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Thomas L. Doetsch

Denise A. Bretting

Lee Ann Dauphinot

James McKellar

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Case Notes

OVERBOOKING—FRAUDULENT MISREPRESENTATION—In a Common-Law Action for Misrepresentation, the CAB Does Not Have Primary Jurisdiction To Determine Whether an Air Carrier's Practice of Intentional Overbooking Is a Deceptive Trade Practice. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S. Ct. 1978 (1976).

Ralph Nader, holding a ticket for a reserved seat, was denied boarding on a flight that Allegheny Airlines had intentionally overbooked. The plane was filled to capacity by the time Nader arrived at the check-in area. The resulting delay forced him to miss his appearance at a fund raising rally in behalf of the Connecticut Citizens Action Group (CCAG), which allegedly caused the loss of $100,000 in contributions. Nader and CCAG brought an action claiming that the incident gave rise to a private damage remedy for unjust discrimination under section 404(b) of the Federal Aviation Act of 1958[1] and that Allegheny's failure to disclose the risk of being denied a seat constituted fraudulent misrepresentation.

The district court's decision in favor of Nader on the first count[2] was reversed by the United States Court of Appeals for the District of Columbia Circuit which found[3] that the facts did not support the district court's conclusion that Allegheny had violated its own priority rules. On the second count the district court allowed both plaintiffs to recover,[4] finding that Allegheny knowingly and inten-

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[1] 72 Stat. 760, *as amended*, 49 U.S.C. § 1374(b) (1970), formerly Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 993. Discussion of other cases involving the same cause of action may be found in Note, *Discriminatory Bumping*, 40 J. AIR L. & COM. 533 (1974).

[2] 365 F. Supp. 128, 132 (D.D.C. 1973).

[3] 512 F.2d 527, 540 (D.C. Cir. 1975). Each air carrier is required to establish and enforce nondiscriminatory priority rules to determine who will be denied boarding when too many passengers show up for a flight. 14 C.F.R. § 250.3 (1976). If a bumped passenger can show that the air carrier violated its own priority rules by not seating him, a *prima facie* case is established. Archibald v. Pan Am. World Airways, Inc., 460 F.2d 14 (9th Cir. 1972).

[4] CCAG could not prove its losses with enough specificity to permit recovery of lost donations but it was awarded $25,000 punitive damages. 365 F. Supp. at

tionally misrepresented that Nader had a guaranteed reservation for a seat and that Nader and CCAG relied to their detriment on the misrepresentation.[5] On appeal, the circuit court held that these findings were not supported by the evidence[6] and went on to consider whether the existence of the Civil Aeronautics Board's (CAB) power under section 411 of the Federal Aviation Act[7] to investigate and determine whether an air carrier is engaged in unfair or deceptive practices precludes a common-law tort action for fraudulent misrepresentation.[8] The circuit court held that the CAB has primary jurisdiction to determine whether the practice of intentionally overbooking flights is a deceptive trade practice within the meaning of section 411. According to the circuit court, if the CAB were to find that section 411 was not violated, then a common-law action for misrepresentation would fail as a matter of law.[9] The Supreme Court granted certiorari to review this ruling.[10] *Held, reversed*: In a common-law action for misrepresentation, the CAB does not have primary jurisdiction to determine whether an air carrier's practice of intentional overbooking is a deceptive trade practice. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S. Ct. 1978 (1976).

In order to evaluate the Court's decision, an explanation of the doctrine of primary jurisdiction is needed. Primary jurisdiction had its inception early in the twentieth century in the landmark case of *Texas & Pacific Railway v. Abilene Cotton Oil Co.*[11] In that case a cotton oil shipper sued its carrier in a state court to recover charges paid in excess of what was just and reasonable. The Interstate Commerce Act permitted a person claiming to be damaged by a common carrier either to make a complaint to the Commission, which could award reparation to a shipper, or bring suit for the recovery of damages in any district or circuit court of the

134. CCAG's recovery was allowed because the trial judge found that it was foreseeable that members of the public would rely on Allegheny's misrepresentations. *Id.* at 132.

[5] 365 F. Supp. at 132.

[6] 512 F.2d at 542.

[7] 49 U.S.C. § 1381 (1970).

[8] 512 F.2d at 542.

[9] *Id.* at 544.

[10] 96 S. Ct. 355 (1975).

[11] 204 U.S. 426 (1907).

United States of competent jurisdiction.[12] The act also had a saving clause which provided that nothing in it abridged or altered the remedies existing at common law or by statute, rather the act's provisions were in addition to such remedies.[13] It should be emphasized that at the time the *Abilene* case arose the common-law right of a shipper to recover, in the courts, damages for the exaction of unreasonable rates was unquestioned,[14] and this right was not abrogated by any provision of that statute, but was, on the contrary, expressly preserved. The Supreme Court, in the face of the express statutory provision of the Interstate Commerce Act, denied the existence of a remedy in the courts in the absence of a prior determination of unreasonableness of the rate by the Interstate Commerce Commission.[15]

The rationale that the Court used was that the saving clause of the act could not be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the other provisions of the statute.[16] The Interstate Commerce Act, reasoned the Court, was intended to abolish preferences and discriminations by establishing a uniform published rate fixed in the mode provided by statute.[17] If, without prior action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, a shipper might obtain relief upon the basis that the established rate was unreasonable. In this manner, he would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued in force. It would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible.

Since the birth of primary jurisdiction, many courts have struggled with its application and implications. It is now recognized that the basic reason behind the doctrine is the need for orderly and sensible coordination of the work of agencies and of the

[12] 24 Stat. 382 (1887).
[13] *Id.* at 387.
[14] 204 U.S. at 436.
[15] *Id.* at 448.
[16] *Id.* at 446.
[17] *Id.* at 439.

courts.[18] Its function is to guide a court in determining whether it should refrain from exercising its jurisdiction until after an administrative agency has resolved some question or aspect of some question arising in the proceeding before the court.[19] Exactly when the judicial process should be suspended pending referral of issues to an administrative body for its views is a point which needs to be explored further.

The Supreme Court in *Abilene* based its decision on the need for uniformity. This principle was refined in *Great Northern Railway v. Merchants Elevator Co.*[20] In this case a shipper billed corn from Iowa and Nebraska to a point in Minnesota where it was inspected and then reconsigned to its ultimate destination. Under the carrier's tariff there was a five dollar charge per car for reconsignment but the charge did not apply to grain "held . . . for inspection and disposition orders incident thereto at billed destination." The dispute centered on whether an order for reconsignment after inspection was a "disposition order incident" to consignment. The Supreme Court held, in an opinion by Mr. Justice Brandeis, that *Abilene* did not apply because the construction of a writing when "the words of a written instrument are used in their ordinary meaning" presented solely a question of law.[21] In the case at hand, the question being solely of law, uniformity could be secured by action of the Supreme Court.[22]

Uniformity, however, was not the only basis for the Court's decision. Mr. Justice Brandeis also stressed the technical expertise possessed by administrative agencies in the industries they regulate.[23] The specialized knowledge of administrative agencies has been emphasized in later decisions as a factor to be considered when primary jurisdiction is an issue.[24] In the instant case, however, a

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[18] 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01 (1958).

[19] *Id.*

[20] 259 U.S. 285 (1922).

[21] *Id.* at 291.

[22] *Id.* at 290.

[23] *Id.* at 291.

[24] Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by

grant of primary jurisdiction to the administrative agency would still be inappropriate since there was no fact in controversy to which the agency's expertise could be applied.[25]

Primary jurisdiction has even been invoked in a case calling only for a legal conclusion but where an intelligent determination required an acquaintance with many complex and technical facts concerning the regulated industry.[26] It should be noted that administrative expertise does not require a transfer of power from courts to agencies, it is just one element the court should consider.[27]

A key issue in the *Nader* decision is the effect of primary jurisdiction on a litigant's common-law remedies. Most regulatory statutes, like the Federal Aviation Act, contain a saving clause expressly preserving all common-law and statutory remedies that are in existence at the time the statute is enacted.[28] Since the *Abilene* decision, however, it has been recognized that such clauses cannot preserve common-law rights that are absolutely repugnant to the statutory scheme.[29] In *T.I.M.E., Inc. v. United States*,[30] the government brought an action to recover damages resulting from an alleged unreasonably high rate charged by a carrier. The government claimed that although the doctrine of primary jurisdiction required the question of reasonableness to be decided by the Interstate Commerce Commission, the common-law right to recover exorbitant rates

> specialization, by insight gained through experience and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574-75 (1952); *see* United States v. Radio Corp. of America, 358 U.S. 334 (1959).

[25] 259 U.S. 285, 294 (1922).

[26] United States v. Western Pac. R.R., 352 U.S. 59 (1956); *see* World Airways, Inc. v. Northeast Airlines, Inc., 349 F.2d 1007 (1st Cir. 1965), *cert. denied*, 382 U.S. 984 (1966).

[27] 3 K. DAVIS, *supra* note 18.

[28] Section 1106 of the Federal Aviation Act, 49 U.S.C. § 1506 (1970), provides, "Nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

[29] In the *Abilene* decision the Court held that "a statute will not be construed as taking away a common law right existing at the date of its enactment, unless . . . it be found that the preexisting right is so repugnant to the statute that the survival of such right would . . . render its provisions nugatory." 204 U.S. at 437. The saving clause of the Federal Aviation Act has been held to have "engrafted unto it . . . the gloss of Abilene." Danna v. Air Fr., 334 F. Supp. 52, 59 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 407 (2d Cir. 1972).

[30] 359 U.S. 464 (1959).

could be vindicated in a court action by referring the issue of unreasonableness to the Commission. This common-law right was claimed to be preserved under the saving clause of the Motor Carrier Act,[31] the regulatory statute involved. The Supreme Court noted that the Motor Carrier Act, unlike Parts I and III of the Interstate Commerce Act,[32] did not give a shipper a right of action against carriers for damages incurred by carrier violations of the act. The Court said that in light of *Abilene*, it would be anomalous to hold that the only effect of such an omission would be to require a shipper to bring two actions instead of one. Congress could not have wished to omit a direct reparations procedure and yet leave open the circuitous route of filing an action in a court of competent jurisdiction and then immediately proceeding to the Commission to litigate what would be the sole controverted issue in the suit.[33]

The *T.I.M.E.* opinion strongly suggested that the existence of primary jurisdiction alone destroyed all court remedies.[34] Such an idea was laid to rest three years later in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*[35] In this case the Supreme Court made it clear that the survival of a judicial remedy under the saving clause of the Motor Carrier Act did not depend on the presence or absence of primary jurisdiction in the Commission.[36] Using the rationale of *Abilene* the Court said that survival depends on the effect of the exercise of the remedy on the statutory scheme of the regulation.[37] This decision seems preferable to the *T.I.M.E.* decision since there is nothing in the purposes served by primary jurisdiction which excludes the "circuitous route" procedure where there is a common-law remedy but no administrative remedy.[38] The doctrine of primary jurisdiction only governs who will *initially* decide an issue, not who

[31] Motor Carrier Act § 216(j), 49 U.S.C. § 316(j) (1970).

[32] Relating respectively to rail and water carriers.

[33] 359 U.S. at 474.

[34] Although such a holding would seem to sanction injustice especially where the administrative agency has no power to award damages, it has been noted that the extra amount paid because of an unreasonably high rate is usually passed along to some undiscoverable and unreimbursable consumer. Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws*, 102 U. PA. L. REV. 577, 589 (1954).

[35] 371 U.S. 84 (1962).

[36] *Id.* at 89.

[37] *Id.*

[38] Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1059 (1964).

will finally decide it.[39] It is not surprising to find that in a case involving the Civil Aeronautics Act of 1938,[40] the court read the saving clause together with the absence of power in the agency to award damages and concluded that the "circuitous route" was the correct procedure to follow.[41]

The cases now seem to form a pattern indicating when preliminary resort must be made to an administrative agency before certain pre-existing common-law or statutory rights can be asserted in the courts. Long ago the Supreme Court held that a court may not enjoin a Sherman Act violation which could be rendered legal by administrative approval.[42] The exercise of power of approval would be hampered if a court could issue an injunction prohibiting the activity in question. Such a conflict does not exist when the activity or practice is not subject to administrative approval or immunization and the remedy of damages is sought.[43]

This rule fully applies to the aviation industry. In *Pan American World Airways, Inc. v. United States*[44] the Supreme Court held that if an alleged illegal activity has been immunized from the antitrust laws by the CAB,[45] then no court action will lie for the violation of such laws. Also, to the extent that the activity is subject to a cease and desist order under section 411 of the Act,[46] an action for *injunctive* relief must first be brought before the CAB. Thus in *International Travel Arrangers v. Western Air Lines, Inc.*[47] where plaintiff sought *damages* for antitrust violations, which could *not* be immunized by the CAB, it was held that plaintiff could proceed in

[39] 3 K. DAVIS, *supra* note 18.

[40] Ch. 610, 52 Stat. 973.

[41] S.S.W., Inc. v. Air Transp. Ass'n of America, 191 F.2d 658, 664 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952).

[42] United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932); Far E. Conference v. United States, 342 U.S. 570 (1951); Jaffe, *supra* note 38, at 1038.

[43] Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966); Breen Air Freight, Ltd. v. Air Cargo, Inc., 470 F.2d 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

[44] 371 U.S. 296 (1963).

[45] Section 414 of the Federal Aviation Act, 49 U.S.C. § 1384 (1970), gives the CAB the power to immunize certain activities from the antitrust laws.

[46] 49 U.S.C. § 1381 (1970). This section permits the CAB to order an air carrier to cease and desist from unfair or deceptive practices or unfair methods of competition.

[47] 408 F. Supp. 431 (D. Minn. 1975).

court without prior resort to the CAB. The court noted that section 411 of the Federal Aviation Act did not remove any right of plaintiff to proceed for damages.[48] There is good reason for such a statement: if the CAB were to issue a cease and desist order it would mean only that it found the conduct in question to constitute an unfair competitive practice; it would not necessarily indicate that the conduct constituted a violation of the antitrust laws.[49] The failure to make this distinction has led some courts to a contrary result.[50] Other courts have denied plaintiff's common-law remedy when the alleged breach of duty was excused by a tariff provision.[51]

In *Nader* the Supreme Court gave three reasons for its reversal of the circuit court's decision on the issues of primary jurisdiction and the continued existence of Nader's common-law remedies. First, the Court found that unlike the situation in *Abilene*, in the instant case there was no absolute inconsistency between Nader's common-law action for misrepresentation and the Federal Aviation Act.[52] The Court noted the absence of any CAB requirement that air carriers overbook their flights or that they not disclose such practice.[53] The circuit court had indicated that an award in favor of Nader would conflict with the CAB's rate making power.[54] The Supreme Court found, however, that any impact on rates would be

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[48] *Id.* at 440; *cf.* Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973), where the court said that the Federal Trade Commission Act did not bar a consumer's right to damages for common-law fraud or deceit.

[49] Slick Airways v. American Airlines, 107 F. Supp. 199 (D.N.J. 1951), *appeal dismissed*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953); Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974).

[50] S.S.W., Inc. v. Air Transp. Ass'n of America, 191 F.2d 658 (D.C. Cir. 1951) (held that where the same set of facts may give rise to a violation of both the antitrust laws and the Civil Aeronautics Act, preliminary resort must be made to the CAB even though its findings will not bind the court as to possible violations of the antitrust laws); Adler v. Chicago & S. Air Lines, Inc., 41 F. Supp. 366 (E.D. Mo. 1941) (held that the reasonableness or lawfulness of cancelling scheduled flights must be first determined by the CAB).

[51] Lichten v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951); Killian v. Frontier Airlines, Inc., 150 F. Supp. 17 (D. Wyo. 1957); Wittenberg v. Eastern Airlines, Inc., 126 F. Supp. 459 (E.D.S.C. 1954); Furrow & Co. v. American Airlines, Inc., 102 F. Supp. 808 (W.D. Okla. 1952); Mack v. Eastern Airlines, Inc., 87 F. Supp. 113 (D. Mass. 1949).

[52] 96 S. Ct. at 1985.

[53] *Id.*

[54] 512 F.2d at 543.

merely incidental.[55] It would seem that the CAB should not be held to have the power to preempt common-law remedies resulting from overbooking regardless of the effect on rates. *Any* damages recovered from an air carrier will have at least a theoretical effect on rates. This is certainly true when a carrier pays damages for antitrust violations it has committed, yet in such actions the effect on rates has not been discussed as a possible bar to recovery.[56] Instead of allowing the CAB to adjust people's rights to fit the rates it has set, it seems more logical to read the CAB's rate making power as requiring it to leave passengers' rights as it finds them and adjust the rates accordingly. Any other interpretation would ignore the saving clause.

Secondly, the Court held that Nader's action could not be barred by section 411 since that section does not grant a power of immunization to the CAB.[57] This holding is directly in line with similar cases holding that a damage action will be barred *only* when the conduct complained of is capable of being immunized by a regulatory agency.[58] Although the CAB has an immunization power under section 414,[59] that power does not extend to overbooking. Moreover, the mere failure to issue a cease and desist order under section 411 is not equivalent to a grant of immunity.[60] The circuit court held that if the CAB found defendant's practice of overbooking was not in violation of section 411, then a common-law action for misrepresentation would fail as a matter of law.[61] The illogic of this holding was disclosed by the Supreme Court's finding that a

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[55] 96 S. Ct. at 1985.

[56] Carnation Co. v. Pacific Conference, 383 U.S. 213 (1966); International Travel Arrangers v. Western Air Lines, Inc., 408 F. Supp. 431 (D. Minn. 1975); Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974).

[57] 96 S. Ct. at 1985.

[58] Carnation Co. v. Pacific Conference, 383 U.S. 213 (1966); Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974); Breen Air Freight, Ltd. v. Air Cargo, Inc., 470 F.2d 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); International Travel Arrangers v. Western Air Lines, Inc., 408 F. Supp. 431 (D. Minn. 1975); Slick Airways v. American Airlines, 107 F. Supp. 199 (D.N.J. 1951), *appeal dismissed*, 204 F.2d 330 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953).

[59] 49 U.S.C. § 1384 (1970).

[60] International Travel Arrangers v. Western Air Lines, Inc., 408 F. Supp. 431, 437 (D. Minn. 1975).

[61] 512 F.2d at 544.

violation of section 411 is not coextensive with a common-law tort.[62] The purpose of section 411, said the Court, is to provide an injunctive remedy to protect the public interest as a supplement to the compensatory common-law remedies for private parties preserved by the saving clause.[63] Therefore a finding by the CAB that Allegheny's conduct is or is not in violation of section 411 would have no bearing on Nader's court action for misrepresentation. In addition the Court pointed out that since individuals cannot initiate a section 411 proceeding, Congress did not intend to require private litigants to obtain a section 411 determination before they could proceed with their common-law remedies.[64]

Finally, the Supreme Court found no reason to refer Nader's case to the CAB for initial determination.[65] The circuit court had taken the opposite view because it thought the case presented a technical question requiring a uniform resolution.[66] The Supreme Court reasoned, however, that an action for fraudulent misrepresentation fell within the conventional competence of the courts and did not call for any technical expertise.[67] The issue should therefore remain in the courts to be determined by a judge whose canon of legal objectives is less likely to be distorted by specialized interest and responsibility.[68] This does not mean that uniformity must be sacrificed. A court decision on whether overbooking constitutes a misrepresentation should not deter the CAB from making a single, industry-wide determination on whether the practice is deceptive. Therefore whether an air carrier can continue to overbook can be made subject to one uniform regulation. The rights of those passengers who are bumped presents a legal question. Under the rationale of *Great Northern Railway*, uniformity of such a determination can be secured by action of the Supreme Court.

The most important aspect of the circuit court's decision was that it allowed the CAB to extinguish common-law remedies of airline passengers by finding that allegedly tortious conduct is not ob-

[62] 96 S. Ct. at 1986.

[63] *Id.*

[64] *Id.*

[65] 96 S. Ct. at 1987.

[66] 512 F.2d at 544.

[67] 96 S. Ct. at 1988.

[68] Jaffe, *supra* note 38, at 1048.

jectionable under section 411. The circuit court did not hold, as the Supreme Court held in *Abilene*, that Nader's cause of action was precluded because it was repugnant to the regulatory act; rather, it held that Nader's common-law remedy would continue if the CAB were to find that overbooking is deceptive[69] while the remedy would be preempted by a finding that it is not deceptive. Nader's suit, therefore, was found by the circuit court to hinge on an agency determination. Other courts have so held in analogous cases but only when the agency had the power to render the activity complained of legally blameless.[70] It has already been decided that section 411 does not grant such power to the CAB.[71] Had the Supreme Court not acted, the circuit court's opinion would have set an unfortunate precedent by recognizing a power in the CAB, not expressly granted by statute, to extinguish preexisting remedies not already precluded under the *Abilene* rationale.

Thomas L. Doetsch

CAB DECISION—Public Disclosure—Under the Freedom of Information Act the CAB Must Release Foreign Air Transportation Certificate Decisions, Which Require Presidential Approval, as Soon as They Are Submitted to the President. *Aviation Consumer Action Project v. Civil Aeronautics Board,* 412 F. Supp. 1028 (D.D.C. 1976).

In November of 1970 Eastern Air Lines, Inc. (Eastern) and Caribbean-Atlantic Airlines, Inc. (Caribair), which possessed route authority for many points in the Caribbean, jointly filed applications with the Civil Aeronautics Board (CAB) for approval of Eastern's proposed acquisition of Caribair and for the issuance to Eastern of a certificate for the Caribbean market.[1] On August

[69] 512 F.2d at 544.

[70] *See* cases cited in note 58 *supra.*

[71] Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203, 208 (9th Cir. 1973), *cert. denied,* 417 U.S. 913 (1974); International Travel Arrangers v. Western Airlines, Inc., 408 F. Supp. 431, 437 (D. Minn. 1975).

[1] Pursuant to the Federal Aviation Act of 1958, 72 Stat. 731, *as amended,* 49 U.S.C. §§ 1301, *et seq.* (1970 & Supp. V 1975), *formerly* Civil Aeronautics Act

3, 1972, the CAB decided against the merger and submitted its decision to the President for approval pursuant to Section 801 of the Federal Aviation Act (the Act),[2] but did not release its decision to the general public at this time. The President returned the decision to the CAB for further consideration, and by order dated October 30, 1972,[3] the CAB released its original decision to the public along with the President's letter.

Several months later, on February 12, 1973, the CAB submitted a supplemental opinion to the President, reaffirming its earlier denial of the Eastern-Caribair merger. In accord with its earlier procedure, this decision was not released to the public. On April 11, 1973, the President disapproved this supplemental opinion, and for foreign policy reasons[4] directed the CAB to approve the proposed merger. In accordance with this presidential directive, the CAB approved the merger[5] and subsequently released its supplemental opinion together with the President's letter.

After the CAB submitted its supplemental opinion to the President but before its subsequent publication, the Aviation Consumer

of 1938, ch. 601, 52 Stat. 973, the Civil Aeronautics Board (CAB) must certify all United States air carriers engaging in foreign and interstate air transportation (49 U.S.C. § 1371 (1970 & Supp. Dec., 1976)), as well as all foreign air carriers engaging in air transportation between the United States and any other countries (49 U.S.C. § 1372 (1970)). The CAB must also approve the mergers of these U.S. and foreign air carriers (49 U.S.C. § 1378 (1970)).

[2] 49 U.S.C. § 1461(a) (Supp. V 1975) provides:

> The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 1372 of this title, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

[3] CAB Order No. 72-10-96 (Oct. 30, 1972).

[4] Letter from President Richard M. Nixon to CAB (April 11, 1973) provides in part:

> For foreign policy reasons I have decided to disapprove the Board's decision in the Acquisition Case, and accept the recommendations of the Board's minority decision. Accordingly, I direct the Board to approve the acquisition, subject to the restrictions on the merger carrier's operating authority, as stated in the minority opinion . . .

[5] CAB Order No. 73-4-80 (Apr. 11, 1973).

project (ACAP)[6] requested access to the CAB opinion pursuant to the Freedom of Information Act (FOIA).[7] When the CAB denied access, the ACAP filed this action in the District of Columbia District Court[8] to compel disclosure of the CAB's opinion and to enjoin the CAB from withholding similar decisions in the future.

The CAB filed a motion for summary judgment,[9] relying on its interpretation of section 801, *i.e.*, that its decisions were not subject to disclosure until after presidential action, together with the statutory exemption under the FOIA;[10] and in the alternative, upon exemption (5) of the FOIA which excludes from public dis-

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[6] The Aviation Consumer Action Project (ACAP) is a Washington, D.C., nonprofit organization engaged in the promotion of safety and consumer interests in aviation matters. The ACAP was concerned about the possible anti-competitive effect of the proposed Eastern-Caribair merger, and was "disturbed by the apparent fact that in this and other similar cases the CAB's international route decisions had apparently been made available to certain special interests, but not to the general public." *See* Brief for Plaintiff at 6-7, Aviation Consumer Action Project v. Civil Aeronautics Board, 412 F. Supp. 1028 (D.D.C. 1976).

[7] 5 U.S.C. § 552(a)(2) (1970 & Supp. V 1975), provides:

> Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases. . . .

In addition, 5 U.S.C. § 552(a)(3) (1970 & Supp. V 1975) provides:

> . . . [that] each agency, upon any request for records which (A) reasonably describes such records . . . shall make the records promptly available to any person.

[8] 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975) requires:

> On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. . . .

The District of Columbia District Court initially dismissed the action as moot once the CAB's decision was released on April 11, 1973; however, on appeal to the Court of Civil Appeals, 505 F.2d 475 (D.C. Cir. 1974), the CAB agreed that the action was not moot, and the case was reversed and remanded.

[9] *See* Aviation Consumer Action Project v. CAB, 412 F. Supp. 1028 (D.D.C. 1976) [hereinafter *ACAP*] for elaboration of procedural developments in the case.

[10] Exemption (3) of the FOIA, 5 U.S.C. § 552(b)(3) (1970) provided that the disclosure provisions of the FOIA do not apply to matters that are "specifically exempted from disclosure by statute." In 1976, however, this exception was modified so that disclosure provisions do not apply to matters that are:

> [S]pecifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. . . .

5 U.S.C. § 552(b)(3) (Supp. Dec., 1976).

closure inter-agency memoranda or letters.[11] The ACAP filed a cross-motion for summary judgment relying on the disclosure provisions of the FOIA and contesting the CAB's interpretation of section 801. *Held*: Under the Freedom of Information Act, the CAB must release foreign air transportation certificate decisions, which require presidential approval, as soon as they are submitted to the President. *Aviation Consumer Action Project v. Civil Aeronautics Board*, 412 F. Supp. 1028 (D.D.C. 1976).

Prior to the FOIA, access to government materials was governed by the Administrative Procedure Act (APA).[12] APA disclosure provisions allowed agencies to withhold information if disclosure was not considered to be in "the public interest," or if a person seeking disclosure could not show "good cause" for disclosure, or if that person was not "properly and directly concerned."[13] Furthermore, judicial attempts to compel disclosure of CAB records were infrequent because judicial remedies were difficult to obtain, initially because of venue requirements[14] and later because of the time and expense involved. As a result, disclosure actions were seldom used by litigants seeking CAB records.[15]

Congress sought to change this assumption of government secrecy through the FOIA, its main purpose being to "change the general basic position of the government that all documents should be withheld unless there is some reason to disclose them, to the proposition that all documents should be disclosed unless there is

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[11] Exemption (5) of the FOIA, 5 U.S.C. § 552(b)(5) (1970) provides that disclosure provisions of the FOIA do not apply to:

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

[12] *E.g.*, the following provision of the Administrative Procedure Act, ch. 324 § 3(b), 60 Stat. 238 (1946), (current version at 5 U.S.C. § 552 (1970)) provided "Every agency shall publish or, in accordance with published rules, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules."

[13] 1971 U. ILL. LAW F. 329, 334.

[14] Until 1962, any court action brought in an attempt to force disclosure of CAB records had to be brought in the District of Columbia. In 1962 Congress liberalized the venue requirements with the enactment of section 1391(e) of the Judicial Code, 28 U.S.C. § 1391(e) (Supp. Dec., 1976), allowing suits to be brought in district courts outside Washington, D.C. Comment, *Freedom of Information Act*, 33 J. AIR L. & COM. 490, 492 (1967).

[15] *Id.* at 493.

some reason to withhold them.[16] Thus, with the FOIA, the burden was shifted from the person urging disclosure to the agency justifying secrecy. The FOIA did, however, set out nine specific exemptions to its disclosure requirements, but legislative history makes it very clear that all materials are subject to public disclosure unless they are expressly allowed to be kept secret under one of the exemptions.[17]

Case law since the enactment of the FOIA[18] has added to the scope of the two exemptions the CAB invoked in the instant case, exemptions (3) and (5).[19] Exemption (3) excludes from disclosure matters that are specifically exempted from disclosure by statute.[20] Where a particular agency statute specifies the exact material to be withheld or provides strict guidelines to be followed in determining exempt material, the courts have had no difficulty including materials within exemption (3).[21] For example, if Congress through legislation ordered that certain CAB documents be kept secret, exemption (3) would allow these documents to re-

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[16] Wozencraft, *The Freedom of Information Act and the Agencies: Introduction*, 23 ADMIN. L. REV. 130 (1971). *See also* EPA v. Mink, 410 U.S. 73, 80 (1973), where the Court stated, "[w]ithout question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possible unwilling official hands."

[17] S. REP. No. 813, 89th Cong., 1st Sess. 10 (1965).

[18] The Freedom of Information Act was signed by President Johnson on July 4, 1966, and became effective one year later.

[19] In connection with exemption (3), *see* Administrator v. Robertson, 422 U.S. 255 (1975); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); and Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971) (mem.).

In connection with exemption (5), *see* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975); EPA v. Mink, 410 U.S. 73 (1973); and Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975).

[20] 5 U.S.C. § 552(b)(3) (1970).

[21] In Cutler v. CAB, 375 F. Supp. 722, 724 (D.D.C. 1974), the court held that the Federal Aviation Act "must require that the statutes in question either clearly identify some class of documents to be kept confidential or, at the very least, prescribe specific standards by which an administrative agency can determine the propriety of disclosure." *See also* Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), in which a statute concerning trade secrets which the defendant unsuccessfully relied upon is a good example of the type of statute properly included within exemption (3)—18 U.S.C. § 1905 (1970).

main secret; the FOIA would not authorize their disclosure.[22] But such an interpretation of any agency statute must come from its literal reading or from long-standing agency policy consistent with that reading. CAB procedure for many years had been to withhold its decisions from disclosure until after the president had taken action, and the CAB was of the opinion that this long-standing practice was consistent with its interpretation of section 801.

Exemption (5) deals with the exemption of inter-agency and intra-agency memoranda and letters,[23] and is designed to foster two specific policy considerations which define its scope: (1) to prevent premature disclosure of agency records that might impede the proper functioning of the administrative process, and (2) to eliminate the inhibition of a free and frank exchange of opinions and recommendations among government personnel which could result from routine disclosure of their internal communications.[24] Case law has been concerned primarily with exemption (5) in three areas—what information is "discoverable" by an adverse party in litigation with the agency and hence not included in the exemption[25] (which aspect was not addressed by the court in the instant case), what information is fact as opposed to policy and thus

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[22] Although there have been conflicting decisions when the statute in question allows material to be withheld on the basis of an agency's discretionary authority, section 801 of the Act was not argued by either party to be a discretionary statute.

The following information might prove helpful to those interested in pursuing the discretionary statute argument further. There is a line of cases, *e.g.*, Schechter v. Weinberger, 506 F.2d 1275 (D.C. Cir. 1974); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); and Cutler v. CAB, 375 F. Supp. 722 (D.D.C. 1974), which holds that discretionary withholding statutes are not within the ambit of exemption (3). There is recent authority to the contrary, however, in Administrator v. Robertson, 422 U.S. 255 (1975), and Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), to the effect that discretionary statutes are properly included within exemption (3), subject only to reversal upon a finding of abuse of discretion as provided by the Administrative Procedure Act § 10(2)(a), 5 U.S.C. § 706(2)(A) (1970).

[23] 5 U.S.C. § 552(b)(5) (1970).

[24] S. REP. No. 813, note 17 *supra*, at 3; and H.R. REP. No. 1497, 89th Cong., 2d Sess. 6 (1966).

[25] The discovery aspect of exemption (5), although not strictly construed in terms of what materials are discoverable under federal rules of procedure (FED. R. CIV. P. 26-37), involves many of the same considerations. *See, e.g.*, NLRB v. Sears, Roebuck & Co., note 19 *supra*. *See also* Hannigan and Nealson, *The Freedom of Information Act—The Parameters of the Exemptions*, 62 GEO. L.J. 177, 189-90 (1973) and Comment, *Freedom of Information Act And the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047 (1973).

subject to disclosure,[26] and what constitutes a final opinion as opposed to memoranda or letters, which are protected under the exemption.[27]

In *Kaiser Aluminum & Chemical Corp. v. United States*,[28] a 1958 case in which the plaintiff sought discovery of all internal General Services Administration reports, memoranda and documents concerning sales to the company, the Court of Claims discussed the need to protect open and frank discussion among government officials to safeguard the administrative decision making process from unwarranted probing.[29] In *Kaiser*, however, and in *Berguido v. Eastern Airlines, Inc.*,[30] involving access to CAB accident reports, and also decided prior to the implementation of the FOIA, this exemption was restricted to materials dealing strictly with agency opinion. The factual portions of those materials, as opposed to agency opinion, were ordered by both courts to be disclosed. Once the FOIA became effective, the same limitations were incorporated into the FOIA.[31] In explaining the fact/policy distinction in exemption (5), the United States Supreme Court in *Environmental Protection Agency v. Mink*[32] pointed out congressional intent to "delimit . . . exemption (5) as narrowly as [is] consistent with efficient Government operation."[33] In fact, the *Mink* opinion noted that the FOIA as first introduced in the Senate excluded "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy."[34] Although the last few words of the exemption as it appeared in the Senate Bill[35] were deleted as the FOIA was further debated in Congress, this distinction is surely justified in the present interpretation of exemption (5).

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[26] *E.g.*, EPA v. Mink, 410 U.S. 73 (1973).

[27] *E.g.*, Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975), and NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

[28] 157 F. Supp. 939 (Ct. Cl. 1958).

[29] Comment, *Discovery of Government Documents*, 76 COLUM. L. REV. 142, 157 (1976), discussing *Kaiser*, 157 F. Supp. 939, note 28 *supra*.

[30] 317 F.2d 628 (3d Cir. 1963).

[31] 5 U.S.C. § 552(b)(5) (1970).

[32] 410 U.S. 73 (1973).

[33] *Id.*

[34] *Id.* at 89-91.

[35] *Id.* at 79, *citing* S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965); and H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966).

Agency final opinions are not included within exemption (5),[36] but the difficulties in determining whether agency materials are final opinions or merely memoranda are discussed in *Vaughn v. Rosen.*[37] In *Vaughn* the District of Columbia District Court considered the release of Civil Service Commission reports of inspections evaluating personnel management in various federal agencies, and stated that the line was to be drawn between "predecisional and decisional documents,"[38] concluding that the reports in question were final analyses subject to partial disclosure at least.[39] This decision was affirmed on appeal.[40] *Renegotiation Board v. Grumman Aircraft Engineering Corp.*[41] considered the question to be whether documents were "final opinions or predecisional consultative memoranda."[42] The *Grumman* Court concluded that since the decisions in question were those made by regional boards, and were subsequently submitted to the national renegotiation Board, the decisions were protected from disclosure by exemption (5), as evidenced by the following excerpt from the Court's opinion: "The Regional Board Reports are thus precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the Board in reaching its decision."[43] Contrary to what would constitute a final opinion, the decisions concerned with in the *Grumman* opinion were mere recommendations and investigatory reports, subject to reversal by the national board. In fact, the national Renegotiation Board was not required to rely on the Regional Board Reports in the least.[44] These considerations were some of those relied upon by the *Grumman* Court in distinguishing final opinions from predecisional consultative memoranda, which hence exempted the latter from disclosure under exemption (5).

Against this background, the District of Columbia District Court

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[36] 5 U.S.C. § 552(a)(2)(A) (1970 & Supp. V 1975); *see* note 7 *supra.*

[37] 523 F.2d 1136 (D.C. Cir. 1975).

[38] 383 F. Supp. 1048, 1053 (D.D.C. 1974).

[39] *Id.* at 1053-54.

[40] 523 F.2d 1136 (D.C. Cir. 1975).

[41] 421 U.S. 168 (1975).

[42] *Id.*

[43] *Id.* at 186.

[44] *Id.* at 184.

was called upon to decide the instant case. As outlined above, the statutory exception provided by exemption (3) must arise from the statute's literal interpretation or from long-standing agency policy consisting with the statute's reading. Accordingly, the CAB's arguments that the application of exemption (3) to its decisions be upheld were two-fold. First, the CAB contended a literal reading of section 801, which provides that "all decisions . . . by the Board shall be submitted to the President before publication thereof"[45] would support its position. The court, however, determined that a literal reading would not support the CAB's position, that the meaning of section 801 was "clear and unambiguous on its face,"[46] and that section 801 only prohibited disclosure *before* the CAB submitted its decisions to the President; it did not prohibit disclosure *until* the President had acted. Thus, even though courts will "avoid statutory interpretations which would render the statute ineffective,"[47] the court held that section 801 was not so rendered. The court found its meaning to be clear: no decisions could be disclosed before they were sent to the President for his review.

The court cited Executive Order 11652[48] and section 1104 of

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[45] 49 U.S.C. § 1461(a) (Supp. V 1975).

[46] 412 F. Supp. 1030.

[47] *Id.*

[48] Exec. Order No. 11652, 3 C.F.R. 678 (1976), *as amended* Exec. Order No. 11714, 3 C.F.R. 764 (1976), provides that certain official information or material which "bears directly on the effectiveness of our [U.S.] national defense and the conduct of our [U.S.] foreign relations" be given limited dissemination and is exempted from public disclosure by section 552(b)(1) of the Freedom of Information Act. The Order further "identifies the information to be protected, prescribes classification, downgrading, de-classification and safeguarding procedures to be followed, and establishes a monitoring system to ensure its effectiveness."

Exec. Order No. 11920, 41 Fed. Reg. 23665 (1976), dated June 10, 1976, establishes Executive Branch procedures for the implementation of the ACAP decision, particularly in regard to Executive Order 11652:

> Section 1. (a) Except as provided in this section, decisions of the Civil Aeronautics Board, hereinafter referred to as the CAB, transmitted to the President pursuant to section 801 of the Federal Aviation Act, as amended, hereinafter referred to as section 801, may be made available by the CAB for public inspection and copying following submission to the President.
>
> (b) In the interests of national security, and in order to allow for consideration of appropriate action under Executive Order No. 11652, as amended, decisions of the CAB transmitted to the President under section 801 shall be withheld from public disclosure for five days after submission to the President.

the Act[49] which provide suitable procedures for specifically exempting certain CAB decisions from disclosure under specified circumstances. In light of these two provisions, the court concluded that these means were sufficient to properly exclude CAB decisions under exemption (3).[50]

The second argument the CAB advanced in support of an exemption (3) inclusion was long-standing CAB interpretation of section 801. More precisely, the CAB pointed to its Procedural Regulations which specifically excluded from disclosure "[c]opies of Board decisions *awaiting* Presidential action . . ." (emphasis added).[51] *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,[52] upon which the CAB relied for upholding its interpretation of section 801, incidentally recognized this CAB practice. Contrary to the support the CAB purportedly found in *Waterman*, the ACAP court stated that *Waterman* did not address itself to

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The Order further sets out the procedures to be followed in determining whether a particular CAB order or parts of it should fall under Executive Order 11652.

[49] 49 U.S.C. § 1504 (1970) provides:

> Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of Congress.

[50] It is interesting to note at this point that in subsequent litigation, Aviation Consumer Action Project v. CAB, 418 F. Supp. 634 (D.D.C. 1976), section 1104 (for text *see* note 49 *supra*) of the Act was used constructively in conjunction with Exec. Order No. 11920, *see* note 48 *supra*, to uphold the five day provision of Exec. Order No. 11920. The District of Columbia District Court held that in effect Exec. Order No. 11920 was the President's "written objection" required by section 1104 and that five days was a reasonable amount of time consistent with prompt disclosure requirements in the FOIA for the President to determine national security exclusions in section 801 decisions.

[51] 14 C.F.R. § 310 Appendix B, Types of Records Generally Excluded from Availability, *as amended*, 38 Fed. Reg. 515 (1973), includes under exempted records:

> (5) Inter-agency and Intra-agency memoranda.
> —Copies of Board decisions awaiting Presidential action . . .

[52] 333 U.S. 103 (1948).

the question here, especially since it was decided in 1943, long before passage of the FOIA, and that *Waterman* only casually mentioned this usual CAB practice of prohibiting disclosure of CAB decisions awaiting presidential action.[53] And while the ACAP court realized it should show "great deference to the interpretation given the statute by the officers or agency charged with its administration,"[54] it believed its duty in the instant case was to uphold a statute "clear on its face."[55]

As it considered the CAB's arguments with respect to exemption (3), the court frequently mentioned the peculiar effect a decision for the CAB would have been because exemption from disclosure would only be applicable for a very short time—from the CAB's submission to the President to the President's action on the decision. The CAB acknowledged that its decisions were required to be published,[56] but its argument in the instant case turned on timing. This contention did not give the court much pause in deciding against the CAB, especially upon the court's finding that CAB timing practices had not been consistent in the past.[57]

The court declined to follow the CAB's exemption (5) classification for decisions awaiting presidential action,[58] and used the holding in *NLRB v. Sears, Roebuck & Co.*[59] as the basis for this

[53] The Court in *Waterman* was concerned primarily with section 1006 of the Federal Aviation Act, 49 U.S.C. § 1486 (1970), which sets out the provisions for judicial review of CAB or Administrator orders.

[54] 412 F. Supp. 1028, 1032, citing Udall v. Tallman, 380 U.S. 1, 16 (1965).

[55] 412 F. Supp. 1028, 1032.

[56] Section 204 of the Act, 49 U.S.C. § 1324(d) (1970), provides:

> Except as may be otherwise provided in this chapter, the Board shall make a report in writing in all proceedings and investigations under this chapter in which formal hearings have been held, and shall state in such report its conclusions together with its decision, order, or requirement in the premises. All such reports shall be entered of record and a copy thereof shall be furnished to all parties to the proceeding or investigation. The Board shall provide for the publication of such reports, and all other reports, orders, decisions, rules, and regulations issued by it under this chapter in such form and manner as may be best adapted for public information and use. . . .

[57] 412 F. Supp. at 1032. Apparently, prior to the 1950's, the CAB refused to publish its decisions at any time. And in more recent years the CAB has occasionally published its decisions before presidential action. Brief for Plaintiff in ACAP, note 6 *supra*, at 26-27.

[58] 14 C.F.R. § 310 (1973), note 51 *supra*.

[59] 421 U.S. 132 (1975).

part of its decision. *Sears* concerned various Appeals and Advice Memoranda in an unfair labor practices suit[60] and the importance of consultative functions within the NLRB. The *Sears* test as adopted by the ACAP court was whether publication of CAB decisions prior to presidential action would inhibit "the frank discussion of legal and policy matters" within the agency, or would otherwise cause "injury to the quality of agency decisions."[61] After briefly discussing arguments the CAB had raised, the ACAP court found that views expressed in the CAB's decisions would not be less frank or candid if publication occurred prior to presidential action, and that presidential action would not be inhibited or injured since the President is always aware that the decision he receives from the CAB will shortly be published.[62] Thus the ACAP court found the criteria for disclosure set out in *Sears* were met, and held that CAB decisions awaiting presidential action do not come within exemption (5).

The court's decision in its exemption (3) analysis was concerned primarily, as it should have been, with the exact wording of the Act. Section 801 only requires that CAB "decisions . . . be submitted to the President before publication thereof."[63] It does not require that the decisions be submitted to the President *and acted upon* before publication. Furthermore, the legislative history of the Act provides no support for the CAB's interpretation of section 801. In fact, the only references to section 801 in congressional debate on the enactment of the original Civil Aeronautics Act (now the Federal Aviation Act) are concerned with the manner of submission of the CAB's decisions to the President.[64] The court would have overreached its judicial perimeters should it have decided this portion of the case in favor of the CAB.

The court's discussion of exemption (5) was somewhat limited. For instance, it failed to consider the question of whether section 801 decisions were final opinions, which are subject to disclosure

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[60] *Id.*

[61] *Id.* at 150-51.

[62] 412 F. Supp. 1028, 1032.

[63] 49 U.S.C. § 1461(a) (Supp. V 1975).

[64] 83 Cong. Rec. 6636 (daily ed. May 11, 1938) (remarks of Senator McCarran).

under section 552(a)(2)(A) of the FOIA.[65] And it seems clear from the nature and character of section 801 decisions that they would easily fall within the definition of final opinions. Decisions involving purely United States routes are not subject to presidential scrutiny as outlined by section 801 and are prime examples of final opinions. The only distinction section 801 provides is the requirement of presidential approval. Once approved, these CAB decisions stand as final opinions. The court could easily have based its holding on an affirmative answer to this question and avoided analysis of exemption (5) any further.

The court neglected to consider another issue under exemption (5). There is an important question as to whether the executive is an agency and thus whether the inter-agency or intra-agency memorandum referred to in exemption (5) would even be applicable to information traveling between the CAB and the President. No case has specifically addressed this issue,[66] and only one has hypothetically considered the President to be an agency.[67] Of course, if the court had concluded the material involved here was a final opinion, this agency question would be immaterial.

The major area of neglect, however, was the court's failure to concern itself with the realities of situations in which CAB decisions are submitted to the President. Although CAB decisions are not disclosed prior to presidential action, in this case,[68] as in previ-

[65] 5 U.S.C. § 552(a)(2)(A) (1970 & Supp. V 1975).

[66] In Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) the court held that the Director of the Office of Science and Technology, an executive office, was an agency. Under the APA, an agency is an "authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1) (1970).

[67] Five Smiths, Inc. v. Hollaway, 499 F.2d 1321 (Em. App. 1974), *cert. denied*, 419 U.S. 896 (1974).

[68] Brief for Plaintiff, note 6 *supra*, at 5-6, 9. *See also* Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.—C.L. L. REV. 1 (1970) (hereinafter referred to as Nader), in which the matter of a request for a CAB report on the causes and handling of customer complaints received by the airline industry was at first denied, then finally, after suit was initiated, the CAB granted the request and disclosed the report. The CAB relied on 18 U.S.C. § 1905 (1948) as the basis for its refusal, which prohibits the CAB from divulging certain classes of confidential financial and commercial data obtained in CAB audits of the airline books. Nader states:

> This argument, however, utterly ignores the fact that much of the information requested had *already* been released to several of the airlines as well as to their trade association. The legitimacy of the CAB's rationale is further shattered by the fact that detailed infor-

ous cases, as soon as the decision is submitted to the President, letters, telegrams and various other means of persuasion are used by those especially interested in the results of these decisions in attempts to influence the President's decision.[69] Although the FOIA is designed to provide *citizens* with tools of disclosure, the distinction in the FOIA's definition of citizen as "any person or persons who are not regulated by the agency and who do not constitute an organized, special interest group,"[70] is important "because most agencies have a two-pronged information policy—one toward citizens and one towards the special interest groups that form the agency's regulated constituency."[71] In this case, long before the CAB's decision was made public, the particulars of the decision were known by Caribair associates, who were, of course, extremely interested in the President's final approval or disapproval of the CAB's unfavorable decision.[72] And in ignoring this unequal access to information, perhaps the court's decision does not go to the realities of the CAB practices and their results.

This same disparity in information access was addressed by the District of Columbia District Court in *Tax Analysts & Advocates v. I.R.S.*[73] *Tax Analysts* was concerned with the disclosure of private letter rulings, and the *Tax Analysts* court noted as a basis for its decision in favor of disclosure that "such rulings are already disseminated among select groups of tax attorneys and it is unfair for some attorneys to benefit by the rulings while others remain ignorant of them."[74] It is curious that the same court in the ACAP case did not even mention similar concerns.

It is conceded that the court's decision will in effect meet the crux of this inequity. Since, as a result of the court's decision, the CAB is enjoined from withholding its decisions once they have

> mation on the number and types of complaints is readily exchanged among the airlines themselves, a practice which destroys the shibboleth of pretended confidentiality.

Id. at 13.

[69] Nader, note 68 *supra.*

[70] *Id.* at 2.

[71] *Id.*

[72] Brief for Plaintiff in ACAP, note 6 *supra,* at 5-6, 9.

[73] 362 F. Supp. 1298 (D.D.C. 1973), *modified in part,* 505 F.2d 350 (D.C. Cir. 1974).

[74] *Id.* at 1309-10.

been submitted to the President, all interested parties will have access to section 801 decisions at the same time, and all will have the opportunity to make their views known and exert what pressures they may have to bear upon the final reviewer of the decisions, the President. A similar possible effect was also important in *Tax Analysts*, since the IRS would "no doubt be more reluctant to rule favorably unless it is certain it can answer any ensuing public criticism."[75]

It is in this area that the practical import of the court's decision will be felt. While the court could have addressed itself to a more in-depth view of exemption (5) of the FOIA and to some of the actualities of the CAB's practice of withholding decisions awaiting presidential action, it did not do so. Perhaps the court exercised an appropriate aloofness. Whatever the specific grounds for its decisions, the result will have a tremendous effect on the ability of every interested party to section 801 decisions to exercise the same kind of influence only those privileged interest groups exercised under prior CAB practices.

Policy arguments in support of ACAP's arguments for disclosure appear legitimate and important. Obviously, CAB practice in withholding its decisions has discriminated against those citizens or interests not intimately connected with pending section 801 decisions. If the President will be innundated with appeals from those parties directly affected by CAB decisions, why should this same access be withheld from other important concerns, for example, consumer groups such as the ACAP and other airlines which may be affected by specific section 801 decisions?

On the other hand, it is difficult to imagine legitimate grounds for the CAB's contentions when such disparity is evident. Longstanding practices seem to be the only real reason for the CAB's position and it is difficult to believe the CAB would be so protective of its "ways of doing things" to blatantly disregard FOIA requirements. Nevertheless, the CAB still has not conceded defeat. Pursuant to an executive order withholding section 801 decisions from public disclosure for five days in order to give the President time to review these decisions for national security reasons,[76] the

[75] Comment, 7 IND. L. REV. 416, 432 (1973).

[76] Exec. Order No. 11920, 41 Fed. Reg. 23,665 (1976). *See generally* notes 48-50 *supra*.

CAB promulgated a regulation allowing itself another five days (in addition to the President's five days) to prepare these decisions for mass distribution.[77] This regulation, as well as the executive order, was challenged by the ACAP in court,[78] and while the executive order was upheld, the CAB regulation was struck down on the basis of FOIA requirements for disclosure.[79] The CAB argued that it needed the additional time (up to five days) to be able to print up sufficient copies of section 801 decisions for mass distribution, and that to allow access to those few people able to visit the CAB office in Washington, D.C., in person and copy the decision prior to mass distribution would result "in an unfair advantage over others in the stock or other financial markets."[80] Even this first glimmer of a tangible policy concern set forth by the CAB in this later case does not merit much weight in view of the strong considerations in support of the ACAP's position. For many of those connected with the impending section 801 decision and probably also concerned with its financial repercussions will learn of the decision as soon as it is rendered by the CAB. It is still very difficult to perceive any valid grounds for the CAB's persistence (apparently the CAB has appealed this decision) in contesting that its decisions be promptly released to the public. It is encouraging to note the court's decision in this most recent case, and perhaps on appeal the right to information access will prevail.

Denise A. Bretting

RADIOACTIVE MATERIAL—PASSENGER NOTICE OF CARRIAGE—Injunction to Order an Air Carrier to Give Adequate Warning to Passengers When a Significant Amount of Radioactive Material Was to Be Shipped on Its Flights Was Properly Denied

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[77] 41 Fed. Reg. 28,946-7 (1976) (to be codified 14 C.F.R. § 399.101).

[78] Aviation Consumer Action Project v. C.A.B., 418 F. Supp. 634 (D.D.C. 1976).

[79] *Id.*

[80] *Id.* at 638. The court did not agree with the CAB's contention in light of the "promptly available" requirement of the FOIA, and in light of the fact that even under a mass distribution procedure, it is impossible to assure that every one would have access to the decision at the exact same moment.

Because The Doctrine of Primary Jurisdiction Required Prior Agency Action. *Kappelmann v. Delta Air Lines, Inc.*, 539 F.2d 165 (D.C. Cir. 1976), *cert. denied,* 97 S. Ct. 784 (1977).

On April 5, 1974, plaintiff Arthur C. Kappelmann was possibly exposed to radiation leaking from an improperly shielded container that was carried in the cargo section of a commercial airliner on which plaintiff traveled from Washington, D.C., to Atlanta, Georgia. Plaintiff[1] filed suit seeking damages against the airline and the shipper, and temporary and permanent injunctive relief against the airline requiring it to give adequate warning of the presence of a significant amount of radioactive materials on passenger flights.[2] The suit also named the Department of Transportation (DOT), the Civil Aeronautics Board (CAB), and the Federal Aviation Administration (FAA) (hereafter referred to collectively as the federal defendants) as parties defendant. The district court dismissed the complaint against the federal defendants on the grounds that no relief was sought against them. The court also dismissed the injunctive relief counts of the complaint and denied plaintiff's motion for partial summary injunctive judgment, or in the alternative, for a preliminary injunction. *Held, affirmed:*[3] The doctrine of primary jurisdiction was properly invoked when denying an injunction that was sought to order an air carrier to give adequate warning to passengers when a significant amount of radioactive material was to be shipped on its flights. The need for uniformity and a tribunal of special competence had been shown and it appeared that rulemaking was a more appropriate means of resolving the problems raised. *Kappelmann v. Delta Air Lines, Inc.*,

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[1] Plaintiffs were Arthur C. Kappelmann and his wife. For convenience plaintiffs are referred to in the singular.

[2] Plaintiff sought to require defendant airline to give such warning to

> (a) all prospective passengers who may be boarding airplanes operated as passenger flights by it and carrying a significant amount of radioactive materials; or, in the alternative (b) all prospective passengers who may be boarding airplanes operated as passenger flights by it and carrying a significant amount of radioactive materials, which passengers have been exposed previously to significant amount of radiation.

Kappelmann v. Delta Air Lines, Inc., 539 F.2d 165, 168 (D.C. Cir. 1976).

[3] Since no final judgment had been entered against the federal defendants, the court granted the motion to dismiss as to federal defendants.

539 F.2d 165 (D.C. Cir. 1976), *cert. denied*, 97 S. Ct. 784 (1977).

Transportation of radioactive materials has been a reality in interstate commerce since 1946. From modest beginnings, carriage of hazardous materials has increased to the point that estimates indicated at least one of the eight major classifications of hazardous materials was on board almost every commercial airline flight in 1974.[4] As the nuclear industry continues to grow, transportation of radioactive materials should increase correspondingly. The overall annual growth rate is fifteen per cent for the nuclear industry as a whole and twenty-five per cent for radio-pharmaceuticals[5] which generally have short half-lives and consequently must be shipped by air to maximize efficient use.[6]

There have been numerous administrative efforts to regulate air transportation of hazardous substances. The FAA originally regulated the carriage of such substances,[7] but with the promulgation of the Department of Transportation Act on October 15, 1966, most administrative and regulatory functions were delegated to the DOT. The DOT hierarchy, however, is somewhat fragmented. In 1969 the responsibility for surveillance and enforcement of regulations on manufacturers and shippers (a duty of the FAA under the Federal Aviation Act of 1958) was delegated to DOT's Office of Hazardous Materials (OHM) which is comprised mostly of technical staff qualified in radiation matters. This staff attempts to coordinate development of regulations. Another DOT branch, the Hazardous Materials Regulations Board (HMRB) was established by order of the Secretary of Transportation in 1967 to insure consistency of regulations among each of the transportation modes.[8] The other major regulatory body is the Atomic Energy Commission (AEC)[9] which is responsible for licensing and safety in the pos-

[4] Note, *Air Transportation of Radioactive Materials*, 40 J. AIR L. & COM. 681, 684 (1974).

[5] *Id.*

[6] The half-life of radioactive material is the rate of decay or disintegration; it is the period of time required for a certain amount of such substance to decay to one-half of its original value. *Id.*

[7] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. § 1301 *et seq.* (1970), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

[8] DOT Order 1100.11 (July 27, 1967).

[9] Established by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* (1970).

session, use, and transport of byproduct, source, and special nuclear materials.[10] The AEC also assists DOT in establishing national safety standards and in reviewing and evaluating packaging designs.

The National Transportation Safety Board (NTSB) was created in the DOT Act of 1966 as an autonomous part of the department and was given responsibility to investigate and determine probable causes of transportation accidents. Its determination can have substantial effect on causes of action brought for radiation injury.

Unfortunately the effectiveness of regulation in the past has been disappointing. In the Secretary of Transportation's Annual Report[11] for 1972 it was estimated that of approximately 14,000 daily flights in the United States as many as 11,000 may harbor FAR 103 violations.[12] (This regulation concerns the transportation of dangerous articles and magnetized materials.) The most recent effort to regulate the transportation of hazardous materials is the Hazardous Materials Transportation Act (HMT Act) which went into effect January 3, 1975.[13] The expressed purpose of the act is

> to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.[14]

Section 1807(a) instructs the Secretary of Transportation to issue regulations within 120 days of the effective date with respect to the transportation of radioactive materials on passenger-carrying aircraft to prohibit the carriage of all radioactive materials not intended for use in, or incident to, research or medical diagnosis or treatment. The materials permitted may be carried only so long as they pose no unreasonable hazard to health and safety either during

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[10] *Id.* at §§ 2061-2112.

[11] As cited in *Hearings on the Transportation of Hazardous Materials by Air before a Subcomm. of the House Comm. on Government Operations*, 93d Cong., 1st Sess. 67 (1973) [hereinafter cited as *1973 Hearings*].

[12] Federal Aviation Regulations, Title 14 of the Code of Federal Regulations, Part 103, revoked effective July 1, 1976, by Materials Transportation Bureau, 41 F.R. 15971. Revocation was merely part of the reorganization and consolidation scheme and most FAR 103 provisions have been written into the current regulations of the Materials Transportation Bureau.

[13] 49 U.S.C. §§ 1801-1812 (Supp. 1974).

[14] *Id.* at § 1801. The court appears to find this purpose less compelling than that of avoiding confusion.

packaging or during actual transportation. The Secretary is further ordered to establish effective procedures for monitoring and enforcing the provisions of the regulations. The new act was inspired by the apparent failures of earlier efforts to deal effectively with the safe transportation of hazardous materials. These failures were underscored by newspaper accounts of radioactive leakages resulting in exposure of hundreds of passengers.[15]

In *Kappelmann v. Delta Air Lines, Inc.*, the court was forced to determine exactly where the new HMT Act fit into the scheme of existing regulations, agency functions, state regulations, and common law. The first problem confronting the court, however, was proper characterization of the plaintiff's complaint. The doctrine of primary jurisdiction has traditionally been applied in adjudicatory situations.[16] Plaintiff's demand for injunctive relief, therefore, removed the case from the classic doctrine of primary jurisdiction, in the court's view, because such relief constituted "legislation by injunction, initially limited to one carrier but expected and intended to have sweeping effects on the entire industry."[17] Yet the court found that if the present case met both standards for primary jurisdiction: (1) desire for uniformity of regu-

[15] One such article reported that 917 people had traveled on a contaminated aircraft (in eight flights) before discovery of a radioactive leak. The affected passengers had been subjected to amounts of ionizing radiation far in excess of that which federal guidelines permit per year. Days after the leaking package had been removed, AEC readings at the passenger seats nearest the containers showed that anyone sitting in that general area would still have received his yearly acceptable level of radiation exposure in less than one hour. New York Times, Jan. 4, 1972, at 14, col. 6; *see also 1973 Hearings, supra* note 11, at 38; NTSB, REPORT OF AIRCRAFT RADIOACTIVE CONTAMINATION INCIDENT, DELTA AIRLINES, INC. (Dec. 31, 1971).

[16] *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01 (1958) [hereinafter cited as DAVIS]. The doctrine of primary jurisdiction provides that in cases originally brought in a court, in which both the court and the agency have subject matter jurisdiction, the court should not exercise its jurisdiction until certain issues have been passed upon by the appropriate administrative agency. Originally the rationale for applying primary jurisdiction was the concept of the agency as a fact finder and the idea that the court should stay its action until issues of fact requiring special expertise had been determined by the agency. A second rationale developed somewhat later and involvd the desire for uniformity and consistency of regulation. The function of uniformity in the application of primary jurisdiction is twofold: to insure that issues of fact are determined consistently and to solidify the legal standards made applicable to particular kinds of conduct when agency standards under an administrative statute differ from those ordinarily applied by the courts. *See also*, Note 42 J. AIR L. & COM. — (1976), dealing with primary jurisdiction.

[17] Kappelman v. Delta Air Lines, Inc., 539 F.2d 165, 169 (D.C. Cir. 1976).

lation; and (2) the need for an initial consideration by a tribunal with specialized knowledge,[18] the facts would then support the application of a doctrine "*in the nature of primary jurisdiction* . . . ." (Emphasis the court's.)

To examine the first prong of the test, the court turned to the HMT Act itself as an indication of congressional recognition of the need for uniformity of regulation in this area. The stated intention of the act was "to broaden federal regulatory control over the interstate and foreign shipments of hazardous materials . . . ."[19] Section 105 of the HMT Act provides that the Secretary may issue regulations for the safe transportation in commerce of hazardous materials. The regulations apply to shippers and transporters of hazardous materials, as well as those who prepare or sell the containers in which these materials are transported. The regulations may govern any safety aspect of the shipping of hazardous materials which the Secretary deems necessary or appropriate. The HMT Act then lists representative although not exclusive areas to be regulated, including the packaging, repacking, handling, labeling, marking, placarding, and routing of hazardous materials.[20]

The court interpreted this provision as evidence of congressional intent to preempt the field in order to assure uniformity of regulation,[21] emphasizing the inclusion of placarding as within the sphere

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[18] *See* DAVIS, *supra* note 16. In *Texas & Pac. R.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) the court stressed the need for uniformity. More recently the expert and specialized knowledge of the agencies involved has been stressed. *See* Far East Conference v. United States, 342 U.S. 570 (1952).

[19] H.R. REP. No. 9083, 93d Cong., 2d Sess. 1 (1974).

[20] 49 U.S.C. § 1804(a) (Supp. 1974).

[21] Although the House version limited the Secretary's power to interstate and foreign commerce, the Senate bill which was incorporated into the HMT Act specifically preempted any state or local requirement inconsistent with any requirement of that act unless

> the Secretary determines . . . that such requirement affords an equal or greater level of protection to the public than is afforded by the requirements of this Act or regulations issued under the Act and does not burden interstate commerce.

S. 4057, 93d Cong., 2d Sess. § 112(a), (b) (1974). This provision became § 112 of the HMT Act, also 49 U.S.C. § 1811 (Supp. 1974). In reporting out that particular section, the Senate committee stated:

> The Committee endorses the principle of Federal preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation.

S. REP. No. 1192, 93d Cong., 2d Sess. 37 (1974).

of agency regulation. The court concluded that Congress intended that the HMT Act correct the confusion created by the multiplicity of regulatory bodies. Congress sought to remedy the situation by consolidating the authority to regulate into one agency and thereby promoting uniformity of regulation.[22]

The court then turned to the second prong of the primary jurisdiction test, which is the need for an initial consideration by a tribunal with specialized knowledge. It found that the trial court had correctly determined that the injunctive relief requested by the plaintiff involved "both technical and policy questions which have industry-wide application."[23] In order to grant the injunctive relief sought by the plaintiff, the court would have to determine how much radioactivity is "significant." It conceded that section 108(b) of the HMT Act[24] prohibits materials (excluding research and medical materials) emitting radiation above a specified level from being transported on passenger-carrying aircraft, and therefore does, in a sense, define what level of radioactivity is "significant." The court pointed out, however, that a standard would still have to be established for those radioactive materials which met the section 108 standard. The court would, furthermore, still be required to determine the means by which the radioactivity level must be tested, and what constitutes "adequate warning." It was held that the nature of these questions met the test laid down in *United States v. Western Pacific R. R. Co.*[25] requiring the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. The court, therefore, determined that only an agency rulemaking proceeding would comply with congressional intent as manifested in the HMT Act.[26]

Finally plaintiff's two arguments against the use of an agency rulemaking proceeding were considered. In presenting the first

[22] 539 F.2d 165, 169-70 (D.C. Cir. 1976).

[23] Kappelmann v. Delta Airlines, Inc., 13 Av. Cas. 17,919, 17,920 (D.C.D.C. 1975).

[24] 49 U.S.C. § 1807(b) (Supp. 1974).

[25] 352 U.S. 59 (1956).

[26] The court stated that:

> Such determinations are better made on an industry-wide basis in an agency rulemaking proceeding, and this indeed is the choice which Congress has made in enacting the Hazardous Materials Transportation Act.

Kappelmann v. Delta Air Lines, Inc., 539 F.2d 165, 171 (D.C. Cir. 1976).

point, plaintiff cited the dissent of Justice Frankfurter in *Federal Maritime Board v. Isbrandtsen Co.*[27] in which he emphatically declared:

> It would be a travesty of law and an abuse of the judicial process to force litigants to undergo an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency.[28]

The court rejected this argument out of hand, stating simply that the point had been improperly pleaded. Plaintiff had failed to explain what "controlling legal issue" was present which was "wholly unrelated" to the determinations which the Secretary or his delegate would make. In the court's opinion the determinations were integrally bound up with the legal issues and the argument without merit.

Plaintiff's second argument was that the use of the doctrine of primary jurisdiction would be an "empty ritual" because the agency had already expressed its opinion on the precise point raised by the complaint. Plaintiff was referring to three separate agency actions. In the first, the Civil Aeronautics Board (CAB) denied a petition for rulemaking on this subject filed by the Aviation Consumer Action Project. The CAB ruled that responsibility to regulate this area rested with the FAA.[29] In the second action, the FAA denied a similar petition on the grounds that the problem was not a serious one and that the placarding of aircraft would cause unwarranted apprehension among passengers.[30] These denials were dated September 22, 1972, and May 4, 1973, respectively. The court stated that since they occurred prior to the enactment of the HMT Act, the denials could not be taken to reflect current policy.

The court, therefore, would consider only the third of the agency decisions cited by the plaintiff. In this agency determination by the Acting Director of the Materials Transportation Bureau (MTB) of the Department of Transportation a regulation of the

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[27] 356 U.S. 481 (1958).

[28] *Id.* at 521.

[29] Denial of Petition for Rule Making, CAB Docket No. 24578 (Sept. 22, 1972).

[30] Denial of Petition for Rule Making, FAA Regulatory Docket No. 12033 (May 4, 1973).

Louisiana Office of Consumer Protection requiring prior notification of passengers boarding commercial passenger-carrying aircraft of the presence of hazardous materials was found to be inconsistent with the HMT Act. The court referred to a letter dated September 22, 1975, from Acting Director Herbert H. Kaiser, Jr., of the Materials Transportation Bureau of the Department of Transportation to the Director of the Louisiana Office of Consumer Protection.[31] In the letter it was noted that the Louisiana regulation was not preempted but only declared inconsistent with the HMT Act. Before preemption was decided, further proceedings would be necessary to determine (1) whether the rule afforded an equal or greater level of protection than the HMT Act, and (2) whether the state rule unreasonably burdened commerce.[32] The court reasoned that when Congress, in enacting the HMT Act, expressly provided measures to assure the safe passage of permitted radioactive materials on passenger-carrying aircraft, it removed any basis for a conclusion that passenger safety was being jeopardized when riding in an aircraft carrying radioactive materials which were being carried in compliance with the regulations. Any rule that gives rise to an unwarranted belief to the contrary would, therefore, be inconsistent with the purposes of the HMT Act and the regulations adopted under the authority of that act. The Louisiana rule would have conflicted with the purpose of the HMT Act by requiring warning to passengers when the aircraft carried materials regarded as "safe" under federal regulations.

The court announced that it was unwilling to permit plaintiff to substitute an MTB decision on the Louisiana state regulation for the record that would be developed during a rulemaking proceeding. To do so would be to "short circuit the path mandated by Congress" and leave the court without the full record of the agency's reasons for refusing to adopt such a regulation.

Although the court did reject plaintiff's initial resort to judicial process, requiring that he first exhaust the remedies available through the rulemaking procedure of agencies,[33] the door was not closed entirely on the possibility of warnings for passengers. Despite

[31] Brief for Appellee Delta Air Lines, Inc. at Appendix B, Kappelman v. Delta Air Lines, Inc., 539 F.2d 165 (D.C. Cir. 1976).

[32] *See* 49 U.S.C. § 1811(b) (Supp. 1974).

[33] *See* notes 29, 30, 31 *supra* and accompanying text.

the negative tone of the decision, the court implied that it was not totally unsympathetic to plaintiff's petition. It was pointed out that the MTB's rejection of the Louisiana regulation was not necessarily a total rejection of the idea of passenger warnings. The decision was one of federal preemption and showed no intent to reject per se the idea of posting passenger warnings.

Of paramount importance is the court's failure to recognize any common-law right of warning. The trial court dismissed this right as having been preempted by statute and denied preliminary injunction on the grounds that since no common-law right was involved, plaintiff had failed to meet the standards of *Virginia Petroleum Jobbers Association v. Federal Power Commission.*[34] These standards require that a showing of irreparable injury, public interest, and a likelihod of prevailing on the merits be made to justify the court's interference with the ordinary processes of administrative and judicial review. A careful reading of the statute, however, clearly indicates that only state and local laws are preempted by the HMT Act. There is no provision in the statute for preemption of common-law guarantees, although the court thought one might be implied. It may, however, with equal logic be presumed that had Congress intended any such preemption, it would have been included in the language of the statute.[35]

Collaterally, it may be presumed that failure to preempt common-law duties was an indication of congressional intent that public utilities not be relieved of this obligation to warn invitees of potentially hazardous conditions. The court, in that case, would not be creating a duty in requiring that warnings be posted, but rather would be recognizing and enforcing a pre-existing duty which applied not only to the defendant airline, but to all common carriers, thereby satisfying the congressional desire for uniformity. The argument that special knowledge beyond the competence of the court was required in granting the injunction is weakened if the warning is aimed at revealing the presence of a hazardous substance rather than announcing that the amount of a hazardous substance on board an aircraft has been declared dangerous. If, on the other hand, the statute must be interpreted as preempting common-law rights as well as state and local legislation, the HMT Act appears

[34] 259 F.2d 921 (D.C. Cir. 1959).

[35] Unfortunately legislative history on this point is unavailable.

to exempt those requirements which afford an equal or greater level of protection to the public than that afforded by the requirements of the HMT Act, provided they do not burden interstate commerce.[36]

Even if no common-law right of warning exists, it would appear that, contrary to the trial court's opinion, the standards laid out in *Virginia Petroleum* have been satisfied. The public interest test is clearly met as discussed above. Exposure to radiation is highly likely to cause irreparable injury, particularly if the person exposed has already been subjected to a higher than normal amount of radiation. The trial court declared that the plaintiff failed to show why the provisions of the Hazardous Materials Transportation Act would not prevent irreparable injury. The relevant provisions of section 105, however, provide that the Secretary "*may* issue . . . regulations for the safe transportation in commerce of hazardous materials."[37] (Emphasis added.) The language is in no sense mandatory but rather discretionary. Moreover, as pointed out above, previous attempts at safety regulations for hazardous substances have been notoriously, and perhaps tragically, ineffective. The third prong of the test requires that plaintiff demonstrate a probability of success on the merits. The court in *Virginia Petroleum* says that such probability of success is necessary to justify the court's intrusion into the ordinary processes of administration and judicial review. But where there is probability of irreparable injury, a lesser standard is imposed than probability of success.[38]

The weakest point in plaintiff's case, aside from procedural problems, is the fact that even the warning would not prevent irreparable injury should radiation leakage occur as the result of accident or of violation of a safety (*i.e.*, packaging) regulation. The airlines recognized this dilemma in *Delta Airlines, Inc. v. Civil Aeronautics Board*.[39] The only way to assure that no radiation

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[36] 49 U.S.C. § 1804(a) (Supp. 1974). For text see note 21 *supra*.

[37] *Id.*

[38] Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 926 (D.C. Cir. 1959); American Home Products Corp. v. Finch, 303 F. Supp. 448, 456 (D.C. Del. 1969).

[39] No. 74-1984, 1974 Term; renumbered No. 75-1267, 1975 Term (D.C. Cir. June 22, 1976). The court clarified its position in this decision two months after *Kappelmann*. Four airlines had filed tariff revisions which provided that they would not transport various items designated as "dangerous articles" by the FAA and the DOT, which were not related to human medical concerns. The CAB rejected the tariffs as inconsistent with the provisions of 14 C.F.R. Part 103 by

injury occurs is to ban such materials from passenger flights. In the absence of this drastic, yet obviously effective step, the court has a duty to enforce the public's common-law right to a warning of a potentially hazardous situation. The fact that the public would hesitate to fly on aircraft if it knew radioactive materials were aboard is not a valid reason for finding warnings a burden on interstate commerce, and therefore refusing to require or even permit them. Such reasoning is as valid as not permitting a highway warning in a rock-slide area because people might not travel on the road.

The court did not discuss the fact that federal agencies have been regulating the transportation of radioactive materials for many years, and yet passengers continue to be injured on aircraft carrying materials regarded as "safe" under federal regulations.[40] Nor was

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reason of being "more stringent," "more restrictive" and "more narrow in scope" than the regulation. The court ruled in *Delta Air Lines, Inc. v. CAB* that "in conformity with" must not be interpreted to mean "identical to," but rather "not in violation of" a safety regulation. If this be the court's position indeed, it would appear to follow that the Louisiana regulation requiring passenger warnings of the presence of hazardous materials aboard passenger-carrying aircraft merits reexamination. The MTB decision appears in direct conflict with the court's position and seems to require that the state regulation be identical to the federal.

[40] Aware of the shortcomings of federal regulations governing the transportation of radioactive materials, Delta attempted to add safety controls more stringent than the minimum requirements imposed by those regulations. The following exchange occurred during the House hearings relating to transportation of hazardous materials, indicating to some extent congressional intent:

> Mr. Reed (representing NTSB): The Hazardous Materials Regulation Board on March 17, 1972, filed a docket proposing changes in shipment quality control procedures to be performed by shippers, and these are regulatory changes reflecting almost verbatim those suggested by the Atomic Energy Commission.
>
> . . . .
>
> Mr. Brooks: And is there a *proposal now being considered to transfer the present authorities within the Office of Hazardous Materials over radioactive materials to the Atomic Energy Commission?* . . . .
>
> Mr. Reed: Yes. . . . .
>
> [A discussion of a leakage aboard a Delta flight follows.]
>
> Mr. Brooks: Do you know whether Delta Airlines has tried to tighten its own internal regulations with respect to the carriage of radioactive material?
>
> Mr. Reed: *They have taken definite steps to tighten up,* and *their requirements will be higher than the recommended requirements.*
>
> Mr. Brooks: You make me and Mr. Buchanan feel better, because we fly on Delta Airlines.
>
> Mr. Reed: Yes, sir. *We feel better now, when we fly on Delta,* too.

it mentioned that the Atomic Energy Commission (AEC), which has a voice in the regulation, is also a shipper of radioactive materials. Indeed, when representatives of the airline industry attempted to add safety controls more stringent than the minimum requirements imposed by agency regulation, the AEC petitioned the CAB to suspend those stricter safety rules.[41]

It is, then, a curious situation in which the regulated request stricter standards than the regulating agency will permit. And yet, aware of the continuing attitude of the agency, the court required that the plaintiff exhaust the remedies available through the rule-making procedure of agencies which had three times rejected the very relief he sought.

Although the issue of a common-law right of warning[42] was raised on trial level, on appeal the court failed to address itself to this important question. Tort law requires that a public utility give warning of hazardous or potentially hazardous conditions. This is especially true where the user has no reasonable alternative except to forego the use of the premises.[43] But the court's primary concern appears to be, not with passenger safety, but with orderliness. There is little emphasis on Congress's interest in protecting the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.[44] Yet this is the language of the HMT Act, upon which the court relies so heavily in reaching its decision. Congressional intent was further

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> Mr. Brooks: Does Delta have to get the approval from any Government agency to tighten their own regulations?
>
> Mr. Reed: It is my understanding this would have to be from the Civil Aeronautics Board.

Among those shippers which petitioned the CAB to suspend the stricter safety rules was the AEC. Hearings Before the Subcomm. on the Study of the Transportation of Hazardous Materials of the House Comm. on Government Operations, 92d Cong., 1st & 2d Sess. 318-19 (1972).

[41] *Id.*

[42] Professor Prosser states:

> The Restatement of Torts, § 347, has taken the position that in the case of a public utility, which has no right to exclude the public, the duty is not merely to give warning, but always to provide reasonably safe premises. This is no doubt true where the plaintiff has no reasonable alternative except to forego the use of the premises, as in *Hayes v. Illinois Cent. R. Co.*, La. App. 1955, 83 So.2d 160. . . .

W. PROSSER, HANDBOOK OF THE LAW OF TORTS 394 n.60 (4th ed. 1971).

[43] *Id.*

[44] 49 U.S.C. § 1801 (Supp. 1974).

clarified in a statement appearing in the Federal Register which points out that determination of the consistency of a state or local requirement with federal regulation is traditionally judicial in nature, and any conflicts "will be the subject of future litigation." The procedures established for obtaining formal determinations regarding state and local requirements are seen as complementary to the judicial machinery of the nation and not as granting exclusive jurisdiction to any governmental agency.[45]

There is no evidence that Congress has ever intended that all areas of human activity which are dealt with by an agency be automatically removed from traditional common-law protections. The court here failed to distinguish between technical and administrative concerns, which are the proper province of the administrative agencies, and common-law rights inherent in our system of laws.

Lee Ann Dauphinot

TORTS—Breach of Implied-in-Law Duty of Care—In an Action Against a Certified Aircraft Mechanic for Failure to Properly Inspect an Airplane, the Injured Party Is Entitled to Present a Cause of Action under a Contract Theory of Implied Warranty, But Liability under that Theory Cannot Be Imposed without a Showing of Fault, and the Defenses of Assumption of the Risk and Contributory Negligence are Available. *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 539 P.2d 584 (1975).

In September 1971 Fred Hoffman was landing his single engine airplane on a pasture landing strip when he hit a ditch, damaging the landing gear, propeller, and left wing. Hoffman contacted Simplot Aviation, Inc. to have repairs made on the airplane. Simplot repaired the parts of the plane damaged by the crash and then made a general visual inspection of the aircraft. On the basis of this inspection, Simplot informed Hoffman that the plane was in condition for a short flight to Simplot's repair facilities for general repairs.

[45] 41 Fed. Reg. 38,168 (1976).

Hoffman, after confirming the plane's flightworthiness, took off for the repair facilities. Before he reached the field, a bolt holding a wing strut broke, causing the plane to crash short of the destination airfield. The faulty bolt was unrelated to the repairs made by Simplot, and it was a question of fact whether the defect could have been detected from the exterior inspection made by Simplot's employees. Hoffman brought suit against Simplot on four theories: 1) negligence; 2) breach of express warranty; 3) breach of implied warranty; and 4) strict liability in tort. On special verdicts the jury held that there was no express warranty, and that strict liability would not be imposed. It further found the parties equally negligent and denied recovery in accordance with Idaho's comparative negligence statute.[1] The jury found, however, that Simplot had breached an implied warranty of proper inspection and returned a verdict for Hoffman on that theory. Simplot appealed, claiming that the special verdicts returned by the jury were inherently contradictory and that an implied warranty theory, assessing liability without fault, should not be imposed on a provider of services. *Held, Reversed and Remanded*: In an action against a certified aircraft mechanic for failure properly to inspect an airplane, the injured part is entitled to present a cause of action under a contract theory of implied warranty, but liability under this theory cannot be imposed without a showing of fault, and the defenses of assumption of the risk and contributory negligence are available. *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 539 P.2d 584 (1975).

The question which *Hoffman* presents is whether a cause of action may be brought on an implied warranty (contract) theory for the breach of a service contract by failure to meet an implied-in-law standard of care arising from the contract. This question falls within an area of law which is still in a confused state[2] and

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[1] IDAHO CODE ANN. § 6-801 (Supp. 1976):

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

[2] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 614 (4th ed. 1971) [hereinafter cited as PROSSER]; Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833 (Alas. 1967).

requires inquiry into two distinct issues. The first is whether an action for breach of an implied-in-law duty of care lies in tort or in contract. The second issue, influenced by the first, concerns the applicability of implied warranties to service contracts.

Included in the first issue are the problems involved in drawing a line between contract and tort recovery situations. These problems are based at least in part on the historical development of the two theories. Early tort law, emerging before the law of contracts, sought to offer protection to those injured by the inept serviceman and allowed an action for deceit against the serviceman for misrepresenting his skill.[3] Later, when the theory of contract law emerged, it was reasoned that assumpsit should be the gist of the action.[4] The result was to leave two distinct theories of recovery with differing procedural and remedial requirements which would lie for the same wrong.[5] The English courts sought to find some grounds which could be used to classify situations into one theory or the other,[6] and they therefore developed the dichotomy of nonfeasance and misfeasance.[7] Nonfeasance occurred when the actor completely failed to perform a condition or covenant in a contract. Only an action in contract was allowed to lie against the actor for this failure. Misfeasance, on the other hand, occurred when the actor in performance of the contract negligently caused damage, and an action in tort was therefore allowed.[8] The distinction cannot easily be applied in a great number of cases, but the concept remains at least partially in use in many American courts.[9]

In determining whether an action will lie in contract or in tort, most modern courts look at many factors, including the relief re-

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[3] *See* Hart v. Ludwig, 347 Mich. 559, 79 N.W.2d 895 (1956) for an extended discussion on the evolution of theories of contract and tort recoveries.

[4] Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888); 3 STREET, FOUNDATION OF LEGAL LIABILITY 173 (1906).

[5] Hart v. Ludwig, 347 Mich. 559, 79 N.W.2d 895 (1956).

[6] PROSSER, *supra* note 2, at 614.

[7] Watton v. Brinth, Y.B. Mich. 2 Hen. 4, f. 3, pl. 9 (1400).

[8] Hart v. Ludwig, 347 Mich. 559, 79 N.W.2d 895 (1956).

[9] Much scorn has been poured on the distinction, but it does draw a valid line between the complete nonperformance of a promise, which in the ordinary case is a breach of contract only, and a defective performance, which may also be a matter of tort. In general, the courts have adhered to the line thus drawn.

PROSSER, *supra* note 2, at 614.

quested, the form of the pleading, the nature of the grievance and the remedies available.[10] The decisions, however, have avoided the difficult classification of misfeasance and nonfeasance and have distinguished between contract and tort on the basis of how the breached duty arose.[11] In general, if a duty of care is imposed by law irrespective of the contractual relationship, then an action in tort will lie for breach of that duty.[12] On the other hand, if the duty arises solely under the terms of the contract, then an injured party will be confined to his contract action.[13] In those cases where the duty is imposed both by the terms of the contract and independently by law, most jurisdictions allowed the action to be brought under either theory, subject to the limitation that a person cannot recover twice for the same wrong.[14] At times, however,

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[10] Babb v. Paul Revere Life Ins. Co., 102 F. Supp. 247 (W.D.S.C. 1952); Good v. Hartford Accident & Indem. Co., 39 F. Supp. 475 (W.D.S.C. 1941); Kings Laboratories v. Valley Fruit Co., 18 Cal. App. 2d 47, 62 P.2d 1054 (1936); Nicholson v. Han, 12 Mich. App. 35, 162 N.W.2d 313, 33 A.L.R.3d 1386 (1968); Meeker v. Barton, 200 Okla. 4, 190 P.2d 451 (1948).

[11] Garig v. East End Memorial Hosp., 279 Ala. 118, 182 So. 2d 852 (1966); Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966); Sutker v. Pennsylvania Ins. Co., 115 Ga. App. 648, 155 S.E.2d 694 (1967); John Deere Co. v. Short, 378 S.W.2d 496 (Mo. 1964); Fuchs v. Parsons Constr. Co., 166 Neb. 188, 88 N.W.2d 648 (1958); Trans Caribbean Airways, Inc. v. Lockheed Aircraft Serv.-Int'l, 14 App. Div.2d 749, 220 N.Y.S.2d 485 (1961); Meekers v. Shafranek, 112 Ohio App. 320, 176 N.E.2d 293 (1960).

[12] Atlantic & P. Ry. v. Laird, 164 U.S. 393 (1896); Garig v. East End Memorial Hosp., 279 Ala. 118, 182 So. 2d 852 (1966); Sutker v. Pennsylvania Ins. Co., 115 Ga. App. 648, 155 S.E.2d 694 (1967); Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966); Taylor v. Herbold, 94 Idaho 133, 483 P.2d 664 (1971); Yeager v. National Coop. Refinery Ass'n, 205 Kan. 504, 470 P.2d 797 (1970); John Deere Co. v. Short, 378 S.W.2d 496 (Mo. 1964); Driekosen v. Black, Sivalls & Bryson, Inc., 158 Neb. 531, 64 N.W.2d 88 (1954); Trans Caribbean Airways, Inc. v. Lockheed Aircraft Serv.—Int'l, 14 App. Div.2d 749, 220 N.Y.S.2d 485 (1961); Shubitz v. Consolidated Edison Co., 59 Misc.2d 732, 301 N.Y.S.2d 926 (Sup. Ct. 1969); Meeker v. Shafranek, 112 Ohio App. 320, 176 N.E.2d 293 (1960).

[13] Atlantic & P. Ry. v. Laird, 164 U.S. 393 (1896); Garig v. East End Memorial Hosp., 279 Ala. 118, 182 So. 2d 852 (1966); Sutker v. Pennsylvania Ins. Co., 115 Ga. App. 648, 155 S.E.2d 694 (1967); Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966); Taylor v. Herbold, 94 Idaho 133, 483 P.2d 664 (1971); John Deere Co. v. Short, 378 S.W.2d 496 (Mo. 1964); Driekosen v. Black, Sivalls & Bryson, Inc., 158 Neb. 531, 64 N.W.2d 88 (1954); Trans Caribbean Airways, Inc. v. Lockheed Aircraft Serv.—Int'l, 14 App. Div.2d 749, 220 N.Y.S.2d 485 (1961); Rosenbaum v. Branster Realty Corp., 276 App. Div. 167, 93 N.Y.S.2d 209 (1949); Shubitz v. Consolidated Edison Co., 59 Misc.2d 732, 301 N.Y.S.2d 926 (Sup. Ct. 1969); Meeker v. Shafranek, 112 Ohio App. 320, 176 N.E.2d 293 (1960).

[14] Garig v. East End Memorial Hosp., 279 Ala. 118, 182 So. 2d 852 (1966);

the plaintiff may be limited to an action in tort alone.[15]

Hoffman presents a fourth type of situation. The duty does not arise independently of the contract, but arises out of the contractual relationship of the parties. By undertaking to perform under the terms of the agreement a duty is imposed by law that the performance be done according to a minimum standard of care. The duty would not arise without the contract, and yet there is no express or implied-in-fact contractual obligation. This is a twilight area where it is often difficult to determine whether the gist of the action lies in contract or tort.[16]

There are many jurisdictions which will freely allow an election of remedy by the injured party in situations such as this. For example, in *Gilley v. Farmer*[17] an action was filed against an insurer for failure to settle within the policy limits on a claim against its client, and the plaintiff sought garnishment of the insurer. Under Kansas law[18] garnishment is allowed only in contract actions, and the insurer-defendant therefore sought to have the action construed as arising only in tort so as to avoid the garnishment. The Kansas Court firmly ruled that where the contractor's negligence results in the breach of the implied-in-law warranty an action may be brought in either contract or tort or in both.[19]

Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966); Trans Caribbean Airways, Inc. v. Lockheed Aircraft Serv.—Int'l, Inc., 14 App. Div.2d 749, 220 N.Y.S.2d 485 (1961); Rosenbaum v. Branster Realty Corp., 276 App. Div. 167, 93 N.Y.S.2d 209 (1949).

[15] *See* Eads v. Marks, 39 Cal. 2d 807, 249 P.2d 257 (1952) at 260, where the court said:

> Contractual negligence ordinarily gives rise to an action either on contract or in tort, and the injured party may at his election waive the contract and sue in tort, . . . In general, however, it has been held that actions based on negligent failure to perform contractual duties . . . although containing elements of both contract and tort, are regarded as delictual actions, since negligence is considered the gravamen of the action.

See also Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953).

[16] Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833 (Alas. 1967).

[17] 207 Kan. 536, 485 P.2d 1284 (1971).

[18] KAN. STAT. ANN. § 60-724 (1964) states;

> No judgment shall be rendered in garnishment by reason of the garnishee:
> (2) holding moneys on a claim not arising out of contract and not liquidated as to amount. . . .

[19] Whatever the rule may be elsewhere, this court has been consistent in holding that where a person contracts to perform work or to

A view more widely adhered to is that the breach of duty arising out of the contractual relationship will generally give rise to an action in tort alone.[20] The contract is considered significant merely in establishing the relationship out of which the duty arises. The California Supreme Court in *Eads v. Marks*[21] stated this view clearly in holding that:

> It has been well established in this state that if the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu, but if it arises *from a breach of duty growing out of the contract* it is ex delicto . . . .[22]

Courts have considered the distinguishing grounds between contract and tort theories to be important because different substantive and procedural elements have developed under the two theories because of their independent historical evolution.[23] For example, the proof requirements in an action based on contract theory are generally less burdensome than those required in an action based on tort theory. On the other hand, a tort action will often give rise to a greater recovery of damages since, unlike a contract recovery, tort awards may sometimes include punitive damages. Tort actions are usually subject to a shorter statute of limitations

> render a service, without express warranty, the law will imply an undertaking or contract on his part to do the job in a workmanlike manner and to exercise reasonable care in doing the work. (Crabb v. Swindler, Administratrix, 184 Kan. 501, 337 P.2d 986.)
>
> Where negligence on the part of the contractor results in a breach of the implied warranty, the breach may be tortious in origin, but it also gives rise to a cause of action *ex contractu*. An action in tort may likewise be available to the contractee and he may proceed against the contractor either in tort or in contract; or he may proceed on both theories. (Nichols v. Nold, 174 Kan. 613, 258 P.2d 317, 38 A.L.R.2d 887). However, his petition need not state whether his action is based upon implied contract or tort. (Ablah v. Eyman, 188 Kan. 665, 680, 365 P.2d 181, 90 A.L.R.2d 766.)

Gilley v. Farmer, 207 Kan. 536, 485 P.2d 1284, 1289 (1971).

[20] Gagne v. Bertram, 43 Cal. 2d 481, 275 P.2d 257 (1952); L.B. Laboratories v. Mitchell, 235 P.2d 253 (Cal. App. 1951); Hoeqir v. Teague, 77 Ga. App. 513, 48 S.E.2d 697 (1948); Flint & Walling Mtg. Co. v. Beckett, 167 Ind. 429, 79 N.E. 503 (1906); Jackson v. Central Torpedo Co., 117 Okla. 245, 246 P. 426 (1926); Yeager v. Punnavan, 26 Wash. 2d 554, 174 P.2d 755 (1946).

[21] 39 Cal. 2d 807, 249 P.2d 257 (1952).

[22] *Id.* at 810, 249 P.2d at 260 [quoting Peterson v. Sherman, 68 Cal. App. 2d 706, 711, 157 P.2d 863, 866 (Dist. Ct. App. 1945) (emphasis added by *Eads* court)].

[23] *See generally* PROSSER, *supra* note 2, § 92.

than contract actions. Various other statutes and court-made law set up different rules depending upon whether the action is in contract or in tort theory.

Tort actions are subject to various defenses, such as contributory negligence and assumption of the risk, which are not applicable to contract actions.[24] The contributory negligence doctrine acts as a total bar to the plaintiff's recovery against the negligent defendant where the plaintiff has contributed to the harm he suffered by failing to conform to a standard of care for his own protection.[25] The assumption of the risk doctrine similarly acts as a bar to a plaintiff's suit against a defendant for negligence where the plaintiff has acted to voluntarily encounter a known unreasonable risk.[26] These defenses are clearly inapplicable to an action brought on contract theory.

The second primary issue involved in *Hoffman* is whether implied warranties are annexed by law to service contracts. The first issue, whether a particular action will lie in contract or tort theory, as discussed above, is closely involved with this second issue. This is because a contract action cannot be maintained unless a duty which is connected to the contract is breached,[27] and where there are no applicable express or implied-in-fact obligations the duty of care can arise only through the courts' or legislatures' imposition of a warranty.[28] If the jurisdiction recognizes that the law implies certain standards of care in the performance of the service which become part of the contract, then clearly it is possible to have a contract recovery situation.[29] On the other hand, if the jurisdiction does not annex such an obligation to the contract itself, the injured plaintiff may only raise the tort breach of duty in a negligence action. The critical focus, then, is whether the jurisdiction attaches the standard of care to the contract itself as an implied warranty or whether the jurisdiction recognizes the standard of care only as a general duty, the breach of which gives rise to a negligence action.

[24] *Id.* § 65.
[25] *Id.*
[26] *Id.* § 68.
[27] CORBIN ON CONTRACTS § 943 (1951).
[28] *Id.* § 653.
[29] *In re* Talbott's Estate, 184 Kan. 501, 337 P.2d 986 (1959).

It is universally accepted that one who attempts to perform services for another has placed upon him a common law implied obligation to exercise some degree of care and skill, the breach of which will give rise to a tort recovery.[30] Many jurisdictions have long supported the rule that this standard of care is an implied contractual provision and that failure to meet this standard is a breach of the contract.[31] Other jurisdictions, however, have traditionally refused to allow an action in contract for failure of a serviceman to meet this common law duty of care and have only allowed an action to lie in tort.[32]

These traditional classifications on the standard of care imposed on a service contract have been influenced by the advancement of the law in the sales contract area.[33] Although intended to deal only with the sale of goods, the broad policy arguments behind the Uniform Commercial Code's (UCC) strict liability type of implied warranties[34] of merchantability and fitness for a particular purpose have been discussed by several writers as being applicable

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[30]
> The law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken to do, for nonperformance of which duty an action lies.

Hart v. Ludwig, 347 Mich. 559, 79 N.W.2d 895 (1956).

[31] Kuitems v. Covell, 104 Cal. App. 2d 482, 231 P.2d 552 (1951); Bellman Heating Co. v. Holland, 86 A.2d 816 (D.C. Mun. App. 1952); *In re* Talbott's Estate, 184 Kan. 501, 337 P.2d 986 (1959); George v. Goldman, 333 Mass. 496, 131 N.E.2d 772 (1956); Baerveldt & Honig Constr. Co. v. Szombathy, 365 Mo. 845, 289 S.W.2d 116 (1956); Brush v. Miller, 208 S.W.2d 816 (Mo. App. 1948); R. Krevolin & Co. v. Brown, 20 N.J. Super. 85, 89 A.2d 255 (1952); Gore v. Sindelar, 48 Ohio L. Abs. 317, 74 N.E.2d 414 (Ohio App. 1947); Brown v. Eakins, 220 Ore. 122, 348 P.2d 1116 (1969); Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950).

[32] *See* cases cited *supra* note 20.

[33] Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[34] UNIFORM COMMERCIAL CODE § 2-314 (1972):

> Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .

UNIFORM COMMERCIAL CODE § 2-315 (1972):

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

to the area of service contracts,[35] and some courts have examined this possibility, although these courts have generally denied the application of UCC warranties to service contracts.[36] In fact, only the Alabama Supreme Court case of *Broyles v. Brown Engineering Co.*[37] has conflicted with this general rejection, and that case has been either ignored by other courts or has been strictly limited in its applicability.[38]

The inapplicability of the UCC-type of implied warranties to service contracts has not caused the courts to reject the application of all implied warranties to service contracts. The common law standard of care and skill placed upon a performer of services, described above,[39] has been examined by courts in this modern context, and as a result, there has been some reconsideration given to whether this common law duty should be called a warranty and whether breach of such duty may give rise to a contract theory recovery as well as a tort theory recovery.[40]

The recent case of *Pepsi Cola Co. of Anchorage v. Superior Burner Service*[41] falls into this category. In a situation where the

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[35] F. HARPER & F. JAMES, LAW OF TORTS § 28.19, at 1576 (1956); Farnsworth, *Implied Warranty of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

[36] La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968); Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833 (Alas. 1967); Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954); Shepard v. Alexian Bros. Hosp., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973); Samuelson v. Chutich, 529 P.2d 631 (Colo. 1974); Audlane Lumber & Bldrs. Supply v. D. E. Britt Assocs., 168 So. 2d 333 (Fla. App. 1964); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (1967), *aff'd*, 241 A.2d 637 (1968); Aegis Prods. v. Arriflex, 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1966); 2 F. HARPER & F. JAMES, LAW OF TORTS § 28.19 (1956); PROSSER § 104, at 679.

[37] 151 So. 2d 767 (Ala. 1963).

[38] Central Stikstof Verkoopkanter, N.V. v. Walsh Stevedoring Co., 380 F.2d 523 (5th Cir. 1967); Note, *Implied Warranties in Service Contracts*, 39 NOTRE DAME LAW. 680 (1964).

[39] *See* note 30 *supra*.

[40] Recent cases allowing a contract action for breach of implied warranty of workmanlike and reasonable care and skill include Aced v. Hobb-Sesack Plumbing Co., 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961); Gilley v. Farmer, 207 Kan. 536, 485 P.2d 1284 (1971); Hebert v. Pierrotti, 205 So. 2d 888 (La. App. 1968); Garcia v. Color Tile Distrib. Co., 75 N.M. 570, 408 P.2d 145 (1965); McCool v. Hoover Equip. Co., 415 P.2d 954, (Okla. 1966).

Recent cases not recognizing implied warranties in service contracts include Audlane Lumber & Bldrs. Supply, Inc. v. D.E. Britt Assocs., 168 So. 2d 833 (Alas. 1967); and Aegis Prods., Inc. v. Arriflex Co., 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1966).

[41] 427 P.2d 833 (Alas. 1967).

defendant's repairman failed to properly examine a boiler to see if it contained water before firing it, the Alaska Supreme Court first noted that the statutory UCC-type warranties[42] were inapplicable. It then recognized that there was a conflict of authority as to whether a plaintiff who asserts a defendant's breach of a serviceman's duty of workmanlike conduct may sue on a contract as well as a tort cause of action. The court found that the standards of care required under both negligence (tort) and implied warranty (contract) are identical, and that both are imposed by law and not by agreement of the parties. Based upon this and upon the court's feeling that the defenses to both actions would be the same,[43] the implied warranty cause of action was rejected, and the case was limited to the clearly applicable tort cause of action.

In reaching a determination in this area the majority of courts have generally continued to follow policy and procedural considerations in deciding whether an action will lie in contracts for failure to live up to the common law duty of care imposed in a service contract.[44] Many jurisdictions where the courts have limited the recovery for breach of the common law duty of care to actions in tort alone have rejected the use of the term "implied warranty" as adding only confusion.[45] Therefore, in suits on a service contract, the decision whether there is a common law implied warranty of workmanlike care determines the first issue of whether the action will lie in contract as well as in tort.

The Idaho Supreme Court in *Hoffman v. Simplot Aviation,*

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[42] *See* note 34 *supra.*

[43] *See* note 61 *infra* and accompanying text on the Alaska Supreme Court's dictum concerning the applicability of the tort defenses of contributory negligence and assumption of the risk to the implied warranty (contract) theory of recovery.

[44] *See* note 40 *supra.*

[45] Aegis Prods. v. Arriflex Corp., 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1966); *and see* Audlane Lumber & Bldrs. Supply v. D.E. Britt Assocs., 168 So. 2d 333, 335 (Fla. App. 1964) where the court said:

> [I]n the preparation of design and specifications as the basis of construction, the engineer or architect 'warrants' that he will or has exercised his skill according to a certain standard of care, that he acted reasonably and without neglect. Breach of this 'warranty' occurs if he was negligent. Accordingly, the elements of an action for negligence and for breach of the 'implied warranty' are the same. The use of the term 'implied warranty' in these circumstances merely introduces further confusion into an area of law where confusion abounds.

Inc.[46] was apparently trying to confront this situation logically. As its starting point, the court held that an implied warranty is imposed on the serviceman, *i.e.*, that his performance will be done in a workmanlike manner.[47] In so doing, the court was apparently forcing itself to uphold its own precedent of *Knoblock v. Arenguena.*[48] There it was said, in a case involving the drilling of a water well, that the defendant's undertaking to perform the drilling carried with it an implied obligation to do the work in a good and workmanlike manner with the ordinary skill of those who undertake such work, and that negligent failure to observe these conditions is a tort as well as a breach of contract.

The court in *Hoffman* stated that generally the cause of action in tort exists independently of the cause of action in contract, but that in the circumstances presented by the instant case the two merged into a single cause of action because whether the standard of care is defined as a tort duty of care or as a contractual implied warranty, the result is the same.

The court then decided that under this single cause of action the plaintiff is entitled to submit issues to the jury using the implied warranty theory. The court's terminology makes it difficult to determine whether only the causes of action[49] have merged, or whether the court has also merged the contract and tort theories of recovery into a single theory.[50] Presumably, since the court only states that the causes of action have merged, and does not rule on the negligence theory, the result of the holding is that a cause of action based on breach of the common law duty of workmanlike care may be based on either the implied warranty (contract)

[46] 97 Idaho 32, 539 P.2d 584 (1975).

[47] The standard imposed may vary depending upon the expertise of the actor, either possessed or represented to be possessed, the nature of the services and the known resultant danger to others from the actor's negligence or failure to perform.

Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584, 588 (1975).

[48] 85 Idaho 503, 380 P.2d 898 (1963).

[49] As used in this article the term "cause of action" is given the definition adopted by the Supreme Court in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), which is "the common nucleus of operative facts." This should be distinguished from the terms "theory" or "theory of action" which are defined in this article as the system of legal concepts into which the facts of the case fall. BLACKS LAW DICTIONARY 1649 (4th ed. 1968) further defines "theory" as "the basis of liability."

[50] *See* note 49 *supra.*

theory or the negligence (tort) theory, or both. If this was in fact the holding of the case then it is still consistent with the rule which allows dual theories of recovery to be presented for breach of an implied-in-law duty arising from the contract.[51]

The court went beyond this traditional position, though, because in defining the implied warranty theory of recovery which it was allowing the court created a hybrid action. The decision does not define all the elements of and the defenses to this action, but it does state that the tort defenses of contributory negligence and assumption of the risk are available against this implied warranty action. The reasons are not clear. One possible explanation for the court's position is that the court is, in fact, merging the implied warranty and negligence theories of recovery in addition to merging the causes of action.[52] As was discussed above, it is difficult to determine whether this was the court's holding, because the court's terminology is imprecise.

Even assuming that the court did not intend to create a hybrid between the contract and tort theories of recovery, the decision is still significant in that the court held that it must allow an action in contract, but at the same time held that it would not deprive the defendant of the tort defenses of contributory negligence and assumption of the risk. Unfortunately the court failed to fully define what it meant by "contributory negligence" and "assumption of the risk," so that it is difficult to determine exactly how far the decision goes. It is possible that the court intended to apply the common law defense of contributory negligence,[53] which is a complete bar; however, it is not possible to determine this from the court's opinion, and there does not appear to be any court which has made such a ruling in a contract case.

If the court did not mean that the common law contributory negligence defense should apply, then it could have been looking

[51] *See* note 19 *supra*.

[52] *See* note 49 *supra*.

[53] *See* PROSSER, *supra* note 2, at 416 where he states:

> Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection . . . the plaintiff is denied recovery because his own conduct disentitles him to maintain the action.

to statutory comparative negligence.[54] Idaho has enacted a comparative negligence statute[55] which makes fifty percent negligence on the part of the plaintiff a bar to recovery. This statute, however, applies only to causes of action in negligence, not contract. It is possible that the court is attempting to expand the statute by judicial interpretation to cover this type of implied warranty situation.

A third possible interpretation of "contributory negligence" which may have been intended by the Idaho court would be one similar to that used in products liability cases. Idaho recognized in the case of *Shields v. Morton Chemical Co.*[56] that there is a defense of contributory negligence in products liability cases which may be raised against both implied warranties and strict liability. This defense is not the same as the contributory negligence normally applied to negligence cases,[57] but is defined as knowingly misusing a product or voluntarily and unreasonably proceeding to encounter a known danger.[58] This definition of contributory negligence has been recognized in other jurisdictions as well, in the context of products liability,[59] although some courts still hold the defense of "contributory negligence" per se to be inapplicable in any product liability case.[60]

The Alaska Supreme Court in *Pepsi Cola Bottling Co. v. Superior Burner Service Co.*,[61] in dictum, also explored the problem of contributory negligence in implied warranties in service contracts. That court, although not allowing the cause of action for implied warranties in services contracts, did state that, assuming that it were to allow such an action, it believed that the defenses of contributory negligence and assumption of the risk would be

[54] For general discussion on comparative negligence see: C.R. HEFT & C.J. HEFT, COMPARATIVE NEGLIGENCE MANUAL (1971); V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974).

[55] *See* note 1 *supra*.

[56] 95 Idaho 674, 518 P.2d 857 (1974).

[57] *See* note 53 *supra*.

[58] PROSSER, *supra* note 2, § 102.

[59] Maiorino v. Weco Prods. Co., 45 N.J. 570, 214 A.2d 18 (1965); PROSSER, *supra* note 2, § 102.

[60] Brown v. Chapman, 304 F.2d 149, 153 (9th Cir. 1962); Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254, 257-58 (6th Cir. 1960); Simmons v. Wichita Coca-Cola Bottling Co., 181 Kan. 35, 309 P.2d 633, 635 (1957).

[61] 427 P.2d 833 (Alas. 1967).

available. It went further to include lack of causation as a defense in the hypothetical implied warranty cause of action. The court did not define these terms to have the meanings which are used in tort;[62] instead, it viewed all three defenses as merging and defined contributory negligence as it is used in products liabilities actions.[63]

The court in *Hoffman,* if it intended to allow contributory negligence and assumption of the risk defenses for breach of a duty of workmanlike performance, should have limited the cause of action in that situation to negligence theory alone. That approach would be more logically consistent with both theory and precedent, and even more importantly, it would avoid unnecessary confusion in lower courts trying to apply the hybrid theory fairly and in juries attempting to deal with these issues. Although many areas of law have been undergoing modification in the past few years, there seems to be no overriding policy reason for the introduction of the decision in *Hoffman.* It is apparent that the court has attempted to take a critical look at the law and search for sound theories; however, its main success has been to confuse the area even more.

James McKellar

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[62] PROSSER, *supra* note 2, §§ 65, 68.

[63] The court in its footnote quotes Prosser's description:

> But if he [Plaintiff] discovers the defect, or knows of the danger arising from it, and proceeds nevertheless deliberately to encounter it by making use of the product, his conduct is the kind of contributory negligence which overlaps assumption of the risk; and on either theory his recovery is barred.

427 P.2d 833, 842 n.31.

Current Literature