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Case Notes

CASE NOTES

Antitrust—Block Booking of Copyrighted Feature Films for Television Exhibition Held Violative of Sherman Act.—In 1957, the United States brought separate civil antitrust actions in the southern district of New York charging six distributors[1] of pre-1948 copyrighted feature films for television exhibition with block booking in violation of Section 1 of the Sherman Act.[2] After a consolidated trial,[3] the district court found the defendants had individually,[4] from "time to time,"[5] conditioned the licensing of one or more copyrighted films upon the acceptance by the television station purchasers of one or more other inferior copyrighted films,[6] and that such actions were illegal tying arrangements violative of section 1.

The Supreme Court affirmed this finding unanimously,[7] holding tying ar-

1. The six distributors are: Loew's, Inc., C & C Super Corp., Screen Gems, Inc., Associated Artists Productions, Inc., National Telefilm Associates, Inc., United Artists Corp.

2. "Every contract . . . in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

3. United States v. Loew's, Inc., 189 F. Supp. 373 (S.D.N.Y. 1960).

4. No joint action or conspiracy was alleged by the Government.

5. Of the sixty-eight contracts which the Government contended were in violation of the Sherman Act, the district court concluded only twenty-five were illegal.

6. An example of one of the block booked contracts is as follows: in order to get "Treasure of the Sierra Madre," "Casablanca," "Johnny Belinda," "Sergeant York," and "The Man Who Came to Dinner," one of the buyers also had to take such films as "Nancy Drew Troubleshooter," "Tugboat Annie Sails Again," "Kid Nightingale," "Gorilla Man," and "Tear Gas Squad." United States v. Loew's, Inc., 371 U.S. 38, 41-42 (1962).

7. Five of the defendants appealed the district court's finding directly to the Supreme Court, the Government also cross-appealing, under the Expediting Act § 2, 32 Stat. 823 (1903), as amended, 15 U.S.C. § 29 (1958). The Supreme Court noted probable jurisdiction at 368 U.S. 973 (1962) and consolidated the appeals. In the district court, each defendant was enjoined from: "'(A) Conditioning or tying, or attempting to condition or tie, the purchase or license of the right to exhibit any feature film over any television station upon the purchase or license of any other film; (B) Conditioning the purchase or license of the right to exhibit any feature film over any television station upon the purchase or license for exhibition over any other television station of that feature film, or any other film; (C) Entering into any agreement to sell or license the right to exhibit any feature film over any television station in which the differential between the price or fee for such feature film when sold or licensed alone and the price or fee for the same film when sold or licensed with one or more other film [sic] has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films.'" 371 U.S. at 43. The Government's cross-appeal requested that the decree also "(1) require the defendants to price the films individually and offer them on a picture-by-picture basis; (2) prohibit noncost-justified differentials in price between a film when sold individually and when sold as a part of a package; (3) proscribe "temporary" refusals by a distributor to deal on less than a block basis while he is negotiating with a competing television station for a package sale." Id. at 52. The Court granted the first request as asked. The second was also granted, but the Court would not rule that the only basis for a discount would be savings in distribution costs; "all legitimate cost justifications" were to be included. Id. at 55. The third request was also granted, but modified "to the limited degree necessary to per-

rangements to be illegal where a seller has sufficient economic power over a tying product to appreciably restrain free competition in the market for the tied product, assuming a not insubstantial amount of commerce is affected. *United States v. Loew's, Inc.*, 371 U.S. 38 (1962).

Although tying arrangements were originally ruled illegal under the patent laws, they eventually became a matter of antitrust concern,[8] and now are dealt with almost exclusively under antitrust legislation. Tying arrangements may be challenged under either Section 1 of the Sherman Act[9] or Section 3 of the Clayton Act,[10] or both. It is clear from the language of the Clayton Act provision that it covers only agreements involving tangible commodities so that if the challenged agreement involves services, resort must be had to the Sherman Act. In 1922, in the first section 3 tying case to reach the Supreme Court, it was observed that the two acts "provide different tests of liability" in that the Sherman Act proscribes unreasonable restraints of trade while the Clayton Act reaches any substantial lessening of competition.[11] In 1953, in *Times-Picayune Publishing Co. v. United States*,[12] the Court attempted to distill from its prior decisions[13] the distinct criteria to be applied.

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mit a seller briefly to defer licensing or selling to a customer pending the expeditious conclusion of bona fide negotiations already being conducted. . . ." Ibid. Mr. Justice Harlan, joined by Mr. Justice Stewart, dissented to the granting of the Government's modification requests saying "disagreement goes not so much to the particular additional relief granted, but to the fact that the Court should have deemed it appropriate to concern itself at all with such comparatively trivial remedial glosses upon the District Court's decree." Id. at 56.

8. See Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 51-52 (1958).

9. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

10. "That it shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise . . . on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition . . . may be to substantially lessen competition or tend to create a monopoly . . . ." 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

11. United Shoe Mach. Corp. v. United States, 258 U.S. 451, 459-60 (1922).

12. 345 U.S. 594 (1953). The Times-Picayune Publishing Company owned and published both the only morning newspaper in New Orleans and one of the two evening newspapers. Buyers of advertising space were required to place combined insertions in both of the defendant's newspapers, and could not run an ad in either separately.

13. Significant tying cases reviewed were: (a) United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922), where the Court held illegal under § 3 of the Clayton Act tying contracts employed by the United Shoe Machinery Corp. which occupied a "dominant position" through control of more than 95% of the shoe machinery business in the country, notwithstanding a prior unsuccessful Sherman Act challenge. The Government brought this action to restrain United Shoe from making leases of its machinery containing clauses requiring lessees to use exclusively its machinery and supplies in shoe manufacture. (b) International Business Machs. Corp. v. United States, 298 U.S. 131 (1936). IBM leased its patented tabulating machines under contracts requiring the lessees to use only its tabulating cards in the operation of the machines. The Court investigated the market position of IBM in the tied product market and found that it made and sold 81% of all tabulating

From the "tying" cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the "tying" product, *or* if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is "unreasonable, *per se*, to foreclose competitors from any substantial market," a tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met.[14]

The Government proceeded under the Sherman Act in *Times-Picayune* and the Court found, upon investigation of the relevant market, that the defendant's percentile share did not represent a "dominant" position in the tying market.[15] Thus, the first of the above criteria was absent.

In 1959, *Northern Pac. Ry. v. United States*,[16] while not specifically rejecting *Times-Picayune*, did appear to obliterate the distinctions between the two tests of legality by reducing the section 1 test.

> They [tying arrangements] are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected.[17]

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cards used in the country. The gross receipts derived from the tied sales of these cards averaged $3,192,700. These facts left no doubt that the tying arrangement violated § 3. (c) International Salt Co. v. United States, 332 U.S. 392 (1947). The Government successfully brought an action under both § 1 of the Sherman Act and § 3 of the Clayton Act to enjoin the International Salt Co. from leasing its patented machines on the condition that lessees would use therein only salt supplied by the lessor. Without investigating the market position of International Salt, the Court held that it was unreasonable per se to foreclose competitors from any substantial market. International Salt's volume of tied sales of nonpatented salt was $500,000 which the Court said could not be regarded as "insignificant or insubstantial." Id. at 396. Hence, the Court used a quantitative determination in finding a violation of both the Sherman and Clayton Acts. Ibid. See also United States v. Columbia Steel Co., 334 U.S. 495 (1948) where the Court stated if "defendants . . . have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal per se," citing International Salt for support. Id. at 522-23. (d) United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). Here it was held that block booking of copyrighted feature films which were for theatre exhibition violated the Sherman Act and the protection of a copyright was equated to that of a patent. Loew's was also a party in this case.

14. Times-Picayune Pub. Co. v. United States, 345 U.S. at 608-09.

15. Id. at 611. The handling of the market investigation in this case has been criticized. See Kahn, A Legal and Economic Appraisal of the "New" Sherman and Clayton Acts, 63 Yale L.J. 293, 325-26 (1954); Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 55n.21 (1958).

16. 356 U.S. 1 (1958). In this case, defendant leased and sold various tracts of land under agreements which contained preferential routing clauses requiring all goods produced or made on the land to be transported only on its railway lines, provided rates and service were competitive.

17. Id. at 6. Subsequently, the Court said there was "some language" in Times-Picayune

Three Justices dissented in *Northern Pac.*,[18] indicating that the case should have been remanded "for a trial and findings on the issue of 'dominance.' "[19] Although the district court found that a fee simple title in land constituted "absolute domination of the market in *such* land,"[20] Mr. Justice Harlan did not

> think that these findings as to appellants' *ad hoc* "dominance" over the particular land sold or leased suffice[d] to meet the showing of market control which *Times-Picayune* established as one of the essential prerequisites to holding tying clauses illegal *per se* under the Sherman Act.[21]

He suggested that the "sufficient economic power" of *Northern Pac.* or the dominance required by *Times-Picayune* could be shown by the percentile share of defendant's landholdings or consumer desirability in the tying product, or such uniqueness of the product as could be analogized to a patent monopoly.[22] Both patents[23] and copyrights[24] had been held to evidence sufficient dominance.

In the instant case, defendant argued that it did not have the sufficient economic power, notwithstanding its copyrights on the tying films because the presence of competing television programming material destroyed the uniqueness given by the copyright. The Court, however, held that "a copyrighted feature film does not lose its legal or economic uniqueness because it is shown on a television rather than a movie screen."[25]

Although once this distinction was rejected *United States v. Paramount Pictures, Inc.*[26] seemed directly in point, the Court relied most heavily on *Northern Pac.* stating that *Paramount Pictures* is "a particularized application of the general doctrine as reaffirmed in *Northern Pacific*,"[27] which provides the "standard of illegality."[28]

It is in the discussion of this "standard" that the instant case appears to go beyond *Northern Pac.* in thoroughly devitalizing the *Times-Picayune* tests. What had been suggested by the *Northern Pac.* dissent as valid substitute proof of market power, if available, in lieu of market analysis, was now clearly stated to be sufficient. Market analysis in tie-in cases, as undertaken in *Times-Pi-*

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which spoke of "monopoly power" or "dominance" but it did not construe this "general language" as requiring anything more than the sufficient economic power to appreciably restrain free competition in the tied product. Id. at 11.

18. Mr. Justice Harlan wrote the dissent in which he was joined by Mr. Justice Frankfurter and Mr. Justice Whittaker. Mr. Justice Clark did not participate.

19. 356 U.S. at 20 (dissenting opinion).

20. United States v. Northern Pac. Ry., 142 F. Supp. 679, 684 (W.D. Wash. 1956). (Emphasis added.)

21. 356 U.S. 15-16 (1953) (dissenting opinion).

22. Id. at 19.

23. International Salt Co. v. United States, 332 U.S. 392 (1947). See note 13 supra.

24. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). See note 13 supra.

25. 371 U.S. at 48.

26. 334 U.S. 131 (1948).

27. 371 U.S. at 50.

28. Id. at 45.

cayune, is the exception, and a mere finding of desirability or uniqueness is the rule, even where neither a patent nor copyright is involved.[29]

Significantly, Mr. Justice Harlan, who in dissenting in *Northern Pac.* argued for an investigation of the relevant market, and Mr. Justice Clark, who wrote the *Times-Picayune* opinion, but did not participate in *Northern Pac.*, joined in the instant Court's decision.[30] Sufficient economic power will be found, therefore, in any case involving a tying product which is patented or copyrighted, or which has "consumer desirability" or "uniqueness" in its attributes.[31]

The present case also seems to relax the already vague, negatively stated "quantitative" test of illegal restraint in the tied product. The Court declared that there could be no "question as to the substantiality of the commerce involved,"[32] even though neither the district court or Supreme Court opinions nor the parties' briefs indicated how much of the license fees were paid for the tied films. The Court simply said it was a "substantial portion"[33] of the total "payments . . . ranging from $60,800 [to one appellant] . . . to over $2,500,000 [to another]. . . ."[34] No conspiracy or joint action having been charged, one defendant was held to have violated section 1 through two contracts whose total value was $60,800, of which some undetermined portion was a not insignificant amount of commerce.

Recent decisions of the Court have moved away from purely quantitative tests for the substantiality of commerce affected by an allegedly illegal contract or agreement. In *Brown Shoe Co. v. United States,*[35] an antimerger case brought by the Government under the amended Section 7 of the Clayton Act,[36] great stress was placed upon trends in the relevant industry and not simply the

29. "Market dominance . . . is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." Ibid. In a footnote to this, Mr. Justice Goldberg goes on to say "it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market. This is even more obviously true when the tying product is patented or copyrighted, in which case . . . sufficiency of economic power is presumed." Ibid. See also the discussion of "distinctiveness" in Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 55-59 (1958).

30. Mr. Justice Whittaker and Mr. Justice Frankfurter, who had joined in the Northern Pac. dissent, were no longer part of the Court when the instant case was decided.

31. 371 U.S. at 45. Considering the marketing and advertising techniques of today's manufacturers in promoting their products' attributes, it appears that very few products can be found which lack both of these characteristics.

32. Id. at 49.

33. Ibid.

34. Ibid.

35. 370 U.S. 294 (1962). The Government successfully prevented a proposed merger of the Brown Shoe Co., G. R. Kinney Co., and the G. R. Kinney Corp.

36. 64 Stat. 1125-26 (1950), 15 U.S.C. § 18 (1958), amending 38 Stat. 731 (1914).

dollar volume of shoe sales that would be affected if the merger were permitted.[37]

A year earlier, in *Tampa Elec. Co. v. Nashville Coal Co.*,[38] a requirements contract was held lawful under section 3, although the commerce involved over the contract's term was approximately $128,000,000.[39] The Court noted "that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence,"[40] and appeared to distinguish *Standard Stations*[41] by the "industry-wide practice of relying upon exclusive contracts"[42] which that case presented.

Thus while in the case at bar, the dollar amounts involved in some of the illegal contracts might arguably have been relatively insignificant, the Court may have considered more important the fact that the parties concerned[43] were the major suppliers of films to the television industry and, therefore, block booking was prevalent industry-wide. Accordingly, the Supreme Court once more condemned tying arrangements and demonstrated that almost any such agreement is a per se violation of the antitrust laws.[44]

Antitrust—Sherman Act Statute of Limitations Tolled by Fraudulent Concealment of Conspiracy.—Plaintiffs filed complaints between November 1961 and March 1962 in the Federal District Court for the Southern District of New York. They claimed treble damages during a period ranging from at least the 1940's to 1960 under Section 4 of the Clayton Act[1] for alleged violations of Section 1 of the Sherman Act.[2] This case, involving 418 related causes

37. 370 U.S. at 324. See also 31 Fordham L. Rev. 361 (1962).

38. 365 U.S. 320 (1961).

39. Id. at 333.

40. Id. at 329.

41. Standard Oil Co. v. United States, 337 U.S. 293 (1949). Here the Court declared illegal under § 3 of the Clayton Act requirements contracts between Standard Oil and thousands of independent gasoline dealers who sold 6.7% of the gasoline marketed in the western area of the United States. The Supreme Court here set forth the "quantitative substantiality" test of proof of foreclosure of competition. Id. at 298.

42. 365 U.S. at 334.

43. See note 1 supra.

44. See Brown Shoe Co. v. United States, 370 U.S. 294 (1962). The Court indicated that a tying arrangement "employed by a small company in an attempt to break into a market" may not be illegal. Id. at 330.

1. "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

2. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958). It provides generally that every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade shall be illegal.

of action, is part of the massive civil antitrust litigation arising out of the federal government's criminal indictments in 1960 of electrical manufacturers for price-fixing violations of the Sherman Act. Defendants moved to strike allegations of damages claimed prior to the four year period of limitations indicated by Sections 4B[3] and 5(b)[4] of the Clayton Act, as well as allegations of fraudulent concealment of any purported unlawful conspiracy. The district court denied the motions, finding the federal doctrine of fraudulent concealment which tolls a statute of limitations to be applicable to Section 4B of the Clayton Act.[5] The court stated that the view expressed in *Moviccolor, Ltd. v. Eastman Kodak Co.*[6] was controlling, but because of the possibility that it was relying on dicta, and since the case involved a controlling question of law as to which there existed a substantial ground for difference of opinion, it certified immediate appeal from its order.[7] The Court of Appeals for the Second Circuit, in an opinion by Chief Judge Lumbard, held *Moviccolor* not to be dispositive of the issue but affirmed on the ground that the federal doctrine of fraudulent concealment is so strong a "policy of law" that its inapplicability to section 4B could only be justified by Congress expressly so providing in clear and unambiguous language. Judge Moore, dissenting, sharply criticized the majority opinion as challenging the power of Congress to enact any statute limitations in that section 4B, as enacted, nowhere contains a fraudulent conspiracy excep-

3. "Any action to enforce any cause of action under sections 4 or 4A [15 or 15a] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act." 69 Stat. 283 (1955), 15 U.S.C. § 15b (1958).

4. "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A [15a], the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 [15] is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." 69 Stat. 283 (1955), 15 U.S.C. § 16(b) (1958). (Emphasis omitted.)

5. Atlantic City Elec. Co. v. General Elec. Co., 207 F. Supp. 613, 618 (S.D.N.Y. 1962).

6. 288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961). The case involved an action for treble damages under § 4 of the Clayton Act. The claim presumably accrued in the early 1930's, but was not brought until 1959. In accord with § 4B which made it clear that if on its effective date (January 7, 1956), the applicable state law barred the claim, § 4B would not revive it, the critical issue was whether the federal doctrine of fraudulent concealment tolled the New York statute of limitations. Since New York did not recognize the doctrine, the district court held the action was barred. On appeal, the court affirmed but stated: "We hold that the federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act even when a state statute is used to measure the period; but we affirm on the ground that the complaint does not contain allegations sufficient to bring plaintiff within this federal rule." 288 F.2d at 83. See notes 16, 30 & 37 infra and accompanying text.

7. 207 F. Supp. at 620.

tion despite a six year effort to insert just such a provision. *Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236 (2d Cir. 1962).

At present the number of similar cases pending throughout the nation exceeds 1700.[8] As of this writing, this preliminary determination has been made by one other circuit and nine other district courts. District court decisions in the third,[9] sixth,[10] and seventh[11] circuits are in accord with the decision under consideration. One district court in the fifth circuit has held contra.[12] Three district court decisions in the tenth circuit have been handed down: one in accord,[13] two contra.[14] The Court of Appeals for the Eighth Circuit has recently reversed a district court finding so as now to be in conformity with the present ruling.[15] As this summary of conflicting opinion indicates, the rectitude of the instant holding is by no means free from doubt.

Fundamentally, the present adjudication involves a construction of legislative intent. Inherent in Chief Judge Lumbard's rejection of *Moviecolor* as controlling is a recognition of the case as one of first impression in the Second Circuit.[16] Concededly, there does exist a strong federal doctrine of fraudulent concealment, the only question being: May it be applied to section 4B without doing violence to other well established principles or without infringing upon the power of Congress to enact an absolute statute of limitations?

The so called "federal doctrine of fraudulent concealment" can be traced to *Bailey v. Glover*,[17] an 1874 Supreme Court decision. In that case, Glover's as-

8. This bulk of litigation appears to be challenging the capacity of the federal courts to administer justice effectively. To meet this challenge a national coordinating committee, with Chief Judge Murrah of the Tenth Circuit as chairman, has been established for the purpose of disseminating recommendations for uniform action by district courts. See Kansas City v. Federal Pac. Elec. Co., 210 F. Supp. 545, 546-47 (W.D. Mo. 1962).

9. United States v. General Elec. Co., 209 F. Supp. 197 (E.D. Pa. 1962); Dovberg v. Dow Chem. Co., 195 F. Supp. 337 (E.D. Pa. 1961) (dictum).

10. Gaetzi v. Carling Brewing Co., 205 F. Supp. 615 (E.D. Mich. 1962).

11. Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 210 F. Supp. 557 (N.D. Ill. 1962).

12. Rinzler v. Westinghouse Elec. Corp., Civil No. 7427, N.D. Ga., Oct. 30, 1962.

13. Public Serv. Co. v. Allen-Bradley Co., Civil No. 7349 and Related Cases, D. Col., Sept. 11, 1962.

14. Brigham City Corp. v. General Elec. Co., 210 F. Supp. 574 (D. Utah 1962); Public Serv. Co. v. General Elec. Co., Civil No. 4924 and Related Cases, D. N.M., July 25, 1962.

15. Kansas City v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir.), reversing 210 F. Supp. 545 (W.D. Mo.), cert. denied, 371 U.S. 912 (1962).

16. The question posed in the instant case appears to have been one of first impression in a number of circuits until most recently. Cases such as American Tobacco, Crummer, Philco and Norman as well as Moviecolor dealt with state statutes which were applicable prior to the enactment of § 4B. State statutes being statutes of general application not enacted by the sovereign creating the cause of action, must be regarded as procedural and subject to the federal rule that procedural statutes are tolled by fraudulent concealment. Crummer Co. v. Du Pont, 255 F.2d 425 (5th Cir. 1958); American Tobacco Co. v. People's Tobacco Co., 204 Fed. 58 (5th Cir. 1913); Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 197 F. Supp. 333 (N.D. Ala. 1960); Philco Corp. v. Radio Corp. of America, 186 F. Supp. 155 (E.D. Pa. 1960). See notes 37 & 38 infra.

17. 88 U.S. (21 Wall.) 342 (1874).

signee in bankruptcy instituted suit, some three years after his appointment, to set aside certain conveyances allegedly given by Glover to members of his family in order to escape the payment of a debt. Thereafter Glover applied for a discharge under federal bankruptcy laws. The bill alleged that concealment of the fraudulent acts prevented the assignee from obtaining information sufficient to bring the bill, until some time within two years prior to the filing of suit. The lower court sustained the defendant's demurrer on the ground that the suit had not been brought within two years of the assignee's appointment as required by Section 2 of the Bankruptcy Act of 1867.[18] In reversing, the Supreme Court stated the principle, specifically found to be applicable to suits at law as well as in equity, which was to become known as the fraudulent concealment doctrine:

> [W]e hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.[19]

The rationale of *Bailey* was followed in two subsequent Supreme Court determinations,[20] both involving the bankruptcy statute of limitations. In 1918, the rule was applied in *Exploration Co. v. United States*[21] to toll the statute of limitations of the Act of March 3, 1891,[22] in an action brought by the federal government to cancel certain coal land patents which had been fraudulently procured. Referring to the *Bailey* doctrine as one which had "never been overruled nor modified in this court and has been approved and followed,"[23] the Court went on to state:

> When Congress passed the act in question the rule of *Bailey v. Glover* was the established doctrine of this court. It was presumably enacted with the ruling of that case in mind. . . . We are aware of no good reason why the rule, now almost universal, that statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud, should not apply in favor of the Government as well as a private individual.[24]

In *Holmberg v. Armbrecht*,[25] a class suit by creditors of a joint stock land bank to enforce the liability imposed upon shareholders of the bank by Section 16 of the Federal Farm Loan Act,[26] the alleged fraud was the concealment of the shareholders' identity. The bank closed in 1932 and it was alleged that it was not until 1942 that petitioners learned of concealment of the ownership of

18. 14 Stat. 518 (1867).
19. 88 U.S. (21 Wall.) at 349-50.
20. Traer v. Clews, 115 U.S. 528 (1885); Rosenthal v. Walker, 111 U.S. 185 (1884).
21. 247 U.S. 435 (1918).
22. 26 Stat. 1093 (1891), 43 U.S.C. § 1166 (1958).
23. 247 U.S. at 448.
24. Id. at 449.
25. 327 U.S. 392 (1946).
26. 39 Stat. 374 (1916), 12 U.S.C. § 812 (1958).

stock by the defendant. There was no federal bar, yet the Court invoked *Bailey v. Glover* to toll the New York statute of limitations, stating:

This equitable doctrine is read into every federal statute of limitation. If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under § 16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception by Bache which is the basis of this suit. . . . It would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to fraud when even a federal statute in the same terms would be given the mitigating construction required by that doctrine.[27]

Upon this line of cases rests principally the instant court's finding that "all federal limitation statutes are subject to the doctrine of fraudulent concealment,"[28] in the absence of any express congressional mandate to the contrary. Nowhere in the legislative history of section 4B, the court concludes, can such a directive be found.[29]

Section 4B was enacted in 1955 and it became effective as of January 7, 1956. Prior to that time the federal courts uniformly followed the practice of borrowing the limitation statute of the state in which they sat in actions brought under the Clayton Act.[30] The disparity between state statutes (ranging from one to twenty years) promoted "forum shopping" and uncertainty which finally resulted in an awareness of the need for a federal statute of repose which would be uniformly applied throughout the United States.[31] Bills were introduced as early as 1949 and several[32] contained a provision similar to the House and Senate bills of 1949 which provided that the statute should not begin to run until

discovery by the plaintiff of the facts upon which he relies for proof of the existence of such conspiracy, if the plaintiff has exercised due diligence in seeking to discover such facts.[33]

Despite the efforts of Representative Wright Patman of Texas to insert such a provision into the act which became the present section 4B, the bill passed without it. In distinguishing the doctrine of discovery as *mere* failure to discover facts constituting a violation from the doctrine of fraudulent concealment as

27. 327 U.S. at 397. (Emphasis added.)

28. 312 F.2d at 239.

29. Id. at 240-41.

30. See note 16 supra and accompanying text.

31. 310 F.2d at 274. On May 20, 1949, S. 1910 "a bill to amend the Sherman and Clayton Acts to provide a uniform period of limitations within which treble-damage actions may be instituted under the antitrust laws," was introduced in the Senate. 95 Cong. Rec. 6493 (1949).

32. H.R. 7905, 81st Cong., 2d Sess. (1950); H.R. 1986, 82d Cong., 1st Sess. (1951). The following bills were introduced prior to 1955 and contained no tolling provision: H.R. 8763, 81st Cong., 2d Sess. (1950); H.R. 3408, 82d Cong., 1st Sess. (1951); H.R. 1323, 82d Cong., 1st Sess. (1951); H.R. 467, 83d Cong., 1st Sess. (1953). The bill which became the 1955 amendment was H.R. 4954, 84th Cong., 1st Sess. (1955).

33. S. 1910, H.R. 4985, 81st Cong., 1st Sess. (1949).

failure to discover due to *active* deceptive practices,[34] the instant court rejected the contention that deletion of the discovery exception demonstrated a legislative intent to enact a limitation statute immune from the doctrine of fraudulent concealment. Rather it pointed to a colloquy just prior to the passage of section 4B on the floor of the House between Representative Emanuel Celler of New York, Chairman of the House Committee on the Judiciary and floor leader of the bill, and Representative Patman as illustrative of a contrary intent:

> Mr. Patman: Does that four years apply to conspiracy cases? Suppose there is a conspiracy, and it is ten years before the conspiracy is known.
>
> Mr. Celler: In the case of conspiracy or fraud, the statute only runs from the time of discovery.
>
> Mr. Patman: From the time of the discovery?
>
> Mr. Celler: In conspiracy cases and cases of fraud.
>
> Mr. Patman: And it is not the object or intention to change that at all?
>
> Mr. Celler: That is correct. . . . We provide that the 4-year statute shall start to run from the time of the accrual of damages, from the time the wrong was done, not from the time of discovery.
>
> Mr. Patman: Even in the case of fraud or conspiracy?
>
> Mr. Celler: No. In the case of fraud or conspiracy the statute of limitation only runs from the time of discovery.
>
> Mr. Patman: That is the point I want to make sure of. You are not attempting to change that particular part of it?
>
> Mr. Celler: Not at all.[35]

As noted above, the holding of the present case is by no means free from doubt. Indeed, many cogent arguments can and have been made for a contrary determination.

The conclusion that section 4B is not subject to suspension because of fraudulent concealment is supported by a long line of cases confirming the power of Congress to enact an absolute statute of limitations.[36] The courts have consistently held that where Congress creates a new right of action and explicitly limits the time in which the action may be brought, the time is not extended by reason of fraud which might work a suspension of an ordinary statute of limitations.[37] In such a case, the limitation proviso is deemed to be a *substantive* rather than a procedural part of the statute creating the cause of action, and the lapse of the prescribed time effects an extinguishment of the right upon which the cause of action is founded, rather than merely barring the

34. 312 F.2d at 240-41 & n.9.

35. 101 Cong. Rec. 5129, 5133 (1955).

36. Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356 (1943); William Danzen & Co. v. Gulf & Ship Island R.R., 268 U.S. 633 (1925); United States ex rel. Louisville Cement Co. v. ICC, 246 U.S. 638 (1918); United States ex rel. Texas Portland Cement Co. v. McCord, 233 U.S. 157 (1914); The Harrisburg, 119 U.S. 199 (1886).

37. A. J. Phillips Co. v. Grand Trunk Western Ry., 236 U.S. 662 (1915); Scott v. Railroad Retirement Bd., 227 F.2d 684 (7th Cir. 1955); United States v. Borin, 209 F.2d 145 (5th Cir.), cert. denied, 348 U.S. 821 (1954); Leimer v. Woods, 196 F.2d 828 (8th Cir. 1952); Pollen v. Ford Instrument Co., 108 F.2d 762 (2d Cir. 1940); Adams v. Albany, 80 F. Supp. 876 (S.D. Cal. 1948).

enforcement thereof.[38] So long as the statute of limitations is specifically directed at the legislatively created cause of action, it is immaterial that it be contained in a subsequent act.[39] This standard appears to be applicable to a treble damage action which was created by act of Congress in 1914 under Section 4 of the Clayton Act. Section 4B, although not enacted until 1955, was then by amendment specifically made a part of the Clayton Act.[40] This rule is even recognized in *Holmberg*, the case upon which the instant court based its decision:

> *If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter.* The Congressional statute of limitation is definitive.[41]

A strong argument might well be made that section 4B contains no ambiguous language and that the court's investigation into legislative intent violates the "plain meaning" rule.[42] Section 4B does not contain an express tolling exception during the period of time the wrong was fraudulently concealed, although just such an exception can be found in a number of federal statutes.[43] It does, however, in section 5(b)[44] provide for a suspension of the statute during the pendency of a civil or criminal proceeding instituted by the United States. By specifying this one exception it might reasonably be inferred that Congress intended no implied exception to the bar created by section 4B. Such an inference is supported by cases which have held that where Congress has used general mandatory language and has imposed one or more explicit exceptions, the courts are not free to read in additional exclusions.[45]

38. Midstate Horticulture Co. v. Pennsylvania R.R., 320 U.S. 356 (1943). See note 16 supra.

39. Davis v. Mills, 194 U.S. 451 (1904).

40. Kansas City v. Federal Pac. Elec. Co., 210 F. Supp. at 550.

41. 327 U.S. at 395. (Emphasis added.)

42. Section 4B is expressly set out to be applicable to all causes of action. This would include an action for fraudulent concealment. Thus, if there is to be any ambiguity in the language of the statute, Judge Moore, dissenting, suggests that the ambiguity must be found in the words "'after the cause of action accrued.'" Only if "'accrued'" is interpreted to mean "'has been discovered'" can the statute be in accord with the court's decision. However, there is ample authority for the position that a cause of action under the Sherman Act accrues "when the injury caused by some overt act pursuant to the conspiracy occurs." 312 F.2d 242-43 & n.2 (dissenting opinion). In this latter regard, see Unexcelled Chem. Corp. v. United States, 345 U.S. 59, 65 (1953); Tessier v. United States, 269 F.2d 305, 309 (1st Cir. 1959); Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196 (9th Cir. 1950), cert. denied, 340 U.S. 943 (1951).

43. Tariff Act of 1930 § 621, 46 Stat. 758, as amended, 19 U.S.C. § 1621 (1958); Securities Exchange Act of 1933 § 13, 48 Stat. 84, as amended, 15 U.S.C. § 77m (1958); Securities Exchange Act of 1934 § 18c, 48 Stat. 898, as amended, 15 U.S.C. § 78r(c) (1958); Federal Deposit Insurance Act of 1950 § 7g, 64 Stat. 878, 12 U.S.C. § 1817(g) (1958) (Supp. III, 1959-1961).

44. See note 5 supra.

45. Soriano v. United States, 352 U.S. 270 (1957); Kendall v. United States, 107 U.S. 123 (1882).

The dicta in *Holmberg*, that "this equitable doctrine is read into every federal statute of limitation,"[46] besides being diametrically opposed to the principle expounded in the same case that Congress may provide an absolute statute of limitation, would appear not to refer even by implication to that type of doctrine of fraudulent concealment relied upon by the instant court.[47] The decisions upon which the court relied for its authority appear to have reference to a situation essentially different from the case at bar. The Supreme Court in *Bailey* characterized the action as one dealing with "fraud which is the foundation of the suit."[48] *Exploration Co.* was an equity suit to cancel patents procured by fraud.[49] And in *Holmberg*, the suit was treated as one to set aside a fraudulent transfer of title so that statutory liability could be imposed.[50] The point might well be made, therefore, that the doctrine of fraudulent concealment, stated to be universally applicable in *Holmberg*, is applicable only to cases in which fraud is the gravamen of the action. Application, therefore, of the doctrine to the situation as presented in the case under consideration could be denied. In this case, the court is not actually dealing with fraud in the doctrinaire sense, but with what one court has referred to as fraud "as a mere appellation attached to a root conspiracy and related concealment."[51]

Glus v. Brooklyn Eastern Dist. Terminal[52] has often been cited in support of

46. 327 U.S. at 397.

47. In the words of District Court Judge Christensen, writing the opinion in Brigham City Corp. v. General Elec. Co., 210 F. Supp. 574: "It is the inexorable 'every' which plaintiffs must strain to its fullest scope and the definitive 'this' which they must extirpate from its textual antecedent to make much [sic] favorable to their position out of Mr. Justice Frankfurter's language." Id. at 577.

48. 88 U.S. (21 Wall.) at 349.

49. Brigham City Corp. v. General Elec. Co., 210 F. Supp. at 577 n.7.

50. Ibid.

51. Id. at 578. Judge Christensen makes some unsettling conjectures as to how the holding of the instant case might affect the entire field of antitrust litigation. "If it were to be assumed that some pervasive doctrine of 'fraudulent concealment' must be . . . read into every statute of limitations, we . . . should be confronted at once . . . by obstacles which appear insurmountable. Having no guidelines, such as those existing in causes of actions founded upon fraud or the accepted equitable principles of estoppel, we would have to fashion new criteria with reference to conspiracy cases. Assuming a conspiracy is established, would mere failure of the participants to disclose the conspiracy as a whole, or limited facts with reference to it, suspend the running of the statute? . . . To what degree must concealment appear, and in what form, to amount to 'fraudulent concealment.' How will we instruct the jury; what standards for our own decisions? . . . The short of the matter is that the statute of limitations under the doctrine of 'fraudulent concealment' would be suspended in every conspiracy case without any limitation except for the provable discovery of the alleged victim. In my experience, indications of wrongful concealment . . . often may be more readily established than the conspiracy itself; and it is not unusual for plaintiffs to rely upon inferences drawn from indications of concealment or misrepresentation, coupled with parallel action, when the conspiracy itself was not otherwise provable. There are few if any cases where a plaintiff could not plausibly ascribe his failure of discovery to concealment and could not with plausibility characterize such concealment as 'fraudulent'. . . ." Id. at 577-78.

52. 359 U.S. 231 (1959).

the court's implied finding that the dicta of *Holmberg* is not to be deemed inapplicable to a case involving collateral fraud or to a statute of limitations which is substantive rather than procedural. In that case, the six year bar was suspended so as to allow a claim under the Federal Employers' Liability Act. However, it is to be noted that the court, rather than read any doctrine of fraudulent conspiracy into the statute, precluded reliance upon its benefits in accordance with the established principles of estoppel.[53] While a strong argument might be made for distinguishing *Glus* from the instant decision on the basis of the subject matter of the statutory causes of action,[54] such would appear to be unnecessary. The present case contains no allegations of conduct which are separate from the foundations of the alleged wrong itself or which were designed to cause a change of position or the relinquishment of a right apart from the acts which afford the statutory right of action. There was no relationship of trust, no special reliance claimed. Indeed, *Glus* in basing its decision on estoppel rather than the doctrine of fraudulent concealment, might be cited as an indication of the Supreme Court's disposition to restrict the doctrine within the limits indicated.[55]

Aside from the court's questionable use of the eleventh-hour colloquy on the floor of the House as a device for construing legislative intent,[56] a strong argument may be made that the court's interpretation of that dialogue constitutes unwarranted speculation. Without any evidence that the Senate or even all the members of the House heard the colloquy, it can scarcely be presumed that all relied upon it when voting. Furthermore, there is no evidence of any awareness among the members of Congress that the doctrine of fraudulent concealment existed distinct from the doctrine of discovery, the subject matter of Congressman Patman's rejected amendment. Indeed, as the colloquy itself reveals, even Congressman Patman appears to have been somewhat unsure of the distinction. Therefore, if the court is to speculate as to the effect of the colloquy upon the enactment of section 4B, it would appear to be far more reasonable to assume that Congress, in voting for a bill which did not contain a discovery exception, did not intend to implicitly approve a fraudulent concealment exception.

The contention that by rejecting a discovery exception Congress necessarily rejected a fraudulent concealment exclusion can be supported by a consideration of how closely related the concepts actually are. Any sharp distinction would appear to be largely artificial. A fundamental restriction assimilates the two in actual operation. In both cases the statute will begin to run not merely

53. Id. at 234-35.

54. Conceivably the principles of estoppel might be more readily applied to the limitations in Federal Employers' Liability Act cases, involving tort actions by employees, than to actions based on conspiracy, which is ordinarily secretive in nature. Kansas City v. Federal Pac. Elec. Co., 210 F. Supp. at 551.

55. Brigham City Corp. v. General Elec. Co., 210 F. Supp. at 580.

56. There exists substantial authority condemning the use of anything less than committee reports to determine legislative intent. FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 475 (1921); Binns v. United States, 194 U.S. 486, 495 (1904).

upon actual discovery, but when the claimant might have discovered the existence of the claim by the exercise of reasonable care. In the words of one court:

> The so-called doctrine of fraudulent concealment can be neither expressed nor applied without reference to the principle of fraud undiscovered in spite of the exercise of reasonable diligence. On any sound and practical view of the problem, fraudulent concealment has a bearing on the statute of limitations only contextually with lack of knowledge on the part of the claimant after the exercise of reasonable diligence upon his part. The gist of the problem was not whether there would be concealment but whether by reason of concealment or because of the intrinsic nature of the wrongful conduct, or other circumstances, the claimant, despite reasonable care or diligence, could be deemed to have no notice of the wrong.[57]

In virtually every case highly meritorious reasons can usually be advanced excusing failure to bring an action within the time required by a particular statute of limitations. But if the pronouncement of *Holmberg* is to be taken literally, the avowed purpose of section 4B, *i.e.*, to enact a uniform statute of repose, would be reduced to a nullity, the already heavily burdened federal courts might be taxed beyond their capacities, and dicta might be extended into a mandate to judicially legislate. Founded neither upon recognized principles of estoppel, nor upon any undisputed indication of legislative intent, the soundness of the decision of the instant case would appear to be open to question. It may well be that a fraudulent concealment exception should be added to section 4B—but this is for the Congress to resolve, not the courts.

Criminal Law—Federal Conviction for Sale of Narcotics Requires Such Constructive Possession as To Enable Defendant To Assure Routine Delivery in Lieu of Knowledge of Illegal Importation.—Upon being approached by defendant, an agent of the Bureau of Narcotics asked to be introduced to a dealer in narcotics. After some initial difficulty in locating the "connection," defendant succeeded in introducing the agent to such a person and in defendant's presence, the agent tendered one hundred and fifty dollars to the dealer in exchange for a package containing heroin. At no time during this transaction did defendant have physical possession of the narcotics. After a trial without a jury, defendant was convicted of violating Section 2(c) of the Narcotic Drugs Import and Export Act.[1] The Court of Appeals for the Second Circuit, sitting en banc, reversed on the ground that the evidence was insuffi-

57. Brigham City Corp. v. General Elec. Co., 210 F. Supp. at 579.

1. 70 Stat. 570 (1956), 21 U.S.C. § 174 (1958). That section provides in part: "Whoever . . . receives, conceals, buys, sells, or in any manner facilitates the . . . sale of any . . . narcotic drug . . . knowing the same to have been imported . . . into the United States contrary to law . . . shall be imprisoned . . . and, in addition, may be fined. . . . Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

cient to show a direct violation of section 2(c), absent knowledge of illegal importation or a showing of actual or constructive possession by defendant. The court also ruled that the conviction could not stand on the ground that defendant aided or abetted the sale made by his "connection," since knowledge of the illegal importation, or possession in lieu thereof, is required for a conviction as an aider or abettor, and the principal's unexplained possession was not attributable to defendant. *United States v. Jones,* 308 F.2d 26 (2d Cir. 1962).

In order to obtain a conviction under Section 2(c) of the Narcotic Drugs Import and Export Act it must be shown that the defendant knew that the narcotics were illegally imported.[2] Proof of defendant's possession, however, raises an inference of *scienter.* Consequently, a showing of possession coupled with the other elements of the crime authorizes, but does not compel, his conviction.[3]

In holding that defendant had neither actual nor constructive possession, the majority concluded that his conviction under the statute could not stand since there was no actual evidence that he had knowledge of illegal importation. Mere introduction of "a willing buyer to a willing seller"[4] and service as a go-between, the court reasoned, are not tantamount to constructive possession. Nor could defendant's conduct establish his guilt as an aider and abettor of the illegal transaction, since all the elements of the principal's crime must be actually proved with respect to the defendant. Thus the principal's knowledge of illegal importation, based upon actual possession of the narcotics, could not be imputed to the defendant.[5]

Possession may be either actual or constructive,[6] the latter being constituted by dominion and control over the drugs.[7] For example, actual possession by an agent or employee over whom a principal has readily exercisable control

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2. See, e.g., United States v. Santore, 290 F.2d 51 (2d Cir. 1960), cert. denied, 365 U.S. 834 (1961).

3. See Caudillo v. United States, 253 F.2d 513 (9th Cir.), cert. denied, 357 U.S. 931 (1958). A trier of fact may refuse to convict even though the inference is raised. 253 F.2d at 516 n.5. The inference is, of course, rebuttable. See, e.g., Green v. United States, 282 F.2d 388 (9th Cir. 1960), cert. denied, 365 U.S. 804 (1961).

4. 308 F.2d at 31.

5. The present case was heard below by a judge without a jury and, therefore, the conviction could have been sustained as a direct violation of the statute or on an alternative theory that the defendant was an aider or abettor. If the trial had been before a jury the charge to the jury would have had to include instructions on aiding and abetting before the conviction could be sustained on that theory. Nye & Nissen v. United States, 336 U.S. 613 (1949).

6. See, e.g., Johnson v. United States, 270 F.2d 721 (9th Cir. 1959), cert. denied, 362 U.S. 937 (1960).

7. E.g., Rodella v. United States, 286 F.2d 306 (9th Cir. 1960), cert. denied, 365 U.S. 889 (1961), where the court said that "constructive possession is that which exists . . . without actual personal present dominion over a chattel, but with an intent and capability to maintain control and dominion." 286 F.2d at 311.

amounts to constructive possession by the principal.[8] In at least two cases,[9] United States courts of appeals have drawn the inference of *scienter* from the most tenuous showing of dominion and control. In *Cellino v. United States*,[10] the defendant introduced a buyer and a seller, vouched for the seller's reliability, and was present when the sale was consummated. From these facts the Court of Appeals for the Ninth Circuit found constructive possession.[11] In *United States v. Moia*,[12] answering phone calls from buyers and informing them of the place of delivery were held sufficient acts of control to support a finding of constructive possession by the defendant. A more stringent test, however, was adopted by the Court of Appeals for the Second Circuit in *United States v. Hernandez*.[13] There, the court recognized, as a test for constructive possession by an agent or employee, such association with one having physical custody of narcotics as would enable the agent-defendant to assure their delivery to a purchaser *as a matter of course*. Conversely, an agent who lacked that relationship with a possessor of narcotics which would enable him to assure routine delivery would be merely a "casual facilitator" without the requisite dominion and control.[14]

In applying the *Hernandez* test, the instant court concluded that the evidence was insufficient to show that the defendant could assure routine delivery. This conclusion was supported by the fact that he experienced difficulty in locating his "connection," and that the "connection" told the federal agent to deal with him directly in the future. Thus, the present case reaffirmed the *Hernandez* distinction between a mere "casual facilitator" and one who can assure delivery "as a matter of course."[15] Judge Waterman, writing for the majority, distinguished *Cellino*[16] on the ground that there the defendant had vouched for the reliability of the narcotics dealer. Furthermore, the court expressly indicated its unwillingness to follow *Cellino* if that case was, in fact, inconsistent with the present holding.[17]

As an alternative theory on which to base the inference of scienter, the Government sought to impute the possession of the principal to defendant as an aider or abettor of the transaction. The soundness of this reasoning had

8. United States v. Maroy, 248 F.2d 663 (7th Cir. 1957), cert. denied, 355 U.S. 931 (1958).

9. Cellino v. United States, 276 F.2d 941 (9th Cir. 1960); United States v. Moia, 251 F.2d 255 (2d Cir. 1958).

10. 276 F.2d 941.

11. In United States v. Mills, 293 F.2d 609 (3d Cir. 1961), the court, in referring to Cellino, stated "we think that case goes as far as reason and fairness permit in inferring dominion and control." Id. at 611.

12. 251 F.2d 255 (2d Cir. 1958).

13. 290 F.2d 86 (2d Cir. 1961).

14. Id. at 90.

15. 308 F.2d at 30.

16. See note 10 supra.

17. The court said "since we believe our own decision in United States v. Santore . . . governs the disposition of the issue of constructive possession here, we decline to follow Cellino to the extent that it is inconsistent with our present decision." 308 F.2d at 30 n.2.

apparently been recognized by the Court of Appeals for the Second Circuit in *United States v. Cohen*,[18] where the court said that "it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction . . . ."[19] The *Cohen* rule, while often cited, was not followed, and the drawing of the inference was never permitted unless the defendant was found to be in constructive possession.[20] The Second Circuit Court of Appeals, itself, was evenly divided in *United States v. Santore*[21] on the question of whether the possession of the principal should be imputed to one who participates in the illegal transaction with knowledge of the principal's possession.[22] The instant case has resolved the question and apparently has brought *Cohen* to its final demise.

When a penal statute defines knowledge of specific elements as a part of the substantive offense, an aider or abettor must also be shown by independent proof to have had such knowledge.[23] A consideration of the general aider and abettor statute[24] justifies this result. It would be illogical to say that a defendant had knowledge of importation because he was an aider or abettor of one who had knowledge, when the very question of whether he was an aider or abettor depends, in the first instance, on whether he, himself, had such knowledge. Nor would it be correct to say that a principal's *possession* should be attributed to one who participated in an illegal act merely because the participant *knew* of the principal's possession. One in possession of stolen property may, from that fact, be found to have knowledge that such property was stolen.[25] An imputation, however, of the principal's possession of stolen

18. 124 F.2d 164 (2d Cir. 1941), cert. denied, 315 U.S. 811 (1942).

19. 124 F.2d at 165.

20. See, e.g., Alexander v. United States, 241 F.2d 351 (8th Cir.), cert. denied, 354 U.S. 940 (1957); United States v. Chiarelli, 192 F.2d 528 (7th Cir. 1951), cert. denied, 342 U.S. 913 (1952).

21. 290 F.2d 51 (2d Cir. 1960), cert. denied, 365 U.S. 834 (1961).

22. At a rehearing en banc, six judges were evenly divided on the question of whether the possession of the principal could be attributed to an aider or abettor. Chief Judge Lumbard and Judges Moore and Smith found that possession was imputed to the aider or abettor while Judges Friendly, Waterman, and Clark found it was not. Regardless of the confusion on this point, the convictions were affirmed on the basis that there was sufficient evidence of knowledge of illegal importation. 290 F.2d at 74-83.

23. For a good discussion of the circular reasoning that would result if the possession of the principal could be attributed to the aider or abettor, see Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962).

24. 18 U.S.C. § 2(a) provides that "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

25. See, e.g., Wilson v. United States, 162 U.S. 613 (1896); United States v. Minieri, 303 F.2d 550 (2d Cir.), cert. denied, 371 U.S. 847 (1962). The governing statute today is 18 U.S.C. § 659 which provides that "whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen . . . shall in each case be fined . . . or imprisoned . . . or both . . . ."

goods to a participant in the crime requires both that such defendant actually knew that his principal had possession and that he knew that the goods were stolen.[26] Applying this analogy to the narcotics statute,[27] the majority concluded that the principal's actual possession might be attributed to a participant in the transaction only if the latter had actual knowledge of illegal importation as well as knowledge of the principal's possession. Since in the instant case, defendant lacked knowledge of the illegal importation of the narcotics, the *actual* possession of his "connection" could not be attributed to him simply because he knew of the "connection's" possession. To attribute the possession of the principal to the aider or abettor where the latter simply knows of the former's possession would require the aider or abettor to explain away not his own, but also another's, actual possession.[28]

Although the result in the instant decision fails to meet satisfactorily the acute national problem created by the illicit traffic in narcotics, it is premised upon the only correct reading of the statute as drafted. Since Section 2(c) of the Narcotic Drugs Import and Export Act requires a violator to have knowledge of the illegal importation or possession in lieu thereof, defendant, a mere "casual facilitator" in the illegal transaction, without knowledge of illegal importation or possession in lieu thereof, could not properly be said to have violated the statute. If the sanctions of section 2(c) are to be extended to those who participate in a sale of narcotics without knowledge of the illegal importation and without possession of the narcotics, the change requires legislative and not judicial redrafting.

Equity—A Court of Equity May Award Punitive Damages.—Plaintiff, a restaurant operator, rented a building owned and managed by defendants. With the intention of demolishing and redeveloping the premises, defendants served plaintiff with notice purporting to terminate its lease on the ground of vacancy. Subsequently, in an attempt to frustrate plaintiff's occupancy, defendants entered the premises, boarded up entrances and removed electric fuses. On a second occasion, they welded steel bars and plates to the door and window frames. Plaintiff commenced suit to enjoin defendants from further interference with its occupancy and sought damages incurred by reason of the intrusions. Later he amended his pleading to include a claim for punitive damages. Concluding that the defendants' intrusions were without justification, the trial court granted a permanent injunction and awarded plaintiff $5,268.50 in compensatory damages and treble that amount, $15,805.50, in punitive damages. The appellate division, while reducing the amount of damages, held that a court of equity has

26. Johnson v. United States, 195 F.2d 673 (8th Cir. 1952) (defendant's conviction of aiding in violation of a statute prohibiting interstate transportation of stolen cars, knowing the same to have been stolen, was reversed on the ground that defendant did not know the car was stolen).

27. 70 Stat. 570 (1956), 21 U.S.C. § 174 (1958).

28. The statute says in part that a finding of possession is sufficient to authorize conviction "unless the defendant explains the possession to the satisfaction of the jury." Ibid.

the power to award punitive damages. *I. H. P. Corp. v. 210 Central Park So. Corp.*, 16 App. Div. 2d 461, 228 N.Y.S.2d 883 (1st Dep't 1962).

Although the New York Court of Appeals has never expressly decided the question, the appellate division in *Dunkel v. McDonald*,[1] reaffirmed the rule of the majority of American jurisdictions, that courts of equity may not award punitive damages.[2] In *Dunkel*, the defendant association had enacted certain by-laws and resolutions for the purpose of precluding the plaintiff, a former employee, from continuing his business. Plaintiff, in an equity action, sought both an injunction and damages. Upon the trial court's finding that the defendants' actions were unjustified, plaintiff was awarded both compensatory and punitive damages. In reversing the award of punitive damages, the appellate division held:

> The court has no power in an action in equity to award exemplary or punitive damages. . . . The function of a court of equity goes no further than to award as incidental to other relief, or in lieu thereof, compensatory damages.[3]

It has been said that courts of equity inherently lack the power and authority to award punitive damages.[4] Some jurisdictions which follow the majority rule do so either on the ground that the traditional equity rule against the enforcement of a penalty forbids the use of punitive damages in such actions[5] or on the basis that a petitioner waives any claim to punitive damages by seeking equitable relief.[6]

The instant court determined that the *Dunkel* holding implies that a court cannot sit as a court of equity and law at the same time.[7] In light of the New York statutes providing for a single form of action for both law and equity[8] and permitting the joinder of both legal and equitable claims in one complaint,[9] such an implication is certainly unwarranted. A court of equity, once vested with proper jurisdiction, may award legal relief in the form of compensatory

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1. 272 App. Div. 267, 70 N.Y.S.2d 653 (1st Dep't 1947), aff'd mem., 298 N.Y. 586, 81 N.E.2d 323 (1948).

2. The only other states clearly authorizing awards of punitive damages in equitable actions are California and Tennessee. See Union Oil Co. v. Reconstruction Oil Co., 20 Cal. App. 2d 170, 66 P.2d 1215 (Dist. Ct. App. 1937); Bryson v. Bramlett, 204 Tenn. 347, 321 S.W.2d 555 (1958).

3. 272 App. Div. 267, 272, 70 N.Y.S.2d 653, 658 (1st Dep't 1947).

4. Florida: Orkin Exterminating Co. v. Truly Nolen, Inc., 117 So. 2d 419 (Fla. Dist. Ct. App. 1960); Nebraska: Sickler v. City of Broken Bow, 143 Neb. 542, 10 N.W.2d 462 (1943); South Carolina: Mortgage Loan Co. v. Townsend, 156 S.C. 203, 152 S.E. 878 (1930); Virginia: Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 S.E. 770 (1908).

5. Texas: Bush v. Gaffney, 84 S.W.2d 759 (Tex. Civ. App. 1935); West Virginia: Given v. United Fuel Gas Co., 84 W. Va. 301, 99 S.E. 476 (1919).

6. Wisconsin: Karns v. Allen, 135 Wis. 48, 115 N.W. 357 (1908). Maryland has adopted all three theories. See Superior Constr. Co. v. Elmo, 204 Md. 1, 104 A.2d 581 (1954).

7. 16 App. Div. 2d at 463, 228 N.Y.S.2d at 886.

8. N.Y. Civ. Prac. Act § 8.

9. N.Y. Civ. Prac. Act § 258.

damages, in lieu of, or in connection with, equitable redress.[10] This, reasoned the present court, dictated the conclusion that the

> plea that an equity court lacks power to award punitive damages does not answer the question whether a modern-day court, empowered and directed to dispense both equitable and legal relief in the same action, may award punitive damages and also grant a permanent injunction.[11]

Hence, the court found that an award of such relief coincides with "present-day concepts of procedural efficiency."[12]

In *Union Oil Co. v. Reconstruction Oil Co.*,[13] the California District Court of Appeal, reasoning similarly, held that a California statute providing for the merger of law and equity allowed courts of equity to award punitive damages.[14] There, plaintiff obtained an order to restrain defendants from trespassing upon a mine leased by plaintiff. The claim for damages which first arose during the trial on the equitable cause of action, was based upon defendant's continuing trespasses upon plaintiff's leasehold in violation of the court's restraining order. California law provided that in the case of an unintentional trespass to a mine the measure of damages would be the value of the minerals extracted less the cost of mining and milling. The measure of damages in the case of a wilfull or malicious trespass allowed no cost deduction whatever from the gross value of the extracted mineral.[15] Recognizing that the Supreme Court of California had considered this rule to amount to an assessment of punitive damages,[16] the appellate court concluded:

> [I]t may be conceded that as a general rule equity does not award damages by way of punishment . . . . Nevertheless, it must be observed that in California there is but one form of action (section 307, Code Civ. Proc.), and that although this action . . . was purely equitable in nature the claim for damages which arose during the trial . . . was legal in character. It is our conclusion, therefore, that in dealing with this phase of the case the trial court correctly applied the above-mentioned legal rule in awarding . . . damages [in] the gross amount.[17]

This rationale is weakened, however, by the fact that the *Union Oil Co.* decision has been criticized as an award of "enlarged compensatory damages" rather than punitive relief.[18]

The logic of allowing a court of equity to award punitive damages because it already possesses the power to award legal relief in the form of compensatory damages is founded upon the basic function of equity to affect complete relief while avoiding multiplicity of actions.[19] Punitive damages, however, which do

10. McNulty v. Mt. Morris Elec. Light Co., 172 N.Y. 410, 65 N.E. 196 (1902).
11. 16 App. Div. 2d at 464, 228 N.Y.S.2d at 887.
12. Id. at 466, 228 N.Y.S.2d at 888.
13. 20 Cal. App. 2d 170, 66 P.2d 1215 (Dist. Ct. App. 1937).
14. Cal. Civ. Proc. § 307.
15. Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Pac. 771 (1912).
16. Id. at 704, 120 Pac. at 777.
17. 20 Cal. App. 2d at 185-86, 66 P.2d at 1222.
18. Superior Constr. Co. v. Elmo, 204 Md. at 21, 104 A.2d at 585.
19. Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936).

not compensate the plaintiff for any actual loss are not necessary to afford complete restitution or redress. Traditionally punitive damages have been used to punish the defendant's malicious conduct and to deter such misconduct on the part of others.[20] Theoretically, therefore, an award of punitive damages in equity should not be based on equity's existing power to award compensatory relief. Practically speaking, there is no reason for forbidding courts of equity to award punitive damages if the circumstances warrant their assessment.[21] Apparently, the instant court rejected the traditional rule forbidding equitable awards of punitive damages because of the practical considerations of modern procedure which the merger of law and equity was designed to facilitate.[22]

The court also noted that defendants were ready to pay substantial compensatory damages and even contempt assessments, if necessary, in order to reap the profits anticipated from the redevelopment of the premises.[23] "And even if it were not true of this landlord," the court stated,

> it could well be true of another, whose wilfull misconduct would be deterred by the menace of punitive damages. Consequently, the trial court was justified in concluding that the circumstances provided a rare but recurrable instance in which the traditional remedies would fall short of effecting a just result.[24]

Although it is apparent that the instant case empowers courts to award punitive damages in equitable actions, the court's statement that the facts presented a "rare but recurrable instance in which the traditional remedies would fall short of effecting a just result"[25] is ambiguous. Does the instant decision open the door to awards of punitive damages in all future equity actions where a proper basis exists? Or did the court intend to limit such redress to only those cases where the traditional remedies of injunction, contempt assessments and compensatory damages fail to accomplish justice because of the great profits the defendant would realize despite the payment of both damages and contempt assessments? Such a basis for awarding punitive damages overlooks the traditional purposes of punitive damages, *i.e.,* to punish malicious actions and to deter the future malicious conduct of not only the defendant but all those of like mind.[26]

In *Dunkel,* the traditional equitable remedy of injunction served to afford the petitioner protection, while the court's award of compensatory damages gave relief for injuries actually sustained. It is interesting to note that the instant court expressly overruled *Dunkel.* It is therefore submitted that perhaps future awards of punitive damages in equitable actions will not be limited to a "rare but recurrable instance in which the traditional remedies would fall short of effecting a just result."[27]

20. Walker v. Sheldon, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488, 490 (1961).

21. 16 App. Div. 2d at 463, 228 N.Y.S.2d at 885-86.

22. Ibid.

23. Id. at 466, 228 N.Y.S.2d at 888.

24. Ibid.

25. Ibid.

26. See note 20 supra and accompanying text.

27. 16 App. Div. 2d at 466, 228 N.Y.S.2d at 888.

Labor Law—*Garmon* Rule of Pre-emption of State Court Jurisdiction Over Unfair Labor Practice Cases Held Inapplicable in Suits Under Section 301 of the National Labor Relations Act.—Plaintiff employee sued his employer in a Michigan court for breach of a discrimination clause[1] contained in a collective bargaining agreement between the employer and a labor organization of which plaintiff was a member. The complaint alleged that while other employees of defendant, belonging to a different union, were on strike, plaintiff was not permitted to report to his job, although willing and able to do so. At the same time, however, employees in departments not covered by collective bargaining agreements were allowed to report and were paid full wages even though no work was available. Defendant's motion to dismiss for lack of jurisdiction was sustained on the grounds that the allegations in the complaint made out an unfair labor practice under Section 8(a) of the National Labor Relations Act,[2] and that the subject matter was therefore within the exclusive jurisdiction of the National Labor Relations Board. The Supreme Court of Michigan affirmed,[3] relying chiefly on *San Diego Bldg. Trades Council v. Garmon*.[4] On certiorari,[5] the United States Supreme Court reversed, holding that since the suit arose under Section 301(a) of the National Labor Relations Act,[6] the state courts had jurisdiction which was not pre-empted even though the act complained of constituted an unfair labor practice. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

The doctrine of pre-emption[7] was first established by the Supreme Court in *Garner v. Teamsters Union*[8] and *Weber v. Anheuser-Busch, Inc.*,[9] which held

1. "'[T]here shall be no discrimination against any employee because of his membership or activity in the Guild.'" Smith v. Evening News Ass'n, 371 U.S. 195, 196 (1962).

2. "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1958) (Supp. III, 1959-1961). It was agreed for purposes of this case that the conduct alleged as constituting a breach of contract also amounted to an unfair labor practice.

3. Smith v. Evening News Ass'n, 362 Mich. 350, 106 N.W.2d 785 (1961).

4. 359 U.S. 236 (1959).

5. 369 U.S. 827 (1962).

6. "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." National Labor Relations Act § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958). To make § 301 applicable, the Court held that only the contract, and not the suit, need be between employer and union, i.e., § 301 may apply to employee suits, and that the suit may properly be brought to enforce uniquely personal employee rights. This impliedly overrules Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).

7. As used herein the term "pre-emption" refers only to Congress' limitation of a court's power to entertain certain suits—not to any restriction on a state court's power to apply its own substantive law.

8. 346 U.S. 485 (1953).

9. 348 U.S. 468 (1955).

that state courts did not have jurisdiction to enjoin unfair labor practices,[10] even when tortious under state law. By Section 8 of the National Labor Relations Act, Congress had given the National Labor Relations Board jurisdiction—impliedly exclusive—over such practices, thereby "pre-empting" court jurisdiction.[11] *San Diego Bldg. Trades Council v. Garmon*[12] extended *Garner* and *Weber* by applying pre-emption in tort suits for damages as well as for injunction, even where the Board had declined jurisdiction over the controversy.

In a separate line of cases, section 301 of the act was construed. *Textile Workers Union v. Lincoln Mills*[13] held that under that provision federal courts had jurisdiction to compel arbitration pursuant to the labor contract, and that a uniform, court-created federal substantive law was to control in 301-type[14] federal suits. In *Charles Dowd Box Co. v. Courtney*,[15] a state court suit to uphold a labor contract, it was argued that by granting the federal courts jurisdiction, section 301 thereby divested state courts of jurisdiction; the Court refused to attribute to the statute any such effect. In *Sinclair Ref. Co. v. Atkinson*,[16] the Court denied the contention that section 301 was such a positive grant of jurisdiction to the federal courts as to effect an implied repeal of the pre-existing section 4 prohibition, in the Norris-La Guardia Act,[17] against federal court issuance of injunctions in certain cases.

The pre-emption rule and section 301 first came into conflict before the Supreme Court in *Local 174, Teamsters Union v. Lucas Flour Co.*[18] This was a state court case in which the breach of contract sued for under section 301 also created a pre-emption situation;[19] further, the clause violated was an

10. Unfair labor practices are set forth in the National Labor Relations Act § 8, 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), amended by 73 Stat. 525, 542 (1959), as amended, 29 U.S.C. § 158 (1958) (Supp. III, 1959-1961). Such practices are often termed "prohibited by section 8." Pre-emption also applies in cases involving conduct arguably "protected by § 7" of the act. National Labor Relations Act § 7, 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 157 (1958). See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959); Youngdahl v. Rainfair, Inc., 355 U.S. 131, 137-38 (1957); Local 25, Int'l Bhd. of Teamsters v. New York, N.H. & H.R.R., 350 U.S. 155, 161 (1956); Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 478-81 (1955). For a discussion of the early pre-emption cases, see Weber v. Anheuser-Busch, Inc., id. at 474-77.

11. At that time the "violence" cases were the one exception to pre-emption. See note 32 infra and accompanying text.

12. 359 U.S. 236 (1959).

13. 353 U.S. 448 (1957).

14. This terminology will be used to designate "suits for violation of contracts between an employer and a labor organization. . . ." See note 6 supra.

15. 368 U.S. 502 (1962).

16. 370 U.S. 195 (1962).

17. 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958).

18. 369 U.S. 95 (1962).

19. The Court in the instant case said: "[In] Lucas . . . it was seriously urged that the conduct involved was arguably protected or prohibited by the National Labor Relations Act and therefore within the exclusive jurisdiction of the . . . Board." 371 U.S. at 197.

arbitration provision. The Court based its refusal to apply pre-emption on the fact that the suit was within section 301.[20] The decision also extended the *Lincoln Mills* application of uniform federal substantive law to *state* suits brought within the purview of that section. Shortly thereafter, in *Atkinson v. Sinclair Ref. Co.*,[21] a federal suit under section 301, pre-emption was again argued—whether validly or not did not appear—but the Court dismissed[22] the argument merely by reference to *Lucas*. The instant case followed—a state court 301-type suit where the breach complained of *concededly* constituted an unfair labor practice. There is one difference, however, between this case and *Lucas*—the latter revolved around an arbitration clause. Nevertheless, the result reached was the same—pre-emption being held inapplicable because the suit arose under section 301.[23]

The basic holding of the case at bar is that, because this was a 301-type suit,[24] state court jurisdiction was not pre-empted by the *Garmon* rule. In the absence of express reasoning in the Court's opinion, there seem to be only two theories which could conceivably be advanced to support this finding: (1) that section 301 operates as a positive grant of jurisdiction to state courts, and therefore precludes pre-emption; or (2) that the contractual nature of a 301-type suit is the essential element, and that congressional intent did not extend to pre-emption of state court common-law contract jurisdiction. It is here submitted that only the second has any color of logic, and that even it is invalid.

The notion that section 301 was a positive grant of jurisdiction to state courts is unquestionably contrary to congressional intent and the clear meaning of the statute, and is unsupported by prior cases. In the first place, in its jurisdictional aspects[25] section 301 was obviously meant to affect only *federal* courts. The wording could not be clearer—301-type suits "may be brought in any district court of the United States . . . ."[26] It has never been suggested that this section could broaden *state* court jurisdiction by precluding pre-emption

20. See note 37 infra and accompanying text.

21. 370 U.S. 238 (1962).

22. Id. at 245 n.5.

23. See note 37 infra and accompanying text. In the instant case, see 371 U.S. at 201.

24. The Court went to great lengths to bring this case within § 301. While the overruling of Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955), which refused to allow a suit under § 301 for the enforcement of "uniquely personal" employee rights, was undoubtedly proper, the Court in addition went so far as to hold, contrary to the great weight of lower court authority (see Annot., 7 L. Ed. 2d 959, 978 (1962); Annot., 99 L. Ed. 529, 538 (1955)), that only the contract and not the suit need be between an employer and a labor organization in order to come within § 301, i.e., an employee's suit may qualify. As Mr. Justice Black pointed out in his dissent, the Court refused to decide whether in this particular instance plaintiff employee had standing to sue. Possibly the majority felt justified in confining itself to the one jurisdictional issue of pre-emption. This did not constitute, as the dissenting Justice implied, a decision on substantive questions before jurisdiction (standing to sue) was fully established.

25. Lincoln Mills and Lucas did give § 301 substantive effect, by necessary implication from its jurisdictional effect. The latter, however, is well defined.

26. See note 6 supra.

there. It might be argued, however, that the Court had that in mind, for the majority opinion merely spoke of the "jurisdiction of the courts,"[27] without addressing itself to the distinction between state and federal. In addition, however, it is even questionable whether section 301 operates to confer jurisdiction on *any* courts, state *or* federal, when an unfair labor practice is involved.[28]

The second possible rationale for the instant decision is that pre-emption is confined to tort cases, and hence it does not apply in a 301-type suit precisely because it is a contract action. This idea was probably derived from an oft-quoted congressional conference report:

> Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.[29]

This statement, however, was made when Congress had before it a proposal to make *any* breach of a collective bargaining agreement ipso facto an unfair labor practice so as to bring it within the Board's exclusive jurisdiction.[30] Thus the report was merely stating the *general* congressional policy as to breaches of labor contracts, as distinguished from that governing unfair labor practices. However, when the broad statement above is contrasted with the latter strong and specific policy, discussed at great length in *Garmon*, it is clear which one must prevail in case of conflict. The reasoning of *Garmon* is all-encompassing, and remains as valid in contract cases as in tort:

> Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience. . . . When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. . . . When it is clear or may fairly be assumed that the activities which a State purports to regulate . . . constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.[31]

Congress clearly meant to pre-empt court jurisdiction in *all* unfair labor practice cases, whether tort or contract. The only proper exceptions would arise where there was a conflicting congressional policy strong enough to override pre-emption, *e.g.*, that of preserving domestic peace, in the "violence" cases,[32]

27. 371 U.S. at 197.

28. See discussion in notes 44-52 infra and accompanying text.

29. H.R. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947), 1 Legislative History of the Labor Management Relations Act, 1947, pp. 505, 546 (1948).

30. For a full discussion of the history of the given statement and of § 301, see Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 510-13 (1962).

31. 359 U.S. at 242-44.

32. See International Union, UAW v. Russell, 356 U.S. 634 (1958) (damages); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (injunction); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (damages); International Union, UAW v.

or that in favor of arbitration.[33] Even if it be assumed that Congress favored judicial remedy for all violations of collective bargaining agreements, such favor would surely apply only where the contract imposed positive obligations over and above statutory ones, and not where the parties included an unfair labor practice as a contractual prohibition.[34]

One objection to the inclusion of 301-type suits within the scope of *Garmon* might be that pre-emption was intended to prevent application, by the many local tribunals, of diverse rules of substantive law, but only in tort cases, because in 301-type (contract) cases *Lincoln Mills* assured a uniform federal substantive law. However, unless pre-emption is applied in 301-type suits as well, local courts are enabled to entertain suits involving unfair labor practices (when the particular practice is prohibited by contract), and "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."[35]

Of the three cases relied on by the Court—*Dowd Box*, *Lucas* and *Atkinson*—only *Lucas* has any relevance.[36] The Court in *Lucas* stated:

> Since this was a suit for violation of a collective bargaining contract within the purview of § 301 (a) of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as . . . *Garmon* . . . based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant. . . . As pointed out in . . . *Dowd Box* . . . Congress "deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.' "[37]

The Court was apparently making the contract-tort distinction for the first time. The holding of *Lucas* is, of course, distinguishable from that of the case at bar, for *Lucas* involved interpretation of an arbitration clause. Perhaps the strongest congressional policy in the labor field—even stronger than exclusive Board jurisdiction over unfair labor practices—is that in favor of arbitration.

Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (injunction). For a full explanation of the violence rule, see Garmon, supra note 31, at 247, 248 n.6. See also Weber v. Anheuser-Busch, Inc., 348 U.S. at 477.

33. See note 38 infra and accompanying text.

34. The statutory and the contractual prohibitions are very similar in the instant case. See notes 1 & 2 supra. This was the basis on which the Michigan Supreme Court applied pre-emption: "Plaintiff may not characterize an act which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress. . . ." Smith v. Evening News Ass'n, 362 Mich. 350, 364-65, 106 N.W.2d 785, 793 (1961). We may carry the logic of the instant case to an absurd conclusion: Suppose the parties inserted in the contract a blanket prohibition of all unfair labor practices. Of course, this would be an obvious attempt to escape the effect of the statute, while the clause in question here is a usual one in labor contracts, probably inserted in good faith. The logic, however, is inescapable.

35. Garner v. Teamsters Union, 346 U.S. at 490-91 (quoted in San Diego Bldg. Trades Council v. Garmon, 359 U.S. at 243).

36. Dowd Box said merely that § 301 does not operate to divest state courts of jurisdiction, not that it confers jurisdiction. Atkinson was a federal suit, while the instant case was state.

37. 369 U.S. at 101 n.9.

This is evident throughout federal labor legislation and the cases construing congressional labor policy.[38]

There is no doubt about the continuing validity of the *Garmon* rule. The language in *Lucas, Atkinson* and the present decision—the three instances where the Court departed from *Garmon*—expressly limits the exception to 301-type suits, and gives no indication that pre-emption does not still apply in all other unfair labor practice situations (excepting, of course, the "violence" cases).[39] In any event, *Garmon* is good law. Pre-emption received implicit congressional approval in the enactment of Section 701(c)(2) of the Labor-Management Reporting and Disclosure Act of 1959,[40] a National Labor Relations Act amendment passed several months after *Garmon* and intended to make a limited change in the result of that case. By expressly allowing state courts to assert jurisdiction over those labor disputes "over which the Board declines . . . to assert jurisdiction,"[41] Congress evidently wished to preclude pre-emption *only* in those cases where its application would deprive the injured party of any remedy. Approval of pre-emption in all other cases was clearly implied. Even more important, however, is the Supreme Court's reaffirmation of pre-emption in *Local 438, Constr. Union v. Curry*,[42] decided *after* the case at bar. There, the jurisdiction of a state court to enjoin conduct prohibited by state

38. The Court in Lincoln Mills said: "It seems . . . clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule . . . against enforcement of executory agreements to arbitrate." 353 U.S. at 456. The Court further declared: "Section 8 of the Norris-LaGuardia Act does, indeed, indicate a congressional policy toward settlement of labor disputes by arbitration. . . ." Id. at 458. In United Steelworkers v. Warrior & Gulf Nav. Co., it was stated: "Complete effectuation of the federal policy is achieved when the agreement contains . . . an arbitration provision. . . ." 363 U.S. 574, 578 n.4 (1960). See Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 214 (majority opinion), 216 (dissenting opinion) (1962); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). See also Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Colum. L. Rev. 52 (1957); Note, Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725 (1956).

39. See note 32 supra. Under the rule of the instant case, the arbitration cases no longer are an independent exception, since they are now included in the larger exception of 301-type suits.

40. "Nothing in this Act [including § 8, the unfair labor practice section] shall be deemed to prevent or bar any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction." Labor-Management Reporting and Disclosure Act of 1959 § 701(c)(2), 73 Stat. 542, 29 U.S.C. § 164(c)(2) (Supp. III, 1959-1961). This provision was designed to eliminate the "no man's land," created by Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957), of cases where no remedy at all was available—either in the courts, because of pre-emption, or from the Board, because it declined jurisdiction. See 30 Fordham L. Rev. 826 (1962).

41. 73 Stat. 542 (1959), 29 U.S.C. § 164(c)(2) (Supp. III, 1959-1961). Because of its work load, the Board was forced to set minimum amount requirements.

42. 371 U.S. 542 (1963).

statute was held pre-empted because the conduct was arguably an unfair labor practice.[43] Obviously, therefore, the Court is not inclined to forsake the *Garmon* rule.

Of the two possible rationales, then, only the second is seriously arguable. To uphold it and thereby preclude pre-emption is to sacrifice substance for form; for denomination of the same act by a different name—tort, or breach of contract—creates a widely divergent set of remedies, and could defeat the whole purpose of Congress in establishing the Board.

An interesting collateral speculation is what the result should have been had the suit been federal instead of state. The construction of section 301 would then be essential. The caption of section 301(a) is: "Venue, amount and citizenship."[44] This alone is an indication that the statute was merely intended, in its jurisdictional aspects, to *remove* certain prerequisites for federal suits, and not to *confer* jurisdiction which, for reasons outside of those requirements,[45] would not otherwise exist. Further, the statute permits the suit "without respect to the amount in controversy or without regard to the citizenship of the parties."[46] The wording of the provision thus specifically confines its effect. It has also been indicated by Congress that section 301 was meant solely to extend to the federal courts concurrent jurisdiction with that of the state courts in labor contract cases.[47] If, as was assumed above, pre-emption of state court jurisdiction should have existed in the instant case, then to allow a federal suit would create *sole* federal jurisdiction, not extend concurrent jurisdiction. Therefore, under section 301, a federal suit should be allowed only when the state court suit would be permitted—that is, where no other rule of law stands in the way. Actually, the question has already been decided, in *Atkinson*,[48] which involved an unfair labor practice—or at least where the question was raised. There the Court stated: "Since this is a § 301 suit, that doctrine [pre-emption] is inapplicable."[49] A very ironic situation

43. Id. at 546.

44. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

45. E.g., because of pre-emption, or because of § 4 of the Norris-La Guardia Act (see note 51 infra and accompanying text).

46. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

47. See discussion of predecessor bill to § 301 in Charles Dowd Box Co. v. Courtney, 368 U.S. at 511-12.

48. Several lower federal courts have also passed on the question; in each case, either the decision was before Garmon extended pre-emption to suits for damages, or the pertinent statement was dictum. One was an arbitration case, Lodge No. 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc., 257 F.2d 467 (5th Cir. 1958). The others were Local 4264, United Steelworkers v. New Park Mining Co., 273 F.2d 352, 356 (10th Cir. 1959) (dictum); Local 598, Plumbers Union v. Dillion, 255 F.2d 820, 823 (9th Cir. 1958) (before Garmon); Independent Petroleum Workers v. Esso Standard Oil Co., 235 F.2d 401, 405 (3d Cir. 1956) (before Garmon) (dictum); Local 181, Int'l Union of Operating Eng'rs v. Dahlem Constr. Co., 193 F.2d 470, 473-74 (6th Cir. 1951) (before Garmon) (dictum); Reed v. Fawick Airflex Co., 86 F. Supp. 822 (N.D. Ohio 1949) (before Garmon). See Annot., 99 L. Ed. 529, 544 (1955); Annot., 17 A.L.R.2d 614, 627 (1951).

49. 370 U.S. at 245 n.5. See note 22 supra and accompanying text.

exists, however. The very same day *Atkinson* was decided, the Court handed down another decision in the same controversy, *Sinclair Ref. Co. v. Atkinson.*[50] In that case the Court held that section 301 did *not* operate to repeal the statutory prohibition, in the Norris-La Guardia Act, against federal court issuance of injunctions "in any case involving or growing out of any labor dispute."[51] Yet *Atkinson* held that section 301 *did* operate to render the *Garmon* rule inapplicable in a 301-type suit. True, the Norris-La Guardia Act imposed an explicit prohibition on the courts; but *Garmon* should have equal force as a statutory prohibition, being a rule of law laid down by the Supreme Court interpreting congressional legislative policy and intent.[52] While that Court may certainly change its position in a proper case, no good reason is apparent for so limiting the *Garmon* rule; and even if there were an arguable rationale—such as favor towards judicial enforcement of collective bargaining agreements—would not consistency demand a different result in *Sinclair*?

In summary, in the case at bar congressional intent favors pre-emption under the *Garmon* rule, since the rationale of that case is fully applicable to this one, and there is no justification, given or apparent, for the Court's refusal to pre-empt—either according to the cases relied upon, or in any of the cases which provide exceptions to *Garmon*. It is difficult to discern any logic in the application of section 301, especially when the issue is *state* court jurisdiction. Even if section 301 were applicable, this case would still create an inconsistency in the law: the *Garmon* rule would still apply to tort cases, while the rule of the instant case would apply in contract cases. It is to be hoped that the Supreme Court will shortly resolve this inconsistency either by overruling the instant decision or by furnishing a valid reason for the tort-contract distinction. As the law now stands, the parties to a 301-type contract are free to evade completely the congressional policy of subjecting unfair labor practice suits to exclusive Board jurisdiction; for by inserting a clause in the contract prohibiting unfair labor practices, the parties to the contract can give themselves the option, in event of commission of an unfair labor practice, of proceeding before the Board or of bringing suit in the state or federal courts under section 301 as interpreted in the instant decision. While the Board might be happy to have its work load lightened,[53] the purpose of the unfair labor practice section, as construed by *Garmon,* would be frustrated.

Malpractice—General Release Executed in Favor of Original Tort-feasor Does Not Bar Action Against Negligent Physician.—Plaintiff was struck by a taxicab and suffered a broken leg. Eight months later, while still under treatment by the defendant physician, and in reliance upon his representation that

50. 370 U.S. 195 (1962).

51. Norris-La Guardia Act § 4, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958).

52. See note 10 supra and accompanying text.

53. In the instant case the Board filed a brief as amicus curiae, asserting that the purpose of the Labor-Management Relations Act would be fulfilled by upholding state court jurisdiction here.

the fracture had healed and that she was on her way to a good recovery, plaintiff executed a general release in favor of the cab driver in consideration of eight thousand dollars.[1] Defendant's malpractice, both before and after the release, resulted in the permanent shortening of plaintiff's leg.

Defendant moved for summary judgment on the ground that the release executed in favor of the original tort-feasor barred the maintenance of an action against him for aggravation of the original injury. The supreme court at special term denied the motion and the appellate division reversed.[2] In the four-to-three decision,[3] the New York Court of Appeals reversed the judgment of the appellate division and reinstated the special term decision. The court ruled that a general release executed in favor of the initial tort-feasor does not, ipso facto, preclude plaintiff from seeking damages for a supervening aggravation of the original injury by a subsequent wrongdoer. *Derby v. Prewitt*, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962).

The rule that prohibits an action against an independent tort-feasor who aggravated an injury where the plaintiff executed a general release in favor of the previous wrongdoer was first adopted by New York in the case of *Milks v. McIver*.[4] There Judge Lehman reasoned that when a wrongdoer, who is liable for any " 'natural and probable consequence of the original injury' "[5]—including any heightening due to a doctor's negligent treatment—obtains a general release, it necessarily absolves him of *all* liability resulting from his negligence. Since the element of liability for additional harm is theoretically[6] reflected in the amount of compensation given for the release, any further proceedings against the negligent physician would result in a double recovery.

To this rule, there are two generally approved exceptions both of which received recognition in *Milks*. First, the release is no bar if the physician causes a new or separate injury.[7] This is dictated by the principle that the original

1. The standard form of release involved in this case reads, in substantial part, as follows: "I, Elizabeth H. Derby . . . for and in consideration of the sum of Eight Thousand Dollars . . . remise, release and forever discharge the said Joseph J. Petraglia . . . from . . . all manner of action and actions, cause and causes of action . . . claims and demands whatsoever . . . which against said Joseph J. Petraglia I ever had, now have or which my heirs, executors, or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents." Record, p. 13, Derby v. Prewitt, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962).

2. Derby v. Prewitt, 15 App. Div. 2d 653 (1st Dep't 1962) (memorandum decision).

3. Chief Judge Desmond and Judges Burke and Foster concurred with Judge Fuld in the majority opinion; Judge Froessel dissented, with Judges Dye and Van Voorhis concurring.

4. 264 N.Y. 267, 190 N.E. 487 (1934).

5. Id. at 270, 190 N.E. at 488.

6. Given the general release and the fact that the aggravated injury is a proximate result of the original tortious act, this presumption is conclusive. See notes 10 & 11 infra and accompanying text.

7. The release is not a bar, for example, where a doctor operates on the right side of a

tort-feasor cannot be held responsible for unforeseeable damages. Second, the release does not proscribe subsequent suit when it contains an express reservation of rights of action against other prospective defendants.[8]

As the majority of the instant court observed,[9] the only factual distinction between *Milks* and the present case is the temporal relation between the execution of the release and the subsquent aggravation of the injury and its consequent effect upon the parties' intention. Both *Milks*[10] and other New York decisions[11] following it, impliedly adopted a *conclusive presumption* that in giving a general release the plaintiff acknowledges compensation for *all* his damages—both actual and prospective. The present court would reduce this presumption to a *rebuttable* one.[12]

Judge Fuld, speaking for the majority, recognized only two reasons which might justify a conclusive presumption. First, the plaintiff has only a single cause of action which must either be discharged or survive the release *in toto*. Second, public policy abhors a double recovery for the same wrongful act. "[I]t must be presumed that a settlement with one of the joint tort-feasors represents a *full satisfaction* of the entire claim and that any further recovery would involve double compensation . . . ."[13] Judge Fuld could see no relevance in either rationale as applied to this factual situation, which involved successive, rather than joint, tort-feasors,[14] in that "irrebuttable presumptions

patient who has a hernia on his left side. Milks v. McIver, 264 N.Y. at 270, 190 N.E. at 488. See Annot., 40 A.L.R.2d 1075, 1083 (1955).

8. Milks v. McIver, 264 N.Y. at 269, 190 N.E. at 488. "Where the release contains no reservation it operates to discharge all the joint tort feasors; but where the instrument expressly reserves the right to pursue the others it is not technically a release but a covenant not to sue, and they are not discharged." Gilbert v. Finch, 173 N.Y. 455, 466, 66 N.E. 133, 136 (1903). See also Armieri v. St. Joseph's Hosp., 159 Misc. 563, 565, 288 N.Y. Supp. 483, 486 (Sup. Ct. 1936).

9. 12 N.Y.2d at 107, 187 N.E.2d at 560, 236 N.Y.S.2d at 959.

10. "The fact that the plaintiffs now say that they did not intend to release McIver is immaterial; a release of the original wrongdoers releases him regardless of the intent of the plaintiffs." Milks v. McIver, 147 Misc. 297, 299, 263 N.Y. Supp. 595, 597 (Sup. Ct.), aff'd mem., 240 App. Div. 927, 267 N.Y. Supp. 979 (3d Dep't 1933), aff'd, 264 N.Y. 267, 190 N.E. 487 (1934).

11. See, e.g., Rapp v. Myers, 291 N.Y. 709, 52 N.E.2d 596 (1943) (memorandum decision); Von Blumenthal v. Cassola, 166 Misc. 744, 3 N.Y.S.2d 246 (Sup. Ct.), aff'd mem., 254 App. Div. 857, 6 N.Y.S.2d 342 (1st Dep't 1938).

12. "Irrebuttable presumptions have their place in the law but only where public policy demands that inquiry cease. . . . [T]he question for resolution, and it is to be decided as an issue of fact upon a trial, is whether the plaintiff's settlement with the taxicab driver did actually constitute satisfaction of all damages caused by his wrong or was intended as such." Derby v. Prewitt, 12 N.Y.2d at 106, 187 N.E.2d at 559-60, 236 N.Y.S.2d at 958.

13. Id. at 105, 187 N.E.2d at 559, 236 N.Y.S.2d at 957. (Emphasis added.) The elementary principle that there can be but one satisfaction for a single injury, coupled with the doctrine that a wrongdoer is liable for all the proximate results of his tortious act, have led the courts to assume that a releasor would recover twice if allowed to maintain an action against the negligent physician. Milks v. McIver, 264 N.Y. at 270, 190 N.E. at 488; Parchefsky v. Kroll Bros., 267 N.Y. 410, 413, 196 N.E. 308, 310 (1935).

14. "Their wrongs were independent and successive, rather than joint, and, this being

have their place in the law, but only where public policy demands that inquiry cease."[15]

Using intention as the determinative test of a succeeding tort-feasor's liability, the instant court concluded that the *Milks* court probably[16] found, as a matter of fact,[17] that the parties *intended* the consideration for the release to reflect total compensation. This distinction was predicated on the fact that the malpractice in *Milks* occurred before the execution of the release, and, therefore, was necessarily within the contemplation of the plaintiff.[18] Thus, the present majority saw the sequence of events in *Milks*—rather than the sole fact of the release—as the decisive factor which had induced that court to presume an intention to surrender all later *known*[19] claims arising from the original wrong. Conversely, the present case involved malpractice occurring *after*, as well as before, the settlement. Hence, there existed the greater probability that the subsequent tort was not actually considered by the parties.[20] In any event, to the extent that *Milks* represented any implication of an

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so, the plaintiff had not one but two separate and distinct causes of action, one against the cab driver for the negligent operation of his vehicle and the other against the doctor for his alleged malpractice in treating the fracture which the plaintiff sustained in the automobile accident." Derby v. Prewitt, 12 N.Y.2d at 105, 187 N.E.2d at 559, 236 N.Y.S.2d at 958.

15. Id. at 106, 187 N.E.2d at 559, 236 N.Y.S.2d at 958.

16. As noted previously, the court considered the release determinative of the parties' intent and did not expressly discuss the actual negotiations between the parties. See notes 10 & 11 supra and accompanying text.

17. Of course, appellate courts do not usually decide questions of fact; but the point being made by the instant court is that Milks was decided upon a background of facts in which an actual intent to provide total compensation was evident.

18. "It might reasonably be inferred that a release . . . executed prior to the malpractice . . . would not constitute a bar to the subsequent action, since it could be argued that the subsequent tort was not within the contemplation of the parties to the release." Annot., 40 A.L.R.2d 1075, 1091 (1955). On the other hand, malpractice occurring prior to the execution of the release may justify a presumption that plaintiff knew of the malpractice when he executed the release and consequently that the amount of settlement for which plaintiff bargained reflected the injuries flowing from the malpractice as well as the original negligent act.

19. See note 18 supra.

20. The instant court also suggests, but does not discuss, the importance of the fact that it was the doctor's negligent misstatements which led the plaintiff to execute the release under the belief that her injuries were slight. 12 N.Y.2d at 103 n.2, 187 N.E.2d at 558 n.2, 236 N.Y.S.2d at 956 n.2. At the very least this is further evidence that the parties did not bargain with the possibility of negligent aggravation of the injury in mind. But this fact might also be the basis of an entirely separate cause of action for verbal negligence, under the theory of Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922). If so, the release could not be a bar to the action, because of the lack of causal relation between the original negligent act and the parol negligence alleged against the physician. In this connection see Kropp v. De Angelis, 138 N.Y.S.2d 188 (Sup. Ct. 1955) in which this theory is suggested.

irrebuttable presumption[21] of full satisfaction through release so as to bar an action against a subsequent wrongdoer, that case has been effectively overruled. Even if all the alleged acts of malpractice were prior to the release, most commentators insist that "a plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has *intentionally* done so, or unless he has received such full compensation that he is no longer entitled to maintain it."[22]

The majority's unqualified rejection of the absolute rule long considered[23] to have had its genesis in *Milks* seems eminently sound. The *Milks* presumption ignores the fact that ordinarily the extrajudicial settlement represents at best a *compromise* between plaintiff's conflicting desires to be made whole and to avoid the precarious and arduous alternative of litigation. A more realistic view would require consideration of the actual nature of the prior settlement in order "to determine on a purely factual basis whether it was intended as full satisfaction or merely as the 'best obtainable compromise'. . . ."[24] Moreover, it has been suggested that if amounts paid in settlement to the injured party are "credited" by the jury against any damages which the plaintiff seeks to recover from the supervening wrongdoer, the possibility of double recovery would be obviated.[25] This position appears to find support in Section 235 of the New York Debtor and Creditor Law,[26] which applies to tort as well as contract claims.[27] However, the courts have hesitated to apply this reasoning to personal injury actions, because of the difficulty in ascertaining with mathematical certainty the proportionate share of damage allocable to each tort-feasor.[28]

21. See notes 10 & 11 supra and accompanying text.

22. Prosser, Torts § 46, at 245 (2d ed. 1955). (Emphasis added.) See also 1 Harper & James, Torts § 10.1, at 712 (1956); 2 Williston, Contracts § 338A, at 722 (3d ed. 1959); Havighurst, The Effect of a Settlement With One Co-Obligor Upon the Obligations of the Others, 45 Cornell L.Q. 1, 23 (1959).

23. See, e.g., Parchefsky v. Kroll Bros., 267 N.Y. 410, 196 N.E. 308 (1935); Armieri v. St. Joseph's Hosp., 159 Misc. 563, 288 N.Y. Supp. 483 (Sup. Ct. 1936); see also note 11 supra.

24. Havighurst, op. cit. supra note 22, at 14.

25. Id. at 4.

26. "(a) If an obligee releasing . . . an obligor without express reservation of rights against a co-obligor, then knows or has reason to know that the obligor released . . . did not pay so much of the claim as he was bound by his . . . relation with that co-obligor to pay, the obligee's claim against that co-obligor shall be satisfied to the amount which the obligee knew or had reason to know that the released . . . obligor was bound to such co-obligor to pay. (b) If an obligee so releasing . . . an obligor has not then such knowledge or reason to know, the obligee's claim against the co-obligor shall be satisfied to the extent of the lesser of two amounts, namely (1) the amount of the fractional share of the obligor released . . . or (2) the amount that such obligor was bound by his . . . relation with the co-obligor to pay." N.Y. Debt. & Cred. Law § 235.

27. "In this article, unless otherwise expressly stated, 'obligation,' includes a liability in tort; 'obligee' includes a person having a right based on a tort. 'Several obligors' means obligors severally bound for the same performance." N.Y. Debt. & Cred. Law § 231.

28. In an action involving aggravated injury to property, it was said that "where the

Judge Froessel, in dissent, viewed a release as no more than an ordinary contract, the construction of which is determined by the parties' manifest intent. If the plaintiff intended to release only the cab driver, she could easily have inserted an express reservation therein. "To allow plaintiff to go to trial here to prove her 'intention' . . . would be a dangerous practice . . . and releases in such cases as this would not be worth the paper they were written on."[29] However, this is not a case in which the plaintiff is seeking further relief from a party to the contract, or a party who gave consideration therefor; rather, damages are sought from a stranger to the contract, whose liability, if any, rests in tort, not contract, law. Furthermore, even as between releasor and releasee, it has been held that, where mutual mistake exists as to the nature of plaintiff's injuries, the original tort-feasor may be subject to an action for further damages.[30] This conclusion would seem to apply with greater force against a subsequent tort-feasor who neither participated in the negotiations nor contributed to the settlement.

Finally, the majority seems to question even the validity of the doctrine which prohibits an action against one *joint* tort-feasor where the plaintiff has executed a prior release to another. In reducing the issue unequivocally to one of intention[31] (which, as a practical matter, is almost always a question of fact), the court rejected any irrebuttable presumption unless "public policy demands that inquiry cease."[32] The majority suggested that such examination of intent should not be foreclosed *even in the case of joint tort-feasors*[33]

damages arising out of tort are unliquidated . . . sections 231-235 of the Debtor and Creditor Law are inapplicable." Rector v. City of New York, 261 App. Div. 614, 617, 26 N.Y.S.2d 762, 764 (2d Dep't 1941). But in a personal injury action the court stated that "we are of opinion that the rule respecting the release of joint tort-feasors by a compromise with one has been, to a large extent, abrogated by statute." Bessong v. Muhleman, 254 App. Div. 738, 3 N.Y.S.2d 992, 993 (2d Dep't 1938) (memorandum decision). Thus the New York courts are in doubt concerning the applicability of the statute.

29. 12 N.Y.2d at 108, 187 N.E.2d at 561, 236 N.Y.S.2d at 960 (dissenting opinion).

30. Farrington v. Harlem Savings Bank, 280 N.Y. 1, 19 N.E.2d 657 (1939) (scalp wound thought to be slight at time of release); Kropp v. Diamond K Markets, Inc., 207 Misc. 1030, 141 N.Y.S.2d 542 (Sup. Ct. 1955) ("slight" injury later discovered to be traumatic arthritis). See also Viskovich v. Walsh-Fuller-Slattery, 16 App. Div. 2d 67, 225 N.Y.S.2d 100 (1st Dep't 1962), in which the court stated that "something more tangible is required than the mere assertion by one party of the claim of mutual mistake. The basic question is what was the intention of the parties at the time of the execution and delivery of the instrument." Id. at 69, 225 N.Y.S.2d at 103. For an analysis of the elements necessary for rescission of the release on the ground of mutual mistake, see Keefe, Validity of Releases Executed Under Mistake of Fact, 14 Fordham L. Rev. 135 (1945).

31. "The release, however, may very well be taken as a prima facie acknowledgment of satisfaction, and the burden of going forward with evidence placed upon the plaintiff to prove that it is not." Prosser, Torts § 46, at 246 (2d ed. 1955). This has been approved by the instant court. 12 N.Y.2d at 106, 187 N.E.2d at 560, 236 N.Y.S.2d at 958.

32. 12 N.Y.2d at 106, 187 N.E.2d at 559, 236 N.Y.S.2d at 958.

33. Cf. the language of the instant court in discussing the general rule: "[T]he rule

by "an artificial rule of law." It is submitted that the rule is no less artificial when applied to joint tort-feasors. Its final demise is sure to follow.[34]

Statute of Limitations—Cause of Action for Malpractice Accrues at Termination of Treatment Under Doctrine of "Continuous Treatment."—Plaintiff, an infant, was admitted to a city hospital in 1956 for treatment of second and third degree burns. He went into a state of shock which, due to the defendant's negligence, resulted in a condition of anoxia and subsequent brain injury which required him to remain at the hospital for physiotherapy and rehabilitation until the time of his discharge on February 14, 1958. A notice of claim was served upon the defendant city on April 10, 1958 pursuant to Section 50-e of the General Municipal Law,[1] which requires such notice to be served within ninety days of the accrual of the cause of action. The supreme court denied defendant's motion for a directed verdict made on the ground that the notice of claim was not timely served.[2] The appellate division reversed, holding that the ninety day period was measured from the date of the last malpractice and not the date when treatment ceased.[3] In a five-to-two decision, the New York Court of Appeals reversed, concluding that if the "course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint,"[4] the cause of action accrues only at the end of the treatment. *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).

In malpractice actions,[5] as in actions for personal injuries based on negli-

has survived to this day despite strong attacks upon it by modern commentators. . . . That the release of one tort-feasor must necessarily release all other tort-feasors who are jointly liable for the injury can hardly be regarded as an inexorable principle when its consequences may be avoided by the simple expedient of a reservation in the release of rights against the others." Id. at 104-05, 187 N.E.2d at 558-59, 236 N.Y.S.2d at 957.

34. Judge Froessel, in his dissent, stated that any changes in the Milks rule should be made by the legislature, not the courts. It is difficult to see why this should be so, since the rule had its origin in case law. Furthermore, it may be argued that the legislature has already acted in the Debtor and Creditor Law, and that the courts need only apply its intention to malpractice actions. See notes 27 & 28 supra and accompanying text.

1. Notice of claim is required as a condition precedent to commencing an action in tort against a New York City hospital. Administrative Code of the City of New York § 349a-1.0(c).

2. Borgia v. City of New York, 216 N.Y.S.2d 897 (Sup. Ct. 1961).

3. Borgia v. City of New York, 15 App. Div. 2d 557, 223 N.Y.S.2d 17 (2d Dep't 1961).

4. 12 N.Y.2d 151, 155, 187 N.E.2d 777, 778, 237 N.Y.S.2d 319, 321 (1962). The court expressly stated that its holding is applicable to the true statute of limitations, incorrectly referring to N.Y. Civ. Prac. Act §§ 49(6), 50(2). See N.Y. Civ. Prac. Act § 50(1) which provides a two-year limitation for malpractice actions.

5. Budoff v. Kessler, 284 App. Div. 1049, 135 N.Y.S.2d 717 (2d Dep't 1954); Ranalli v. Breed, 251 App. Div. 750, 297 N.Y. Supp. 688 (2d Dep't 1937) (memorandum decision), aff'd, 277 N.Y. 630, 14 N.E.2d 195 (1938); Conklin v. Draper, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't), aff'd mem., 254 N.Y. 620, 173 N.E. 892 (1930).

gence, New York traditionally has followed the settled principle that the statute of limitations commences to run upon the occurrence of the injury, however slight,[6] which results from the breach of duty. The fact that the plaintiff has no knowledge of his damage has never been considered relevant for such purpose.[7] To mitigate the harshness of this rule in malpractice actions—where most often, a patient could not be expected to discover his doctor's tortious conduct during the course of treatment—New York courts, in a number of cases, have adopted the "continuous treatment" doctrine.

In the leading case of *Sly v. Van Lengen*,[8] the supreme court found continuing malpractice in a physician's failure to remove from plaintiff's abdomen a sponge which he had left there during an operation. Although plaintiff did not commence her action until more than two years after the initial act, the court held that the statute of limitations did not start to run until the termination of the professional relationship. It found that the "defendant negligently allowed the foreign substance to remain in plaintiff's body . . . while he continued to treat her."[9] Consequently, the very treatment was a continuing breach of duty on the part of the defendant, and where the tort persists, so also does the right of action.[10]

The continuing tort rationale has also been applied where an improper *course of treatment* is based upon an original negligent diagnosis. The courts view the initial duty of correct diagnosis as persisting throughout the entire treatment, since upon such rests the propriety of any future action.[11]

Both "improper diagnosis" and foreign substance[12] cases, as exemplified in *Sly*, represent no departure in New York from the general rule that the duration of a cause of action is coextensive with the tortious conduct. In these situations it is readily apparent that the whole transaction was inherently negligent.

In *Hammer v. Rosen*,[13] however, the New York Court of Appeals, in dictum, recognized another area of continuing malpractice. There, the defendant psychiatrist had beaten plaintiff four times in the course of treating her for schizophrenia. The court found that these acts so tainted the course of treatment as to render it improper. It reasoned that where separate and individual

6. Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936).

7. Gross v. Wise, 16 App. Div. 2d 682, 227 N.Y.S.2d 523 (2d Dep't 1962) (memorandum decision); Golia v. Health Ins. Plan, 6 App. Div. 2d 884, 177 N.Y.S.2d 550 (2d Dep't 1958) (memorandum decision), aff'd mem., 7 N.Y.2d 931, 165 N.E.2d 578, 197 N.Y.S.2d 735 (1960); Conklin v. Draper, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't), aff'd mem., 254 N.Y. 620, 173 N.E. 892 (1930).

8. 120 Misc. 420, 198 N.Y. Supp. 608 (Sup. Ct. 1923).

9. Id. at 422, 198 N.Y. Supp. at 610.

10. Ibid. See also Hotelling v. Walther, 169 Ore. 559, 130 P.2d 944 (1942).

11. See Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941); Ferraro v. New York Univ. Bellevue Medical Center, 13 Misc. 2d 131, 177 N.Y.S.2d 788 (Sup. Ct. 1958).

12. See Hotelling v. Walther, 169 Ore. 559, 130 P.2d 944 (1942); Adams v. Berlinghof, 14 App. Div. 2d 654, 218 N.Y.S.2d 917 (3d Dep't 1961) (memorandum decision).

13. 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960).

acts of negligence "were part and parcel of a continuing course of . . . treatment,"[14] the entire transaction would be viewed as negligent. Thus the *Hammer* decision forecasted a substantial extension of the doctrine originally set out in *Sly*. The instant court, however, has gone far beyond the minimal requirements of *Hammer*. In *Hammer*, the negligence was viewed as continuing and persisting throughout the entire course of treatment. The present court in placing the time of the accrual of the cause of action at the termination of the treatment, found no such justification for its holding.[15] There were no repeated acts of negligence—as there were in *Hammer*—which might render the entire treatment essentially negligent. Clearly, the instant holding does not depend on a finding that the course of treatment in its purpose or direction was negligent. Nor does it intimate that a single act of negligence would render the entire treatment tortious. Thus, the postponement of the "accrual" date does not rest on substantive theory as was suggested in *Hammer*.

Nevertheless, Chief Judge Desmond, writing for the majority, found that the present holding was "no . . . sudden break with precedent."[16] Such a conclusion would appear questionable since it goes far beyond New York's most liberal expression of the "continuous treatment" doctrine in *Hammer*. In his dissenting opinion, Judge Froessel reasoned that the "continuous treatment" doctrine had always been limited to cases in which there existed "some plausible theory for concluding that the injury complained of was the result of a continued course of treatment."[17] In the instant case, the course of treatment was not negligent—plaintiff's theory of recovery was based upon one negligent omission which was the immediate cause of his injury. The subsequent treatment could not have been the cause of plaintiff's injury for the very reason that it was subsequent. It would appear that the dissent rests upon firmer ground than does the majority opinion. The "continuing treatment," as the majority reasoned, although related to the original condition of the plaintiff, was not causally related to the injury flowing from the single negligent act.

In requiring that the continuing treatment be merely uninterrupted and related to the initial injury, New York has far exceeded every other jurisdiction which has applied this doctrine.[18] The instant holding should not be viewed as

14. Id. at 380, 165 N.E.2d at 757, 198 N.Y.S.2d at 67.

15. The court in its statement of the "continuous treatment" rule justified it as being "the fairer one." 12 N.Y.2d at 156, 187 N.E.2d at 779, 237 N.Y.S.2d at 321. Although the court could have based its decision on the rationale that negligence which is attributable to any segment of the treatment is predicated of the whole course, they chose not to do so. Insofar as an action may be commenced where there has been neither a specified negligent act nor an improper course of treatment within the statutory period, this holding departs from the "continuous treatment" doctrine as espoused by previous cases. See Nervick v. Fine, 195 Misc. 464, 87 N.Y.S.2d 534 (Sup. Ct. 1949) and cases cited in note 18 infra.

16. 12 N.Y.2d at 156, 187 N.E.2d at 778, 237 N.Y.S.2d at 321.

17. Id. at 160, 187 N.E.2d at 781, 237 N.Y.S.2d at 324.

18. See Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936); De Haan v. Winter, 258 Mich. 293, 241 N.W. 923 (1932); Schanil v. Branton, 181 Minn. 381, 232 N.W. 708 (1930); Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943); Williams v. Elias,

changing substantive negligence principles however. The court used the term "accrual" solely within the framework of the limitations problem.[19] The majority surely did not intend to postpone a cause of action as a matter of substantive law until termination of the related course of treatment. Certainly, a malpractice victim may bring an action prior to the termination of his relationship with his physician. "Accrual" at the cessation of continuous treatment is little more than a judicial toll.

The present decision represents a practical and sane response to the many criticisms leveled at the law of limitations in malpractice actions.[20] The diversity of judicial theory[21] used to circumvent the harshness of the statute of limitations points up the infirmities of existing legislation. The court effected a judicial toll in order to permit continued "corrective efforts [uninterrupted] by [a patient's] serving a summons on the physician. . . ."[22] More significantly, however, the decision corrects, at least in part, the primary injustice in malpractice cases, *i.e.*, the barring of a patient's claim before he could have reasonably discovered its existence. In its unrestricted espousal of the "continuous treatment" doctrine, however, the court has also raised the possibility of unintended and undesired results. Rather than face extended liability, the negligent physician will find it of greater advantage to discontinue corrective treatment in the hope that the statute will run before discovery of the malpractice. Furthermore, it does not alleviate the plight of the ordinary victim who is not within the "continuous treatment" docrine and yet, because of excusable ignorance of his injury, has his remedy barred.

Certainly, the law in the instant case represents a beneficial change. It also demonstrates the need for legislation to protect adequately the interests of both physician and patient. The mere extension of the limitation period in the New York Civil Practice Law and Rules[23] hardly meets the natural disability of

140 Neb. 656, 1 N.W.2d 121 (1941); Pump v. Fox, 113 Ohio App. 150, 177 N.E.2d 520 (1961); Hotelling v. Walther, 169 Ore. 559, 130 P.2d 944 (1942); Peteler v. Robinson, 81 Utah 535, 17 P.2d 244 (1932).

19. In approving the "'end of continuous treatment' formula" the court was careful in confining this doctrine "for computing time limitations." 12 N.Y.2d at 156, 187 N.E.2d at 778, 237 N.Y.S.2d at 321.

20. See Lillich, The Malpractice Statute of Limitations in New York's New Civil Practice Law and Rules, 14 Syracuse L. Rev. 42 (1962); Report on Amendment to Statute of Limitations Relating to Malpractice Suits, 13 Record of N.Y.C.B.A. 465 (1958). See also Flynn v. New York Hosp., 33 Misc. 2d 393, 396, 224 N.Y.S.2d 881, 883 (Sup. Ct. 1962); Dorfman v. Schoenfeld, 26 Misc. 2d 37, 38-39, 203 N.Y.S.2d 955, 957 (Sup. Ct. 1960).

21. See, e.g., United States v. Reid, 251 F.2d 691 (5th Cir. 1958) (distinction between injury and negligence); Proctor v. Schomberg, 63 So. 2d 68 (Fla. 1953) (fraudulent concealment); Sly v. Van Lengen, 120 Misc. 420, 198 N.Y. Supp. 603 (Sup. Ct. 1923) (foreign substance—continuous treatment); De Long v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952) (termination of professional relationship); Allison v. Blewett, 348 S.W.2d 182 (Tex. Civ. App. 1961) (discovery rule).

22. 12 N.Y.2d at 156, 187 N.E.2d at 779, 237 N.Y.S.2d at 321.

23. N.Y. Civ. Prac. Law & R. § 214(6) (eff. Sept. 1, 1963) provides that an "action to recover damages for malpractice" must be commenced within three years.

ignorance present in almost every physician-patient relationship. It is hoped that the legislature will act both to recognize this inherent disability and to restrict the physician's liability within reasonable limits.[24]

Section 203(a) provides that "the time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed."

24. Alabama and Connecticut have adopted a "discovery accrual provision" while limiting the extended liability of physicians. The Alabama Code provides that "all actions against physicians . . . for malpractice . . . must be commenced within two years next after the act or omission or failure giving rise to the cause of action, and not afterwards. Provided that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery . . . provided further that in no event may the action be commenced more than six years after such act." Ala. Code tit. 7, § 25(1) (1960). The Connecticut statute is substantially the same. Conn. Gen. Stat. Rev. § 52-584 (1960). The New York Law Revision Commission proposed a bill along similar lines to the Alabama statute which preserves the present two-year limitation on malpractice actions and also provides that accrual is delayed until discovery by the injured party; but in no event would the period in which a patient may sue be extended after six years from the alleged malpractice. N.Y. S. Int. No. 1780, N.Y. Ass. Int. No. 1939 (1962). The legislature failed to enact this bill due in part to the "noticeable lack of enthusiasm . . . by the medical associations and the insurance companies." Lillich, The Malpractice Statute of Limitations in New York's New Civil Practice Law and Rules, 14 Syracuse L. Rev. 42, 46 (1962). The instant decision impliedly demonstrates the merits of the Commission's proposed bill.