 5 (D.N.M. 1972). "[I]t was unnecessary for the Fuentes opinion to have adopted so broad and inflexible a rule . . . ." Mitchell v. W.T. Grant Co., 416 U.S. 600, 624 (1974) (Powell, J., concurring).

26. See 41 Fordham L. Rev. 1051, 1060-61 (1973).

27. 416 U.S. 600 (1974). "Mitchell . . . marks a substantial retreat by the Supreme Court from prior precedent relating to the procedural due process requirement of prior notice and hearing generally and to the constitutional validity of creditors' prejudgment seizure remedies particularly." Hobbs, Mitchell v. W.T. Grant Co.: The 1974 Revised Edition of Consumer Due Process, 8 Clearinghouse Rev. 182 (1974) [hereinafter cited as Hobbs].

28. "Sequestration under the Louisiana statutes is the modern counterpart of an ancient civil law device to resolve conflicting claims to property. Historically, the two principle concerns have been that, pending resolution of the dispute, the property would deteriorate or be wasted in the hands of the possessor and that the latter might sell or otherwise dispose of the goods. A minor theme was that official intervention would forestall violent self-help and retaliation." 416 U.S. at 605.

29. 416 U.S. at 616-17; see La. Code Civ. Pro. Ann. art. 3501 (West 1961).

30. "Mitchell turned to a balancing test and repudiated elements of [Fuentes] which had been described as establishing 'a Procrustean rule of a prior adversary hearing' as a due process prerequisite to prejudgment creditor remedies." 1973 Term 72 (footnotes omitted).

31. 416 U.S. at 616-18; see text accompanying note 47 infra.

32. 416 U.S. at 605.

33. Id. at 615; Note, Repossession of Fuentes 85. "[F]lorida law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily." Fuentes v. Shevin, 407 U.S. 67, 74 (1972).

issue only upon a judge's authorization;[34] in *Fuentes* the writ of replevin was issued on the order of the clerk of the court.[35] Third and fourth, under the Louisiana statute the attaching creditor was required to post bond and the debtor could regain possession by posting a counterbond.[36] In *Fuentes*, both the Florida and the Pennsylvania statute required a creditor's bond, but only the Pennsylvania procedure allowed a debtor's counterbond to regain possession.[37] Finally, the Louisiana statute entitled the debtor to obtain immediate dissolution of the writ unless the creditor proved "the existence of the debt, lien, and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees."[38] In *Fuentes*, the Florida statute provided that the debtor "eventually" would be given a hearing; the Pennsylvania statute did not require that there "*ever* be [an] opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property."[39]

Despite the plurality's multifaceted attempt to distinguish *Fuentes*, both the concurring and dissenting opinions in *Mitchell* believed that the prior decision had been overruled.[40] Taking issue with the Court's analysis, Justice Stewart, in his dissent, adhered to the *Fuentes* doctrine:

> Matters such as requirements for the posting of bond and the filing of sworn factual allegations, the length and severity of the deprivation, the relative simplicity of the issues underlying the creditor's claim to possession, and the comparative "importance" or "necessity" of the goods involved [in *Fuentes*] were held to be relevant to determining the form of notice and hearing to be provided, but not to the constitutional need for notice and an opportunity for a hearing of some kind.[41]

Thus, the *Mitchell* Court was divided as to the necessity for prior notice and hearing. By upholding a procedure which lacked both of these safeguards, *Mitchell* raised but did not resolve questions concerning the extent of its departure from prior law.[42] The anticipated thrust of *Mitchell* was that of a return to a flexible analysis of prejudgment seizures.[43] To reach

34. 416 U.S. at 605-06.

35. Fuentes v. Shevin, 407 U.S. 67, 74 (1972).

36. 416 U.S. at 606-07.

37. Fuentes v. Shevin, 407 U.S. 67, 73-77 nn.6 & 7 (1972).

38. 416 U.S. at 606.

39. Fuentes v. Shevin, 407 U.S. 67, 75, 77 (1972).

40. "[T]he Court today has unmistakably overruled a considered decision of this Court that is barely two years old . . . ." 416 U.S. at 635 (Stewart, J., dissenting). "I think it fair to say that the Fuentes opinion is overruled." Id. at 623 (Powell, J., concurring).

41. Id. at 630-31 (Stewart, J., dissenting).

42. "Whether Fuentes' interpretation of the fourteenth amendment can be successfully refuted in favor of utilitarian balancing was not resolved by the Mitchell opinion . . . ." 1973 Term 79.

43. Quoting Cafeteria Workers, Local 473 v. McElroy, 367 U.S. 886, 895 (1961), and Stanley v. Illinois, 405 U.S. 645, 650 (1972), Mitchell stated: "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." 416 U.S. at 610. "The more significant import of the Mitchell decision is its reaffirmation of a flexible procedural due process analysis." Ruocco v. Brinker, 380 F. Supp. 432, 437 (S.D. Fla. 1974). For

this end, *Mitchell* appeared to pose an alternative to the prior notice and hearing requirements set forth in *Fuentes*. Accordingly, some courts interpreted the opinion as illustrative of a flexible approach under which varying procedures other than notice and hearing could sufficiently preserve the basic fairness necessary in the extension of due process. For example, a district court, finding three of the five *Mitchell* criteria present, upheld an attachment statute in *Woods v. Tennessee*[44] and refused to treat the absence of two safeguards as sufficiently substantial to render the procedure unconstitutional. A second possible interpretation was that *Mitchell* established a five-point test against which similar statutes were to be strictly judged. Illustrative of this "strict compliance" view is a mechanical approach which invalidates statutes although all but one of *Mitchell*'s criteria are present, as was done in *Sugar v. Curtis Circulation Co.*[45]

In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[46] the Court, again per Justice White, appeared to take the narrow view of *Mitchell*'s procedural alternative. In so doing, the unusually brief decision dispelled the impression that *Mitchell* had so undercut *Fuentes* as to overrule it sub silentio.[47] This was immediately apparent in the Court's application of *Fuentes* as predominant authority. In an analysis similar to that of Justice Stewart's dissent in *Mitchell*,[48] the majority in *Di-Chem* separated out of *Fuentes* those factors which are determinative of the right to a hearing, as compared to those determinative only of the hearing's form:

> Although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, [in *Fuentes* this] was not deemed to be determinative of the right to a hearing of some sort. Because the official seizures had been carried out without notice and without opportunity for a

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an analysis supporting this "flexible" view of Mitchell, see 6 Seton Hall L. Rev. 150, 162-64 (1974).

44. 378 F. Supp. 1364 (W.D. Tenn. 1974) (no debtor counterbond or immediate post attachment hearing). "Under the balancing test of the [Mitchell] majority, it is unclear which of the factors the Court found relevant must coexist to protect ex parte creditor remedies from constitutional attack. . . . The [Mitchell] majority's itemization of particular factors which may validate such statutes suggests that the opinion may have been directed primarily toward the legislatures of those several states whose summary creditor remedies have been invalidated under Fuentes and remain invalid under the holding of Mitchell." 1973 Term 82 (footnote omitted).

45. 383 F. Supp. 643 (S.D.N.Y. 1974), prob. juris. noted, 43 U.S.L.W. 3550 (U.S. Apr. 15, 1975) (No. 74-859); see Guzman v. Western State Bank, No. 74-1740 (8th Cir., March 11, 1975), vacating 381 F. Supp. 1262 (D.N.D. 1974); Garcia v. Krausse, 380 F. Supp. 1254 (S.D. Tex. 1974). The Guzman and the Garcia analyses, however, are similar to that employed in North Ga. Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975). In Sugar, supra, the court mechanically struck down a statute which met all criteria except the one requiring an immediate post-seizure hearing. The decision has been criticized, see McLaughlin, Attachment Statute Unconstitutional—Wholly or in Part?, 172 N.Y.L.J., Nov. 8, 1974, at 1, col. 1.

46. 95 S. Ct. 719 (1975).

47. Referring to the decision of the Georgia Supreme Court, Justice White's opinion for the majority stated: "This approach failed to take account of Fuentes v. Shevin, . . . a case decided by this Court more than a year prior to the Georgia court's decision." Id. at 722.

48. See text accompanying note 41 supra.

hearing *or other safeguard* against mistaken repossession [the statutes in *Fuentes*] were held to be in violation of the Fourteenth Amendment.[49]

Concurring briefly in *Di-Chem,* Justice Stewart simply noted that his report of *Fuentes'* "demise" had been "greatly exaggerated."[50] In light of his *Mitchell* dissent, Justice Stewart would appear to concur with the *Di-Chem* statement that the "length and severity" of a deprivation are only determinative of the hearing's form. However, *Di-Chem* conspicuously did not adopt Justice Stewart's sentiments that the posting of bond, the sworn affidavit containing specific facts, the relative simplicity of the issues and the comparative importance of the goods involved *also* go to the issue of the hearing's form.[51] Instead, *Di-Chem* employed, as the second part of the constitutional inquiry, the five specific factors discussed in *Mitchell.* As in *Mitchell,* these factors were analyzed to determine whether the Georgia garnishment procedure provided the debtor with sufficient safeguards as to afford him due process without granting him prior notice and hearing.[52]

The Georgia statute in *Di-Chem* did provide for the creditor's affidavit; however, that affidavit required only conclusory allegations.[53] Although the statute also provided for a debtor's posting of bond "to dissolve the garnishment,"[54] and for the posting of a bond by the creditor in a sum double the amount sworn to be due,[55] the remaining two safeguards identified in *Mitchell*—a judge's granting of the writ and an immediate post-seizure hearing—were totally absent. Thus, the statute in *Di-Chem* was struck down for failure to meet three of the five criteria set forth in *Mitchell.*

For this reason, it remains unclear whether due process demands full or only partial compliance with the *Mitchell* alternative. Had the Georgia procedure contained three factors similar to those approved in *Mitchell,* it is possible that the Court would have upheld the statute.[56] If the Georgia

49. 95 S. Ct. at 722 (emphasis added). The reference to "other safeguard" appears to be an attempt to harmonize Fuentes with Mitchell. However, it is doubtful that the Fuentes Court would have allowed anything but a notice and hearing. See text accompanying notes 18-26 supra.

50. "It is gratifying to note that my report of the demise of Fuentes v. Shevin . . . seems to have been greatly exaggerated. Cf. S. Clemens, Cable from Europe to the Associated Press, reprinted in II A. Paine, Mark Twain: A Biography 1039 (1912)." 95 S. Ct. at 723 (Stewart, J., concurring); see note 40 supra.

51. See Mitchell v. W.T. Grant Co., 416 U.S. 600, 630-31 (1974) (Stewart, J., dissenting). In Mitchell, the relative simplicity of the issues underlying the creditor's claim to possession aided the Court in its decision that the Louisiana statute had minimized the risk of any unjust deprivation to the debtor. Id. at 617-18. In Di-Chem, "the comparative 'importance' or 'necessity' of the goods involved" was considered irrelevant to the issue of whether there should be prior notice or hearing: "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." 95 S. Ct. at 723 (citing Fuentes v. Shevin, 407 U.S. at 89-90).

52. Compare 95 S. Ct. at 722-23 with Mitchell v. W.T. Grant Co., 416 U.S. at 616-20.

53. 95 S. Ct. at 722; see note 1 supra.

54. See note 3 supra and accompanying text.

55. See note 2 supra.

56. This was the situation before the court in Woods v. Tennessee, 378 F. Supp. 1364 (W.D. Tenn. 1974), discussed in text accompanying note 44 supra.

statute in *Di-Chem* had lacked only one of the five criteria, but had been struck down nevertheless, then the decision would have indicated that *Mitchell* was indeed a test demanding strict compliance.[57] Put another way, it is apparent that *Di-Chem* was far from the best possible set of facts with which to clarify *Mitchell*. However, the opinion's treatment of *Fuentes* as the applicable rule and its mechanical approach to *Mitchell* appear to push the decision towards the strict compliance view.

While concurring in the Court's decision, Justice Powell did not approve of *Di-Chem*'s reasoning, stating that it swept "more broadly than necessary and appear[ed] to resuscitate [*Fuentes*]."[58] Justice Powell examined the post-*Sniadach* "expansion of concepts of procedural due process" and urged "a more careful assessment of the nature of the governmental function served by the challenged procedure and of the costs the procedure exacts of private interests."[59] Doubting whether *Fuentes* struck a proper balance, and whether *Mitchell* should be relegated to its facts in this "more careful assessment," Justice Powell offered his own three-point procedural alternative. It was similar to that set forth in *Mitchell*.[60] The first requirement would be a creditor's bond; the second requirement would provide for a creditor's "establishment before a neutral officer of a factual basis of the need to resort to the remedy."[61] Third, Justice Powell would require a post-seizure hearing.[62] Since his second and third requirements were absent in the Georgia statute, Justice Powell would have found the garnishment procedure unconstitutional due to its failure to afford "fundamental fairness."[63]

In their dissent, Justices Blackmun and Rehnquist assailed the *Di-Chem* majority on five principal grounds. First, the dissent relegated *Sniadach* to the "environment" of wages. Admitting that *Sniadach* had been expanded by *Fuentes*, the dissent asserted that this expansion was disapproved by *Mitchell*.[64] Second, the dissent adhered to a flexible construction of *Mitchell*'s thrust, viewing that decision as "substantially" retreating from *Fuentes*.[65]

57. See note 45 supra.

58. 95 S. Ct. at 723 (Powell, J., concurring).

59. Id. at 724 (Powell, J., concurring). Justice Powell based his proposal almost solely upon the authority of two cases, Goldberg v. Kelly, 397 U.S. 254, 263-66 (1970) (see text accompanying notes 14-17 supra) and Cafeteria Workers, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (governmental interest in national security overrides defense plant employee's interest in pre-firing hearing). Beyond their common endorsement of a balancing test, these two cases are quite dissimilar; neither dealt with prejudgment remedies. See note 15 supra.

60. Compare Justice Powell's opinion with Mitchell v. W.T. Grant Co., 416 U.S. 600, 605-07 (1974).

61. 95 S. Ct. at 725 (Powell, J., concurring) (footnote omitted). The concept of a "neutral officer" as central to the issue of adequate safeguards finds support in Mitchell, 416 U.S. at 616 ("The Louisiana law provides for judicial control of the process from beginning to end.").

62. 95 S. Ct. at 725 (Powell, J., concurring).

63. Id. at 726.

64. Id. at 726-27 (Blackmun & Rehnquist, JJ., dissenting). While both Sniadach and Di-Chem dealt with garnishment statutes, the Di-Chem procedure did not involve wages. See note 2 supra.

65. "I would have thought that, whatever Fuentes may have stood for in this area of

Third, the dissent introduced a new argument by collaterally attacking the Court's four-to-three decision in *Fuentes* on the ground "that the practice of the Court 'except in cases of absolute necessity' is not to decide a constitutional question unless there is a majority 'of the whole court.' "[66] Fourth, the dissent emphasized that the present dispute was between two corporations[67] and found that the Georgia system provided sufficient protection in this commercial setting.[68] Indeed, this factor was totally ignored by the majority. Finally, the dissent criticized the Court for having "embarked on a case-by-case analysis . . . of the respective state statutes in this area. That road is a long and unrewarding one, and provides no satisfactory answers to issues of constitutional magnitude."[69] These five arguments appear to reflect a desire to preserve the flexible view that *Mitchell*'s five procedural safeguards are not an exclusive test but are examples of sufficient debtor protection in the absence of prior notice and hearing.[70]

The thrust of the Supreme Court decisions leads to the basic proposition that there must be a preservation of judicial control over the initial decision whether or not to issue the ex parte writ. The exercise of this judicial discretion would turn upon whether or not there exist statutory safeguards adequate to protect the debtor's property interest in the absence of prior notice and hearing. Although five safeguards were isolated in *Mitchell*, it is as yet an unwarranted assumption that Louisiana's garnishment law constitutes the sole configuration of statutory provisions constitutionally permissible absent notice and hearing. Therefore, the Court in future decisions should adopt a qualitative rather than a quantitative construction of *Mitchell*.

Under such a qualitative standard, a mechanical application of *Mitchell* would be unwarranted. Assuming arguendo that the Court might accept a statute meeting three of the five *Mitchell* criteria, the crucial factors are not the specific forms in which the safeguards manifest themselves; rather, what is important is the substantive protection afforded the debtor. Thus, a creditor's bond *or* a creditor's non-conclusory affidavit, since both are directed at imposing a personal risk on the creditor seeking an extraordinary ex parte remedy, may be sufficient, assuming other substantive protections are af-

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debtor-creditor commercial relationships, with its 4-3 vote by a bobtailed court, it was substantially cut back by Mitchell." 95 S. Ct. at 727 (Blackmun & Rehnquist, JJ., dissenting).

66. Id. at 727, quoting Briscoe v. Commonwealth Bank, 33 U.S. (8 Pet.) 118, 122 (1834); see note 19 supra and accompanying text.

67. See D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) (summary seizure after waiver of corporation's right to prejudgment notice and hearing on advice of counsel during contractual negotiations with another corporation did not violate due process).

68. 95 S. Ct. at 729 (Blackmun & Rehnquist, JJ., dissenting).

69. Id. Even before the decision in Di-Chem, one commentator suggested that Mitchell would require a case-by-case clarification. Phillips, Revolution and Counterrevolution: The Supreme Court on Creditors' Remedies, 3 Fordham Urban L.J. 1, 10-11 (1974).

70. The dissent appeared to place too great an emphasis on the Court's employment of Sniadach, which was but superficially dealt with by the majority; see 95 S. Ct. at 722. In addition, the dissent failed to explicate Mitchell and its approach would also seem to require a case-by-case analysis.

forded. Similarly, at least in some circumstances (particularly commercial ones), posting a counterbond in order to recover the seized property may obviate the necessity of an immediate post-seizure hearing. Perhaps one can read Justice Powell's concurrence in *Di-Chem* as supporting this view. In any event, in the context of careful supervision by a judge, almost any form of safeguards of such quality should be constitutionally adequate.[71]

Putting aside the theoretical analysis involved in the struggle to ascertain coherence between *Fuentes, Mitchell* and *Di-Chem*, the fact remains that the area of procedural due process as applied to prejudgment remedies is confusing and unsettled. After *Mitchell,* the Court had the option to treat the procedural alternative proposed in that case as an example of a more flexible approach to creditors' remedies. On the other hand, the *Di-Chem* Court could have viewed *Mitchell* as a test and, therefore, a narrow exception to the still vital authority of *Fuentes*. Due to the factual setting of *Di-Chem*—the absence of three of the five safeguards identified in *Mitchell*—it remains unclear which option the Supreme Court has elected. Perhaps the most that can be said with certainty is that *Fuentes* continues to exert significant authority. Although *Mitchell* has offered an alternative to what was once a blanket rule, the extent and effect of that alternative will remain unclear unless future decisions are more enlightening than *Di-Chem*. Barring another about face, a case-by-case analysis appears unavoidable.

Michael W. Hogan

Labor Law—Arbitrability—In-Course Termination of Collective Bargaining Agreement Presents Issue for Judicial Resolution.—In 1972 plaintiff union and defendant Rainbow Plastics entered into a collective bargaining agreement which was to expire on November 18, 1974. The grievance clause mandated arbitration as a final remedy for "complaint[s] pertaining to the interpretation or application of the terms of [the collective bargaining] agreement."*[1] During negotiations Rainbow advised the union that it was considering closing one of the plants covered by the agreement, and moving some of the site's operations to a new location. Prior to the shutdown, the parties entered into a separate letter agreement covering the effects of the move upon the unionized employees.[2] By its terms, the letter

71. This view is supported by Mitchell's final footnote, where the Court sought to minimize the impact of its decision on replevin statutes held unconstitutional under Fuentes: "Nor is it at all clear, with an exception or two, that the reported cases invalidating replevin or similar statutes dealt with situations where there was judicial supervision of seizure or foreclosure from the outset." 416 U.S. at 620 n.14.

* As this Case Note went to press, the principal case was reported in 508 F.2d 1309, as indicated in the text. All footnote citations are to L.R.R.M.

1. UAW Local 125 v. International Tel. & Tel. Corp., 88 L.R.R.M. 2213, 2215 n.4 (8th Cir., Jan. 8, 1975).

2. Id. at 2214-15.

agreement "represent[ed] the full and final agreement between the parties and include[d] all matters discussed regarding the shut down of the Rainbow Plastics operation and the termination of the agreement and the effects of such shut down on the employees included in the bargaining unit . . . ."[3]

Shortly after the opening of the new plant, the union filed grievances on behalf of some of the twenty-seven workers transferred there. After Rainbow rejected the grievances and refused arbitration, the union brought suit to compel arbitration. The district court found the letter agreement ambiguous and directed that the question of whether the letter agreement terminated the collective bargaining agreement be determined by an arbitrator.[4] The Court of Appeals for the Eighth Circuit reversed, holding that regardless of the degree of ambiguity involved, the question of termination of collective bargaining agreements was for judicial resolution.[5] *UAW Local 125 v. International Telephone & Telegraph Corp.*, 508 F.2d 1309 (8th Cir. 1975) [hereinafter cited as *Rainbow*].

Under federal labor policy, arbitration under a collective bargaining agreement with an arbitration clause has been the preferred method of settling labor disputes. This policy was first developed in the *Steelworkers Trilogy*[6] which defined the initial role of a court as "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract,"[7] rather than as encompassing the resolution of the dispute on its merits. Under this policy, the actual interpretation of the contract is reserved to the arbitrator.[8] A court must avoid evaluating the substantive provisions of a contract "even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."[9] Although the scope of a court's power appears limited in this area, it must decide "whether or not [a party is] bound to arbitrate . . . on the basis of the contract entered into by the parties."[10] The apparent contradiction[11] is overcome through a judicial construction of the collective bargaining

3. Id. at 2215-16.

4. See id. at 2216.

5. Id. at 2217.

6. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

7. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

8. Id. at 569; United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

9. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 585 (1960); cf. Tobacco Workers Local 317 v. Lorillard Corp., 448 F.2d 949 (4th Cir. 1971) in which the court said "the judge must determine whether there is an agreement to arbitrate and whether that agreement has been breached. . . . [H]e must take care to steer clear of the questions that the parties have agreed to settle through the arbitrator. If he does not, he becomes an instrument of a breach of the agreement." Id. at 957.

10. Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962).

11. See Tobacco Workers Local 317 v. Lorillard Corp., 448 F.2d 949, 955 (4th Cir. 1971) (arbitration ordered over company objection that grievance provisions precluded award of remedy sought, on theory that the limitation was not on arbitrability but on arbitrator's power to

agreement based on a "presumption of arbitrability"[12] of grievances under the contract. The presumption serves to protect the integrity of the agreement and further the policy favoring arbitration.[13] Disputes which the parties wish to exclude from the grievance procedures must be specifically set out as non-arbitrable in the agreement. "A collective-bargaining agreement cannot define every minute aspect of the complex and continuing relationship between the parties. Arbitration provides a method for resolving the unforeseen disagreements that inevitably arise."[14]

While arbitration clauses have been presumed to cover substantive issues of contract interpretation,[15] they have rarely been viewed as empowering an

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fashion an award); International Union of Elec. Workers v. General Elec. Co., 407 F.2d 253, 264-66 (2d Cir. 1968), cert. denied, 395 U.S. 904 (1969) (the court's position is "treacherous" where commitment to arbitration itself is questioned in face of relatively unambiguous facts, as distinguished from case in which commitment to arbitration is clear but facts are not); McDermott, Arbitrability: The Courts Versus The Arbitrator, 23 Arb. J. 18, 26-29 (1968); Meltzer, The Supreme Court, Arbitrability and Collective Bargaining, 28 U. Chi. L. Rev. 464, 475-76 (1961).

12. Gateway Coal Co. v. UMW, 414 U.S. 368, 377 (1974). See generally Gould, The Supreme Court and Labor Law: An Analysis of Recent Trends and Developments, 16 W. Reserve L. Rev. 819 (1965); Jones, The Name of the Game Is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration, 46 Texas L. Rev. 865 (1968); McDermott, Arbitrability: The Courts Versus The Arbitrator, 23 Arb. J. 18 (1968); Smith, Arbitrability—The Arbitrator, The Courts and The Parties, 17 Arb. J. 3 (1962).

The proper effect of a court order compelling arbitration on the power of an arbitrator to determine arbitrability has been disputed. Compare Claremont Painting & Decorating Co. v. Painters Local 144, 66-2 CCH Lab. Arb. Awards ¶ 8423, at 4451 (after court orders arbitration, redetermination by arbitrator would "disrupt the allocation of function and responsibility between court and arbitrator") with J.C. Wattenbarger & Sons v. Teamsters Local 87, 66-2 CCH Lab. Arb. Awards ¶ 8626, at 5143-44 (parties may contest arbitrability before arbitrator after court orders arbitration). A judicial decision on arbitrability, however, is not dispositive of the merits of the dispute.

13. International Ass'n of Machinists v. Howmet Corp., 466 F.2d 1249, 1256 (9th Cir. 1972) ("flexible nature of . . . arbitration . . . requires that the arbitrator be given as much freedom as possible—from the framing of the issues themselves to the fashioning of appropriate remedies"); Tobacco Workers Local 317 v. Lorillard Corp., 448 F.2d 949, 955 (4th Cir. 1971) (presumption of arbitrability carried question of exclusion of remedy to the arbitrator "in order to receive 'the benefit of the arbitrator's interpretive skills as to . . . his contractual authority.' ") (quoting Torrington Co. v. Metal Prod. Workers Local 1645, 362 F.2d 677, 680 n.6 (2d Cir. 1966)). In International Union of Elec. Workers v. General Elec. Co., 407 F.2d 253 (2d Cir. 1968), cert. denied, 395 U.S. 904 (1969) the court said that in the absence of a presumption of arbitrability "in order to decide whether a case is arbitrable, a court would have to try it on the merits." Id. at 259. "When an arbitration clause begins to resemble a trust indenture, one wonders what gain there is for either party in agreeing to arbitrate at all, other than the questionable joys of litigation." Id. at 258.

14. Gateway Coal Co. v. UMW, 414 U.S. 368, 378 (1974).

15. See United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960) (arbitration should be denied only where "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"); cf. Drake Bakeries Inc. v. Local 50, Bakery Workers, 370 U.S. 254, 258-59 (1962) (Court rejected contention that "parties cannot have intended to arbitrate so fundamental a matter as a union

arbitrator to determine the threshold question of arbitrability[16] "unless the parties clearly state to the contrary."[17] When contract termination is at issue courts have viewed the problem as one reserved for the judiciary, and not the arbitrator.[18] This result seems to be based on an assumption that an arbitrator is not competent to decide questions involving threshold determina-

strike"); International Union of Elec. Workers v. General Elec. Co., 407 F.2d 253, 259 (2d Cir. 1968), cert. denied, 395 U.S. 904 (1969) (the application of a clause overriding the presumption of arbitrability would have to be specifically designated to be effective, if in light of national labor policy it could be given effect at all); A.S. Abell Co. v. Baltimore Typo. Union, 338 F.2d 190, 193-94 (4th Cir. 1964) (bargaining history is insufficient to meet Warrior test requiring forceful evidence to rebut presumption of arbitrability). See also Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 409-12 (2d Cir. 1959), petition for cert. dismissed, 364 U.S. 801 (1960) (claim of fraud in inducement of entire contract contemplated by broad arbitration provisions).

16. See Associated Milk Dealers, Inc. v. Milk Drivers Local 753, 422 F.2d 546, 550 (7th Cir. 1970) ("The party claiming that arbitrability is for the arbitrator to decide bears the burden of proof and must show that the contract clearly manifests such an intention . . . ."); cf. Necchi S.p.A. v. Necchi Sewing Mach. Sales Corp., 348 F.2d 693, 696 (2d Cir. 1965), cert. denied, 383 U.S. 909 (1966) (arbitration of arbitrability is proper only where arbitration provision is "so unusually broad that it clearly vests the arbitrators with the power to resolve questions of arbitrability as well as the merits . . . . However arbitrability is normally for the arbitrator in the different sense that his finding that a grievance lacks merit is a decision that the dispute is non-arbitrable"); see Aaron, Judicial Intervention in Labor Arbitration, 20 Stan. L. Rev. 41, 43 (1967); Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663, 801 n.537 (1973). See also Jones, The Name of the Game Is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration, 46 Texas L. Rev. 865 (1968); Note, Mid-Term Modification of Terms and Conditions of Employment, 1972 Duke L.J. 813, 827-28.

Some arbitrators have found the question of arbitrability to be within their authority where the arbitration provisions of the collective bargaining agreement have been very broad. See Master Builders Ass'n v. United Bhd. of Carpenters, 66-1 CCH Lab. Arb. Awards ¶ 8120 (1965) (assuming that arbitrability is for the court gives "either party the power to completely frustrate the whole purpose and intent of the arbitration section." Id. at 3445. "If the contract arbitrator is to fulfill his obligations under this agreement, he must assume the responsibility of determining if any given dispute between the parties is an arbitrable question." Id. at 3446). See also Fleming, Arbitrators and Arbitrability, 1963 Wash. U.L.Q. 200.

17. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 571 (1960) (Brennan, J., concurring).

18. Oil Workers Int'l Union v. American Maize Prod. Co., 492 F.2d 409, 411-12 (7th Cir.), cert. denied, 417 U.S. 969 (1974) (court found notice went to termination rather than amendment of the collective bargaining agreement); M.K. & O. Transit Lines, Inc. v. Division 892, Street Employees, 319 F.2d 488, 491 (10th Cir.), cert. denied, 375 U.S. 944 (1963) (court found "arbitration of the question of termination [was] . . . clearly precluded by the agreement" which contained automatic renewal provisions); UMW Dist. 22 v. Roncco, 314 F.2d 186, 188 (10th Cir. 1963) (arbitration, "the contractual 'remedy,' [cannot be ordered] until the issue before the court as to [the contract's] very existence is settled"); Pullman, Inc. v. International Bhd. of Boilermakers, 354 F. Supp. 496, 499 (E.D. Pa. 1972) (under collective bargaining agreement with automatic renewal provisions, "[d]etermination of a question of contract law, such as duration, which is devoid of any labor law consideration, is uniquely the province of a court rather than of an arbitrator"). See also Los Angeles Newspaper Guild Local 69 v. Hearst Corp., 504 F.2d 636, 641 (9th Cir. 1974), cert. denied, 43 U.S.L.W. 3571 (U.S. Apr. 21, 1975).

tions as well as a presumption that an arbitrator should not have the authority to define the scope of his own power.[19]

When a claim for arbitration is met with the argument that the contract has terminated, difficult questions arise. Courts generally have failed to distinguish in-course termination[20] (termination by election by a party to the collective bargaining agreement)[21] from end of term expiration of such agreements (termination by lapse of time).[22] The presumption that courts, rather than arbitrators, decide issues involving in-course termination usually has been applied.

It is arguable that the judicial reluctance to submit in-course termination disputes to arbitrators, even where the arbitration clause is broad, ignores several Supreme Court cases dealing with arbitrators' power to determine the arbitrability of a grievance. In *John Wiley & Sons, Inc. v. Livingston,*[23] the company alleged that the union grievances were not arbitrable because of a failure to fulfill the procedural prerequisites to arbitration required by the grievance provisions of the collective bargaining agreement. The Court held the question to be for the arbitrator since the question of compliance with procedural prerequisites "cannot ordinarily be answered without consideration of the merits of the dispute."[24] In *Local 150, AFL-CIO v. Flair Builders, Inc.,*[25] the Court declined to decide whether a defense to arbitration was arbitrable as " 'necessarily involv[ing] a determination of the merits,' "[26] but found arbitration of the issue of laches contemplated by the collective bargaining agreement.

Wiley and *Flair* may herald a shift in the presumptions concerning threshold questions generally. The proper degree of judicial interpretation of a collective bargaining agreement involves questions to which "[n]eat logical

19. See, e.g., Oil Workers Int'l Union v. American Maize Prod. Co., 492 F.2d 409, 411 (7th Cir.), cert. denied, 417 U.S. 969 (1974); ILGWU v. Ashland Indus., Inc., 488 F.2d 641, 644 (5th Cir.), cert. denied, 419 U.S. 840 (1974); Local 998, UAW v. B. & T. Metals Co., 315 F.2d 432, 436-37 (6th Cir. 1963); Pullman, Inc. v. International Bhd. of Boilermakers, 354 F. Supp. 496, 499 (E.D. Pa. 1972).

20. But see Local 998, UAW v. B. & T. Metals Co., 315 F.2d 432 (6th Cir. 1963) which analogized expiration to termination. The same legal question is presented although "the question of the existence of the contract at the time when the grievances occurred depends upon facts occurring subsequent to the original execution of the contract instead of upon facts existing at the time of the execution of the contract." Id. at 436.

21. See, e.g., Oil Workers Int'l Union v. American Maize Prod. Co., 492 F.2d 409, 411 (7th Cir.), cert. denied, 417 U.S. 969 (1974); M.K. & O. Transit Lines, Inc. v. Division 892, Street Employees, 319 F.2d 488, 489 (10th Cir.), cert. denied, 375 U.S. 944 (1963).

22. See Teamsters Local 249 v. Kroger Co., 411 F.2d 1191 (3d Cir. 1969) (per curiam).

23. 376 U.S. 543 (1964); see Note, Procedural Arbitrability Under Section 301 of the LMRA, 73 Yale L.J. 1459 (1964).

24. 376 U.S. at 557; see Guaranty Trust Co. v. York, 326 U.S. 99, 115-16 (1945) (Rutledge, J., dissenting) (decisions regarding procedural rights may determine substantive rights).

25. 406 U.S. 487 (1972).

26. Id. at 490, quoting Brief for Petitioner. But see Amalgamated Clothing Workers v. Ironall Factories Co., 386 F.2d 586, 591-92 (6th Cir. 1967).

distinctions do not provide the answer."[27] In approving arbitration of general defenses not expressly derived from the terms of the contract, *Flair* broadens the scope of arbitrator functions. The *Wiley* rationale[28] has been applied, under authority of *Flair,* to the question of repudiation which was held arbitrable since it "necessarily requires an interpretation of the meaning of the contract and the intent of the parties."[29] The decision in *Flair* emphasizes how the jurisdiction of the courts has been markedly circumscribed by the *Steelworkers Trilogy.* As the dissent in *Flair* pointed out, that decision raised a question whether other affirmative defenses, *e.g.,* fraud and duress, may be considered by a court.[30] The *Rainbow* decision seems contrary to the spirit of *Flair,* and illustrates the problems a court faces when it precludes arbitrability of an in-course termination defense to a suit to compel arbitration of grievances.

In *Rainbow,* the court conceded that "the letter agreement is not so unequivocal as to call for a ruling that as a matter of law the parties intended a termination of all rights under the collective bargaining agreement."[31] Nevertheless, it rejected the proposition that "where there is ambiguous language relating to an alleged termination, the threshold issue of contract expiration or termination should be submitted to arbitration."[32] The court cited five cases to support its position. However, each of these decisions is factually distinguishable.[33] Moreover, as the court itself conceded, issues of

27. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 572 (1960) (Brennan, J., concurring).

28. There arbitration was warranted because "[q]uestions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it." 376 U.S. at 556-57; see Rochester Tel. Corp. v. Communications Workers, 340 F.2d 237, 239 (2d Cir. 1965) (per curiam) ("We do not . . . read . . . Wiley to say that procedural defenses fall to the arbitrator only if factually related to the merits of the dispute . . . .").

29. General Dynamics Corp. v. Local 5, Marine Workers, 469 F.2d 848, 853 (1st Cir. 1972); see H & M Cake Box, Inc. v. Bakery Workers Local 45, 493 F.2d 1226, 1227 (1st Cir.), cert. denied, 419 U.S. 839 (1974). But see 6A A. Corbin, Contracts § 1443 at 434-35 (1962).

30. 406 U.S. at 497 (Powell, J., dissenting); see note 42 infra.

31. 88 L.R.R.M. at 2216.

32. Id.

33. Oil Workers Int'l Union v. American Maize Prod. Co., 492 F.2d 409, 411 (7th Cir.), cert. denied, 417 U.S. 969 (1974) (issue involving termination by notice under collective agreement containing automatic renewal provisions is for the judiciary); ILGWU v. Ashland Indus., Inc., 488 F.2d 641, 644-45 (5th Cir.), cert. denied, 419 U.S. 840 (1974) (issue of fraud in inducement of collective agreement is for the judiciary); Local 998, UAW v. B. & T. Metals Co., 315 F.2d 432, 436 (6th Cir. 1963) (issue involving termination by notice under collective agreement with automatic renewal provisions is for the judiciary); UMW Dist. 22 v. Roncco, 314 F.2d 186, 187-88 (10th Cir. 1963) (issue of cancellation of contract is for the judiciary); Procter & Gamble Indep. Union v. Procter & Gamble Mfg. Co., 312 F.2d 181, 184 (2d Cir. 1962), cert. denied, 374 U.S. 830 (1963) (termination by notice under collective agreement having automatic renewal provisions is for the judiciary). In-course termination, however, may involve the same determinations as notice of termination under agreements with automatic renewal provisions.

contract termination have been submitted to arbitrators in situations not dissimilar to the one before the court.[34]

As a second ground for its holding, the court reasoned that the issue of termination depended on a construction of the letter agreement, which had no arbitration clause, and not on a construction of the pre-existing collective bargaining agreement. Since the bargaining agreement confined itself to "interpretation or application of the terms of this agreement," the court refused to find any basis upon which to vest in an arbitrator the power to determine the effect of the letter agreement.[35] This reasoning is subject to criticism. The collective bargaining agreement itself defined how the agreement could be terminated.[36] The dispute over whether the letter agreement terminated the collective bargaining agreement arguably should be determined by reference to the grievance provisions of the collective bargaining agreement.[37] Thus, termination might not have rested solely on construction of the letter agreement, as the court stated that it did; the arbitration clause might have been construed to cover interpretation and application of the subsequent letter agreement.

A second issue raised in *Rainbow* was whether the original collective agreement had any applicability at the new location. The court viewed the issue presented as "whether [the letter agreement] terminated the collective bargaining agreement or whether the letter agreement and the bargaining

34. In Local 4, Elec. Workers v. Radio Thirteen-Eighty, Inc., 469 F.2d 610, 614 (8th Cir. 1972) the court ordered arbitration of question of termination under a collective agreement having a broad arbitration clause and substantive provisions "vaguely and ambiguously" applying to termination of the agreement. The court distinguished B. & T. Metals and Procter & Gamble as involving conduct subsequent to express expiration dates and found "the position taken in these cases, resolving the construction of ambiguous terms in bargaining agreements in favor of nonarbitration, is at variance with the approach in cases decided by this court." Id. at 615.

35. 88 L.R.R.M. at 2217.

36. The collective agreement had automatic renewal provisions which allowed termination to be effective after November 17, 1974 upon sixty days prior written notice. See UAW Local 125 v. International Tel. & Tel. Corp., 85 L.R.R.M. 2721, 2723 (D. Minn. 1974), rev'd, 88 L.R.R.M. 2213 (8th Cir., Jan. 8, 1975).

37. The relationship between the two agreements is arguably sufficient without an express presumption of arbitrability of the question of termination. See Local 4, Elec. Workers v. Radio Thirteen-Eighty, Inc., 469 F.2d 610 (8th Cir. 1972) (arbitration of termination where substantive terms arguably provide for termination on condition); Davis v. Pro Basketball, Inc., 87 L.R.R.M. 2285 (S.D.N.Y. 1974) (employment contract providing for arbitration of interpretation, application and compliance found to apply to subsequent "modification of agreement" providing for termination of contract upon occurrence of condition; claim of termination under subsequent modification of agreement held arbitrable); cf. Amalgamated Clothing Workers v. Ironall Factories Co., 386 F.2d 586, 590-91 (6th Cir. 1967) (dispute over whether agreement subsequent to execution of collective agreement settled dispute over wages held arbitrable under collective agreement providing for arbitration of disputes arising out of or relating to the agreement or its interpretation). But cf. District 2, Marine Eng'rs Ass'n v. Falcon Carriers, Inc., 374 F. Supp. 1342, 1347-48 (S.D.N.Y. 1974) (dispute over side agreement partly conflicting with terms of collective agreement does not relate to an interpretation, construction or application of the collective agreement).

agreement together articulate the rights of the . . . workers . . . ."[38] The court went on to conclude that, "[u]nder these circumstances, the question of the geographic limitation of the collective . . . agreement is not separable from the overall question of contract termination but, rather . . . the two issues are inextricably intertwined."[39] The court directed the district court that on remand "the geographic limitation language in the bargaining agreement should be taken into account as evidence . . . bearing on the question of . . . [termination]."[40] Thus, the court conceded that interpretation of the bargaining agreement was essential to decide the termination issue, and also, in effect, ordered the district court to become fully enmeshed in the merits of the case. As a result, it became involved in the very issues which the Supreme Court consistently has viewed as most suitable for arbitration.

In light of *Wiley* and *Flair* the question of the arbitrability of in-course termination should be re-examined. The problem of satisfaction of procedural prerequisites to arbitration would seem to involve the same investigation into the merits and relationships under a collective bargaining agreement as questions concerning in-course termination.[41] Questions going to the arbitrator's power to arbitrate a grievance need not, as "legal" in nature,[42] be

38. 88 L.R.R.M. at 2218.

39. Id.

40. Id.

41. In many cases, especially where the arbitration clause is limited, no clear line can be drawn between interpretation of substantive and remedial provisions of a collective agreement for the purpose of delimiting the separate domains of court and arbitrator. In such cases, arguably, the decision as to arbitrability is a function of the strength of the presumption applied and the proximity to a threshold issue. See International Union of Elec. Workers v. General Elec. Co., 407 F.2d 253, 266 (2d Cir. 1968), cert. denied, 395 U.S. 904 (1969) (question of arbitrability involved "motive and manner of enforcing a 'rule' "); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959) ("difference between fraud in the inducement and mere failure of performance [of a contract] depends upon little more than legal verbiage and the formulation of legal conclusions").

42. The dissent in Flair felt that affirmative defenses to the enforceability of contracts were "issues within the traditional equity jurisdiction of courts of law" and therefore issues which courts are better qualified to decide. 406 U.S. at 497 (Powell, J., dissenting). Some courts have extended the presumption of arbitrability to similar threshold questions. See Lodge 1327, International Ass'n of Machinists v. Fraser & Johnston Co., 454 F.2d 88, 92 (9th Cir. 1971), cert. denied, 406 U.S. 920 (1972) (provision for arbitration of disputes over interpretation or application of collective bargaining agreement applies to question of whether the agreement continues to apply at relocated plant); International Longshoremen's Ass'n v. New York Shipping Ass'n, 403 F.2d 807, 810-11 (2d Cir. 1968) (applying Warrior presumption of arbitrability, the court held question of whether precondition to arbitration, income drop in Medical Fund, was met, was a question for arbitrators); A.S. Abell Co. v. Baltimore Typo. Union, 338 F.2d 190, 193 (4th Cir. 1964) (presumption of arbitrability under the Steelworkers Trilogy extended to issue of whether a particular dispute is arbitrable under the terms of the agreement). See also Local 4, Elec. Workers v. Radio Thirteen-Eighty, Inc., 469 F.2d 610, 614 (8th Cir. 1972) (labor policy requires question of termination of collective bargaining agreement under its provisions be arbitrated where agreement provides for arbitration of differences concerning its interpretation or application); Garlick Funeral Homes, Inc. v. Local 100, Service Employees Union, 87 L.R.R.M. 2254 (E.D.N.Y. 1974) (where application of a collective agreement to dispute arising prior to its

presumed to be for judicial resolution. Far from being beyond the ken of an arbitrator, in-course termination may be a question particularly within his competence.[43] An approach reserving judicial jurisdiction by distinguishing "legal" questions as non-arbitrable highlights judicial unwillingness to relinquish power more than it realizes policy objectives. Such an approach disregards the *Steelworkers* admonition that a collective bargaining agreement is more than a contract. Since *Steelworkers,* intent in a collective bargaining agreement is gauged from a policy perspective.[44]

Questions relating to extension past expiration are more properly for judicial consideration. Unlike in-course termination, where an agreement has expired on its face such expiration does not arise out of the working relationship of the parties. A judicial determination of expiration, a less ambiguous event, may be seen as more properly within the expectation of the parties. But in-course termination should be presumed arbitrable under a collective bargaining agreement with a broad arbitration clause. Arbitration in this context would reduce duplication of effort, and avoid delay and expense in resolving disputes. In addition, the presumption of arbitrability is justified by the foreseeability of disputes over in-course termination. This

execution is unclear, arbitrator should decide the question of arbitrability); Local 24, Elec. Workers v. William C. Bloom & Co., 242 F. Supp. 421, 429 (D. Md. 1965) (collective agreement to arbitrate disputes "relating to this agreement" contemplated questions of arbitrability).

43. See Laundry Workers Local 93 v. Mahoney, 491 F.2d 1029, 1032 (8th Cir.) (en banc), cert. denied, 419 U.S. 825 (1974) (presumption of arbitrability should apply to mid-term disputes over wages and seniority); cf. Winston-Salem Printing Pressmen v. Piedmont Publishing Co., 393 F.2d 221, 224 (4th Cir. 1968) (arbitration of new contracts); Davis v. Pro Basketball, Inc., 87 L.R.R.M. 2285 (S.D.N.Y. 1974) (occurrence of terminating event held arbitrable under provisions for arbitration of disputes over interpretation, application or compliance with the contract); Aaron, Judicial Intervention in Labor Arbitration, 20 Stan. L. Rev. 41, 44 (1967); Note, Procedural Arbitrability Under Section 301 of the LMRA, 73 Yale L.J. 1459, 1468 (1964). But cf. La Vale Plaza, Inc. v. R.S. Noonan, Inc., 378 F.2d 569, 572 (3d Cir. 1967) ("the continuity of judicial office and the tradition which surrounds judicial conduct is lacking in the isolated activity of an arbitrator").

An opinion dissenting to the ordering of arbitration of a dispute involving the defense of laches suggested that arbitrators not be given the power to decide questions related to arbitrability because "it is not likely that [they] can be altogether objective in deciding whether or not they ought to hear the merits. Once they have bitten into the enticing fruit of controversy, they are not apt to stay the satisfying of their appetite after one bite." Trafalgar Shipping Co. v. International Milling Co., 401 F.2d 568, 573-74 (2d Cir. 1968) (Lumbard, C.J., dissenting). This position was later rejected by Flair.

44. "[W]e think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960); see Affiliated Food Distrib., Inc. v. Local 229, 483 F.2d 418, 422 (3d Cir. 1973) (Adams, J., dissenting), cert. denied, 415 U.S. 916 (1974) ("Rules of contract construction applicable in a normal commercial context are to be eschewed in the interpretation of the arbitration clause of a collective bargaining agreement."); Aaron, Judicial Intervention in Labor Arbitration, 20 Stan. L. Rev. 41, 44-45 (1967); Gross, The Labor Arbitrator's Role, 25 Arb. J. 221, 222 (1970); Jones, On Nudging and Shoving the National Steel Arbitration into a Dubious Procedure, 79 Harv. L. Rev. 327 (1965); Note, Procedural Arbitrability Under Section 301 of the LMRA, 73 Yale L.J. 1459, 1461 (1964).

foreseeability allows the parties expressly to rebut the arbitrability presumption where they so desire. In this manner, the parties' intentions can be easily established[45] without extended judicial interpretation of the agreement. The Supreme Court has to date extended a presumption of arbitrability to a diverse group of disputes; *Rainbow* should not be allowed to narrow the spectrum.

William L. Barish

Labor Law—Discriminatorily Discharged Employees Must Seek Work Outside Their Trade to Mitigate Back Pay Damages.—Members of the Louisville Typographical Union No. 10 went on strike against their employer, the Madison Courier, to protest the employer's unfair labor practices.[1] The strikers were discharged, but subsequently ordered reinstated by the National Labor Relations Board (NLRB).[2] The NLRB also ordered back pay awards for the discharged employees, and petitioned to enforce the awards in the Court of Appeals for the District of Columbia Circuit. An initial petition for enforcement was denied and remanded by the court on the grounds that the NLRB gave an inadequate explanation of its conclusions and "failed to consider whether [the employees] made adequate efforts to locate comparable *nonprinting* work commensurate with their respective employment histories."[3] The NLRB issued a Second Supplemental Decision and Order[4] and again petitioned to enforce its back pay award, asserting, in support of its award, that reasonable efforts had been made by the employees in seeking suitable interim employment in the printing trade. The court of appeals modified the NLRB's order, reasoning that "nonprinting employment was not per se unsuitable"[5] and holding that, "when it became apparent that printing jobs were not available in the Madison area, the claimants should have broadened the scope of their search and sought suitable non-printing employment."[6] The mitigation efforts of nine of the ten claimants were held inadequate.[7] *NLRB v. Madison Courier, Inc.*, 505 F.2d 391 (D.C. Cir. 1974).

The power of the NLRB to fashion remedies for unfair labor practices is given by the National Labor Relations Act:[8]

45. The result in United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) was defended on the grounds that contracting out, the basis of the action to compel arbitration, was "grist in the mills of the arbitrators" which might easily be excluded from the grievance process by a specific provision in the collective agreement. Id. at 584; see Laundry Workers Local 93 v. Mahoney, 491 F.2d 1029, 1033 (8th Cir.), cert. denied, 419 U.S. 825 (1974).

1. Madison Courier, Inc., 162 N.L.R.B. 550, 551 (1967).
2. Id. at 603.
3. NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1323 (D.C. Cir. 1972).
4. Madison Courier, Inc., 202 N.L.R.B. 808 (1973), modified, 505 F.2d 391 (D.C. Cir. 1974).
5. NLRB v. Madison Courier, Inc., 505 F.2d 391, 396 (D.C. Cir. 1974).
6. Id. at 402.
7. Id. at 405-06; see text accompanying notes 43-44 infra.
8. 29 U.S.C. §§ 151-68 (1970).

[T]he Board . . . shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .[9]

Generally, the Supreme Court has interpreted this grant of remedial authority broadly; however, the Court also has imposed specific limitations on the Board's powers. Judicial review of NLRB orders is limited, but a court may invalidate an order that is: (1) punitive rather than remedial (or otherwise violative of the National Labor Relations Act's policies);[10] (2) based on findings of fact not supported by substantial evidence in the record as a whole;[11] or (3) concerned with questions of judgment and policy rather than questions of fact alone.[12]

Traditionally, judicial review and enforcement of NLRB back pay awards has incorporated the common law doctrine of mitigation of damages. The common law rule is that a discharged employee will not recover damages that could have been avoided by reasonable diligence in seeking and accepting other employment;[13] but that "[h]is recovery will not be diminished because

9. Id. § 160(c).

10. "The declared policy of the Act . . . is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest." Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 539 (1943); accord, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 193 (1941); see 29 U.S.C. § 151 (1970). The Court has limited the Board's remedies under the Act to the vindication of "public, not private, rights." Virginia Elec. & Power Co. v. NLRB, supra at 543. The Board's exercise of affirmative power must be " 'remedial, not punitive.' " Carpenters Local 60 v. NLRB, 365 U.S. 651, 655 (1961) (quoting from Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938)). But see Note, NLRB Power to Award Damages in Unfair Labor Practice Cases, 84 Harv. L. Rev. 1670, 1679-80 (1971). If the Board's action results in the " 'dissipation' of the effects of the prohibited action" it is remedial. Carpenters Local 60 v. NLRB, supra at 655 (quoting from NLRB v. District 50, UMW, 355 U.S. 453, 463 (1968)). A back pay order is remedial since it removes the consequences of a violation of the Act, thus vindicating the public policy of the Act. NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969).

11. The Act mandates that the "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e) (1970). In Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), the Court defined substantial evidence as " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " Id. at 477 (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court also indicated that the reviewing courts must consider the whole record including both the trial examiner's findings and any evidence opposed to the Board's viewpoint. 340 U.S. at 487-88. This standard does not mean that "a court may displace the Board's choice between two fairly conflicting views," but only that a court may invalidate the Board's decision when the supporting evidence is insubstantial. Id. at 488; see text accompanying note 52 infra.

12. "[W]here, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests," review is proper. NLRB v. Brown, 380 U.S. 278, 292 (1965).

13. See J. Calamari & J. Perillo, Contracts § 219 (1970) [hereinafter cited as Calamari & Perillo]; 11 S. Williston, Contracts § 1359 (3d ed. 1968) [hereinafter cited as Williston].

he fails to engage in a business that is not of the same general character as that for which he contracted, or fails to accept work at a distant place, though it is of the same general character."[14] In one of the first cases dealing with the mitigation doctrine in the NLRB context,[15] the court analogized to the situation of an employee wrongfully discharged in violation of his employment contract.

> He cannot recover damages for losses which, in the exercise of due diligence, he could have avoided; but he may refuse to accept other employment 'which is dangerous, or distasteful and essentially different from that for which he is employed, [or] . . . at a distance from his home.'[16]

Any question of reasonableness of the employee's efforts in mitigation—as well as any question of comparability of particular jobs—is a question of fact for the NLRB to determine.[17] The role of the NLRB also was emphasized by the Supreme Court in *Phelps Dodge Corp. v. NLRB*.[18] The Board argued that only actual interim earnings were properly deductible from a back pay award and objected to an increased duty to evaluate mitigation efforts as too complicated, time consuming and burdensome. The Court, however, decided that "deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred."[19] The Court did emphasize that the Board had wide discretion, freedom and power to avoid speculative employer claims. Thus, the Board, in determining whether losses were willfully incurred, should concentrate on "a clearly unjustifiable refusal to take desirable new employment."[20]

However, subsequent cases have altered the duty to mitigate damages, notwithstanding the Supreme Court's admonition. Thus, a Fourth Circuit case held that the failure of one discriminatorily discharged sawmill employee, a former farmworker, to seek and accept available agricultural work was unreasonable under the circumstances, and that the back pay

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14. 11 Williston § 1359, at 307 (footnote omitted). A recent case states the common law rule: "[A] discharged or demoted employee is not required . . . to accept alternative employment of an 'inferior kind', or of a more 'menial nature', or employment outside of his usual type or for which he is not sufficiently qualified by experience, or employment the inferiority of which might injuriously affect the employee's future career or reputation in his profession." Williams v. Albemarle City Bd. of Educ., 508 F.2d 1242, 1243 (4th Cir. 1974) (en banc).

15. Mooresville Cotton Mills v. NLRB, 110 F.2d 179 (4th Cir. 1940).

16. Id. at 181 (quoting Restatement of Agency § 455, comment d at 1073 (1933)).

17. 110 F.2d at 181; see Florence Printing Co. v. NLRB, 376 F.2d 216, 221 (4th Cir.), cert. denied, 389 U.S. 840 (1967) ("whether an employee acted reasonably . . . in accepting, rejecting, or seeking . . . employment, [is] a question of fact"); cf. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).

18. 313 U.S. 177 (1941).

19. Id. at 198.

20. Id. at 199-200; see NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953): "[I]n devising a remedy the Board is not confined to the record of a particular proceeding. 'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated."

award to that employee must be reduced by the amount he would have earned had he accepted the agricultural work.[21]

In another enforcement proceeding relating to a back pay award, the employer, a printer, alleged, *inter alia,* that the employees had incurred a willful loss of earnings by refusing available work, albeit in trades unrelated to printing.[22] The court nevertheless enforced the back pay awards, holding that the burden of proof as to willful loss of earnings was on the employer—once the Board had established the amount of back pay due, the employer must establish that the employees willfully refused available work—and that he had failed to carry that burden.[23] Implicit in the decision is the possibility that refusal to accept non-printing work *might* have jeopardized the employee's back pay award, if the employer had satisfactorily established the refusal. Whether an employee acted reasonably in seeking, accepting or rejecting a particular job was held to be a question of fact for the Board.[24] Other courts seemed to imply by their discussions that an employee need not seek work outside his trade.[25]

A further departure from the common law rule is found in cases adopting the "lower sights" doctrine. Thus, in *NLRB v. Southern Silk Mills, Inc.,*[26] the court held that, after seven months of seeking employment in their trade, the textile workers involved in the case should have sought other lower paying jobs. This "lower sights" doctrine apparently has not been accepted by all the circuits.[27] It should be noted, however, that in many enforcement

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21. NLRB v. Moss Planing Mill Co., 224 F.2d 702 (4th Cir. 1955).

22. Florence Printing Co. v. NLRB, 376 F.2d 216 (4th Cir.), cert. denied, 389 U.S. 840 (1967).

23. Id. at 221-23; see NLRB v. Ohio Hoist Mfg. Co., 496 F.2d 14 (6th Cir. 1974) (per curiam); NLRB v. Nickey Chevrolet Sales, Inc., 493 F.2d 103 (7th Cir.), cert. denied, 419 U.S. 834 (1974); Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 148 (2d Cir. 1968); NLRB v. Mastro Plastics Corp., 354 F.2d 170, 175 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966); Nabors v. NLRB, 323 F.2d 686, 692 (5th Cir. 1963), cert. denied, 376 U.S. 911 (1964); NLRB v. Brown & Root, Inc., 311 F.2d 447, 454 (8th Cir. 1963); cf. White v. Bloomberg, 501 F.2d 1379, 1382 (4th Cir. 1974).

24. 376 F.2d at 221; see note 17 supra and accompanying text.

25. See, e.g., NLRB v. Ohio Hoist Mfg. Co., 496 F.2d 14 (6th Cir. 1974) (per curiam); NLRB v. Nickey Chevrolet Sales, Inc., 493 F.2d 103, 107 (7th Cir.), cert. denied, 419 U.S. 834 (1974); Golay & Co. v. NLRB, 447 F.2d 290, 295 (7th Cir. 1971), cert. denied, 404 U.S. 1058 (1972); Lozano Enterprises, 152 N.L.R.B. 258, 260 (1965), enforced, 356 F.2d 483 (9th Cir. 1966). See also Laidlaw Corp. v. NLRB, 507 F.2d 1381 (7th Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3585 (U.S. Apr. 19, 1975) (No. 74-1317).

26. 242 F.2d 697, 700 (6th Cir.), cert. denied, 355 U.S. 821 (1957). This case adopted a "lower sights" doctrine which mandates that, at a certain point, an employee must seek and accept a lower paying job to mitigate adequately his damages. Id.

27. See, e.g., Golay & Co. v. NLRB, 447 F.2d 290 (7th Cir. 1971), cert. denied, 404 U.S. 1058 (1972). In Lozano Enterprises, 152 N.L.R.B. 258, 260 (1965), the NLRB found that a wrongfully discharged linotype operator adequately mitigated damages despite the fact that he quit an interim job as a janitor. The Board found such an action justified because a janitorial job was unsuited to a person of such skill and experience and "did not meet the 'desirable new employment' standard . . . ." Id. The Ninth Circuit affirmed the order holding that the findings

proceedings, the question of suitability or comparability of particular jobs was tangential to the court's determination.[28]

NLRB v. Madison Courier, Inc.[29] appears to represent the broadest expansion to date of the duty to mitigate damages. There, the court held that even a skilled employee, a printer, must, after a certain period of searching for employment within his trade, seek employment outside that trade.[30] The court in *Madison Courier* viewed the mitigation question as one involving alternatives—either the employee remained idle or he obtained a comparable job in another field. It stated that such a question should be resolved pursuant to the policy of the Act—the promotion of production and employment.[31] The court cited other decisions to support its requirement that employees seek work outside their field, but those cases appear to be distinguishable.[32] It viewed other cases as involving a mere failure of proof on the part of the employer. Since a common law action vindicates a private right only, whereas the Act seeks to promote the public policies of production and employment,[33] the common law doctrine of mitigation was found not directly applicable. The court held that the mitigation doctrine must further the employment and production policies of the National Labor Relations Act.[34]

While the court suggested that the claimants were entitled to search within their trade for a reasonable time after the duty to mitigate arose, it held that when it became clear that printing jobs were not available in the Madison area, the claimants should have sought suitable non-printing employment.[35]

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of the trial examiner and the Board were amply supported by the evidence, NLRB v. Lozano Enterprises, 356 F.2d 483 (9th Cir. 1966).

28. See cases cited in note 25 supra. It should be noted that self-employment or acceptance of different employment does mitigate damages. See, e.g., Golay & Co. v. NLRB, 447 F.2d 290, 295 (7th Cir. 1971), cert. denied, 404 U.S. 1058 (1972); Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 148 (2d Cir. 1968); NLRB v. Armstrong Tire & Rubber Co., 263 F.2d 680 (5th Cir. 1959).

29. 505 F.2d 391 (D.C. Cir. 1974).

30. Id. at 402.

31. Id. at 397; see note 10 supra.

32. The court relied upon NLRB v. Moss Planing Mill Co., 224 F.2d 702, 704-06 (4th Cir. 1955). That case can be read only as holding than an unskilled employee may be required to seek other unskilled work in order to mitigate damages. NLRB v. Southern Silk Mills, Inc., 242 F.2d 697 (6th Cir.), cert. denied, 355 U.S. 821 (1957) announced the "lower sights" doctrine. See note 26 supra.

33. See notes 10 and 14 supra.

34. 505 F.2d at 398; see note 10 supra. But see Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1144 (7th Cir.), cert. denied, 419 U.S. 838 (1974) (the goal of back pay is " 'restoration of the situation . . . to that which would have obtained but for the illegal discrimination' "). Id. at 1144 (quoting F.W. Woolworth Co., 90 N.L.R.B. 289, 292 (1950), in turn quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941)).

35. 505 F.2d at 402. The court indicated that after October 1966, the right to back pay terminated for those who should have sought outside employment. This was four months after the application for reinstatement of the strikers was received by the employer in July 1966 and more than one year after the strike had begun in April 1965. Reinstatement of the strikers was offered by the employer in January 1968. Id. at 394-95. Therefore, for the period of 14 months the claimants should have sought employment in other fields. Id. at 394-95.

At the same time, the court would require the claimants to accept only "non-printing work which is no more dangerous or distasteful or essentially different from [their] regular job[s] and which is suitable to [their] background[s] and experience[s]."[36]

Having set forth the standards, the court undertook to match each printer's background[37] with the available non-printing work in the area, stating that "this court does have the authority to make the necessary determinations where the Board has been given the opportunity to correct its order but refused to do so."[38] The court found that seven of the ten claimants should have sought and accepted suitable non-printing employment. Non-printing jobs were not suitable for three of the printers because of their "ages and long experience in the printing trade."[39] The court further analyzed each individual printer's efforts in seeking work within the printing trade. All the strikers had registered with the state employment agency,[40] which is a factor, albeit no longer a conclusive one, in assessing the efforts exerted,[41] and all the strikers relied on the union "grapevine." However, the court found particularly significant the fact that "most of the claimants made no individual applications for employment in the printing trade."[42] The court found that six of the ten claimants were not entitled to any award.[43] With regard to two employees who had accepted lower-paying, part-time, non-printing jobs, the court recognized the dilemma in concluding that such an acceptance was an inadequate effort:

> If he accepts the lower-paying job too soon, he may be held to have incurred a willful loss of income by accepting an unsuitable position. But if he turns down the lower-paying job, he may be held to have incurred a willful loss of earnings by failing to "lower his sights." Consequently, doubts in this area should be resolved in favor of the claimant.[44]

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36. Id. at 398.

37. Cf. id. In examining each individual employee's efforts to mitigate damages, the court followed the traditional approach. See, e.g., NLRB v. Rice Lake Creamery Co., 365 F.2d 888 (D.C. Cir. 1966).

38. 505 F.2d at 399. Such authority is questioned in the dissent. See notes 47 and 51 infra and accompanying text. This assertion might also be questioned in light of NLRB v. Food Store Employees Local 347, 417 U.S. 1, 10 n.10 (1974), in which the Supreme Court at least impliedly left open this question. See also NLRB v. Armstrong Tire & Rubber Co., 263 F.2d 680, 682 (5th Cir. 1959) ("the Act vests in the Board itself the sole authority to determine the amount of back pay due an employee who has been discriminated against . . . .").

39. 505 F.2d at 402. These three claimants were about 60 years old when the strike began and two of them had worked for the company for approximately 40 years. Id. at 401. The court offered no explanation for the special treatment afforded these senior workers.

40. See NLRB v. Pugh & Barr, Inc., 207 F.2d 409 (4th Cir. 1953) (per curiam).

41. Id.; cf. J.H. Rutter-Rex Mfg. Co. v. NLRB, 473 F.2d 223, 242 (5th Cir.), cert. denied, 414 U.S. 822 (1973).

42. 505 F.2d at 404. This fact may have been over-emphasized by the court since in a specialized field such as printing, contacts with the union as well as with other printers in the area might have been a very reliable method of remaining informed about possible printing opportunities.

43. See id. at 405-06.

44. Id. at 405.

These two claimants should have, after a reasonable time, realized that no printing work was available and, at this point, should have sought full-time employment outside their trade. Therefore, they failed adequately to mitigate damages after that time and consequently received back pay awards for the first period only.

The court's reliance upon an individual employee's past experience as a measure of "suitability" presents a problem if the employee's past work experiences were "distasteful," since the court indicated that an employee would not be required to seek or accept "distasteful" work. Because the decision accepts a "lower sights" doctrine[45] and a duty to seek employment in other fields, an employee would be forced to seek work of almost any type at any pay, particularly if he had no past work experience or all his past employments were "distasteful." Furthermore, the employee is faced with the dilemma, noticed by the court, of not knowing at what point acceptance of lower paying work will be considered necessary to mitigate adequately in order to avoid a willful loss of earnings.[46]

In his dissenting opinion, Judge Leventhal maintained that "the court's opinion represents an unwarranted intrusion on the agency's functioning"[47] in that the Board was given the statutory authority to effectuate the Act's objectives. He stated that the Board's supplemental decision reflected an analysis of the claimants' individual efforts in accordance with the previous court opinion.[48] The Board's holding "that the Company had not carried the burden of proving a willful loss of earnings . . . was a reasonable determination, within the Board's discretion and expertise."[49] The dissent referred to the Board's findings that there was no showing made of available jobs within the printing trade and that the showing of opportunities outside the printing trade was irrelevant because those opportunities were not suitable "considering the skill, background and experience of each of the claimants."[50] The dissent concluded that, even if the Board's findings failed to support its order, "this court does not have the authority to make a determination for itself that the employees have rejected suitable employment."[51] Interestingly, the dissent failed to cite a single authority for its views.

Arguably, the court failed to give proper deference to the substantial evidence standard of review. In recognition of its expertise, the Board has been empowered to resolve factual questions conclusively if supported by substantial evidence.[52] The issue of mitigation is normally viewed as factual

45. See note 26 supra and accompanying text.

46. See note 20 supra and accompanying text.

47. 505 F.2d at 406 (Leventhal, J., dissenting).

48. See NLRB v. Madison Courier, Inc., 472 F.2d 1307 (D.C. Cir. 1972).

49. 505 F.2d at 406 (Leventhal, J., dissenting). "The Board could consider it a fact of life that infuses meaning into a cold record that the printing employers from Versailles and North Vernon who visited Madison did not want men who were on the picket line." Id.

50. Id.

51. Id. at 407.

52. See note 11 supra and accompanying text. See also NLRB v. Brown, 380 U.S. 278, 292 (1965); Nabors v. NLRB, 323 F.2d 686, 690 (5th Cir. 1963), cert. denied, 376 U.S. 911 (1964); NLRB v. Bishop, 228 F.2d 68, 70 (6th Cir. 1955).

in nature.[53] Calling such a question a policy issue should not permit a court to broaden the normal standard of review. When courts have found factual findings of the Board unsupported by the record, they have remanded the case for further consideration, or denied enforcement of the order.[54] Since this procedure had already been followed in *Madison Courier,* the court, under the policy guise, rendered specific factual findings. While a logical argument could be made to support such an approach, particularly since the court felt that the Board had ignored its prior instructions, nevertheless, there appears to be no authority for this decision, and indeed the court referred to none.

There are arguments in favor of the decision in *Madison Courier.* An economic rationale can be advanced to support the new approach to the mitigation issue.[55] Perhaps the strongest rationale for modifying the common law mitigation doctrine in unfair labor practice cases so as to require the employee to seek employment outside his field is based on the very different circumstances presented in an unfair labor practice case as contrasted to a common law action to recover for breach of employment contract. Since reinstatement with back pay is a remedy frequently imposed in section 8(a)(3) discriminatory discharge cases, once an unfair labor practice is found by the trial examiner or the NLRB, the discharged employee might reasonably expect that remedy. Therefore, any job sought or accepted would be clearly temporary until reinstatement. In an action for an employer's breach of contract of employment and wrongful discharge, on the other hand, an employee can have no reason to believe that he will receive back pay until the wrongfulness of the discharge is decided by the court; he also can have no reason to believe, at any time, that he will be reinstated, since reinstatement is an extraordinary remedy at common law.[56] Thus, any employment sought to mitigate damages in the common law situation would more likely be permanent, and it would be more reasonable for the discharged employee to decline to accept such employment if he found it unsatisfactory. These differences in the certainty and character of the remedies applied distinguish the two situations and could justify separate mitigation doctrines.

However, there are disadvantages to expanding the duty to mitigate in this

53. See notes 17 and 24 supra and accompanying text.

54. "A reviewing court may enforce the Board order, deny enforcement, enforce in part, remand for the taking of further evidence or for making additional findings of fact or conclusions." 1 B. Werne, Labor Relations: Law & Practice § 18.3, at 165 (1966).

55. In evaluating the court's decision, the economic situation of the country must be considered. At a time when jobs are scarce, an individual's chance of success in finding a suitable job within his field declines. Thus, an expansion of the common law mitigation rule to encompass work outside the field would result in a greater probability of finding a job and would tend to alleviate hardship during a period of job shortage by promoting mobility of the labor force.

56. "The general rule is that an employee may not have specific performance against an employer when the employment contract is breached by wrongful discharge." D. Dobbs, Remedies § 12.25, at 929 (1973). But cf. In re Staklinski v. Pyramid Elec. Co., 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959) where the court affirmed an arbitrator's award of reinstatement, despite the common law rule against the specific performance remedy. "Whether a court of equity could issue a specific performance decree in a case like this . . . is beside the point." Id. at 163-64, 160 N.E.2d at 80, 188 N.Y.S.2d at 543 (citation omitted).

context. Employers may conclude that they can engage in unfair labor practices with impunity or at least be subject to smaller back pay damages; thus, whatever deterrent effect the payment of a potential back pay award has upon an employer would be eliminated or reduced.[57] Moreover, this expansive rule could have adverse effects on the strength of the union, thus hindering the collective bargaining ideal of the Act.[58] The District of Columbia Circuit failed to consider these ramifications of its decision.

The *Madison Courier* decision also affects the burden of proof of the employer and the Board's burden of showing substantial evidence supporting its conclusions. Since the burden of showing the failure to mitigate is on the employer,[59] he would be required only to show that some suitable jobs existed during the back pay period in that locality in order to meet his burden. On the other hand, the Board would be required to perform a detailed analysis of each claimant's experiences and tastes in order to meet its burden of substantial evidence supporting its conclusions.[60] This increased burden may increase the already substantial delay in the settlement of such labor disputes.[61]

The court's rationale in support of its mitigation rule also may be questioned. The purpose of mitigation is to prevent recovery for consequences or losses that could have been avoided;[62] the purpose of back pay awards is to promote the Act's policy by removing the effects of violations and restoring wrongfully discharged employees to their economic status quo.[63] It has been argued that the back pay remedy is inadequate.[64] To reason that not only the back pay award, but the mitigation doctrine itself, should further the Act's

57. There are some employers who believe that " '[i]t's cheaper to fire employees mixed up in union affairs, even if you have to pay their backpay. I would do it again if the problem came up.' " O'Hara & Pollitt, Section 8(a)(3) of the Labor Act: Problems and Legislative Proposals, 14 Wayne L. Rev. 1104, 1113 (1968) [hereinafter cited as O'Hara & Pollitt], quoting L. Aspin, A Study of Reinstatement Under the National Labor Relations Act 72, Feb. 15, 1966 (unpublished Ph.D. dissertation in the MIT library).

The NLRB has sought to improve the deterrent effect of the back pay award by adopting a formula for computing back pay on a quarterly basis. F.W. Woolworth Co., 90 N.L.R.B. 289, 292-93 (1950). The problem arose in the context of the employee who, while mitigating damages, obtained a higher paying job. "Some employers . . . have deliberately refrained from offering reinstatement, knowing that the greater the delay, the greater would be the reduction in back-pay liability. Thus, a recalcitrant employer may continue to profit by excluding union adherents from his enterprise." Id. at 292. Under the Woolworth formula, an employee's back pay award is computed on a quarterly basis: once the amount is determined for a particular quarter, a job subsequently obtained cannot reduce the award for that quarter. Id. at 293. The formula was approved in NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

58. See note 10 supra.

59. See note 23 supra and accompanying text.

60. See note 11 supra and accompanying text.

61. See O'Hara & Pollitt 1118-25; 19 U. Kan. L. Rev. 325 (1971).

62. See Calamari & Perillo § 219; 11 Williston § 1359.

63. See note 10 supra. See also Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131 (7th Cir.), cert. denied, 419 U.S. 838 (1974).

64. "The 'back-pay' remedy is also inadequate. A lump sum payment of back pay does not compensate for the loss of a steady income. Installment payments and rent cannot be put off until a NLRB case is settled." O'Hara & Pollitt 1114-15; see Note, supra note 10, at 1674.

objectives is to distort the theory and purpose of mitigation while ignoring the raison d'être of back pay awards. Such an approach overemphasizes the mitigation doctrine, a limitation on the remedy, to the detriment of the back pay remedy as a whole.

In the final analysis, the court's decision goes far toward eviscerating the effectiveness of the back pay remedy. By disregarding the overall purpose of this remedy and the expertise of the Board, by making the employer's burden so light as to be inconsequential, and by assuming the authority to make findings of fact, the court "mitigated" the protection afforded to employees under the Act.

Gail Davis Reiner

Taxation—Exercise of Only "Significant" Control over Debtor's Operations Subjects Lender to 100 Percent Withholding Tax Penalty.—Taxpayer, the Skobis Company, failed to remit to the government federal income and employment taxes that it had withheld from the wages of its employees during the second and third quarters of 1970. Pursuant to section 6672 of the Internal Revenue Code,[1] the Internal Revenue Service (IRS) assessed a penalty equal to 100 percent of the delinquent amount against the taxpayer's president and the Lakeshore Commercial Finance Corporation (lender) which had lent operating capital to the taxpayer. Taxpayer's president personally paid a portion of the penalty and sued in federal district court for a refund and for an abatement of the penalty.[2] The government counterclaimed against the taxpayer's president and filed a third party complaint against the lender, alleging that it was jointly liable for the section 6672 penalty " 'as a person who willfully failed to pay over federal income and employment taxes withheld from the wages of employees of the [taxpayer] . . . .' "[3] The affidavits submitted in connection with the lender's motion for summary judgment set forth a revolving loan agreement under which the lender advanced funds to the taxpayer, secured by the latter's accounts receivable and inventory.[4] Such advances, with several exceptions, were deposited in taxpayer's bank account and were not subject to further control by the lender. The district court found that the lender did not come within the definition of a "person" liable for the penalty within the meaning of section

1. Int. Rev. Code of 1954, § 6672.

2. The president's claim against the IRS for a refund was disallowed. Adams v. United States, 353 F. Supp. 333 (E.D. Wis. 1973), rev'd on other grounds, 504 F.2d 73 (7th Cir. 1974).

3. Adams v. United States, 504 F.2d 73, 74 (7th Cir. 1974) (quoting government's third party complaint).

4. "The 'earnings and income' received by [the lender] constitute the accounts receivable paid to [the debtor-taxpayer] and the proceeds from the sale of inventory, or in other words, the liquidated collateral which had secured previous advances. The partial reimbursement of earnings and income by [lender] to [taxpayer] was the advancement of further funds secured by inventory and uncollected accounts receivable." Id. at 79 (Campbell, J., dissenting).

6672 and granted its motion for summary judgment.[5] The Court of Appeals for the Seventh Circuit reversed and remanded, holding that there were substantial issues of fact as to whether the lender had exercised such control over the taxpayer's use of the loan proceeds and disbursement of the taxpayer's earnings as to render it a "person" liable for the penalty. *Adams v. United States,* 504 F.2d 73 (7th Cir. 1974).

Section 6672 provides that any person who willfully fails to collect, account for and pay over to the government any tax imposed by the Internal Revenue Code will be liable for a penalty equal to 100 percent of the delinquent taxes.[6] The section applies to two particular levies that an employer is required to withhold from wages paid to its employees:[7] the federal (income) withholding tax[8] and the employment ("FICA") tax.[9] These withheld amounts become the corpus of a statutory trust[10] until paid over to the government at specified intervals.[11] A penalty will be assessed against the person liable if these amounts are not remitted.[12]

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5. Adams v. United States, 353 F. Supp. 333, 335 (E.D. Wis. 1973), rev'd, 504 F.2d 73 (7th Cir. 1974).

6. Int. Rev. Code of 1954, § 6672. Section 6672 is a civil penalty. The Code also provides for criminal penalties with respect to the duties imposed under section 6672. See, e.g., id. §§ 7202, 7215 (felony and misdemeanor provisions respectively). The constitutionality of a predecessor statute similar in form to § 6672 was upheld in Bloom v. United States, 272 F.2d 215 (9th Cir. 1959), cert. denied, 363 U.S. 803 (1960) (construing Int. Rev. Code of 1939, ch. 26, § 2707, 53 Stat. 290).

7. Under the Int. Rev. Code of 1954, an employer, as defined in § 3401(d), is required to withhold specified amounts, id. §§ 3402(a)-(c), from the wages paid to employees representing the income taxes on such wages. See id. § 3401. Similarly, an employer must withhold certain amounts from an employee's wages representing contributions under the Federal Insurance Contributions Act, id. §§ 3101-26. Section 6672 does not apply to an employer's direct contribution of FICA taxes, but only to FICA taxes contributed by employees under the withholding plan. In re Serignese, 214 F. Supp. 917, 921 (D. Conn. 1963), aff'd per curiam sub nom. Goring v. United States, 330 F.2d 960 (2d Cir. 1964).

8. Int. Rev. Code of 1954, §§ 3402, 3403.

9. Id. §§ 3101, 3102(b).

10. Id. § 7501(a) provides that any person required to "collect or withhold" any tax is a trustee of "a special fund in trust for the United States." The primary purpose of the statutory trust is to protect the tax revenue withheld by the employer. See Dorsey v. United States, 18 Am. Fed. Tax R.2d 5596 (E.D.N.Y. 1966).

11. Generally, employers must file returns of the amounts withheld from wages on a quarterly basis. Treas. Reg. §§ 31.6011(a)-1, -4(a) (1959).

12. Ordinarily, a taxpayer may not file suit to enjoin the collection of the penalty imposed under § 6672. Int. Rev. Code of 1954, § 7421; Shaw v. United States, 331 F.2d 493 (9th Cir. 1964); Botta v. Scanlon, 314 F.2d 392 (2d Cir. 1963); Iraci v. Scanlon, 219 F. Supp. 796 (E.D.N.Y. 1963). If, however, the person against whom the penalty is assessed can show that collection of the penalty would result in irreparable injury, a district court may enjoin the collection. Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932); cf. Enochs v. Williams Packing & Nav. Co., 370 U.S. 1 (1962). Amounts paid under the § 6672 penalty may not be deducted as business expenses. Int. Rev. Code of 1954, § 162(f); Treas. Reg. § 1.162-1(a) (1969). The administrative procedures for protesting a proposed penalty assessment are found in Rev. Proc. 57-26, 1957-2 Cum. Bull. 1093, as amplified by Rev. Proc. 61-27, 1961-2 Cum. Bull. 563.

There are two statutory elements to the imposition of liability: the individual sought to be held responsible must be a "person" within the scope of the provision[13] and that "person" must "willfully" fail to perform his collection and remittance duties.[14] The term "person" is defined in two provisions of the Code. Section 6671(b), setting forth the "rules for application of assessable penalties," states that "[t]he term 'person' . . . includes an *officer* or *employee* of a corporation, or a member or employee of a partnership . . . ."[15] A broader definition of "person" is contained in section 7701(a)(1), the general definitions section, which states: "When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof . . . [t]he term 'person' shall . . . include an individual, a trust, estate, partnership, association, company or corporation."[16] Since the assessable penalties subchapter contains a "distinctly expressed" definition of "person" which is clearly narrower than the definition in the general definitions provision, the former should control determinations of what types of persons are liable for the 100 percent penalty.

When a corporation fails to remit withheld taxes, the IRS typically looks to the officers or directors of the corporation to determine whether they[17]

In order to litigate a penalty assessment in district court, a taxpayer must pay at least part of the penalty and bring suit for a refund. Psaty v. United States, 442 F.2d 1154, 1159 (3d Cir. 1971); Steele v. United States, 280 F.2d 89, 90-91 (8th Cir. 1960); see 28 U.S.C. § 1346(a) (1970).

13. "[A]pplication of this penalty is limited only to the collected or withheld taxes which are imposed on some person other than the person who is required to collect, account for and pay over the tax." H.R. Rep. No. 1337, 83d Cong., 2d Sess. 542 (1954); see Treas. Reg. § 301.6672-1 (1957).

14. This Case Note is concerned only with the scope of the definition of "person" under § 6672. The definition of "willfully" is a distinct issue. The element of willfulness in § 6672 cases does not require evil motives, Horwitz v. United States, 236 F. Supp. 812, 814 (S.D.N.Y. 1964), aff'd, 339 F.2d 877 (2d Cir. 1965) (predecessor statute), or an intent to defraud the government, Flan v. United States, 326 F.2d 356, 358 (7th Cir. 1964); Bloom v. United States, 272 F.2d 215, 223 (9th Cir. 1959), cert. denied, 363 U.S. 803 (1960), but only a "voluntary, conscious and intentional act" such as paying other creditors before the government when there are sufficient funds to pay the taxes due. Mulcahy v. United States, CCH 1969 Stand. Fed. Tax Rep., U.S. Tax Cas. (69-2) ¶ 9553 (S.D. Tex. 1969); Jacquin v. United States, CCH 1968 Stand. Fed. Tax Rep., U.S. Tax Cas. (68-1) ¶ 9300 (N.D.N.Y. 1968); Tiffany v. United States, 228 F. Supp. 700, 702 (D.N.J. 1963); United States v. Slattery, 224 F. Supp. 214, 217-18 (E.D. Pa. 1963), aff'd per curiam, 333 F.2d 844 (3d Cir. 1964). Upon assessment of the penalty by the IRS, the person assessed bears the burden of proving either that he did not willfully fail to pay over such taxes or that he was not a "person" responsible for paying them over. Liddon v. United States, 448 F.2d 509 (5th Cir. 1971), cert. denied, 406 U.S. 918 (1972); Lesser v. United States, 368 F.2d 306 (2d Cir. 1966); Lawrence v. United States, 299 F. Supp. 187 (N.D. Tex. 1969); Melillo v. United States, 244 F. Supp. 323, 326 (E.D.N.Y. 1965).

15. Int. Rev. Code of 1954, § 6671(b) (emphasis added).

16. Id. § 7701(a)(1).

17. The 100 percent penalty may be assessed against more than one "responsible person." United States v. Graham, 309 F.2d 210 (9th Cir. 1962); Datlof v. United States, 252 F. Supp. 11 (E.D. Pa.), aff'd, 370 F.2d 655 (3d Cir. 1966), cert. denied, 387 U.S. 906 (1967); White v. United States, 372 F.2d 513 (Ct. Cl. 1967). Payment by one "person," however, extinguishes the employer's liability for the taxes and other "persons' " liability for the assessed penalty. Datlof v. United States, supra; see Kelly v. Lethert, 362 F.2d 629, 635 (8th Cir. 1966).

can be held responsible.[18] The judicial standard applied is whether, at the time of the violation, the individual had " 'the authority to direct or control the payment of corporate funds . . . .' "[19] or had the final word as to which creditors or what bills were to be or not to be paid.[20] These formulations are within the narrower, section 6671(b) definition of "person."[21]

In recent years, however, the IRS has sought to impose the 100 percent penalty upon lenders even though, on its face, the section 6671(b) definition does not include persons outside the taxpayer's corporate structure.[22] Courts generally have sustained this extension, justifying their decisions to reach beyond the corporate hierarchy of the debtor by construing section 6672 as a "device of a civil nature designed for the collection of taxes legitimately due and unpaid."[23] Thus, it has been said that the word "includes" in section

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18. Various individuals in discretionary positions in the corporate structure of the taxpayer held to be "persons" liable for the penalty include (1) corporate presidents (e.g., Moore v. United States, 465 F.2d 514 (5th Cir. 1972), cert. denied, 409 U.S. 1108 (1973); Miller v. United States, CCH 1974 Stand. Fed. Tax Rep., U.S. Tax Cas. (74-1) ¶ 9343 (M.D. Fla. 1974)), (2) corporate directors (Liddon v. United States, 448 F.2d 509 (5th Cir. 1971), cert. denied, 406 U.S. 918 (1972); United States v. Graham, 309 F.2d 210 (9th Cir. 1962); Braden v. United States, 318 F. Supp. 1189 (S.D. Ohio 1970), aff'd, 442 F.2d 342 (6th Cir.), cert. denied, 404 U.S. 912 (1971)), (3) chief executive officers (Wilson v. United States, 250 F.2d 312 (9th Cir. 1957) (predecessor statute)), and (4) treasurers (Sinclair v. United States, 453 F.2d 1377 (9th Cir. 1972) (per curiam)). See generally Crampton, The 100 Percent Penalty On a "Responsible Officer," N.Y.U. 21st Inst. on Fed. Tax. 117 (1963); Yudkin, Corporate Officers in Increasing Numbers Face Penalties for Defaults on Withholding Tax, 18 J. Tax. 248 (1963); Zampino, The Right of Subrogation in Bankruptcy to the Claims of Taxing Authorities where Officers of a Corporation Personally Pay the Taxes, 1 N.Y.U. 30th Inst. on Fed. Tax. 299, 303-08 (1972).

19. Werner v. United States, 374 F. Supp. 558, 560 (D. Conn. 1974) (quoting Stake v. United States, 347 F. Supp. 823, 826 (D. Minn. 1972)). Corporate officers and employees are not considered responsible "persons" unless they actually exercise control over corporate disbursements. Isaac v. United States, CCH 1970 Stand. Fed. Tax Rep., U.S. Tax Cas. (70-2) ¶ 9541 (C.D. Cal. 1970); Grossberg v. United States, CCH 1968 Stand. Fed. Tax Rep., U.S. Tax Cas. (68-2) ¶ 9506 (E.D. Va. 1968).

20. Bloom v. United States, 272 F.2d 215, 222 (9th Cir. 1959), cert. denied, 363 U.S. 803 (1960); accord, Turner v. United States, 423 F.2d 448 (9th Cir. 1970); United States v. Graham, 309 F.2d 210 (9th Cir. 1962); Burack v. United States, 461 F.2d 1282 (Ct. Cl. 1972); see Silberberg v. United States, 355 F. Supp. 1163 (S.D.N.Y. 1973); Melillo v. United States, 244 F. Supp. 323 (E.D.N.Y. 1965).

21. See text accompanying note 15 supra.

22. Pacific Nat'l Ins. Co. v. United States, 422 F.2d 26, 31 (9th Cir.), cert. denied, 398 U.S. 937 (1970) ("[Section 6672] was designed to cut through the shield of organizational form and impose liability upon those actually responsible for an employer's failure to withhold and pay over the tax.").

23. Pacific Nat'l Ins. Co. v. United States, 270 F. Supp. 165, 171 (N.D. Cal. 1967), aff'd, 422 F.2d 26 (9th Cir.), cert. denied, 398 U.S. 937 (1970); accord, Bloom v. United States, 272 F.2d 215, 223 (9th Cir. 1959), cert. denied, 363 U.S. 803 (1960) (predecessor statute); see Datlof v. United States, 252 F. Supp. 11 (E.D. Pa.), aff'd, 370 F.2d 655 (3d Cir. 1966), cert. denied, 387 U.S. 906 (1967); Dorsey v. United States, CCH 1966 Stand. Fed. Tax Rep., U.S. Tax Cas. (66-2) ¶ 9521 (E.D.N.Y. 1966); White v. United States, 372 F.2d 513 (Ct. Cl. 1967); note 32 infra and accompanying text.

6671(b) was intended to suggest a "calculated indefiniteness"[24] and that the enumeration of individuals in section 6671(b) was intended to be illustrative rather than exclusive.[25] In this manner, courts have extended the section 6671(b) definition of "person" to encompass the broader section 7701(a)(1) definition.[26] Thus, lending institutions that, in connection with a loan, exercise managerial functions ordinarily reserved to the taxpayer-borrower's officers and directors have been held to be persons within the meaning of the section.[27]

In determining whether a lender is a "person" liable under section 6672, courts have applied a standard similar to the one applied to the lender's officers and directors: the lender must be a person who exercises such control as to be the ultimate authority as to the payment of the taxes.[28] Whether a lender possesses sufficient control is a question of fact to be resolved according to the particular circumstances of each case. The few cases that have discussed the legal standard of control requisite for imposition of section 6672 liability upon a lender, however, demonstrate a trend toward a lessening of the degree of control a lender actually must assert over the debtor-taxpayer.

In one case considering lender liability under section 6672, *United States v. Hill*,[29] the taxpayer had assigned contracts to the lender as collateral for a revolving loan agreement.[30] The bank approved all taxpayer's checks over $500 and required the taxpayer to advise it of all large disbursements.[31] The Fifth Circuit found section 6672 to be penal in nature and, therefore, construed it narrowly.[32] In refusing to impose liability upon the lender in the absence of a finding that it had exercised "full authority" over the debtor's

24. "[The] system cannot function unless the law . . . were to focus upon some one person, broadly defined, and, when necessary, judicially determined ad hoc, as responsible for withholding and remittance . . . ." Regan & Co. v. United States, 290 F. Supp. 470, 479 (E.D.N.Y. 1968).

25. Pacific Nat'l Ins. Co. v. United States, 422 F.2d 26, 30-31 (9th Cir.), cert. denied, 398 U.S. 937 (1970). The Code provides that the word " 'includes' . . . when used in a definition contained in [the Code] shall not be deemed to exclude other things otherwise within the meaning of the term defined." Int. Rev. Code of 1954, § 7701(b).

26. Pacific Nat'l Ins. Co. v. United States, 422 F.2d 26, 30 (9th Cir.), cert. denied, 398 U.S. 937 (1970); see text accompanying notes 15-16 supra.

27. Pacific Nat'l Ins. Co. v. United States, 422 F.2d 26, 30 (9th Cir.), cert. denied, 398 U.S. 937 (1970).

28. Mueller v. Nixon, 470 F.2d 1348 (6th Cir. 1972), cert. denied, 412 U.S. 949 (1973); Turner v. United States, 423 F.2d 448, 449 (9th Cir. 1970); United States v. Hill, 368 F.2d 617, 621 (5th Cir. 1966); Krueger v. United States, 326 F. Supp. 231, 233 (E.D. Wis. 1971); Dunham v. United States, 301 F. Supp. 700, 702 (D. Conn. 1969).

29. 368 F.2d 617 (5th Cir. 1966).

30. Id. at 619.

31. Id. at 620.

32. "That the Bank exercised a veto power over corporate checks . . . to insure their use to keep the company alive nowhere brings the Bank within the penal provisions of the statute." Id. at 623; see United States v. Mr. Hamburg Bronx Corp., 228 F. Supp. 115 (S.D.N.Y. 1964); Cushman v. Wood, 149 F. Supp. 644 (D. Ariz. 1956); Smith v. Commissioner, 34 T.C. 1100, aff'd, 294 F.2d 957 (5th Cir. 1961). The view of § 6672 as a penal measure is not supported by the cases. In Bolme v. Nixon, 239 F. Supp. 907, 910 (E.D. Mich. 1965), the court stated: "100% penalty assessments are civil in nature and constitute taxes as distinguished from penalties.

financial affairs,[33] the court emphasized that the bank did not manage the taxpayer's internal operations and that the taxpayer was free to draw on its own account to the extent of its funds.[34] The decision broadly implied, therefore, that section 6672 liability attaches only to lenders possessing all the attributes of an "employer in fact" of the taxpayer's employees from whose wages the subject taxes were to be withheld and remitted.[35]

The "employer in fact" standard was adopted by a federal district court in *Girard Trust Corn Exchange Bank v. United States*,[36] where the facts demonstrated almost total lender control over the affairs of the debtor-taxpayer. A loan agreement allowed the lender to "supervise the operation of the [taxpayer's] business,"[37] and the taxpayer could pay its long-term debts, taxes and daily operating expenses (including salaries) only to the extent that the lender approved.[38] In addition, the lender countersigned all the taxpayer's checks.[39] The district court instructed the jury:

"[I]f . . . you conclude . . . that in effect the [lender] was operating this business, [that] they were the *employer*, [that] they controlled the payment of taxes, bills [and] the accounts, . . . you should conclude that they were responsible [for the penalty] . . . ."[40]

The jury found the lender not to be liable under this charge and the court denied judgment n.o.v.[41] since there was no evidence that the lender had participated in such internal operations of the taxpayer as merchandizing and personnel decisions or the preparation of tax returns.[42]

The "employer in fact" standard was modified substantially in *Pacific National Insurance Co. v. United States*,[43] where the lender's control over the

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McAllister v. Dudley, 148 F. Supp. 548 (W.D. Pa. 1956); Headley v. Knox, 133 F. Supp. 36 (D. Minn. 1955)." This appears to be the prevailing view. See note 23 supra and accompanying text.

33. 368 F.2d at 621.

34. Id. at 622.

35. The court acknowledged that other courts had indicated a preference toward imposing liability on persons within the corporate structure of the taxpayer-employer. Id. In addition, the court noted that the legislative history of Int. Rev. Code of 1954, §§ 7512 & 7515, which added criminal penalties, suggested that a person other than the direct employer can not be required to pay withholding taxes. See S. Rep. No. 1182, 85th Cong., 2d Sess. 1-2 (1958).

36. 259 F. Supp. 214 (E.D. Pa. 1966).

37. Id. at 215.

38. Id.

39. Id. at 216.

40. Id. at 217 (emphasis added) (quoting the court's charge to the jury). The specific factors that the court instructed the jury to consider evidence the extent of control necessary to meet the employer in fact standard: " 'Who was in control of this business operation, generally speaking? Specifically speaking, who had control of the hiring and discharging of the employees? Who had the control of the receipt . . . and the deposit of funds? Who had control of paying the bills? Who had control of approving credit given to customers of the establishment? . . . Who had control of the books of the corporation, who in fact was the actual person operating this business? . . . Were they an employer?' " Id. (quoting the court's charge to the jury).

41. Id.

42. Id.

43. 270 F. Supp. 165 (N.D. Cal. 1967), aff'd, 422 F.2d 26 (9th Cir.), cert. denied, 398 U.S. 937 (1970).

taxpayer was similar to that shown in *Girard*.[44] In *Pacific National*, a surety arranged for a bank loan for a construction agent, the proceeds of which were under the surety's exclusive control.[45] Specifically, the surety decided which creditors of the taxpayer were to be paid, signed the taxpayer's checks and paid the net wages of the taxpayer's employees.[46] Finding the surety to be a "person" liable under section 6672 because it exercised absolute control over the funds allocated by the loan, as well as other funds of the debtor, the district court impliedly abandoned the *Girard* requirement that the surety undertake all the day-to-day management functions of an employer in fact.[47] The court rejected *Hill*'s interpretaton of section 6672 as a penal provision and held instead that the section was a civil device intended to effectuate the collection of unpaid taxes.[48] By affirming, the Ninth Circuit in effect expanded the judicial interpretation of "person" in section 6671(b) to make the section 6672 penalty applicable to any "person" defined in section 7701(a)(1) who "assumes the function of determining whether or not an employer will pay over taxes withheld . . . ."[49]

Subsequent cases have followed *Pacific National*'s formulation of a control standard,[50] requiring proof that the lender exercised substantial control over the payment of funds to particular creditors. Control that has been found to be of evidentiary significance includes the lender's power to put its employees in charge of the taxpayer's fiscal or day-to-day operations,[51] to co-sign

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44. See text accompanying notes 36-42 supra.

45. 270 F. Supp. at 169, 173.

46. Id. at 169-70.

47. Id. at 173.

48. Id. at 171. The court derived its interpretation of the intent of § 6672 from Bloom v. United States, 272 F.2d 215, 223 (9th Cir. 1959), cert. denied, 363 U.S. 803 (1960) (corporate president who was controlling shareholder held liable for penalty under predecessor statute).

49. Pacific Nat'l Ins. Co. v. United States, 422 F.2d 26, 30 (9th Cir.), cert. denied, 398 U.S. 937 (1970); see text accompanying notes 22-27 supra. In affirming the view that § 6672 was intended as a collection device, the court of appeals found the legislative history "uninformative." 422 F.2d at 31. However, it concluded that the congressional purpose was to hold those "actually responsible" for the failure to pay over the tax liable and found no reason to exclude the creditor, on the facts of the case, from the coverage of the section. Id.

50. In Dunham v. United States, 301 F. Supp. 700 (D. Conn. 1969), the lender-bank under an accounts receivable financing agreement debited money from the financially embarrassed debtor-taxpayer's account, without regard to the amount of collateral available. Taxpayer's checks to the IRS in payment of withholding taxes, consequently, were returned for insufficient funds. In attempting to cast § 6672 liability upon the lender, the debtor alleged that the lender had assured that sufficient funds would be deposited in its account and that the lender previously had paid certain other checks drawn by the taxpayer on an overdraft basis. In denying the lender's motion for summary judgment, the court did not even mention the Hill-Girard employer-in-fact standard. Similarly, in Werner v. United States, 374 F. Supp. 558 (D. Conn. 1974), the court held liable a lender who frequently advised its debtor on business matters, ordered an audit and directed that the proceeds of its loan be paid to other creditors while it knew that the debtor owed withholding taxes to the government. The court warned that § 6672 was aimed at creditors who take effective control of a debtor's business, rather than at bona fide creditors who urge an ailing corporation to pay off its debts.

51. Builders Fin. Co. v. United States, 352 F. Supp. 491, 494 (E.D. Mich. 1970), aff'd sub

taxpayer's checks,[52] to review creditor lists,[53] to approve or honor payments to trade creditors,[54] and to disapprove or dishonor tax payments to the government.[55]

In *Adams v. United States,*[56] the district court granted summary judgment in favor of the lender[57] because it found the degree of control shown in the affidavits to be similar to that in *Hill,* where the lender lacked power to manage the taxpayer-corporation and the taxpayer was free to draw on its own account without limit.[58] On appeal, it was alleged that the lender exercised final, day-to-day authority over the disbursement of taxpayer's funds and that the lender at one point had "determined to discontinue" payment of taxpayer's withholding taxes.[59] If proven, these allegations would justify finding the lender to be a "person" under the *Pacific National* standard.[60] On the other hand, the lender contended that it had not participated in the management of taxpayer's business and that, except for one instance, no advances made under the loan arrangement were subject to its later control.[61] If these allegations were established, there could be no liability, under *Pacific National* or under any other standard, for want of sufficient lender control.[62]

The lender also argued that the *Hill* decision was dispositive of the issue, since the facts in *Hill* that indicated insufficient lender control were "clearly in line" with the facts it alleged.[63] The court disposed of the lender's reliance on *Hill* by asserting that the degree of lender control was "not as clearly defined as it was in *Hill,*" and that *Hill*'s narrow approach to section 6672 liability had been eroded by the recent trend favoring an "expanding view" of "persons" responsible.[64]

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nom. Mueller v. Nixon, 470 F.2d 1348 (6th Cir. 1972), cert. denied, 412 U.S. 949 (1973); cf. Werner v. United States, 374 F. Supp. 558, 562-63 (D. Conn. 1974).

52. Turner v. United States, 423 F.2d 448 (9th Cir. 1970); Silberberg v. United States, 355 F. Supp. 1163, 1165 (S.D.N.Y. 1973); Peterson v. Fidelity & Deposit Co., 330 F. Supp. 424, 425 (D.D.C. 1971); Burack v. United States, 461 F.2d 1282, 1287 (Ct. Cl. 1972).

53. Turner v. United States, 423 F.2d 448 (9th Cir. 1970); cf. Peterson v. Fidelity & Deposit Co., 330 F. Supp. 424 (D.D.C. 1971) (total authority to pay creditors).

54. Pacific Nat'l Ins. Co. v. United States, 270 F. Supp. 165, 170 (N.D. Cal. 1967), aff'd, 422 F.2d 26 (9th Cir.), cert. denied, 398 U.S. 937 (1970); see Werner v. United States, 374 F. Supp. 558, 561-62 (D. Conn. 1974); Krueger v. United States, 326 F. Supp. 231, 232 (E.D. Wis. 1971).

55. Dunham v. United States, 301 F. Supp. 700, 702 (D. Conn. 1969). If a lender pays wages directly to an employee of the debtor-taxpayer or credits funds to the latter's account for the specific purpose of paying wages, liability is governed by Int. Rev. Code of 1954, §§ 3505(a), (b).

56. 353 F. Supp. 333 (E.D. Wis. 1973), rev'd, 504 F.2d 73 (7th Cir. 1974).

57. Id. at 335.

58. Id. at 334-35.

59. 504 F.2d at 76. It was alleged that Lakeshore had at some point required Skobis to use loan proceeds to pay such taxes. Id. at 74.

60. See text accompanying notes 43-55 supra.

61. 504 F.2d at 75.

62. See text accompanying notes 43-55 supra.

63. 504 F.2d at 76.

64. Id. at 76-77.

Having distinguished *Hill,* the court attempted to set forth the appropriate legal standard for lender liability. First, the court stated that liability for the penalty was intended to attach to "that individual who has the *final word* as to what bills should or should not be paid, and when."[65] By way of clarification, however, the court continued: "In this context, the word 'final' means *significant* rather than exclusive control over the disbursal [sic] of funds."[66] Finally, the court endeavored to restate the standard, saying that "the ultimate liability for the failure to pay the tax lies" "where [the] *'ultimate authority'* to pay the tax is vested . . . ."[67]

The first statement of the legal standard is inexplicit insofar as the concept of "significant control" is undefined. "Final word" is, at least, a reasonably objective concept, even though it is clear that the court never considered the employer-in-fact standard of the earlier cases applicable.[68] The court introduced further confusion into its restatement of the standard by failing to define the term "ultimate authority" or to correlate its use with the concepts of "final word" and "significant control."

If, as a matter of law, a lender is liable under section 6672 when, in the course of a revolving loan agreement, he exercises actual control over loan proceeds only in isolated instances, the conflicting affidavits did raise a genuine issue as to a material fact. Since the allegations of the opposing parties portrayed inconsistent versions as to the degree of power possessed by the lender and the frequency of its assertion,[69] the court, if it applied the proper legal standard, correctly remanded the case for findings of fact.

The dissenting judge purported to disagree with the majority both as to the legal standard to be applied and as to whether the affidavits raised any issue of material fact.[70] His calculation of the legal test, however, was very similar to that set forth by the court, and was equally indefinite. He stated that it was the purpose of section 6672 "to 'impose liability upon those *actually responsible* for an employer's failure to withhold and pay over the tax.' "[71] Later, the dissent paraphrased the majority's first formulation of the standard, as "whether [a] person has the final word or at least significant control . . . ." over the disbursement of funds.[72] Apart from the difficulties inherent

65. Id. at 75 (emphasis added), citing Turner v. United States, 423 F.2d 448, 449 (9th Cir. 1970).

66. 504 F.2d at 75 (emphasis added), citing Dudley v. United States, 428 F.2d 1196, 1201 (9th Cir. 1970).

67. 504 F.2d at 77 (emphasis added).

68. "It is generally accepted . . . that employment is not the test of liability under § 6672." Id. at 76, citing Dunham v. United States, 301 F. Supp. 700, 702 (D. Conn. 1969), and Regan & Co. v. United States, 290 F. Supp. 470, 481 (E.D.N.Y. 1968); see notes 23-24 supra and accompanying text.

69. See text accompanying notes 56-62 supra.

70. 504 F.2d at 77 (Campbell, J., dissenting).

71. Id. at 78 (emphasis added), quoting Pacific Nat'l Ins. Co. v. United States, 422 F.2d 26, 31 (9th Cir.), cert. denied, 398 U.S. 937 (1970).

72. 504 F.2d at 78 (emphasis added), citing Pacific Nat'l Ins. Co. v. United States, 422 F.2d 26, 31 (9th Cir.), cert. denied, 398 U.S. 937 (1970).

in a vague concept of mere "significant control," the meaning of the phrase "actually responsible" is both unelucidated and uncoordinated with other statements of the test throughout both opinions.

The dissent argued that under a revolving loan agreement in which the collateral consists of accounts receivable, it is not unusual for the lender to take and apply income and earnings of the debtor-taxpayer in order to liquidate the past debt and make further advances.[73] On this basis he asserted that the affidavits showed no control by the lender inconsistent with an ordinary debtor-creditor relationship.[74] While he acknowledged that at least one check had been made payable to a creditor of the taxpayer and that certain other checks had been drawn jointly to the taxpayer and various taxing authorities,[75] he nevertheless asserted that no genuine issue of fact was raised. Apparently, the dissent felt that, assuming the truth of the allegations, the isolated act of issuing a check payable to a Skobis creditor, and the issuance of a few other checks to various taxing authorities on behalf of Skobis, did not, as a matter of law, make Lakeshore a person under section 6672, since the other advances made by Lakeshore were unrestricted.[76]

> The [lender's] affidavit alleged that Lakeshore exercised no control over funds lent, once they were advanced to Scobis. It was the respondent's burden to establish a genuine issue as to whether Lakeshore exercised "significant control" over the use of *these* funds. The [debtor's] affidavit establishes only that Lakeshore controlled the liquidated collateral, described by [debtor] as earnings and income. . . . [C]ontrol over the liquidated collateral is irrelevant . . . . *Significant* control over the funds used to pay the bills—i.e. the funds advanced by Lakeshore to Scobis—is the critical determinant under these circumstances.[77]

The discursive and imprecise language employed in the court's discussion of the legal standard of control necessary to hold a person subject to section 6672 liability makes it unclear whether the *Adams* court intended to apply the legal standard of *Pacific National* or rather intended to continue the "expanding view" by including within the term "person" those who exercise less control than prior cases required. Such imprecision, it is submitted, was unnecessary.

A broad interpretation of section 6672 has important implications for the business community. It could, for example, cause lenders to become more reluctant to advance funds in the absence of possessory collateral. *Adams,* by looking at least in part to the degree to which the lender "arguably" could control the debtor,[78] rather than to the actual degree of control exercised, injects more than a minimum degree of uncertainty as to what powers a lender may exercise in connection with loans to potentially unstable taxpayer-corporations.[79] The court left little in the way of guidelines for

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73. 504 F.2d at 79 (Campbell, J., dissenting).
74. Id.
75. Id. at 78.
76. Id. at 79-80.
77. Id. (emphasis added). The majority referred to the debtor as S"k"obis.
78. Id. at 76.
79. One commentator proposes extending lender liability under § 6672. His analysis, how-

creditors who wish to avoid section 6672 liability. If the power to control is the relevant factor, nearly all lending institutions risk section 6672 liability. If the exercise of control in fact is the relevant factor, the court should have made this clear. The practical result is that creditors who wish to avoid the *Adams* situation should neither exercise nor assume any substantial control over the use of any proceeds lent to the debtor, and should not, even as an accommodation, participate in the ultimate disbursement of such proceeds. Section 6672 does not, on its face, appear to require such a result. Yet, given the imprecise legal standard set forth by the court, this appears to be the only safe course to follow. Hopefully, courts will repudiate the " 'calculated indefiniteness' "[80] accepted in *Adams* in favor of a more precise legal standard which stresses the degree to which the creditor has deprived the debtor of the ability to pay over taxes that should have been withheld.

Samuel Feldman

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ever, like the Adams court's, fails to account for any suppressive effect such an extension may have on the financial community. Scott, One Hundred Percent Employment Tax Penalty: An Analysis of IRC § 6672, 10 Washburn L.J. 1, 27-28 (1970). See generally Lindeman, Confusion over Scope of 100% Penalty Makes it a Most "Settleable" Issue, 38 J. Tax. 50 (1973); Loo & Krasne, Take the Money and Run: An Assessment of the 100 Per Cent Penalty, 51 Taxes 29 (1973).

80. 504 F.2d at 76, quoting Pacific Nat'l Ins. Co. v. United States, 422 F.2d 26, 30-31 (9th Cir.), cert. denied, 398 U.S. 937 (1970).