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Case Notes

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Case Notes

TORTS—STRICT PRODUCTS LIABILITY AND STATE OF THE ART EVIDENCE IN TEXAS—In an Action Based Upon Strict Products Liability in Tort, Evidence of Unavailability of Safety Devices is Inadmissible Because Such Evidence is Relevant Only to the Issue of Care Exercised by the Seller and Does Not Address the Utility of the Product or the Risk Involved in its Use. *Bailey v. Boatland of Houston, Inc.*, 585 S.W.2d 805 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ filed).

A wrongful death action was brought by the surviving widow and two adult children of Samuel Bailey, who was killed when he was thrown from his bass boat on May 27, 1973, on Lake Livingston, Texas. Plaintiffs brought suit based on strict products liability in tort against Boatland of Houston, Inc., the seller of the boat which deceased was operating at the time of his death.

Plaintiffs' pretrial motion to exclude state of the art evidence concerning the unavailability of kill switches[1] at the time of the manufacture and sale of the bass boat was denied. The trial court granted the plaintiffs a running objection to such state of the art evidence. Based upon the jury's adverse answers to plaintiffs' special issues[2] the district court entered judgment for the defendant. Plaintiffs appealed as to the admission of the evidence. *Held, reversed and remanded*: In an action based upon strict products lia-

[1] Kill switches are simple mechanical devices which kill the motor of the boat if the driver of the boat moves more than a short distance from the area of the boat controls. The device is usually operated by the boat operator clipping a string to the belt loop of his pants. The other end of the string runs to the control box beside the driver's seat. When the driver moves more than several feet from the boat seat the string will trip a switch which kills the motor.

[2] The jury answered adversely to the plaintiff's special issues inquiring whether:

1) The boat in question was defective;
2) Decedent misused the boat in question;
3) Decedent failed to follow proper warnings and instructions; and
4) Decedent assumed the risk of his death.

Bailey v. Boatland of Houston, Inc., 585 S.W.2d 805, 807 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ filed).

bility in tort, evidence of unavailability of safety devices is inadmissible because such evidence is relevant only to the issue of care exercised by the seller, and does not address the utility of the product or the risk involved in its use. *Bailey v. Boatland of Houston, Inc.*, 585 S.W.2d 805 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ filed).

I. STRICT LIABILITY IN TEXAS

The basis for modern strict liability was expressed in *Greenman v. Yuba Power Products, Inc.*,[3] decided by the Supreme Court of California in 1962. The court determined that if a manufacturer realizes that a product which he places on the market will be used without inspection for defects, the manufacturer will be held strictly liable in tort if the product proves to have a defect that causes injury to a person.[4] Section 402A of the Restatement (Second) of Torts[5] has incorporated and expanded the basic approach of *Greenman*.[6] The majority of jurisdictions have either adopted or cited with approval section 402A as the basis for an action in strict liability.[7]

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[3] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

[4] 377 P.2d at 900, 27 Cal. Rptr. at 700.

[5] Section 402A reads:

> SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER:
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> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[6] The *Greenman* case involved an element of scienter, whereas section 402A requires no scienter on the part of the seller or manufacturer.

[7] *See* Walkowiak, *Product Liability and the Concept of Defective Goods: "Reasonableness" Revisited?*, 44 J. AIR L. & COM. 705, 706-07 n.7 (1979); 44 J. AIR L. & COM. 207, 208-09 n.5 (1978); 43 J. AIR L. & COM. 587, 589-90 n.12 (1977).

In 1967, the Texas Supreme Court, in the companion cases *Shamrock Fuel Oil Sales Co. v. Tunks*[8] and *McKisson v. Sales Affiliates, Inc.*,[9] expressly adopted section 402A and extended strict liability to all products. The strict liability theory is not based on negligence or warranty concepts but is founded on public policy considerations.[10] The Texas Supreme Court's adoption of the rule of strict liability as stated in section 402A arose from the "irrefutable logic that the rule of strict liability is the only practical vehicle for protecting the public against harm so often encountered by innocent users and consumers of defective products."[11]

According to section 402A, anyone who sells a product in a "defective condition unreasonably dangerous to the user or consumer" is liable for physical harm suffered by the user or consumer from use of the product.[12] The Texas courts have not articulated a precise definition of "defective condition unreasonably dangerous."[13] However, comment g to section 402A defines a defective condition as "a condition not contemplated by the ultimate

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[8] 416 S.W.2d 779 (Tex. 1967).

[9] 416 S.W.2d 787 (Tex. 1967).

[10] There are three primary reasons for imposing strict tort liability on a manufacturer or seller of products: (1) The consumer is entitled to rely on the product being what it purports to be, and not a dangerous instrumentality; (2) The imposition of such liability upon the manufacturer or seller will act as an inducement to improve the safety of the product, and serve as a deterrent against the sale of other defective products; (3) The manufacturer is in a better position to bear the loss from a faultless but dangerous product than is the consumer since the manufacturer can pass the loss on to his other customers and thus effectively distribute the loss throughout society. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957); Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[11] Pittsburgh Coca-Cola Bottling Works v. Ponder, 443 S.W.2d 546, 548 (Tex. 1969).

[12] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[13] *See, e.g.*, Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979) ("defectively designed" product is "unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use"); Rourke v. Garza, 530 S.W.2d 794, 798 (Tex. 1975) (defective product "exposes its user to an unreasonable risk of harm when used for the purposes for which it was intended"); Pittsburgh Coca-Cola Bottling Works v. Ponder, 443 S.W.2d 546, 550 (Tex. 1969) (product is defective if "not reasonably fit for the purposes for which it was intended to be used"). *See also* Sales & Perdue, *The Law of Strict Liability in Texas*, 14 HOUS. L. REV. 1, 6 (1976).

consumer, which will be unreasonably dangerous to him."[14] "Unreasonably dangerous" is defined in comment i as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics."[15]

In attempting to determine whether a product is "unreasonably dangerous," the Texas Supreme Court developed an instruction for the jury which requires the application of a bifurcated test. In *Henderson v. Ford Motor Co.*,[16] the court held that in finding a product "unreasonably dangerous," the jury must determine that the product as manufactured would not meet the reasonable expectations of the ordinary consumer as to safety[17] or that a prudent manufacturer, aware of the risk involved in its use, would not have placed such a product in the stream of commerce.[18] However, in *Turner v. General Motors Corp.*,[19] the court expressly rejected the bifurcated test advanced in *Henderson* for determining whether a product is "unreasonably dangerous."[20] The court found that neither the bifurcated definition of "unreasonably dangerous"[21] nor the definition provided in comment i of section 402A[22] had any place in jury instructions in a strict liability case due to "the inconclusiveness of the idea that jurors would know what ordinary consumers would expect in the consumption or use of a product, or that jurors would or could apply any standard or test

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[14] RESTATEMENT (SECOND) OF TORTS § 402A, comment g at 351 (1965).

[15] *Id.*, comment i at 352.

[16] 519 S.W.2d 87 (Tex. 1974).

[17] There was apparently some confusion as to whether the jury instruction should be given in the conjunctive using "and," or should be given in the disjunctive using "or." In *Henderson*, the court used the disjunctive form. In *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977), however, the lower court had given the bifurcated test in the conjunctive. The supreme court expressly held that the test was to be given to the jury in the disjunctive using "or" rather than "and." *Id.* at 347.

[18] Henderson v. Ford Motor Co., 519 S.W.2d 87, 92 (Tex. 1974).

[19] 584 S.W.2d 844 (Tex. 1979).

[20] *Id.* at 851.

[21] *Id.*

[22] *Id.* See note 16 *supra*, and accompanying text. The court held that henceforth the jury instruction set forth as Special Issue Number One, 584 S.W.2d at 847, was to be given instead of the comment i definition of "unreasonably dangerous." See note 25 *infra*.

outside that of their own experiences and expectations."[23] The court held that henceforth no definition of "unreasonably dangerous" should be given in strict products liability actions.[24] Instead, the jury was to be instructed that the product was defective if the "product . . . [was] unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use."[25]

Strict liability cases involving product defects generally concern one of three types of product defects. These three types of defects are design, manufacturing and marketing defects.[26] A design defect results when a product is marketed in the condition intended by the manufacturer, but nevertheless, poses a high risk of danger or inadequately protects from harm to the consumer due to its design.[27] Both the *Turner* and *Bailey* cases involved a design defect.[28]

Because *Turner* was a design defect case it is possible that the risk-utility balancing analysis to be used by the jury is limited to cases involving design defects. The statement of the *Turner* court that "henceforth in the trial of strict liability cases involving design defects the issue and accompanying instructions will not in-

[23] 584 S.W.2d at 851.

[24] Other courts that have eliminated the "unreasonably dangerous" terminology from section 402A have found that strict liability can function just as effectively without this qualification. *See* Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973) (applying Alaska law); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975).

[25] 584 S.W.2d at 847. Special Issue Number One states:

> Do you find from a preponderance of the evidence that at the time the [product] in question was manufactured by [the manufacturer] the [product] was defectively designed?
>
> By the term "defectively designed" as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

[26] Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 7-26 (1976).

[27] *See* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacturing and Design of Products*, 20 SYRACUSE L. REV. 559 (1969).

[28] Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979). In *Bailey*, the bass boat was marketed in the condition intended by the manufacturer. Furthermore there was a question in the case of whether the product inadequately protected the consumer from harm due to its design. Thus, *Bailey* concerned a design defect although the court never discussed the case as such.

clude either the element of the ordinary consumer or of the prudent manufacturer,"[29] lends strong support to the theory that the risk-utility analysis will only be applied in design defect cases. If the *Turner* court had intended that the risk-utility analysis apply in manufacturing or marketing defect cases, the court presumably would have mentioned those defects in the above statement.

II. State of the Art Evidence in Strict Liability

The issue of admissibility of state of the art evidence typically arises in a product liability case when it is alleged that the product is defective because of unreasonably dangerous design or failure to incorporate safeguards or protective devices which are technologically feasible.[30] There are actually two interrelated doctrines that are often referred to as state of the art.[31] The first type of state of the art evidence concerns whether the defendant has conformed to the industry-wide standards in design and manufacture of the product. The second type of state of the art evidence is intended to show that at the time the product was designed and manufactured, the state of scientific knowledge was such that the product could not be made safer.

A. *State of the Art Evidence to Prove Conformity with the Prevailing Custom of the Industry*

The custom of the industry type of state of the art evidence has met strong resistance in strict liability cases in several jurisdictions.[32] The basis for the inadmissibility of such evidence is

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[29] 584 S.W.2d at 847.

[30] *See, e.g.*, Bruce v. Martin-Marietta Corp., 544 F.2d 443 (10th Cir. 1976); Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973); Atkins v. American Motors Corp., 335 So. 2d 134 (Ala. 1976); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970); Matthews v. Stewart, 20 Ill. App. 3d 470, 314 N.E.2d 683 (1974).

[31] *See* Karasik, *State of the Art or Science: Is it a Defense to Products Liability?*, 60 ILL. B.J. 348, 350-51 (1972); Murray, *The State of the Art Defense in Strict Products Liability*, 57 MARQ. L. REV. 649, 651-52 (1974); 43 J. AIR L. & COM. 587, 590-92 (1977).

[32] *See* Atkins v. American Motors Corp., 335 So. 2d 134 (Ala. 1976); Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970), discussed in Blohm v. Bardwell Mfg. Co., 380 F.2d 341 (10th Cir. 1967);

founded in section 402A. According to section 402A(2)(a), the seller or manufacturer may be held strictly liable even though "the seller has exercised all possible care in the preparation and sale of his product."[33] Under traditional negligence theory the defendant may introduce evidence of the custom of the industry in order to establish the standard of care required of the defendant.[34] If he has met the standard of care set by the custom of the community he will absolve himself of liability based on negligence. In a strict liability action based on section 402A(2)(a), however, liability is imposed upon the manufacturer regardless of the care he has exercised. Custom of the industry type of state of the art evidence is therefore irrelevant in a strict products liability action when it is introduced to establish a defendant's standard of care. Furthermore, Judge Learned Hand in 1932 expressed a strong public policy reason for denying introduction of the custom type of state of the art evidence when he stated in *The T. J. Hooper*[35] that, "a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own test, however persuasive be its usages. Courts must in the end say what is required."[36] Although liability in *The T. J. Hooper* was based on negligence, the public policy reasoning is equally applicable to strict products liability.

Other jurisdictions have held that the custom type of state of the art evidence is admissible to show that a product is not "defective" as defined in section 402A.[37] As stated earlier, in order to impose liability under section 402A, the product must be in a "defective condition unreasonably dangerous." The product is unreasonably dangerous if the article is "dangerous to an extent beyond that which would be contemplated by the ordinary con-

Gelsumino v. E.W. Bliss Co., 10 Ill. App. 3d 604, 295 N.E.2d 110 (1956); Murray, *supra* note 31, at 652-53.

[33] RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965).

[34] *See, e.g.*, Day v. Barber-Colman Co., 10 Ill. App. 2d 494, 135 N.E.2d 231 (1956), discussed in Murray, *supra* note 31, at 649-51.

[35] 60 F.2d 737 (2d Cir. 1932).

[36] *Id.* at 740.

[37] *See* Bruce v. Martin-Marietta Corp., 544 F.2d 443 (10th Cir. 1976); Olson v. Arctic Enterprises, Inc., 349 F. Supp. 761 (D.N.D. 1972); Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (1976); Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976); Jackson v. Biloxi, 272 So. 2d 654 (Miss. 1973); Murray, *supra* note 31, at 653-55.

sumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[38] The ordinary consumer's expectations therefore govern whether a product is defective as defined in section 402A. Several courts have allowed defendants to introduce custom type of state of the art evidence under section 402A.[39] One commentator has discussed the reasoning of those courts:

> Since whether or not a product is defective depends upon whether or not the danger involved in its use would be apparent to a reasonable consumer, state of the art evidence can be useful in establishing that the product involved is similar to all other products of that type and therefore an ordinary consumer . . . with the ordinary knowledge common to the community as to its characteristics would have realized the potential danger . . . since the machine represents the highest degree of safety attainable at the time, as evidenced by other manufacturer's products, while still being functional, it was not defective because it didn't represent a danger which would not be anticipated by a reasonable consumer.[40]

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[38] RESTATEMENT (SECOND) OF TORTS § 402A, comment i at 352 (1965).

[39] *See, e.g.*, Raney v. Honeywell, Inc., 540 F.2d 932 (8th Cir. 1976); Back v. Wickes Corp., 78 Mass. Adv. Sh. 1874, 378 N.E.2d 964 (1978); Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978); 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A [4] [i] (1979).

[40] Murray, *supra* note 31, at 654-55. Jurisdictions which permit introduction of this type of evidence appear to allow the evidence to be used only in an offensive posture and not in a defensive posture. As an example, several cases hold that the defendant may use this type of evidence to prove that a product is not defective but make no mention of whether a plaintiff may use such evidence. *See* E.R. Squibb & Sons, Inc. v. Stickney, 274 So. 2d 898 (Fla. Dist. Ct. App. 1973); Jackson v. Biloxi, 272 So. 2d 654 (Miss. 1973).

It could be argued that the reasoning advanced by Murray to support the introduction by a defendant seller or manufacturer of custom type of state of the art evidence could just as easily be used to support introduction of such evidence by the plaintiff. In such a situation Murray's argument could be reworded to support use of custom type of state of the art evidence while still maintaining its logical consistency. When reworded to support use of the evidence by the plaintiff, Murray's argument would read:

> Since whether or not a product is defective depends upon whether or not the danger involved in its use would be apparent to a reasonable consumer, state of the art evidence can be useful in establishing that the product involved is similar to all other products of that type and therefore an ordinary consumer . . . with the ordinary knowledge common to the community as to its characteristics would *not* have realized the potential danger . . . since the machine represents the highest degree of safety attainable at the time, as evidenced by other manufacturer's products, while still being functional, it was defective because it *did* represent a danger which

B. *State of the Art Evidence as Proof that the Product was as Safe as was Technologically Feasible when Designed and Manufactured*

The second variety of state of the art evidence is that which shows that the level of scientific knowledge was such that at the time the product was designed and manufactured it was technologically unfeasible to make the product safer. In using this type of state of the art evidence the emphasis is not on what other manufacturers are doing, but instead concerns whether the manufacturer has used all available technological skill and scientific knowledge to manufacture a safe product.[41] Most jurisdictions have not hesitated to accept this evidence in strict liability actions,[42] the one notable exception to this rule being the state of Illinois.[43]

The technological type of state of the art evidence is also useful to demonstrate that a product was "unavoidably unsafe" within the meaning of section 402A, comment k.[44] According to comment

would not be anticipated by a reasonable consumer. (changes italicized).

[41] Murray, *supra* note 31, at 652.

[42] Hines v. St. Joseph's Hosp., 86 N.M. 763, 527 P.2d 1075 (1974); Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974).

[43] The Supreme Court of Illinois has held that any type of state of the art evidence is inadmissible in an action based on strict products liability. Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970). *See* Gelsumino v. E.W. Bliss Co., 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973).

[44] Comment k to § 402A reads:

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they

k, the seller of a product which in the present state of human knowledge is incapable of being made safe for its intended and ordinary use, "is not to be held to strict liability for unfortunate consequences . . . merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparent risk."[45] Such a product, if properly prepared and accompanied by proper warnings and directions is not defective nor is it unreasonably dangerous.[46] Thus, state of the art evidence is relevant under comment k to demonstrate that the "present state of human knowledge" is such that the product could not be made any safer. Once the seller has demonstrated that the product is as safe as is technically possible and that it has been properly manufactured and labeled, the product will fall under the comment k exception to strict liability imposed by section 402A if the utility of the product justifies the risk. The most common type of products which fall under comment k are pharmaceuticals.[47]

III. *Bailey v. Boatland of Houston, Inc.*, 585 S.W.2d 805 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ filed).

An extensive review of case law in Texas reveals that the question of admissibility and relevance of state of the art evidence in strict products liability is one of first impression.[48] In the trial court, plaintiff elicited testimony from the inventor of the kill

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> are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS § 402A, comment k at 353-54 (1965).

[45] *Id.*

[46] *Id.*

[47] *See, e.g.*, Basko v. Sterling Drug, Inc., 416 F.2d 417 (2d Cir. 1969); Hines v. St. Joseph's Hosp., 86 N.M. 763, 527 P.2d 1075 (1974). Comment k has also been used in non-drug cases when the product is an apparently useful and desirable one but is attended with elements of unquestioned danger. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 830 (1974).

[48] Bailey v. Boatland of Houston, Inc., 585 S.W.2d 805, 808 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ filed).

switches[49] that the device is a simple mechanical one that would greatly increase the safety of boats.[50] Testimony was also adduced that the concept of kill switches was not a new concept since various types of kill switches had been used on racing boats for over thirty years.[51] The inventor developed the kill switch for bass boats in November of 1972 and applied for a patent on the device in January of 1973.[52] The accident in question occurred on May 27, 1973.[53] No one knew of the specifics of the inventor's kill switch until it was manufactured and marketed in August of 1974.[54] Expert witnesses for the defendant indicated the kill switches existed as a concept and various kinds were in limited use prior to the manufacture of the bass boat in question but none were commercially available at the time.[55] Defendant also introduced evidence indicating that the placement of kill switches on bass boats was not the accepted industrial practice because kill switches were not commercially available.[56]

It was the admission of the evidence introduced by the defendant and the testimony of its expert witnesses to which the plaintiffs objected at the time of trial, and to which plaintiffs were granted a running objection by the trial court.[57] The plaintiffs contended that such state of the art evidence regarding unavailability is only relevant to establish the "care" exercised by the manufacturer in designing the boat, an issue which is immaterial in a strict liability action. The plaintiffs argued, therefore, that the admission of the evidence in question constituted reversible error.

In holding that the trial court erred in admitting evidence of the unavailability of kill switches at the time of the manufacturing and selling of the boat, the court of appeals relied heavily on the recent Texas Supreme Court decision in *Turner v. General Motors*

[49] See note 1 and accompanying text, *supra.*

[50] 585 S.W.2d at 807.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 807-08. The inventor's personal investigation revealed that prior to this time no other kill switch was marketed, although some people had improvised homemade kill switches for their boats. *Id.*

[55] *Id.* at 808.

[56] *Id.*

[57] *Id.*

Corp.[58] As was noted,[59] the *Turner* court determined that the section 402A definition of "unreasonably dangerous" could not be given to the jury in a strict products liability action. The product would be defective if the product was unreasonably dangerous, considering the utility of the product and the risk involved in its use.[60]

The *Turner* court expressly held that evidence bearing "upon the factors of risk and utility"[61] may be admissible in the trial of

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[58] 584 S.W.2d 844 (Tex. 1979).

[59] See notes 20-25 and accompanying text, *supra.*

[60] 584 S.W.2d at 847. See note 25 *supra.*

[61] In *Turner*, the Court of Civil Appeals had instructed the jury to consider four specific factors when balancing the utility of the product against the risk involved in its use to determine whether the product is defective. These factors were:

> 1) the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use;
> 2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive;
> 3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its cost;
> 4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

General Motors Corp. v. Turner, 567 S.W.2d 812, 818 (Tex. 1978). These four factors, as well as others not enumerated by the Court of Civil Appeals, have been suggested in various law review articles. *See* Dickerson, *Products Liability: How Good Does a Product Have To Be?*, 42 IND. L.J. 301, 331 (1967) (five factors); Keeton, *Manufacturer's Liability: The Meaning of "Defect" In the Manufacture and Design Of Products*, 20 SYRACUSE L. REV. 559, 565-66 (1969) (four factors); Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 818 (1976) (four factors); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1370-71 (1974) (thirteen factors); Tisileu, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 359 (1974) (fifteen factors); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-40 (1973) (revised seven factors); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965) (seven factors); 43 J. AIR L. & COM. 587, 595 (1977) (applying the seven revised factors suggested by Dean Wade to state of the art evidence in strict products liability).

However, the Supreme Court of Texas held that the jury was not to be instructed to balance specific factors of risk of harm against utility due to "the difficulty of formulating a series of specific factors" for the jury to use in its balancing process. Turner v. General Motors Corp., 584 S.W.2d 844, 848-49 (Tex. 1979). The supreme court's finding is supported by the inability of the scholars listed above to agree upon the relevant factors to be given to the jury for

strict liability cases.[62] Thus, the *Bailey* court held that, according to the mandate of *Turner,* the manufacturer is free to introduce all available evidence concerning the engineering and design features of the product in order to show that it is not unreasonably dangerous.[63] In *Bailey,* the court of appeals found that the evidence of the unavailability of kill switches did not address the "utility" of the product or establish the process by which the design was adopted.[64] The evidence only emphasized the care exercised by the manufacturer, and other manufacturers, in designing the boat in question.[65] Therefore, such state of the art evidence was held to be inadmissible.

IV. Effect of Bailey on State of the Art Evidence in Texas

In denying the admission of the evidence, the *Bailey* court has merely made a logical extension of the Texas Supreme Court's holding in *Turner.* The outcome of *Turner* was to streamline jury instructions in strict products liability actions. The *Bailey* decision has extended the *Turner* holding on jury instructions into evidentiary issues. Thus, *Bailey* has expanded a procedural rule into a substantive rule of law.

The evidence introduced by the defendants in *Bailey* is of the custom variety and is not of the technological variety. The evidence was introduced to show the custom of the industry and to demonstrate that the ordinary consumer would have been aware of the risk involved in using the boat. The evidence was not applied in the technological sense because the evidence itself indicates that the concept and technology of kill switches had been in existence for thirty years. The defendant would introduce technological type of state of the art evidence only if it tended to prove that the state of technology was such that the product could not be made more safe at the time of the accident.

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consideration. *See* Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation,* 52 Tex. L. Rev. 1303, 1307-08 (1974); Green, *Strict Liability Under Sections 402A and 402B; A Decade of Litigation,* 54 Tex. L. Rev. 1185, 1203-06 (1976).

[62] 584 S.W.2d at 847.

[63] 585 S.W.2d at 811.

[64] *Id.*

[65] *Id.*

Thus, in *Bailey* the defendant introduced the evidence in an attempt to indicate the custom of the industry and not the technology at the time of the accident.

The *Bailey* decision properly interprets the *Turner* decision to mean that custom of the industry type of state of the art evidence[66] is henceforth irrelevant and thus inadmissible, at least in strict products liability cases involving design defects[67] in Texas. The mandate by the Supreme Court of Texas that any definition of "unreasonably dangerous" can no longer be given to the jury logically implies that custom type of state of the art evidence is irrelevant. The primary relevance that custom type of state of the art evidence has to products liability cases would be to show that the product is similar to all other products of that type, and, therefore, the ordinary consumer with the ordinary knowledge common to the community as to its characteristics would have realized the potential danger. Since the section 402A definition of "unreasonably dangerous" is no longer available as a jury instruction, the expectations of the ordinary consumer, based upon the design of all other products of a similar type, is no longer a valid criteria for determining whether a product is defective. Therefore, evidence tending to show the custom of the industry or to imply that "everyone else is doing it"[68] is irrelevant to strict products liability.

As stated earlier, *Turner* held that evidence upon the factors of risk and utility of the product may be admissible in the trial of products liability cases.[69] From this holding the argument could be made that custom type of state of the art evidence is relevant to the utility of the product or the risk involved in its use. However, the *Bailey* court flatly rejected this contention.[70] The court's analysis rests upon the premise that the evidence of the kill switch emphasizes the care exercised by the manufacturer and other manufacturers in designing the boat.

In reaching the conclusion that the evidence is relevant only to the care exercised by the manufacturer, and, therefore, irrelevant to all other issues, the court effectively sidesteps the issue of

[66] See notes 29-37 and accompanying text, *supra.*

[67] See notes 26-28 and accompanying text, *supra.*

[68] 585 S.W.2d at 811. *See* The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

[69] See note 25 and accompanying text, *supra.*

[70] 585 S.W.2d at 811.

whether custom type of state of the art evidence has any relevance to risk and utility or the process by which the product was designed. This sidestepping of the issue is crucial to the outcome of the case. If the custom type of evidence has any relevance to these issues,[71] then according to *Turner* such evidence must be admissible.

Custom type of evidence is irrelevant to the utility of the product or the risk involved in its use for the simple reason that no logical connection can be drawn between the two. Product utility concerns the value and usefulness of the product to the consumer or the public as a whole. Custom type of evidence has no relevance to such value judgments. Furthermore, custom type of evidence has no relevance to the process by which the design is adopted. The features of a particular design and the process by which the design is adopted depend strictly upon the technological capacity of the industry at the time. Custom type of evidence is relevant only to whether or not the industry as a whole has adopted a particular safety feature. It is not relevant to whether or not the manufacturer was technologically capable of developing and manufacturing the design which would have made the product less dangerous to use.

Although the *Bailey* decision effectively bars the introduction of custom type of state of the art evidence, the court leaves open the question of whether technological type of state of the art evidence is admissible. The court states that "the manufacturer is free to introduce all available evidence of the engineering and design features of the product in order to show that it is not unreasonably dangerous."[72] In concluding that the admission of the evidence of the unavailability of the kill switch was erroneous, the court of appeals stated that such evidence "did not address the 'utility' of the product or establish the process by which the design was adopted."[73] The technological type of state of the art evidence

[71] Under Murray's analysis, custom type of evidence would be admissible even though the evidence does not address the risk or utility of the product. See notes 36-39 and accompanying text, *supra*. However, since the *Bailey* court rejected Murray's analysis, it is apparent that the obviousness of the danger to the reasonable consumer is unimportant to the question of whether custom type of evidence is admissible. Thus, custom of the industry evidence can be introduced in Texas only if it has some relevance to the risk and utility of the product.

[72] 585 S.W.2d at 811.

[73] *Id.*

would bear directly upon the method by which the product design was adopted. Thus, the implication can be drawn from the court's holding that such evidence is admissible in a strict products liability case. A logical extension of the court's holding leads to the conclusion that technological type of state of the art evidence would be admissible to show that the product is "unavoidably unsafe" within the comment k exception to strict liability under section 402A.[74]

The importance to the aviation industry of whether state of the art evidence is admissible in products liability actions was aptly demonstrated in *Bruce v. Martin-Marietta Corp.*[75] In *Bruce*, thirty-two members of the Wichita State football team were killed when the chartered aircraft in which they were traveling crashed into the mountains in 1970. The impact caused a number of the seats to tear loose from their floor attachments and be thrown to the front of the aircraft, thereby blocking the exit. The plaintiffs contended that the design and manufacture of the seats and seat fastenings were defective in that the crash would have been survivable if seats in common use in 1970 had been installed on the aircraft.[76]

The United States Court of Appeals for the Tenth Circuit[77] allowed the defendants to introduce state of the art evidence,[78] holding that such evidence was important to demonstrate the reasonable expectations of the ordinary consumer for purposes of determining whether the product was "unreasonably dangerous"

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[74] See notes 41-44 and accompanying text, *supra.*

[75] 544 F.2d 443 (10th Cir. 1976). *See* 43 J. AIR L. & COM. 587 (1977) (discussion of *Bruce*).

[76] At the time of the crash in 1970, the aircraft still had the original seats and seat fastenings that were installed on the aircraft when it was manufactured in 1952. 544 F.2d at 446.

[77] The district court concluded that the laws of Missouri applied to determine the liability of Ozark Airlines and the laws of Maryland applied to determine Martin's liability. This was not challenged by either party on appeal. Bruce v. Martin-Marietta Corp., 544 F.2d 443, 444-46 (10th Cir. 1976). In diversity cases the federal courts apply conflict of law rules which conform to those prevailing in the state courts in which the federal court is located. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1940). In *Brickner v. Gooden*, 525 P.2d 632 (Okla. 1974), the "significant contacts" test for conflict of law questions in tort cases was adopted by the Oklahoma Supreme Court.

[78] 544 F.2d at 446.

and thus "defective" as defined by section 402A.[79] In admitting the evidence based on the section 402A comment i definition of "unreasonably dangerous," the Tenth Circuit used an analysis no longer available in Texas.[80] Since the section 402A comment i definition was rejected in *Turner*, such state of the art evidence would not be admissible in Texas.[81] The Texas courts, according to *Bailey*, would exclude such evidence from the trial if the evidence was introduced merely to show that all other manufacturers used such fastenings in 1952 and not to prove that such fastenings were the safest type technologically available at the time.

The imposition of strict liability on the manufacturer or seller for the design, manufacture and sale of defective products is required by public policy considerations.[82] If the *Bailey* court had excluded both the custom and technological type of state of the art evidence,[83] the court would, in effect, have imposed absolute liability upon the manufacturer or seller.[84] On the other hand, the admission of both types of state of the art evidence would have allowed the negligence concept of the "reasonable consumer" to creep into state of the art products liability cases in Texas. By denying introduction of the custom type of state of the art evidence while implying that the technological type of state of the art evidence is admissible, the court has provided Texas with a very logical approach to the treatment of products liability cases. In leaving the door open for the admission of technological state of the art evidence, *Bailey* has refused to impose absolute liability on the manufacturer. At the same time, refusal to admit custom type of state of the art evidence has successfully removed the negli-

[79] *Id.* at 447.

[80] Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979). For a discussion of *Turner* and the rejection by the Texas Supreme Court of the section 402A comment i definition of "unreasonably dangerous," see notes 19-25 and accompanying text, *supra*.

[81] *See* 43 J. AIR L. & COM. 587, 598 (1977) (concluding that evidence of seat fastenings was custom type and not technological type of state of the art evidence).

[82] See note 11 and accompanying text, *supra*.

[83] *See* Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

[84] Various commentators have expressed the viewpoint that "strict liability" is not meant to impose "absolute liability." *See* Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 830-33 (1973).

gence concept of the reasonable consumer from the question of admissibility of state of the art evidence.[85]

In the final analysis, the distinction between the two types of state of the art evidence is somewhat strained. The distinction is tenuous because in most cases either party may argue that the evidence is custom or technological depending on which type of evidence will best serve the respective party's interest. Thus, the focus of the courts should not rest upon what type of state of the art evidence the parties contend they are presenting, but should focus upon the purpose for which the party is using the evidence. If the evidence is directed to the technological ability of the manufacturer to make the product safer, then the evidence should be admissible so as not to impose absolute liability on the manufacturer. On the other hand, if the state of the art evidence is intended to point out the custom of the industry then the evidence should be labeled by the court as custom type and the evidence should be excluded.

David P. Dyer

CONSTITUTIONAL LAW—MINIMUM WAGE AND MAXIMUM HOUR PROVISIONS OF THE FAIR LABOR STANDARDS ACT—Airport Employees Are Not Covered by the Minimum Wage and Maximum Hour Provisions of the Fair Labor Standards Act Because the Operation of a Municipally-Owned Airport is an Integral Governmental Function by the Standards Set Forth in *National League of Cities v. Usery. Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979).

Employees and former employees of the city department which operated Cleveland's municipally-owned airport brought suit against the city under the Fair Labor Standards Act (FLSA).[1] Plaintiffs

[85] *See generally* Wade, *The Continuing Development of Strict Liability in Tort*, 22 ARK. L. REV. 233, 242 (1968). *See also* Dorsey v. Yoder Co., 331 F. Supp. 753, 760 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973); Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

[1] 29 U.S.C. §§ 201-219 (1976). The Fair Labor Standards Act was enacted by Congress in 1938 under the authority of the commerce power. The purpose of the Act is to prevent labor conditions which are detrimental to maintaining

sought to recover wages, unpaid overtime, vacation pay, and sick pay under the minimum wage and maximum hour[2] provisions of the FLSA. They alleged that at various times during their employment they had worked in excess of forty hours per week at less than the rates of pay established under the FLSA. Claiming that under the terms of the FLSA, the city was an "enterprise"[3] which was engaged in interstate commerce,[4] the plaintiffs prayed for damages and injunctive relief. In responding to the plaintiff's arguments, the city alleged that the employees were excluded from the general wage and hour provisions of the FLSA,[5] and that

minimum standards of living necessary for the general health and well-being of workers. Congress found that poor labor conditions burdened commerce and resulted in unfair methods of competition in commerce. Two of the primary benefits are the minimum wage and maximum hour provisions.

[2] 29 U.S.C. § 206(a) (1976):

> (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages . . .
>
> (1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, . . .

29 U.S.C. § 207(a)(1) (1976):

> (a)(1) [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

[3] 29 U.S.C. § 203(r) (1976):

> (r) "Enterprise" means the related activities performed . . . by any person or persons for a common business purpose . . . the activities performed by any person or persons—
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> (3) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

[4] 29 U.S.C. § 203(s) & (x) (1976):

> (s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce . . . , and which—
>
> (6) is an activity of a public agency—
>
> (x) "Public agency" means . . . the government of a State or a political subdivision, . . . any agency of a State or a political subdivision of a State; or any interstate governmental agency.

[5] This defense was not at issue on appeal since the district court dismissed

the provisions were unconstitutional under *National League of Cities v. Usery*[6] as applied to employees of the city's municipally-owned airport. Plaintiffs responded that *National League of Cities* was inapplicable because the operation of a municipal airport is a "proprietary" rather than a "governmental" function.[7] In rejecting plaintiffs' analysis of *National League of Cities*, the district court dismissed the complaint for failing to state a claim upon which relief could be granted.[8] Plaintiffs appealed to the Court of Appeals for the Sixth Circuit, assigning as error the district court's putative misapplication of the holding in *National League of Cities* by its refusal to recognize the operation of a municipal airport as a proprietary rather than a governmental function.[9] *Held, affirmed*: Airport employees are not covered by the minimum wage and maximum hour provisions of the Fair Labor Standards Act because the operation of a municipally-owned airport is an integral governmental function by the standard set forth in *National League of Cities v. Usery*. *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979).

Prior to *National League of Cities* the Supreme Court consistently rejected state sovereignty claims as a limitation to Congress' use of the commerce power.[10] State-owned railroads were held sub-

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the action for failure to state a claim. As a result, the court of appeals declined to express a view on the argument that plaintiffs were firemen and exempted from the general wage and hour provisions of the FLSA. Amersbach v. City of Cleveland, 598 F.2d 1033, 1034 n.1 (6th Cir. 1979). *See* 29 U.S.C. § 207(k) (1976).

[6] National League of Cities v. Usery, 426 U.S. 833 (1976). In *National League of Cities* the Court held that the 1974 amendments to the FLSA were unconstitutional as applied to state and municipal employees. The Court reasoned that the amendments were an impermissible interference with the states' sovereignty whenever they intruded on the traditional and integral governmental functions of the state. See notes 29-33 *infra* and the accompanying text.

[7] *See generally* W. PROSSER, LAW OF TORTS § 131 (4th ed. 1971). An activity is considered to be "governmental" whenever the government is acting in a "political" or "public" capacity, whereas a "proprietary" function is viewed as a "corporate" or "private" activity of the government. The classification of particular functions as governmental or proprietary has, however, proved to be confusing and difficult. *Id.*

[8] Amersbach v. City of Cleveland, 598 F.2d 1033, 1034 (6th Cir. 1979).

[9] *Id.* No formal opinion was issued by the district court since it granted the defendants' motion for a judgment on the pleadings.

[10] U.S. CONST. art I, § 8. Judicial interpretation of the commerce clause has played a significant role in shaping the concepts of federalism. The Supreme Court has interpreted the commerce clause as a complete grant of power to

ject to federal regulations enacted by congressional use of the commerce power.[11] State universities,[12] state water projects,[13] and even state boundaries[14] were required to obey federal regulations which were intended to protect interstate commerce. When the Court initially tested and upheld the constitutionality of the FLSA, it rejected any interest reserved to the states under the tenth amendment,[15] and, thereby effectively allowed the federal government to disregard state sovereignty claims as long as it acted within the commerce power.[16]

In *Maryland v. Wirtz*[17] the Court continued to reject state sovereignty claims as a defense to the commerce power. By upholding the constitutionality of the 1966 amendments to the FLSA,[18] the Court in *Wirtz* subjected the employees of state hos-

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Congress. Only recently has the Court revived the tenth amendment as a check on the federal government's ability to control the activities of state governments. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 128-63 (1978) [hereinafter cited as NOWAK].

[11] United States v. California, 297 U.S. 175 (1936) (Federal Safety Appliance Act of 1893 applicable to state-owned and operated railroad; rejection of any state sovereignty limitation on Congress' power to regulate commerce); United States v. Louisiana, 290 U.S. 70 (1933) (intrastate rates of state-owned railroad allowed to be regulated by federal government in order to eliminate discrimination in interstate commerce).

[12] Board of Trustees v. United States, 289 U.S. 48 (1933) (state university required to pay federal import duty on scientific instruments imported through interstate commerce). The principle of duality in our system of government does not limit Congress' authority to regulate commerce. *Id.* at 57.

[13] Sanitary Dist. v. United States, 266 U.S. 405 (1925) (allowed federal regulation of a state's diversion of water since federal commerce power is superior to state power to provide for services of its citizens).

[14] Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941) (Congress allowed to build dam in order to control navigable water, even though it changed a state's boundary).

[15] U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[16] United States v. Darby, 312 U.S. 100, 124 (1941). The Court gave little effect to the tenth amendment by stating that it was but a mere "truism." *See* Note, 8 TEX. TECH L. REV. 403, 408 (1976).

[17] 392 U.S. 183 (1968).

[18] 29 U.S.C. § 203(s) (1966):

> (s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which . . .
>
> (5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill . . . a school for mentally or physically handi-

pitals, institutions, and schools to the minimum wage and hour requirements.[19] In *Fry v. United States*[20] the wage and salary freezes of the Economic Stabilization Act of 1970[21] were held applicable to state employees.[22] The Court rejected the argument that the states are immune from federal regulation under the commerce clause because of their sovereign status.[23]

By recognizing the sovereignty of a state as a constitutional limitation on congressional use of the commerce power, the Court's decision in *National League of Cities* halted the trend that had steadily developed.[24] In *National League of Cities* various states and cities challenged the constitutionality of the 1974 amendments to the FLSA[25] which brought state and municipal employees under the coverage of the minimum wage and hour provisions.[26] The plaintiffs argued that by extending coverage to all employees of state and municipal governments, Congress violated the established constitutional doctrine of intergovernmental immunity.[27] The Supreme Court agreed with the plaintiffs and concluded that since the states play an essential role in a federal system of govern-

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capped children, a preschool, elementary or secondary school, or an institution of higher education . . . .

[19] 392 U.S. at 183.

[20] 421 U.S. 542 (1975).

[21] 12 U.S.C. § 1904(201-220) (1970).

[22] 421 U.S. at 545.

[23] *Id.* at 548.

[24] National League of Cities v. Usery, 426 U.S. at 845.

[25] 29 U.S.C. § 203(d) (1974):

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . .

(2) In the case of an individual employed by a public agency, such term means—

(c) any individual employed by a State, political subdivision of a State, or an interstate governmental agency.

[26] 426 U.S. at 834.

[27] *Id.* at 837. The doctrine of intergovernmental immunity originated in the Supreme Court's decision in *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). In *McCulloch* the Court held a state tax on the Bank of the United States to be invalid by noting that the power to tax has the potential to destroy. The doctrine has expanded throughout this century to limit not only state laws that frustrate federal activities, but also federal interference in state activities. In recent years the doctrine has become a significant limitation on congressional use of the commerce power. *See generally* NOWAK, *supra* note 10, at 367.

ment,[28] congressional use of the commerce power must be limited whenever it interferes with the integral governmental function of the states.[29] In attempting to formulate a test for the state sovereignty doctrine, the Court stated that congressional interference would not be allowed if it infringed upon "functions essential to the separate and independent existence" of the states.[30] In order for a state function to be considered "essential," it must meet two criteria. First, the activity must be within an area of traditional state power,[31] and second, the activity must be such that any interference by the federal government would significantly alter or displace state policy.[32] The Court added state hospitals, institutions, and schools to the list of traditional functions by expressly overruling *Wirtz*.[33] In reaffirming its recent decision in *Fry*, however, the Court noted that the regulations of the Economic Stabilization Act dealt only with federal emergencies and displaced no state choices concerning the structure of governmental operations.[34] The Court also held that the tenth amendment is to be an affirmative constitutional limitation on the federal use of the commerce power in regulating the traditional activities of the states, thus barring any use of the commerce power which could threaten the ability of states to function as separate entities in a federal system of government.[35] Justice Blackmun, in his concurring opinion in *National League of Cities*, viewed the Court's analysis as a balancing approach.[36] He noted that in some instances the federal interest

[28] 426 U.S. at 851.

[29] *Id.*

[30] *Id.* at 845, (*quoting* Coyle v. Oklahoma, 221 U.S. 559, 580 (1911) and Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).

[31] 426 U.S. at 851. The Court listed fire prevention, police protection, sanitation, public health, parks, and recreation as examples of functions traditionally performed by the states. *Id.*

[32] *Id.* at 847. The Court noted that the increased cost alone would have a significant impact on the state's ability to provide certain public services. The FLSA amendments would also affect the manner in which states structure delivery of the services by preventing the hiring of inexperienced workers at lower rates of pay. *Id.* at 848. *See* Note, 8 TEX. TECH L. REV. 403, 404 (1976). In *Amersbach* the court referred to this test as the "traditional-integral" test. 598 F.2d at 1036. This paper will use the same terminology when referring to it.

[33] 426 U.S. at 854.

[34] *Id.* at 852-53.

[35] *Id.* at 842-43.

[36] *Id.* at 856. *National League of Cities* resulted in a 5-4 decision. Blackmun's concurring opinion was the deciding vote.

involved would be considerably greater than the state's interest in sovereignty; in those instances, compliance with federal regulations would be essential.[37]

Since *National League of Cities* was decided, courts have determined that there are certain areas in which the doctrine of intergovernmental immunity does not apply. Courts have uniformly held[38] that the doctrine was not intended to apply to the equal pay provisions of the FLSA.[39] The courts have reasoned that the purpose of these provisions is to protect against discrimination based on sex and age, and that these provisions have a decidedly less direct and intrusive impact on state governmental functions.[40] It also has been held that federal interference in the states' vocational rehabilitation programs and food stamp programs, and the federal government's ability to exercise exclusive control over the level of rents in federally subsidized housing projects does not constitute interference with traditional and integral functions of the states.[41] The courts viewed the programs as having no impact on state policy decisions which are essential to the state's sovereignty. Two of the courts noted that it has long been upheld as an unobjectionable exercise of the spending power[42] to place conditions on federal grants of money to the states.[43] Besides vocational and food stamp programs, the

[37] *Id.* at 856.

[38] See note 40 *infra*.

[39] See notes 42-47 *infra*, and the accompanying text.

[40] Marshall v. City of Sheboygan, 577 F.2d 1 (7th Cir. 1978); Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976); Brown v. County of Santa Barbara, 427 F. Supp. 112 (C.D. Cal. 1977); Usery v. Edward J. Meyer Memorial Hosp., 428 F. Supp. 1368 (W.D.N.Y. 1977); Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976).

[41] Florida Dep't of Health & Rehab. Serv. v. Califano, 449 F. Supp. 274, 284 (N.D. Fla. 1978). The narrow holding of *National League of Cities* is restricted to federal regulations that "directly displace" the power of the states to organize their own governments as they see fit. This rationale has no application where federal intrusion is indirect and limited to measures which insure the proper functioning of federally funded programs. *Id.; see also*, City of Boston v. Hills, 420 F. Supp. 1291 (D. Mass. 1976). HUD's ability to exercise control over level of rents in federally subsidized housing projects has no impact whatsoever on any state determination essential to state's sovereignty. *Id.* at 1298; Dupler v. City of Portland, 421 F. Supp. 1314 (D. Me. 1976). Federal interference with state food stamp program does not displace state policy essential to sovereignty of states. *Id.* at 1320.

[42] U.S. CONST. art. I, § 8: "Congress shall have the Power To . . . provide for the common Defence and general Welfare of the United States."

[43] Florida Dep't of Health & Rehab. Serv. v. Califano, 449 F. Supp. 274, 284

supplying of electrical service by the state[44] and the state's operation of an oil and gas business[45] have also been held not to constitute traditional-integral governmental functions.

Many courts, however, have relied on *National League of Cities* to further the doctrine of state sovereignty in other areas. It has been held that the minimum wage and hour provisions of the FLSA do not apply to court reporters who were employees of the state's judicial court system.[46] It has also been held that a federal tax imposed on state civil aircraft violates the doctrine of intergovernmental immunity.[47] The tax affected the state's policy choices in determining whether air travel is the most efficient means through which to accomplish its governmental obligations.[48] State licensing of automobile drivers is another area that has been held to be an integral state function.[49]

Other courts,[50] in relying on the doctrine of state sovereignty, have stated holdings that are contrary to Justice Blackmun's balancing approach set forth in *National League of Cities* in which he stressed the federal government's keen interest in environmental matters.[51] The courts held that the federal government may neither

(N.D. Fla. 1978); Dupler v. City of Portland, 421 F. Supp. 1314, 1320-21 (D. Me. 1976).

[44] Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 424 (1978).

[45] Public Serv. Co. v. Federal Energy Regulation Comm'n, 587 F.2d 716, 721 (5th Cir. 1979).

[46] Association of Court Reporters of Superior Court v. Superior Court for Dist. of Columbia, 424 F. Supp. 90 (D.C. Cir. 1976). This case held that the D.C. Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970), gave the state court system complete authority to establish compensation rates for nonjudicial court personnel. 424 F. Supp. at 94.

[47] Georgia Dep't of Transp. v. United States, 430 F. Supp. 823 (N.D. Ga. 1976).

[48] *Id.* at 826. The court noted that *National League of Cities* failed to clarify whether undue interference was intended to be in terms of the directness or the magnitude of the impact which the federal legislation has upon state goals. Although the amount in this instance was minimal ($4,000), it was still significant enough to affect state policy. *Id.* at 825.

[49] United States v. Best, 573 F.2d 1095, 1102-03 (9th Cir. 1978).

[50] EPA v. Brown, 431 U.S. 99 (1977), *on remand*, 566 F.2d 665 (9th Cir. 1977); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom.* EPA v. Brown, 431 U.S. 99 (1977); Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom.* EPA v. Brown, 431 U.S. 99 (1977).

[51] National League of Cities v. Usery, 426 U.S. at 856. See notes 38 and 39 and accompanying text *supra*.

impose sanctions on a state for failing to implement or enforce the Environmental Protection Agency's anti-pollution regulations,[52] nor order a state to draft such a plan.[53] The federal imposition of various anti-pollution plans was viewed by one court as posing serious tenth amendment problems.[54] Another court noted that *National League of Cities* requires that the judiciary be reluctant to declare the federal government a winner when conflicts develop between state and federal authorities.[55]

Faced with these recent legal developments and using *National League of Cities* as the controlling precedent, the Sixth Circuit Court of Appeals in *Amersbach*[56] extended the ruling in *National League of Cities* to the employees of municipally-owned airports.[57] The court began its analysis by noting that the state sovereignty limitation on congressional power under the commerce clause has been restricted to situations where the following requirements are met.[58] It must be shown (1) that Congress has used its power under the commerce clause in such a manner as to "displace, regulate, or significantly alter," (2) the "management, structure, or operation" of a (3) "traditional or integral governmental function."[59] The court stated that the first two requirements, dealing with displacement of state policy, were easily met in this case, since the wage and hour provisions of the FLSA would be direct mandates to the city.[60] The provisions would also alter the employer-employee relationship by interfering with the hours and wages of the employees.[61] The third requirement was not as easily met by

[52] Brown v. EPA, 521 F.2d 827, 831 (9th Cir. 1977); District of Columbia v. Train, 521 F.2d 971, 992 (D.C. Cir. 1975).

[53] Maryland v. EPA, 530 F.2d 215, 225 (4th Cir. 1975).

[54] District of Columbia v. Train, 521 F.2d 971, 994 (D.C. Cir. 1975). The regulations required states to enact statutes and to administer and enforce programs contained in the Environmental Protection Agency's plan. The tenth amendment may prevent Congress from selecting methods of regulation which are drastic invasions of state sovereignty when less intrusive means are available. *Id.*

[55] Brown v. EPA, 566 F.2d 665, 672 (9th Cir. 1977).

[56] 598 F.2d 1033 (6th Cir. 1979).

[57] *Id.* at 1034.

[58] *Id.* at 1035.

[59] *Id.* at 1035-36.

[60] *Id.* at 1036.

[61] *Id.*

the facts presented, and the court determined that it was the controlling issue of the case—whether or not the operation of a municipally-owned airport is a traditional or integral governmental function within the scope of *National League of Cities*.[62]

Some writers have criticized the Supreme Court's failure in *National League of Cities* to define clearly the exact nature of integral and traditional state functions.[63] The strongest criticism concerns the frequent use of the word "integral," a term which is never explained in the opinion.[64] The traditional-integral characterization had been previously referred to by Justice Rehnquist in his dissenting opinion in *Fry*,[65] which was later to become the foundation for his majority opinion in *National League of Cities*.[66] In *Fry*, Justice Rehnquist recognized the problems that would result from an attempt to identify the traditional-integral governmental functions and acknowledged that the gray areas which would develop would require a case-by-case analysis.[67]

By relying heavily on the Supreme Court's reference in *National League of Cities* to those activities performed by state and local governments in furnishing public services, the court in *Amersbach* classified the operation of a municipally-owned airport as an integral governmental function.[68] To reach this conclusion, the court

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[62] *Id.*

[63] Beaird & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 GA. L. REV. 35, 66 (1976) [hereinafter cited as Beaird]; Percy, *National League of Cities v. Usery: The Tenth Amendment Is Alive and Doing Well*, 51 TUL. L. REV. 95, 105 (1976).

[64] Michelman, *States' Rights and States' Rules: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1172 (1977) [hereinafter cited as Michelman].

[65] 421 U.S. at 558 n.2.

[66] Beaird, *supra* note 63, at 47.

[67] 421 U.S. at 558.

[68] Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979). In emphasizing the function of public service, the Sixth Circuit appears to have relied on two leading articles which analyzed the Supreme Court's holding in *National League of Cities v. Usery*: Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) and Michelman, *supra* note 64. 598 F.2d at 1034. Both writers suggest that if *National League of Cities* were to be read uncritically it would appear to be a general vindication of the autonomy of state and municipal governments to the detriment of the rights of individuals. Yet, due to the representative nature of Congress and the true political safeguards of federalism, both writers stated that it would be difficult to argue that the FLSA amendments meaningfully threatened the states' existence. Therefore, a logical

found it necessary to analyze the activities characterized in *National League of Cities* as being traditional-integral governmental functions.[69] In *National League of Cities* Justice Rehnquist's list included fire prevention, police protection, sanitation, public health, parks and recreation.[70] By examining the common elements of the protected activities established in *National League of Cities*, the court in *Amersbach* developed a test that would serve as a guideline in making this determination.[71] The government service or activity must benefit the community as a whole, be available to the public at no direct expense, and be undertaken for the purpose of public service rather than for pecuniary gain.[72] The government must also be the principal provider of the service, and it must be particularly suited to provide the service due to the public's general need.[73] Applying these elements to the operation of a municipal airport, which is an indispensable function to a society whose primary mode of transportation is by air,[74] the court concluded that the airport's operation is an integral governmental function.[75]

Two of the court's requirements leave several questions unanswered. The first is whether the activity falls out of the protected class merely because some pecuniary gain is derived in the course of its operation, or whether it loses protection only when the sole purpose of the activity becomes one of pecuniary gain. Municipal airports obtain revenue from leasing runways and terminal space

reading of the decision suggests that the Court was in fact seeking to protect the existence of the public's right to basic government services. Tribe, *supra*, at 1076; Michelman, *supra* note 64, at 1177.

[69] Amersbach v. City of Cleveland, 598 F.2d 1033, 1036 (6th Cir. 1979). See note 34 and accompanying text *supra*.

[70] 426 U.S. at 851.

[71] 598 F.2d at 1037.

[72] *Id.* At least one jurisdiction has held, however, that when the city is obtaining substantial revenue from the operation of the airport it becomes a proprietary and not a governmental function. *See, e.g.*, Taylor v. King, 104 Ga. App. 541, 122 S.E.2d 265, 268 (1961); Southern Airways v. DeKalb, 103 Ga. App. 69, 118 S.E.2d 234, 239 (1960); Caroway v. Atlanta, 85 Ga. App. 792, 70 S.E.2d 126, 128-29 (1956). Evidently Cleveland's airport was operating at a profit. Brief for Appellants at 4, Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979).

[73] 598 F.2d at 1037. The court noted that at the time of writing the opinion there were 475 airports serving the 50 states and U.S. territories. Out of that total, only two are currently operated by private parties. *Id.* at 1038.

[74] *Id.* at 1037.

[75] *Id.*

to private individuals. It is unclear how successful an airport's operation can be before the activity is considered to be motivated by profit rather than by public service. The second unanswered question is, when is the government "particularly suited" to provide a public service. This phrase is as vague as the traditional-integral test used by the Court in *National League of Cities.*

In reaching its conclusion, the court in *Amersbach* ignores the requirement that the activity must also be a traditional governmental function; the court merely concludes that the operation of an airport is an integral governmental function. A reading of the Court's analysis in *National League of Cities* suggests that "integral" and "traditional" have roughly the same meaning.[76] Twice the Court uses them together to identify certain governmental activities: "integral operations in areas of traditional governmental functions"[77] and "integral . . . governmental services which states . . . have traditionally afforded their citizens."[78] If the lower courts are to use the terms interchangeably, the definition of "traditional" comes more readily to mind, whereas "integral" does not as readily lend itself to any concrete definition.[79] In *Amersbach* the court combined the terms into one phrase,[80] "traditional-integral government functions," yet in the end the emphasis was on the more nebulous term, "integral," and the word "traditional" seems to have had little effect upon the court's decision.

The court referred to Justice Rehnquist's recognition in *Fry* of the problems that would develop from an attempt to identify traditional-integral government functions.[81] Rehnquist believed that courts must determine whether the activity in question is so closely allied with traditional state functions that Congress could not constitutionally regulate it.[82] He stated that the traditional distinc-

[76] Michelman, *supra* note 64, at 1172.

[77] National League of Cities v. Usery, 426 U.S. 833, 852 (1976).

[78] *Id.* at 851.

[79] Michelman, *supra* note 64, at 1172. Throughout the opinion the court refers to the "traditional-integral" test; it lists activities that *National League of Cities* considered to be traditional state functions. Yet, in its concluding statement, it merely states that the operation of a municipal airport is an integral government function. *Id.*

[80] 598 F.2d at 1036.

[81] Amersbach v. City of Cleveland, 598 F.2d 1033, 1036 n.5 (6th Cir. 1979).

[82] Fry v. United States, 421 U.S. at 558 (Rehnquist, J., dissenting).

tion between "governmental" and "proprietary" activities, and the distinction between activities traditionally undertaken by the state would be helpful in determining whether or not a state activity warrants immunity from federal commerce power regulation.[83] One year later in *National League of Cities*, Rehnquist referred to traditional state functions as a bar to federal interference.[84] Thus, it would be difficult to argue that the word "traditional" was insignificant in the Supreme Court's final analysis.

Various state jurisdictions have differed over the issue of whether the operation of a municipal airport has traditionally been a governmental or a proprietary function. The issue typically has arisen in suits alleging a city's negligence in the operation of an airport. One court noted the futility of attempting to harmonize the decisions, since different courts have reached different conclusions on the same or similar facts.[85] Some courts have held that the operation of a municipal airport is clearly a governmental function since it is considered the government's response to an obvious public need.[86] Others have held it a strictly proprietary function, for it is not considered an activity which cities have traditionally

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[83] *Id.* at 558 n.2.

[84] 426 U.S. 833 (1976). "[D]isplacement of state decisions may substantially restrict traditional ways in which local governments have arranged their affairs." *Id.* at 840. "[S]ervices . . . which the states have traditionally afforded their citizens." *Id.* at 851. "States' freedom to structure integral operations in areas of traditional governmental functions . . ." *Id.* at 852. The court also reaffirmed its prior holding in *United States v. California*, 297 U.S. 175 (1936), in which it stated that federal interference with the operation of a state-owned railroad does not violate the doctrine of intergovernmental immunity since the operation of a railroad is not the type of activity states have traditionally engaged in. 426 U.S. at 854 n.18.

[85] Wendler v. City of Great Bend, 181 Kan. 753, 759, 316 P.2d 265, 271 (1957).

[86] Pipes v. Hildebrand, 110 Cal. 2d 645, 243 P.2d 123 (1952) (operation of municipal airport as public enterprise); Illinois v. Harlingen Wood, 391 Ill. 237, 62 N.E.2d 809 (1945) (no essential difference between operation of public airport and that of highway, subway, wharf, or public park); Burnham v. Mayor & Alderman of Beverly, 35 N.E.2d 242 (Mass. 1941) (airport is as essential to aerial navigation as docks to marine navigation, terminals to bus stations, and depots to trains); Dysart v. St. Louis, 321 Mo. 514, 11 S.W.2d 1045 (1928) (acquisition and maintenance of airport by city as a public purpose even though no specific reference to an airport in city's charter); Aviation Serv. v. Board of Adjustment, 20 N.J. 275, 119 A.2d 761 (1956) (airport as a municipal undertaking depends upon social needs of times); City of Corsicana v. Wren, 159 Tex. 202, 317 S.W.2d 516 (1958) (airport not less of government function because of unimportance as compared to busier ones in other cities).

undertaken.[87] In many of the jurisdictions where the operation of an airport has been considered to be a public function, the result turns on the fact that the state legislature had expressly declared that for matters of public policy the operation should be a governmental rather than a proprietary function.[88] Otherwise, without the express declaration of the state legislature the operation of the airport would have remained a proprietary function.[89] In resolving a federal constitutional issue, the Sixth Circuit clearly would not have been bound by state court determinations of proprietary and governmental functions. Considering, however, that the proprietary-governmental distinction was the plaintiff's primary contention on appeal[90] and that in the *Amersbach* opinion, the Sixth Circuit noted Justice Rehnquist's observation in *Fry* concerning the distinction between proprietary and governmental activities, the question should have been examined in dealing with the requirement that the operation of an airport must be a traditional governmental function. Apparently the court wanted to avoid the anomalous results that would follow from lower courts attempting to differentiate between proprietary and governmental functions. Yet by choosing instead to place more emphasis on the function and service which the state was providing for the public,[91] the court in *Amersbach* never came to grips with the question of whether or not the operation of an airport is a traditional government function. Instead it merely stated that both terms, traditional and integral, should be given meanings that would expand to meet the changing times.[92]

[87] Wendler v. City of Great Bend, 181 Kan. 753, 316 P.2d 265 (1957) (operation of airport as essentially corporate in nature); Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967) (operation of airport as public purpose but serving proprietary function); *Ex parte* Houston, 93 Okla. Crim. 26, 224 P.2d 281 (1950) (municipal operation of airport clearly proprietary activity as distinguished from governmental activity, even though owned and operated airport under the authority of the Uniform Airport Act).

[88] Kirksey v. City of Fort Smith, 227 Ark. 600, 300 S.W.2d 257 (1957); Barovich v. City of Miles City, 135 Mont. 394, 340 P.2d 819 (1959); Wade v. Salt Lake City, 10 Utah 2d 374, 353 P.2d 914 (1960).

[89] The Ohio legislature has never required a city to operate an airport. Brief for Appellants at 4, Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979). Under Ohio law the operation of an airport has been held to be a proprietary function.

[90] Amersbach v. City of Cleveland, 598 F.2d 1033, 1034 (6th Cir. 1979).

[91] Brief for Appellee at 8, Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979).

[92] Amersbach v. City of Cleveland, 598 F.2d 1033, 1034 (6th Cir. 1979).

The Sixth Circuit was correct in the final result reached in *Amersbach*. The traditional-integral test which was set forth by the Supreme Court in *National League of Cities* is open to numerous interpretations. The Sixth Circuit established some concrete guidelines for lower courts to follow. Although the guidelines themselves will be open to numerous interpretations, they do provide a starting point in attempting to determine the meaning of integral governmental function.

The court, however, failed to deal with the traditional functions of state governments. It would be difficult to deny the important role traditional functions played in the Supreme Court's final analysis in *National League of Cities*. Had the court confronted the problem of distinguishing proprietary and governmental activities, it could still have reached the same result due to the confusing status of airports in determining proprietary and governmental functions.

Amersbach has significantly expanded the scope of *National League of Cities* by giving the lower courts concrete guidelines to follow. The test will require further refinements before courts will be able to render uniform decisions concerning state sovereignty; however, after *Amersbach* the courts will be one step closer to achieving uniform results than they would have been had the Sixth Circuit not attempted to give lower courts some guidance in applying the traditional-integral test.

Connie K. Jobe

FEDERAL AVIATION ACT—UNFAIR METHODS OF COMPETITION—A Fly-Drive Arrangement Between a Carrier and a Rental Agency Based Upon Advertising Costs Rather Than Upon Discounted Rental Fees Did Not Constitute Unfair Competition, and Allegations of Illegal Fare Rebates and Passenger Discrimination Constitute Matters of Public Interest Under Section 411 of the Federal Aviation Act. *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250 (D.C. Cir. 1979).

On August 2, 1973, Hawaiian Airlines filed a complaint with the Civil Aeronautics Board (CAB or Board) alleging that a 1971

"fly-drive" agreement between its principal competitor, Aloha Airlines, and Budget Rent-A-Car was illegal.[1] Under the terms of this agreement, Aloha offered its round-trip passengers a $7.00 per day discount and its one-way passengers a $3.50 per day discount on cars rented from Budget. When passengers exercised the rental discount option, they paid Aloha its published tariff rate and Aloha subsequently transferred to Budget the discounted amount. Although the provisions of the agreement between Aloha and Budget specified that Aloha's payments to Budget constituted Aloha's "share of the advertising costs,"[2] Hawaiian challenged the agreement, claiming that Aloha was guilty of illegal fare rebating, unjust discrimination among passengers, and deceptive practices constituting unfair competition, in violation of sections 403,[3] 404(b),[4] and 411[5] of the Federal Aviation Act (Act).[6]

Based on Hawaiian's complaint, the Director of the CAB's Bureau of Enforcement filed a Petition for Enforcement, indicating that formal investigation of the matter by the Board would be in the public interest. Aloha's response to the complaint was to institute a modified fly-drive arrangement with Budget in 1973. Under the arrangement Aloha made payments to Budget based on the cost of advertising the program, not on the number of cars rented to Aloha passengers. The Administrative Law Judge who presided at hearings on the petition found that in both the 1971 and 1973 agreements with Budget, Aloha was guilty of illegal fare rebating,

[1] Scheduled air service within the Hawaiian Islands is provided by two principal carriers, Hawaiian Airlines and Aloha Airlines, which have virtually identical route structures and schedule patterns. Brief for Petitioner at 7, Aloha Airlines, Inc. v. CAB, 598 F.2d 250 (D.C. Cir. 1979) [hereinafter cited as Brief for Petitioner]. The two airlines were involved in antitrust litigation during the time of the instant case which may account for the degree of animosity existing between them. *See* Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974). At the initial hearing, Aloha attempted to present evidence of Hawaiian's antitrust violations in an effort to illustrate the nature of their competitive environment and to show that the Aloha-Budget agreement was necessary to preserve and promote competition. All of this evidence was stricken by the Administrative Law Judge. Brief for Petitioner at 30.

[2] Brief for Petitioner, *supra* note 1, at 9.

[3] 49 U.S.C. § 1373 (Supp. 1977). See text accompanying note 59 *infra*.

[4] 49 U.S.C. § 1374(b) (1976). See text accompanying note 80 *infra*.

[5] 49 U.S.C. § 1381 (1976). See text accompanying note 11 *infra*.

[6] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. § 1301 (1976).

unjust discrimination between passengers, and deceptive practices which constituted unfair competition.[7] The CAB granted review and sustained the decision of the judge.[8] Aloha appealed the CAB decision to the United States Court of Appeals for the District of Columbia Circuit.[9] *Held, affirmed in part and reversed in part*: A fly-drive arrangement between a carrier and a rental agency based upon advertising costs rather than upon discounted rental fees did not constitute unfair competition, and allegations of illegal fare rebates and passenger discrimination constitute matters of public interest under section 411 of the Federal Aviation Act. *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250 (D.C. Cir. 1979).

On appeal, two separate issues were raised: whether the CAB properly determined public interest and whether a pro rata payment between a carrier and a rental agency constituted unfair competition under the Act. Because these issues are fundamentally different, they are discussed individually.

I. Proper Determination of Public Interest

The maintenance of high standards in dealing with the public has long been established as a duty of common carriers.[10] The CAB, under a congressional mandate, is charged with the protection of the public interest as affected by the practices of air carriers, as stated in section 411 of the Act:

> The Board may, upon its own initiative or upon complaint by any air carrier, . . . if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof.[11]

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[7] These hearings were held in May 1975, before Administrative Law Judge Greer M. Murphy, who issued his decision on September 17, 1975. On October 10, 1975, Aloha filed a petition with the Board for discretionary review of Judge Murphy's decision. Brief for Petitioner, *supra* note 1, at 9.

[8] By CAB Order No. 76-10-88 (Oct. 20, 1976), the Board granted review and without further proceedings sustained Judge Murphy's decision. *Id.* at 7.

[9] The court's jurisdiction over this review action arises under 49 U.S.C. § 1486(a) (1976). Venue in the United States Court of Appeals for the District of Columbia Circuit is provided under 49 U.S.C. § 1486(b) (1976).

[10] American Airlines, Inc. v. North Am. Airlines, Inc., 351 U.S. 79, 84 (1956).

[11] 49 U.S.C. § 1381 (1976).

Through the provisions of section 411, Congress committed to the CAB broad discretion to determine the standards for investigation of complaints and the circumstances which constitute "public interest."[12]

The parentage of section 411, which gives the CAB jurisdiction over allegations of unfair competition when in the public interest, is well established. In 1956, the United States Supreme Court in *American Airlines, Inc. v. North American Airlines, Inc.*[13] noted that section 411 was patterned after section 5 of the Federal Trade Commission Act (FTCA),[14] which similarly prohibits unfair methods of competition in commerce and unfair or deceptive practices.[15] The Court stated that judicial interpretations of section 5 may be used to clarify the resolution of questions concerning section 411.[16] Like the Federal Trade Commission (FTC), the CAB is empowered to issue complaints and initiate investigations if it determines that to do so is in the best interest of the public.[17] A finding of public interest is not a prerequisite to the issuance of a cease and desist order under either section 411 or section 5,[18] but public

[12] REA Express, Inc. v. CAB, 507 F.2d 42, 45 (2d Cir. 1974). *See generally* Transcontinental Bus Sys., Inc. v. CAB, 383 F.2d 466, 478 (5th Cir. 1967); Flying Tiger Line, Inc. v. CAB, 350 F.2d 462, 465 (4th Cir. 1965). Factors to be considered by the Board in determining public interest are set forth in 49 U.S.C. § 1302(a) (1976). These factors include the maintenance of safety, availability of services by air carriers, reliance on competitive market forces, maintenance of a regulatory environment, use of satellite airports, and the prevention of unfair practices in air transportation. The Supreme Court has held that "convenience of the traveling public, speed and efficiency in air transport, and protection of reliance on a carrier's equipment are all criteria which the Board may properly consider in determining whether the public interest justifies use of its powers under § 411." American Airlines, Inc. v. North Am. Airlines, Inc., 351 U.S. 79, 85 (1956).

[13] 351 U.S. 79 (1956).

[14] 15 U.S.C. § 15 (1976).

[15] 351 U.S. at 82.

[16] *Id.*

[17] *Id.* See text accompanying note 11 *supra.* It is noteworthy that the threshold public interest limitation was not contained in the original bill introducing the Federal Trade Commission Act, but was added subsequently during conference. H.R. 15613, 63d Cong., 2d Sess. (1914). Legislative history shows that Congress was concerned that the Commission would become involved in the settlement of disputes between competitors which should be adjudicated in the courts. 51 CONG. REC. 14930 (1914). For a detailed explanation of the development of section 5, *see* 2 H. TOULMIN, JR., A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES § 39.5 (1949).

[18] American Airlines, Inc. v. North Am. Airlines, Inc., 351 U.S. 79, 83 (1956).

interest is an essential condition to the Board's assumption of jurisdiction under section 411 to initiate investigations of allegedly unfair methods of competition.[19]

The Supreme Court considered the proper standard for the filing of an FTC complaint under section 5 of the FTCA in *FTC v. Klesner*.[20] Justice Brandeis' majority opinion stated that for such a complaint to be filed, the public interest must be "specific and substantial."[21] Thus, the inherent public interest in the preservation of private rights is insufficient to support a finding of public interest.[22] The Brandeis opinion also established that the courts alone adjudicate private legal rights concerning competition, prohibiting such adjudication of private rights through administrative agencies.[23] Adopting the "specific and substantial" standard for determination of public interest set forth in *Klesner*,[24] the Court in *American Airlines* observed that, while the discretion of the CAB is subject to judicial review, the courts do not independently determine what constitutes matters of public interest.[25] The Court further clarified the *Klesner* holding as applied to section 411 by emphasizing that the thrust of that section is to protect public interest, not to protect competitors or punish unfair practices.[26] In *Pan American World Airways, Inc. v. United States*,[27] the Supreme Court altered its position in *American Airlines* by stating that the power of the Board under section 411 could be used not only to protect the public interest, but also to strengthen anti-

See 49 U.S.C. § 1381 (1976), which provides in pertinent part: "[I]f the Board shall find . . . unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

[19] American Airlines, Inc. v. North Am. Airlines, Inc., 351 U.S. 79, 83 (1956).

[20] 280 U.S. 19 (1929).

[21] *Id.* at 28.

[22] *Id.*

[23] *Id.* at 25-30. *See also* Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 306 (1963).

[24] *See* FTC v. Keppel, 291 U.S. 304 (1934); FTC v. Royal Milling Co., 288 U.S. 212 (1933).

[25] American Airlines, Inc. v. North Am. Airlines, Inc., 351 U.S. 79, 85 (1956). Although the Board did not expressly state its finding of public interest it did set forth numerous factual and legal considerations which it concluded required a hearing for proper resolution. CAB Order E-7107 at 7 (Jan. 28, 1953).

[26] *Id. See* FTC v. Klesner, 280 U.S. 19, 25 (1929).

[27] 371 U.S. 296 (1963).

trust enforcement.[28] The Court based its reasoning on the legislative history of the CAB's creation[29] which indicates the broad jurisdictional power over air transportation which Congress intended the Board to possess.[30] The Court specified that the precise scope of "unfair practices" and "unfair methods of competition" would be determined on a case-by-case basis.[31]

The District of Columbia Court of Appeals defined the scope of authority of the CAB's Director of the Bureau of Enforcement in *Flight Engineers' International Association v. CAB*.[32] The Director found that a complaint contained sufficient grounds to suggest that provisions of the Act had been violated.[33] Because it appeared to be in the interest of the public for the Board to instigate formal investigation, the Director filed a petition for enforcement and docketed the complaint for a hearing.[34] The Board granted a motion to dismiss the action, concluding that it was not in the public interest to hold a lengthy hearing concerning private rights which adequately and appropriately could be held in the courts.[35]

The court held that the CAB has discretionary power to dismiss a complaint which alleges violations of the Act if it reasonably determines that to do so is in the public interest.[36] Observing that

[28] *Id.* at 304. In his dissenting opinion, Justice Brennan stated that under section 411, Board proceedings should be based not upon antitrust laws but upon the public interest standard of the Board's overall mandate. *Id.* at 320.

[29] "It is the purpose of this legislation to coordinate in a single independent agency all of the existing functions of the Federal Government with respect to civil aeronautics, and, in addition, to authorize the new agency to perform certain new regulatory functions which are designed to stabilize the air transportation industry in the United States." H.R. REP. NO. 2254, 75th Cong., 2d Sess. 1 (1938).

[30] Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 304-05 (1963).

[31] *Id.* at 306.

[32] 332 F.2d 312 (D.C. Cir. 1964). The petitioner in this case, Flight Engineers' International Association, EAL Chapter, filed a complaint with the CAB alleging that Eastern Airlines had violated certain labor provisions under section 401 of the Act.

[33] *Id.* at 313.

[34] *Id.*

[35] *Id.* at 313-14. See note 23 *supra* and accompanying text.

[36] *Id.* at 314. The petitioner argued unsuccessfully that the Civil Aeronautics Act, predecessor of the Federal Aviation Act, was modeled after the Interstate Commerce Act, under section 13 of which the Interstate Commerce Commission is required to hold a hearing upon the filing of a complaint that is not satisfied by the carrier against whom the complaint is filed. The court sustained

the CAB's discretion is subject to review,[37] the court reasoned that denial of this discretionary power would greatly hinder the CAB in settling disputes and protecting the public interest in undisrupted air transportation.[38] Because the Board is not bound by the Director's determinations, the court concluded that the CAB had not delegated to the Director the final authority to determine whether a complaint should proceed to a hearing.[39]

The Second Circuit Court of Appeals, in *REA Express, Inc. v. CAB*,[40] attempted to clarify both the appropriate standard for judicial review of Board decisions and the application of the "specific and substantial" standard for determination of public interest under section 411. The court held that the function of a reviewing court is limited to ensuring that the Board has not abused its discretion.[41] Under this narrow scope of review, a decision by the Board should not be disturbed if supported by substantial evidence on the record as a whole.[42] In this case the CAB held that the complainant failed to establish a prima facie claim for injunctive relief because the facts it alleged were insufficient to meet the "rigorous" specific and substantial standard.[43] Yet the court applied this standard to determine public *injury* and not public interest.[44] Observing the necessity of maintaining the public-private distinction under section 411, the court stated that the Board could assume jurisdiction

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the power of the CAB to exercise wide discretion in dismissal of complaints if such dismissal is based upon reasonable grounds, relying upon *Nebraska Dep't of Aeronautics v. CAB*, 298 F.2d 286, 295 (8th Cir. 1962). *Id. See* Pan American-Grace Airways, Inc. v. CAB, 178 F.2d 34, 36 (D.C. Cir. 1949); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.07, at 259-60 (1958).

[37] 49 U.S.C. § 1486 (1976). *See* Trailways of New Eng., Inc. v. CAB, 412 F.2d 926, 931 (1st Cir. 1969).

[38] Flight Eng'rs Int'l Ass'n v. CAB, 332 F.2d 312, 315 (D.C. Cir. 1964).

[39] *Id. See* 14 C.F.R. § 304.204 (1978).

[40] 507 F.2d 42 (2d Cir. 1974).

[41] *Id.* at 45. *See* Pan American-Grace Airways, Inc. v. CAB, 178 F.2d 34, 36 (D.C. Cir. 1949).

[42] REA Express, Inc. v. CAB, 507 F.2d 42, 45 (2d Cir. 1974). *See* American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); American Airlines v. CAB, 231 F.2d 483, 486 (D.C. Cir. 1956).

[43] REA Express, Inc. v. CAB, 507 F.2d 42, 46 (2d Cir. 1974). In the case, REA's complaint alleged that utilization of the words "Air Express" in the corporate titles of its competitors was inherently likely to cause public confusion. *Id.* at 44.

[44] *Id.* at 46.

under section 411 only where injury to the public is substantial.[45]

The application of section 411 by the Second Circuit in *REA Express* was clarified by the Supreme Court in *Nader v. Allegheny Airlines, Inc.*[46] The Court stated that the Board is not required to find that a carrier's practices caused injury or were intentionally deceptive in order for the Board to assume jurisdiction in the matter.[47] Omitting mention of the threshold "specific and substantial" standard of public interest under section 411,[48] Justice Powell's opinion declared that the Board's assumption of jurisdiction to initiate investigation under section 411 is premised on a finding that public interest is involved.[49]

In the midst of this confusion over application of the public interest standard under section 411, the court in *Aloha Airlines, Inc. v. CAB*[50] dismissed petitioner's argument that allegations in the complaint did not support a finding of public interest.[51] Writing for the court, Judge Robb held that the CAB may delegate authority to the Director of the Bureau of Enforcement to make a finding of public interest.[52] Citing the narrow standard of judicial review of Board decisions under the Second Circuit *REA Express*

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[45] *Id.*

[46] 426 U.S. 290 (1976). The petitioner in this case brought both a common law fraud action against Allegheny based upon its failure to apprise petitioner of its deliberate overbooking practices and a statutory action under section 404(b) of the Act, arising from Allegheny's failure to provide petitioner the boarding priority specified in its rules filed with the CAB. For a detailed discussion of this case see Tice, *Overbooking of Airline Reservations in View of "Nader v. Allegheny Airlines, Inc.": The Opening of Pandora's Box*, 43 J. AIR L. & COM. 1 (1977).

[47] *Id.* at 302. *See* American Airlines, Inc. v. North Am. Airlines, Inc., 351 U.S. 79, 86 (1955).

[48] Justice Powell's majority opinion states, "Section 411 is purely restrictive. It contemplates the elimination of 'unfair or deceptive' practices that impair the public interest." Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 301 (1976).

[49] *Id.* at 302. The majority opinion also states that the Board is not empowered to vindicate private rights; thus individual consumers have no standing under section 411 proceedings. *Id.*

[50] 598 F.2d 250 (D.C. Cir. 1979).

[51] *Id.* at 256.

[52] *Id. See* 14 C.F.R. § 385.22 (1978); 14 C.F.R. § 302.206 (1978). Aloha contended that because section 385.22 contains no delegation of power to make the requisite public interest finding under section 411, the Director did not possess the power to make such a finding. The court noted that section 385 is not the exclusive source of power delegation by the Board and found that section 302.206 empowers the Director to make such a finding.

decision,[53] Judge Robb observed that the courts do not independently determine what constitutes public interest due to the broad discretionary power of the Board to make such judgments.[54] Responding to petitioner's argument that there was no evidence of a threshold finding of public interest by the Board,[55] Judge Robb concluded that the complaint alleged fare rebates in violation of section 403[56] and passenger discrimination in violation of section 404(b)[57] of the Act, constituting "obvious" questions of public interest.[58]

II. LEGAL ASPECTS OF CARRIER PROMOTIONAL PROGRAMS

A. *Fare Rebates*

Under section 403(b)(1) of the Act,[59] air carriers are required to charge and receive no more and no less than the rates set out in their current tariffs. This section specifically prohibits the refund or remittance of any portion of the particular rates by any carrier, ticket agent, or broker "in any manner or by any device, directly or indirectly . . ."[60] except those specified within the section.[61] The provisions of section 403 came directly from the Interstate Commerce Act (ICA)[62] so that decisions interpreting that Act are "the best guide lines available" for the resolution of cases under section 403.[63] Decisions rendered under the ICA have long prohibited the provision of additional services to shippers or passengers at low cost rates.[64] Thus, when services unnecessary for

[53] See text accompanying note 41 *supra.*

[54] Aloha Airlines, Inc. v. CAB, 598 F.2d 250, 256 (D.C. Cir. 1979).

[55] *Id.*

[56] See text accompanying note 59 *infra.*

[57] See text accompanying note 80 *infra.*

[58] Aloha Airlines, Inc. v. CAB, 598 F.2d 250, 256 (D.C. Cir. 1979).

[59] 49 U.S.C. § 1373(b)(1) (Supp. 1977).

[60] *Id.*

[61] *Id.* Exceptions include employees and their families, survivors of employees killed in aircraft accidents, persons injured in aircraft accidents, ministers, elderly persons and handicapped persons.

[62] *See* 49 U.S.C. § 6 (1976).

[63] Northeast Airlines, Inc. v. CAB, 345 F.2d 662, 666 (1st Cir. 1965).

[64] In *Louisville & N.R.R. v. Mottley*, the United States Supreme Court established that "the purchase of a transportation ticket by a passenger and its sale by the company, shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs." 219

transportation are furnished below cost, the ICA is violated.[65]

In the instant case both the Administrative Law Judge and the CAB held the 1971 Aloha-Budget agreement illegal on the grounds that Aloha's subsidization of rental car fees constituted fare rebates to Aloha passengers.[66] The court of appeals affirmed this holding noting that Aloha's payments to Budget amounted to a predetermined assessment based on the number of cars rented.[67] Aloha argued that these payments constituted a legitimate sharing of joint costs incurred in the program.[68] Observing that the payments were not related to advertising costs,[69] the court found that the actual advertising expenses were dramatically lower than Aloha's payments[70] and that Aloha had deliberately disguised its payments to Budget in an effort to mislead the Board.[71] The court concluded that Aloha's payments to Budget allowed Aloha passengers to rent cars from Budget at a subsidized lower rate, thus

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U.S. 467, 477 (1923). Application of this holding in regard to restrictions on subsidized services by carriers was clarified by the Supreme Court in *Baltimore & O.R.R. v. United States*, where the Court stated, "When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation [the ICA] is violated." 305 U.S. 507 (1939). *See also* Union Pacific R.R. v. United States, 313 U.S. 450 (1941).

[65] Baltimore & O.R.R. v. United States, 305 U.S. 507, 524 (1939).

[66] Aloha Airlines, Inc. v. CAB, 598 F.2d 250, 258 (D.C. Cir. 1979). The rationale of this holding was that while an Aloha passenger initially paid the published air fare, he later received a partial refund through a reduced car rental fee. *Id.*

[67] *Id.*

[68] *Id.* at 259. Aloha argued that the Administrative Law Judge and the CAB entirely excluded from their computation of shared costs such items as Budget's extensive mailings to travel institutions, payment of sales incentives to employees of Budget and Aloha, special commissions to travel agents, travel by Budget representatives to the mainland to promote the program, and the cost of printed ads. Brief for Petitioner, *supra* note 1, at 36. The District of Columbia Court of Appeals, however, affirmed the holding of the Administrative Law Judge and the Board that Aloha could not justify its payments as an offset to increased expenses incurred by Budget in renting cars at discount rates. Aloha Airlines, Inc. v. CAB, 598 F.2d 250, 258 (D.C. Cir. 1979).

[69] The court found from the record that the Aloha payments related in a clear and identifiable manner to the discounts which Budget offered to Aloha's fly-drive passengers. 598 F.2d at 258.

[70] During the two years that the 1971 agreement was operative, Budget's actual advertising expenses were less than $360,000, while Aloha's payments to Budget were more than $1,350,000. *Id.* at 259.

[71] The court determined that Aloha had disguised its payments to Budget through indirect billings and reports and a false copy of the fly-drive agreement. *Id.*

constituting a fare rebate in violation of section 403.[72] Responding to Aloha's contention that its payments to Budget could not be distinguished from other carriers' promotional devices such as the provision of meals, drinks, credit cards and movies,[73] the court held that the provision of such services does not violate section 403 because these services are supplied by the airlines in direct connection with air transportation alone and the services are supplied in compliance with filed tariffs.[74]

The CAB sustained the decision of the Administrative Law Judge, who held that the 1973 agreement, like the 1971 agreement, was unlawful because the rebate formed an aggregate payment to Budget through the absorption of all advertising costs.[75] The court of appeals reversed, noting that critical differences existed between the 1971 and the 1973 agreements.[76] In support of this decision, the court simply pointed out that the Board failed to distinguish properly the 1973 Aloha-Budget program from a similar agreement between Hawaiian Airlines and Hertz Corporation, approved by the Board, under which Hawaiian paid for "only its fair share" of the advertising costs.[77] Although Aloha in the 1973 agreement paid for the entire advertising cost of the fly-drive program, the court found no evidence to indicate that this payment was disproportionate to the benefits received by Aloha or that Aloha refunded fares to its passengers through subsidization of the car rental service.[78]

B. *Passenger Discrimination*

Congressional policy concerning transportation requires that persons who obtain transportation in interstate commerce should

[72] *Id.*

[73] *Id.*

[74] *Id. See* Passenger Credit Plans Investigation, 37 C.A.B. 404, 406-07, 412 (1963); Ground Transportation Between Airports, 31 C.A.B. 5 (1960).

[75] Aloha Airlines, Inc. v. CAB, 598 F.2d 250, 260 (D.C. Cir. 1979). The Board affirmed the decision of the Administrative Law Judge without considering the structure or the 1973 arrangement by concluding that "the form of the payments to Budget was altered; everything else remained the same." *Id.*

[76] *Id.* The most significant difference between the 1971 and 1973 Aloha-Budget agreements is that under the 1973 agreement, Aloha made no payments to Budget based on the number of cars rented to Aloha passengers, nor did Aloha pay any part of the air fares it collected to Budget. *Id.* at 261.

[77] *Id.*

[78] *Id.*

be "treated absolutely alike and that all should be on a plane of equality."[79] Section 404(b) of the Act provides that "[n]o air carrier . . . shall . . . subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[80] An early CAB decision[81] held that a promotional arrangement under which passengers were forced to buy an accommodation package in order to be eligible for a reduced fare was unjustly discriminatory.[82] Subsequent Board decisions have determined that such factors as "stimulation of overall traffic levels,"[83] encouragement of development and competition,[84] and differences in types of service[85] and reservations[86] justify discrimination in fares.[87] Section 404(b) is violated when different fares or rates are charged for similar services under substantially similar conditions.[88] Unequal fares thus are not unlawful per se and may be allowed if properly justified.

The court found that no justification existed to validate the 1971 Aloha-Budget agreement, which it found to be simply a method by which Aloha refunded fares to passengers.[89] Because passengers who exercised the option to rent cars paid less for the same service than passengers who did not, the court concluded that different fares were charged.[90] The court distinguished this arrangement from "legitimate" ones in which passengers pay the same fares but choose not to participate in certain air transportation services available to all and set forth under filed tariffs.[91] Since it found no justification for this discrimination, the court affirmed the finding of the Administrative Law Judge and the CAB that the 1971

[79] Northeast Airlines, Inc. v. CAB, 345 F.2d 662, 666 (1st Cir. 1965).

[80] 49 U.S.C. § 1374(b) (1976).

[81] Tour Basing Fares, 14 C.A.B. 257 (1951).

[82] *Id.*

[83] Group Inclusive Tour-Basing Fares to Hawaii, 54 C.A.B. 534 (1970).

[84] United Air Lines, Inc., CAB Order No. 77-12-24 (Dec. 2, 1977).

[85] *See* United Custom Coach, Suspension and Investigation, 26 C.A.B. 23, 24 (1957).

[86] Delta Air Lines, Inc. v. CAB, 455 F.2d 1340 (D.C. Cir. 1971).

[87] 598 F.2d at 262-63.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 263.

[91] *Id.*

agreement violated section 404(b) of the Act by unjustly discriminating among passengers.[92]

The court found no payments or practices under the modified 1973 Aloha-Budget agreement which constituted a fare rebate in violation of section 403.[93] Without a finding of rebates or discrimination in fares charged by Aloha, the court observed that it "logically follows" that there was no discrimination among passengers in violation of section 404(b).[94] Finding no violation of sections 403 or 404(b), the court concluded that the 1973 agreement did not constitute an unfair practice in violation of section 411 of the Act, and reversed the decision of the Board.[95]

III. CONCLUSION

All carriers conduct business under a regulated system of limited competition which is of special concern to the public as is true of all common carriers and public utilities.[96] Congress has committed the regulation of air transportation to the CAB, in an effort to devote the Board's special competence to the aviation industry.[97] This decision significantly modifies the standard for determination of public interest in matters concerning unfair practices and competition under section 411 of the Act. The court failed to heed the specific language of the Supreme Court in *American Airlines*,[98] that section 411 is concerned exclusively with protecting the public interest, not with protecting injured competitors or with punishing wrongdoers.[99] Use of a "dual function" approach to section 411 as in *Pan American*[100] still requires a finding of public interest upon which to base CAB jurisdiction.[101] Even under the recent liberal construction of section 411 in *Nader*,[102] public "involvement"

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[92] *Id.*

[93] See notes 76-78 *supra* and accompanying text.

[94] 598 F.2d at 264.

[95] *Id.*

[96] American Airlines, Inc. v. North Am. Airlines, Inc., 351 U.S. 79, 85 (1956).

[97] *Id.*

[98] See note 13 *supra* and accompanying text.

[99] See note 23 *supra* and accompanying text.

[100] See note 27 *supra* and accompanying text.

[101] See note 28 *supra* and accompanying text.

[102] See note 46 *supra* and accompanying text.

is established as an essential element for the Board's assumption of jurisdiction and the use of section 411 is characterized as "restrictive" and limited to situations where the public interest has been "impaired."[103]

The District of Columbia Court of Appeals construed Aloha Airlines' alleged violations of sections 403 and 404(b) of the Act as matters of obvious public interest constituting per se violations of section 411. By broadening the scope of public interest to include that which is deemed "obvious," this decision expands jurisdiction of the CAB to an unnecessary and potentially hazardous scope.[104] It has long been held that the courts, not the CAB, are the appropriate arenas for the vindication of private rights concerning unfair practices and competition, so that a complaint must allege a matter which concerns public interest to provide a jurisdictional base for the Board. The creation of the "obvious" standard for determination of public interest appears wholly inadequate, providing the CAB with jurisdiction in matters where it "obviously" does not belong.

The opinion of the court is of further significance in setting out qualifications which carriers must meet when participating in joint venture promotional arrangements. In this decision the District of Columbia Court of Appeals establishes a two-tiered test to determine the legality of promotional efforts of a carrier in a joint business venture. Such an arrangement must first avoid a pro rata payment basis under which the carrier's payments create an illegal rebate by subsidization of a tangential service in violation of section 403 of the Act. Although congressional policy concerning transportation promotes equal treatment of passengers, the Act prohibits only that discrimination which is deemed unjust. This

[103] See note 49 *supra* and accompanying text.

[104] The implications of this holding will be greatly affected by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending 49 U.S.C. §§ 1301-1552 (1976)), a topic beyond the scope of this note. For discussion of the Deregulation Act, *see* Cohen, *New Air Service and Deregulation: A Study in Transition*, 44 J. AIR L. & COM. 695 (1979); Kelleher, *Deregulation and the Practicing Attorney*, 44 J. AIR L. & COM. 261 (1978); Comment, *"Deregulation"—Has it Finally Arrived? The Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 799 (1979). This expansion of CAB jurisdiction is particularly noteworthy in view of the provisions set forth under 49 U.S.C. § 1551(a)(2)(A), (B) (Supp. 1979), that the authority of the Board concerning section 403 and section 404 of the Act will expire on January 1, 1983.

decision establishes that pro rata promotional payments constitute illegal rebates and create unjust discrimination among passengers in violation of section 404(b) of the Act. The court seems to impose as a second standard a test of whether the payment by the carrier is proportional to the benefits it receives. Although the existence of an actual refund of fares to a carrier's passengers is undoubtedly the chief criterion for determining the legality of a joint promotional effort, this additional "proportionality" standard could have a significant effect on such programs. It is foreseeable that a carrier's joint venture might fully comply with the pro rata restrictions yet not meet the "proportionality" standard. The difficulties inherent in determining what constitutes a proper proportion are implicit at every stage of a joint venture.

The Airline Deregulation Act of 1978 encourages competition among the airlines.[105] Spiraling fuel costs and operational expenses will undoubtedly force the airlines to frequently increase ticket prices, at least in the foreseeable future.[106] As the degree of competition for passengers becomes more keen, the value of amenities, gratuitous services, and promotional bonuses for passengers will increase. While the pro rata payment basis provides a relatively clear standard for determining the legality of these programs, the "proportionality" standard leaves the airlines and their joint venturers without sufficient guidelines to meet the economic demands of the future.

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[105] *See* 49 U.S.C. § 1302(a)(4) (Supp. 1977) which states that the CAB is to place reliance on competitive market forces and on actual and potential competition "to provide the needed air transportation system, and to . . . encourage efficient and well-managed carriers to earn adequate profits and to attract capital."

[106] United States airlines spent an estimated $2 billion more for fuel in 1979 than in 1978. Without the benefit of frequent fare increases to accommodate higher operational costs, it is doubtful if the airline industry could maintain its operations. AV. WEEK & SPACE TECH., Aug. 13, 1979, at 20.

CIVIL PROCEDURE—PENDENT AND ANCILLARY JURISDICTION—In an Action Based Upon a Federal Question, a District Court May Assert Pendent Jurisdiction Over a Plaintiff's Claim Against a Third-Party Defendant Even Though an Independent Basis for that Jurisdiction is Absent. *Ortiz v. United States*, 595 F.2d 65 (1st Cir. 1979).

On January 21, 1973, a Puerto Rican veteran visited the United States Veteran's Hospital in San Juan. Rather than attending to him, the employees of that institution referred him to the local Mimaya Hospital, Inc. (Mimaya), a private facility, for hospitalization. At Mimaya, he allegedly received improper treatment which caused his health to decline rapidly and which led to his death little more than a year later.

This veteran's family brought suit in 1975 against the United States pursuant to the Federal Tort Claims Act,[1] alleging that the failure of the employees of the Veteran's Hospital to diagnose the decedent's serious condition constituted negligence. This negligence resulted in severe injury to the decedent and contributed to his death. The referral of the decedent to Mimaya by the employees of the Veteran's Hospital was also alleged to be an express authorization for hospitalization under the auspices of the federal government, so that the government would face additional liability for any negligent actions by employees at Mimaya. This construction of the case prompted the government to file a third-party complaint against Mimaya seeking indemnification for any potential liability.[2]

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[1] 28 U.S.C. § 1346(b) (1976) provides that:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions or claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The Federal Tort Claims Act waived the sovereign immunity of the federal government for tortious acts of its officers and employees by expressly granting consent to be sued. The judicial interpretation of that consent has come to include only proprietary or governmental functions. Discretionary duties are excluded from possible liability. 35 AM. JUR. 2d *Federal Tort Claims Act* §§ 15-18 (1967).

[2] FED. R. CIV. P. 14(a). Under this rule, ancillary jurisdiction over the

A year after the third-party complaint was filed, the plaintiffs moved for leave to amend their original complaint to add a nonfederal negligence claim[3] directly against Mimaya. Because both parties were citizens of Puerto Rico, the district court denied both the motion to amend and a later motion for reconsideration but granted permission to the plaintiffs to appeal its ruling.[4] *Held: Reversed and remanded for further proceedings consistent with the court's opinion*: In an action based upon a federal question, a district court may assert pendent jurisdiction over a plaintiff's claim against a third-party defendant even though an independent basis for that jurisdiction is absent. *Ortiz v. United States,* 595 F.2d 65 (1st Cir. 1979).

PENDENT JURISDICTION—PRECEDENT FOR ITS EXPANSION

The federal judiciary is granted power over a narrow variety of

third-party claim has been found so that the court will not be impeded by any procedural barriers should the claim arise from the same set of facts. *See* Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959). In the instant case, an independent basis for federal jurisdiction also existed under 28 U.S.C. § 1345 (1976), which provides that "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

[3] The term "nonfederal claim" means one for which there is no independent basis for federal jurisdiction. Conversely, a federal claim means one for which an independent basis for federal jurisdiction exists. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 n.11 (1978).

[4] 28 U.S.C. § 1292(b) (1976) provides that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Normally, the plaintiff's appeal would have been postponed until the conclusion of the litigation. Recognizing the uncertain state of the law in the field, particularly the most recent Supreme Court opinions, and aware that a decision in *Kroger*, cited in note 3 *supra*, was imminent and might affect its ruling, the district court certified the interlocutory appeal. It was accepted by the First Circuit Court of Appeals and was stayed until the opinion in *Kroger* was handed down and duly considered.

cases and controversies by the United States Constitution,[5] and the actual contours of that power have long been the subject of judicial scrutiny and analysis. Much of that effort has been devoted to defining the doctrines of ancillary and pendent jurisdiction and interpreting the effects of those doctrines upon the courts. Ancillary jurisdiction is technically held to arise only when a federal court effectively controls the property or fund under dispute so that other claimants should be allowed to intervene to protect their interests without regard to the normal requisites of jurisdiction.[6] The application of true ancillary jurisdiction should be limited to appropriate factual situations, while the doctrine of pendent jurisdiction should be invoked when related federal and nonfederal claims derive from a common nucleus of fact so that both may be adjudicated in one proceeding.[7] The nonfederal claim may be either a true pendent claim, involving the same parties, or it may be a pendent party claim, where a party outside the original litigants in the case is sought to be added because of some claim against him which arose from the same facts.[8] The courts in recent years have attempted

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[5] The federal courts, under U.S. CONST. art. III, § 2, cl. 1, are granted power over a variety of cases and controversies:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a party; —to Controversies—between two or more States; —between a State and Citizens of another State; —between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[6] Freeman v. Howe, 65 U.S. (24 How.) 450, 456 (1860).

[7] Over the years, the technical distinctions between ancillary and pendent jurisdiction have become blurred, so that the terms are used interchangeably. This led the Supreme Court to conclude that, whatever the true distinctions, there are no "principled" differences between the two concepts and that they are to be treated in the same manner. Aldinger v. Howard, 427 U.S. 1, 13 (1976). Courts still continue to discuss them separately, however, and draw some distinctions.

[8] The subtle distinction between a pendent claim and a pendent party has proven confusing and has led to erroneous court decisions. The issue is not the personal jurisdiction of the court over the party who is being added to the case, but the subject matter jurisdiction over the claim which is being asserted against the defendant. Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties,"* 34 U. PITT. L. REV. 1, 5, 12 (1972).

to refine and clarify this jurisdictional maelstrom, and *Ortiz* occupies a significant position in this judicial endeavor.

Yet the accepted view of the courts' power has not always encompassed the doctrines of ancillary and pendent jurisdiction. For a time the judiciary did not recognize their existence. They are the products of a slow but steady progression of precedent which has continually broadened the scope of federal jurisdiction from its infancy when the mere presence of a nonfederal question in a case was argued to prevent the exercise of the federal courts' power.[9] That contention was soundly rejected by Chief Justice Marshall in 1824,[10] and his reasoning was later applied by the Court to permit a federal court to decide every question in a case regardless of the grounds for the ultimate decision of the action.[11] Other Supreme Court decisions over the decades held that a defendant's nonfederal compulsory counterclaim could be heard even though the plaintiff's claim had been dismissed[12] and that a non-

[9] Osborn v. Bank of the United States, 6 U.S. (9 Wheat.) 251, 256 (1824). The Bank of the United States sued in federal circuit court under an authorization of jurisdiction found in its charter permitting such action. The suit was to enjoin collection of an allegedly unconstitutional state tax. Questions of state law involving the party liable to pay the award of the court, the levying of interest on that award and the validity of injunctive relief in the action were also present. The appellants in the case argued that under the controlling precedent the presence of those state questions would preclude the federal court's assumption of jurisdiction. Chief Justice Marshall realized the overwhelming practical ramifications of such an argument, as "[i]f this were sufficient . . . almost every case . . . would be withdrawn," and reversed the earlier decisions, holding that "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Id.*

[10] See note 9 *supra.*

[11] Siler v. Louisville & N.R.R. Co., 213 U.S. 175 (1909). A state order regulating rates was attacked as unauthorized by state law and as unconstitutional under federal law. The presence of a substantial federal question "gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." 213 U.S. at 191. The state regulation was held invalid on state grounds and a determination of the federal questions was never reached. *But see* Cleveland Eng'r Co. v. Galion Dynamic Motor Truck Co., 243 F. 405 (N.D. Ohio 1917).

[12] Moore v. New York Cotton Exch., 270 U.S. 593 (1926). The Court, presenting little concrete reasoning, retained jurisdiction over the defendant's compulsory counterclaim under Equity Rule 30 although the plaintiff's allegations of Sherman Act violations were dismissed on the merits. The close connection between the two complaints, making the decision of one tantamount to decision of the other,

federal claim could be adjudicated distinct and separate from its federal companion if each constituted only one ground of the same "cause of action"[13] arising from the same factual situation.[14] It had taken more than a century to achieve even this limited expansion of the boundaries of federal jurisdiction, and another thirty-three years elapsed before the Supreme Court ushered in the modern view of federal jurisdiction with its decision in *United Mine Workers v. Gibbs*.[15]

Gibbs abandoned the "unnecessarily grudging"[16] approach toward parallel claims exhibited by its predecessors. Both a federal statutory claim and a claim under the common law of Tennessee were asserted against the United Mine Workers by the plaintiff.[17] Although diversity between the parties was lacking, the Court sustained the exercise of federal jurisdiction over the nonfederal claim even after the anchor claim[18] was dismissed. Reliance on the outdated single cause of action theory of earlier cases,[19] which would have prevented the court's full disposition of the action, was discarded in favor of a more flexible treatment of the jurisdictional question.

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dictated the decision's outcome. The failure of relief if only a portion of the case were decided was also cited as a ground for the decision. 270 U.S. at 610.

[13] Under the Equity Rules, the predecessor of the Federal Rules of Civil Procedure, the phrase "cause of action" was used to signify all of the claims arising from one factual basis. Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927).

[14] Hurn v. Oursler, 289 U.S. 238 (1933). This decision represented the secure position which the expansion of federal jurisdiction had won in the courts. A federal statutory claim for copyright infringement was coupled with a claim of unfair competition under state law. No copyright infringement was found, but the Court retained the unfair competition claim despite its lack of jurisdiction by applying the *Siler* rule, cited in note 11 *supra*. The reliance in *Hurn* on the elusive concept of a "cause of action" led to confusion and inconsistent application of the test by the lower courts, and with the adoption of the Federal Rules of Civil Procedure in 1948 the decision lost much of its relevance.

[15] 383 U.S. 715 (1966).

[16] *Id.* at 725.

[17] The claims arose from the alleged concerted efforts of the union to deny the plaintiff his employment in a local coal mine, depriving him of his contractual relationship with the owners of the mine. *Id.* at 720.

[18] The term "anchor claim" is used to describe the federal claim, either a federal question or a diversity situation, which forms the basis for the action. The nonfederal claim is attached to this anchor and brought under the jurisdiction of the court. The anchor claim in *Gibbs* was based upon a violation of section 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1976).

[19] See notes 13 and 14 *supra*.

In formulating this flexible approach, the Justices in *Gibbs* initially addressed the constitutional issues involved in expanding jurisdiction. The Court held that pendent jurisdiction, in the sense of judicial power, could be asserted if two tests were satisfied: (1) the anchor claim must meet the constitutional standards of article III[20] and (2) the federal and nonfederal claims must arise from a common nucleus of operative fact so that the action would constitute one case[21] which would ordinarily be adjudicated in a single proceeding.[22] If both of these criteria were met, the constitutional power to hear both claims would exist.

The Court, having reached a decision on the constitutional issue, enumerated three factors traditionally considered in deciding questions of efficient judicial administration: judicial economy, convenience to the litigants, and fairness. Each of these considerations would have a direct bearing upon any decision to exercise the constitutional jurisdictional power. Pendent jurisdiction was not to be a doctrine every plaintiff could claim by right but was to be a doctrine of discretion,[23] carefully and cautiously applied by the courts.

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[20] See note 5 *supra.*

[21] The semantic distinction between case and controversy originally found in article III has been the focus of attention for several courts. The classic definition of the distinction, propounded by Justice Field in *In re Pacific Ry. Comm'n*, 32 F. 241 (N.D. Cal. 1887) and later endorsed by the Supreme Court in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937), holds that a controversy is narrower than a case and should include only suits of a civil nature. 32 F. at 255; 300 U.S. at 239. The court in *Ortiz* devoted considerable thought to the proposition that an action under the Federal Tort Claims Act is only a controversy and that the *Gibbs* standard, phrased in terms of cases, might be inapplicable. It reached the opposite conclusion, however, since any academic distinction that may exist has had no effect upon the permissible scope of pendent jurisdiction and has been used solely in the evolution of the doctrine of justiciability. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3529 (1975).

[22] 383 U.S. at 725. Some commentators, analyzing the language of the Court in strict grammatical fashion, have argued that there are three requirements established for the test of constitutional judicial power. The first, dealing with a substantive federal anchor claim, is of general application, while the latter two, based upon a common nucleus of operative fact and the ordinary disposition of the case in one proceeding, are alternative applications, only one of which must be met for this requirement to be fulfilled. Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 764 (1972).

[23] 383 U.S. at 726. Additional factors which might affect the court's exercise of its discretionary power over pendent jurisdiction have been suggested. Among these is a consideration of federalism, so that the dominion of the state courts

The lower courts were quick to accept the constitutional standard of *Gibbs* and rushed to assert jurisdiction over an assortment of parallel claims by utilizing this procedural device.[24] Over the next several years, however, the Supreme Court continued to wrestle with the nuances of the question of broadened federal jurisdiction, uncertain of what sort of creature they had wrought. The elusive distinctions between ancillary and pendent jurisdiction and between pendent claims and pendent parties proved particularly troublesome and led to less than definitive decisions on the subject.

In *Moor v. County of Alameda*,[25] the Court was presented its first opportunity to expand further the effects of the new-found doctrine of pendent jurisdiction. The anchor claim in *Moor* was based upon violations of the plaintiff's federal civil rights by individual police officers. Although no independent basis for federal jurisdiction existed against the municipality,[26] jurisdiction over a nonfederal claim was alleged to exist because of pendent juris-

over questions of state law might be protected, particularly where the state issue is one of first impression. Comment, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v. Gibbs Extended to Persons not Party to the Jurisdiction-Conferring Claim*, 73 COLUM. L. REV. 153, 167 (1973). In all situations, the respective weight of the claims should be measured so that a substantial state claim is not attached to an insignificant or less important federal claim. *Id.* at 167-68. *See, e.g.*, Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968).

The notion of federalism is a two-edged sword, however, as an argument that refusing to allow a federal right to be vindicated in federal court is an affront to the concept. That situation could occur when a plaintiff, bringing a federal action, would be hesitant to proceed in two courts, federal and state, for fear that the defendant in each would lay the blame on the other absent party. In such circumstances, allowing a federal court to decide both claims would serve the ends of federalism and of judicial efficiency. Fortune, *supra* note 8, at 11.

[24] *See, e.g.*, Almenares v. Wyman, 453 F.2d 1075 (2d Cir.), *cert. denied*, 405 U.S. 944 (1971); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971); Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1970); F.C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917 (6th Cir. 1970); Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Connecticut Gen. Life Ins. Co. v. Craton, 405 F.2d 41 (5th Cir. 1968); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968), *cert. denied*, 409 U.S. 1000 (1972); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966).

[25] 411 U.S. 693 (1973).

[26] The anchor claim was based upon 42 U.S.C. §§ 1983 and 1988 (1976). Congress and the courts had excluded parties such as counties and municipalities from civil liability under this provision. 411 U.S. at 696, 710. *See* Monroe v. Pape, 365 U.S. 167 (1961).

diction. The Court was quick to perceive that such assertions of federal jurisdiction over nonfederal claims would produce "subtle and complex question[s] with far-reaching implications"[27] and thus hesitated to issue an absolute statement. Instead, the Court emphasized the "significant difference"[28] between the facts in *Moor* and those in *Gibbs* in holding that the lower court's decision to decline joining the claims was a legitimate exercise of its discretion.[29]

Similar facts in *Aldinger v. Howard*[30] elicited another uncertain response from the Court, faced with another of the "countless factual permutations"[31] in which federal jurisdictional questions might arise. To permit a plaintiff to assert a state claim lacking an independent basis of federal jurisdiction against an entirely different defendant merely because the constitutional standard of *Gibbs* had been met would be, in the words of Justice Rehnquist, "quite another thing."[32] Such action would run counter to the well-established principle that the federal courts hold only limited juris-

[27] 411 U.S. at 715. The exercise of pendent jurisdiction would have permitted the plaintiff in *Moor* to reach the municipality for the actions of its police officers under a theory of vicarious liability although the cause of action was not permitted under federal law.

[28] *Id.* at 713. *Gibbs* involved no pendent party. Both the federal and nonfederal claim were asserted against the same party, while the addition of the municipality in *Moor* would have required a new party to be added, a move considered inappropriate by the Court.

[29] *Id.* at 715-17. The addition of the state law claim would have required the federal court to resolve difficult questions of California law upon which state court decisions were sparse. The addition of another claim might also have unduly complicated the case, particularly as it was being tried before a jury. *Id.* at 715-16.

[30] 427 U.S. 1 (1976). The plaintiff brought suit under 42 U.S.C. § 1983 (1976) and 28 U.S.C. § 1343(3) (1976), see note 36 *infra*, alleging violations of her federal civil rights due to the termination of her employment by a county treasurer. Along with the federal claim, a state law claim alleging liability of the county under a theory of vicarious liability was brought. 427 U.S. at 3-5.

[31] 427 U.S. at 13. The Federal Rules of Civil Procedure allow joinder of various parties through the use of a number of procedural devices. *See, e.g.*, FED. R. CIV. P. 13, 14, 20. The liberalized provisions of the Federal Rules are seen by at least one commentator as a reason for the expansion of pendent jurisdiction as the two are interrelated. The Federal Rules do not expand jurisdiction themselves, but emphasize the tendency of recent court decisions to require a plaintiff to try his entire case at one time. Baker, *supra* note 22, at 765. This ability to join assorted parties, each of whom would bring problems of jurisdiction, led the Court in *Aldinger* to limit its decision to the differences between the facts there and those of *Gibbs* in determining that jurisdiction would not be present. 427 U.S. at 13-16.

[32] 427 U.S. at 14.

diction, specifically outlined by Congress, while the state courts are possessed of wide general jurisdiction.[33]

The determination in *Aldinger* of the proper parameters of the federal courts' jurisdiction under the congressional grant involved in that case[34] established a second procedural hurdle which, with the constitutional hurdle, must be cleared before jurisdiction will be proper. Once the constitutional barrier is surpassed, the "relevant statutory language"[35] must be given careful attention, particularly the language of the legislation from which the anchor claim emanated. If power over a pendent party is asserted, the statute should be construed in light of the power which Congress *had* extended to the judiciary.[36] When the boundaries of jurisdiction are dictated by a statute, whether it specifically excludes certain parties from suit or designates the parties amenable to the court's power, it would be improper to read the scope of pendent jurisdiction so broadly as to bring excluded parties back into court.[37] In such situations, the power delineated by statute must provide the limitations upon jurisdiction, regardless of how attractive a more liberal approach might appear.

The most recent decision of the Supreme Court upon the question of pendent jurisdiction, *Owen Equipment & Erection Co. v. Kroger*,[38] demonstrated the emphasis placed upon this statutory and procedural analysis, examining the "posture in which the non-

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[33] *Id.* at 15. The principle of the limited jurisdiction of the federal courts is one of primary importance. To allow the federal courts to entertain cases not within their jurisdiction would not be merely wrong but an unconstitutional invasion of the powers reserved to the states. C. WRIGHT, LAW OF FEDERAL COURTS § 7 (1976). *See* Palmore v. United States, 411 U.S. 389 (1973); Lockerty v. Phillips, 319 U.S. 182 (1943); Kline v. Burke Constr. Co., 260 U.S. 226 (1922).

[34] See note 36 *infra.*

[35] 427 U.S. at 17.

[36] *Id.* 42 U.S.C. § 1983 (1976) provided the basis for the suit in *Aldinger* relative to the factual allegations of the case. It refers to deprivations of federal civil rights by any "person." The jurisdictional basis for any civil action brought to redress such deprivations is 28 U.S.C. § 1343(3) (1976).

[37] 427 U.S. at 17. As in *Moor*, the party's identity as a county would exclude it from liability. See notes 26 and 27 *supra.* It would thus be improper to assert jurisdiction over such a party merely because a nonfederal claim involving it was also alleged. If there had been congressional silence on the subject or some sort of tacit encouragement, a different outcome might have been possible.

[38] 437 U.S. 365 (1978).

federal claim is asserted."[39] The survivors of the decedent, Kroger, had filed a wrongful-death action against the Omaha Public Power District (OPPD), based upon diversity jurisdiction. OPPD impleaded Owen Equipment because of its right to contribution, and the original complaint was amended to add Owen as a separate defendant. Diversity was absent between Owen and Kroger, but a motion to dismiss on those grounds was denied by the district court. The Eighth Circuit Court of Appeals affirmed that decision, which was then reversed by the Supreme Court.

The uncontrovertible demand of the diversity statute[40] was presented as the reason for the Court's decision in *Kroger*. The guiding jurisdictional principle of total and complete diversity was not to be subverted for the practical needs of the convenience to the litigants or judicial economy, regardless of how persuasive those needs might be.[41] Not content with halting its discourse at that point, the Court discussed additional elements which contributed to its determination that pendent jurisdiction could not extend over Owen, the pendent party, even if it had been properly impleaded. The nonfederal claim had been asserted by the plaintiff and was not ancillary in the definitive sense, having no relation to any property under dispute. It was instead a new and independent claim separate from the original and not contingent upon its resolution.[42]

[39] *Id.* at 373. This phrase is used to describe the procedural context of the nonfederal claim. The focus is upon the factual and logical relation of the nonfederal claim to the anchor claim; the status of the pendent party within the action (principally whether it could be or was brought into the action through use of the Federal Rules separate from any jurisdictional basis); and the factors often ascribed to the exercise of the court's discretionary powers, *e.g.*, the availability of full relief to the parties in an alternative court.

[40] The inviolability of the diversity statute is unquestioned. *See* American Fire and Cas. Co. v. Finn, 341 U.S. 6 (1951); Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941); Strawbridge v. Curtiss, 1 U.S. (3 Cranch.) 575 (1806). Commentators agree that this principle should be maintained and point out that the courts, on occasion, have reached illogical conclusions by allowing the addition of pendent parties in diversity cases while refusing to do so where a federal question was involved. The opposite result, in the estimation of some scholars, would be the only proper course. Fortune, *supra* note 8, at 18-19, 21.

[41] 437 U.S. at 377. So strict is the construction of the principle of complete diversity that the overwhelming presence of these two factors in *Kroger* had no effect upon the Court's decision. Its ruling necessitated a new trial of the issues in the case although a jury verdict had previously been rendered. *Id.* at 369.

[42] 437 U.S. at 376. The typical assertion of ancillary jurisdiction involves the rights of one of the defending parties or of a party whose rights might be

The majority in *Kroger* was forceful in its statement of the law, but the facts served to limit the effect of the decision. The Court again refused to offer "any sweeping pronouncement upon the existence or exercise of [pendent] jurisdiction"[43] and adhered to earlier equivocations that "[o]ther statutory grants and other alignments of parties and claims might call for a different result."[44] In classes of actions in which courts are granted exclusive jurisdiction, a particularly strong argument would exist for the opposite conclusion.[45] Yet recognition of this point, in the context of the Court's reasoning, was nothing but dictum.[46]

In its four major decisions discussing pendent jurisdiction the Supreme Court had failed to enunciate any firm rules for its broader application. Not surprisingly, some lower courts, confronted with the Court's uncertain approach, had been wary of using this procedural tool. The Ninth Circuit Court of Appeals, for example, had traditionally refrained from exercising the broader power which pendent jurisdiction afforded,[47] and refrained again in *Ayala v. United States*.[48]

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irretrievably lost unless they are asserted in the ongoing action, such as where specific property is under dispute. The adjudication of those rights usually follows logically from the resolution of the original complaint and they are linked by more than mere factual similarity. Neither generalization was true in *Kroger*, however, lending additional support to the Court's decision.

[43] 427 U.S. at 18. This language was clearly indicative of the Court's staunch refusal to define just how far pendent jurisdiction might extend. Formulating such a definition was considered both unwise and unnecessary by the Justices, although their unwillingness to do so was counterproductive, contributing to confusion within the lower courts.

[44] *Id.*

[45] *Id.* Commentators following the *Gibbs* decision had astutely anticipated such fact situations arising primarily under the Federal Tort Claims Act. Forcing a plaintiff to divide his case between federal and state court obviously would prove disadvantageous as there exists the possibility that he could lose both cases and go uncompensated. Under such a procedural structure, neither defendant would be bound by an adverse decision to which he was not a direct party. The coupling of the state claim to the federal action would be the only equitable result. Fortune, *supra* note 8, at 7-9.

[46] The Court specifically limited its decision to "the issue of so-called 'pendent party' jurisdiction with respect to a claim brought under §§ 1343(3) and 1983." 427 U.S. at 18.

[47] Aldinger v. Howard, 513 F.2d 1257 (9th Cir. 1975), *aff'd*, 427 U.S. 1 (1976); Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972), *aff'd sub nom.* Moor v. County of Alameda, 411 U.S. 693 (1973); Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); Williams v. United States, 405 F.2d 951 (9th Cir. 1969).

[48] 550 F.2d 1196 (9th Cir. 1977), *cert. dismissed*, 435 U.S. 982 (1978).

The anchor claim in *Ayala* was brought against the government pursuant to the Federal Tort Claims Act. A nonfederal claim was asserted against a third party, the manufacturer of government-owned railroad cars which had exploded, injuring the plaintiff. The Ninth Circuit, extensively referring to *Moor* and *Aldinger*, rejected the asserted jurisdiction and held that such a decision would be proper whether the anchor claim was predicated upon a federal question or upon diversity.[49] Criticism of the decision focused on the circuit's traditional disdain for the doctrine of pendent jurisdiction and on the tenuous precedent which supported its argument.[50] However, the fact that two of the four leading cases on the subject[51] originated in the circuit would mitigate many of the critics' objections.

Ortiz v. United States—THE COURT'S REASONING

The First Circuit Court of Appeals, faced with the claims of Ortiz's survivors and the jurisdictional questions they engendered, confronted a confusing and at times contradictory body of precedent. Nevertheless the First Circuit quickly set out to analyze and apply that precedent. The bifurcated standard of *Gibbs* and *Aldinger* was acknowledged as the proper test for determining the validity of pendent jurisdiction.[52] Any obstruction in clearing the

[49] *Id.* at 1200-01 n.8. The statement was made in reference to the Fifth Circuit's decision in *Fawvor v. Texaco, Inc.*, 546 F.2d 636 (5th Cir. 1977), where a nonfederal claim against a properly impleaded third-party defendant was denied jurisdiction. If pendent jurisdiction had been asserted, diversity would have been destroyed. The Ninth Circuit argued that a diversity anchor was no more suspect than a federal question anchor, a view nullified in light of the decision in *Kroger*.

[50] Ortiz v. United States, 595 F.2d 65, 71 n.8 (1st Cir. 1979). The holding in *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969), one of the leading Ninth Circuit cases dealing with pendent jurisdiction, was based in large part on *Katoaka v. May Dep't Stores Co.*, 115 F.2d 521 (9th Cir. 1940). That decision predated *Gibbs* and its expansion of the concept of pendent jurisdiction beyond the narrow limits of *Hurn*. The reasoning of the entire chain of decisions within the circuit was suspect although the Supreme Court upheld it in *Moor* and *Aldinger*.

[51] *Moor* and *Aldinger* both had their beginnings in the Ninth Circuit. See note 47 *supra*.

[52] 595 F.2d at 71-73. The district court ruled that it lacked the constitutional power to hear the nonfederal claim against Mimaya and cited *Moor* and *Ayala* for the proposition. The First Circuit noted that the Court in *Moor* never reached the article III issue, resting its decision upon the lower court's valid exercise of discretion. Further, *Moor* and *Ayala* were easily distinguishable, re-

constitutional hurdle was dispensed with by remanding to the district court two questions for consideration: (1) whether a valid and substantive federal claim existed[53] and (2) whether both claims derived from a common nucleus of operative fact.[54]

Turning its scrutiny to the second, procedural hurdle, the posture of the disputed claim, the court conceded that the allegations of negligence against Mimaya were not ancillary in the sense of being dependent upon the outcome of the anchor claim but were separate and distinct.[55] This point had been deemed critical to resolution of the jurisdictional questions in *Kroger*[56] but the First Circuit felt that other factors were controlling. First, efficient judicial administration would be promoted by litigation of all the claims in federal court, the requisite forum under the anchor statute.[57] Second, the plaintiff's claim had not forced the addition of Mimaya to the action since it was present due to the government's impleading, which was supported by an independent basis of federal jurisdiction.[58] Third, the Federal Tort Claims Act did not expressly or implicitly negate the exercise of pendent jurisdiction by a federal court over an

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quiring the addition of a new party under the nonfederal claim while Mimaya was already present in the action under the impleader by the government. *Id.* at 71 n.8.

[53] *Id.* at 71. The Federal Tort Claims Act makes the government liable for tortious conduct of one of its employees acting within the scope of his office or employment for which "a private person would be liable . . . in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1976). Reference to the local laws of Puerto Rico would be required. Neither party briefed or argued the point, so it was remanded to the district court. 595 F.2d at 71.

[54] 595 F.2d at 71.

[55] *Id.* at 72.

[56] *Kroger* addressed the setting of such a claim and stated that it was "quite different" from the type of nonfederal claim which previously had been viewed as falling within the ancillary jurisdiction of the federal courts. 437 U.S. at 376. The effect of that finding is mitigated by its position as dictum within the opinion. *Id.* at 376-77.

[57] Where "the efficiency plaintiff seeks so avidly is available without question in the state courts," 595 F.2d at 72, *quoting* Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 (4th Cir. 1972), a different result might ensue.

[58] 595 F.2d at 72. Although the independent basis for federal jurisdiction referred to related only to the claim between the government and Mimaya, it still served as an additional factor weighing for the exercise of pendent jurisdiction. The Court had dealt with the question of pendent parties in *Aldinger*, holding that the addition of a new party who otherwise would not be present in the action presented "a more serious obstacle to the exercise of pendent jurisdiction." 427 U.S. at 18. Mimaya was not such a party.

associated nonfederal claim.[59] The combined effect of these considerations made an assertion of pendent jurisdiction proper, despite the nature of the claim against the pendent party.[60]

Any precedent which might have dictated a different result was distinguished by the inapposite facts of the earlier cases. In *Moor*, no independent basis of federal jurisdiction over the third party existed as was provided in the instant case.[61] Mimaya would remain a party to the action absent the amended complaint because of its impleader, the barrier discussed in *Aldinger*.[62] *Kroger* was inapplicable because it involved a diversity anchor rather than the federal statute which was present in *Ortiz*.[63] Thus the basis for any argument against the assertion of pendent jurisdiction was effectively dismantled.

ANALYSIS OF THE DECISION

Analytically, the court composed a strong proposition for its extension of pendent jurisdiction, but one that was far from unassailable. The independent nature of the claim against Mimaya was openly acknowledged but largely neglected. The advantages of judicial economy and convenience were given more weight than

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[59] 595 F.2d at 72-73. The courts have generally given a liberal construction to all the provisions of the Federal Tort Claims Act since its enactment in 1946. *See, e.g.*, United States v. Muniz, 374 U.S. 150 (1963); Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955). Compare the strict construction given the diversity statute. See cases cited at note 40 *supra*.

[60] "Given the posture of [the] claim against Hospital Mimaya, considerations of judicial economy, convenience and fairness to [the parties] . . . favor such jurisdiction here; its exercise will not, moreover, circumvent or 'flout [a] congressional demand.'" 595 F.2d at 73. For a more complete judicial discussion of such prudential considerations, *see* Roxse Homes, Inc. v. Adams, 83 F.R.D. 398 (D. Mass. 1979).

[61] Due to the impleader of Mimaya by the government, 28 U.S.C. § 1345 (1976) was applicable. See note 2 *supra*. Although the parties did not mention its existence during the proceedings, the First Circuit properly took notice of it in its opinion. 595 F.2d at 67.

[62] "If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim." 427 U.S. at 18.

[63] The plaintiff in *Kroger* was a citizen of Iowa, while the Omaha Public Power District, the original defendant, was a Nebraska corporation. The plaintiff in *Ortiz* brought suit under the Federal Tort Claims Act. See note 1 *supra* and accompanying text.

was justifiable.[64] The Federal Tort Claims Act, although never negating the exercise of pendent jurisdiction, never endorsed the doctrine, expressly or implicitly, a point which the court overlooked.[65]

Despite its inconsistencies and weaknesses, however, the decision was probably proper[66] viewed against the backdrop of all the earlier opinions, particularly those of the Supreme Court.[67] Although the Supreme Court had refrained from establishing the exact contours of federal pendent jurisdiction, it had constructed loopholes through which a court might guide an adroit reading of an appropriate case. Dictum which prophetically anticipated the facts of *Ortiz* by suggesting that the Federal Tort Claims Act might provide an exception to the normal workings of pendent party theory[68] and the extraordinarily narrow language of some opinions[69] furnished the First Circuit with the building blocks for its decision. Purely pragmatic factors might have provided addi-

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[64] The same factors had been present in *Kroger*. The Court had ruled that they were not be be controlling, even if the consequences might appear inconvenient and a waste of judicial resources. 437 U.S. at 377. See note 41 *supra*.

[65] Some conservative commentators have suggested that the most direct solution to the dilemma presented by such situations does not lie with judicial expansion of pendent jurisdiction. Allowing the courts to grant themselves additional power is a questionable answer at best. If Congress intended for the federal courts to hold jurisdiction over related state claims when the anchor claim is the Federal Tort Claims Act, it should grant that jurisdiction legislatively, an approach already used in patent, copyright and trademark litigation. Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262, 267 (1968).

[66] Even commentators who have been critical of the expansion of pendent jurisdiction would agree that its use is appropriate under some circumstances. One such situation would be the avoidance of double litigation when the federal courts are granted exclusive jurisdiction over certain actions. Shakman, *supra* note 65, at 285.

[67] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Aldinger v. Howard, 427 U.S. 1 (1976); Moor v. County of Alameda, 411 U.S. 693 (1973); United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

[68] "When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together." 427 U.S. at 18 (emphasis in original).

[69] "But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same state in a *diversity* case." 437 U.S. at 373 (emphasis added).

tional motivations. The dissent in *Kroger*[70] had maintained that the considerations of convenience to the parties, judicial economy and inherent fairness to the litigants would be sufficient to induce, if not demand, the assertion of pendent jurisdiction over all nonfederal claims if opportune circumstances were present. The First Circuit briefly mentioned those factors in its opinion in *Ortiz*, treating them as further reasons for its decision to extend pendent jurisdiction. It was this combination of elements, regardless of the weight attached to each respectively, which created the foundation for the court's presentation of its strong, cogent argument for the expansion of pendent jurisdiction.

CONCLUSION

The impact of *Ortiz* on air law will undoubtedly be strong and immediate, opening the federal courts to actions which otherwise might never have been pursued. At the present time, the representatives of a decedent killed in a mid-air collision between aircraft could sue the federal government under the Federal Tort Claims Act if the accident were caused by the negligence of a federal air traffic controller. They might be prevented from pursuing the airport or the controller personally in federal court if diversity between the parties was absent.[71] This bar to suit would take on critical dimensions if the aircraft involved in the crash were intrastate commuter carriers,[72] as virtually all of the claimants would be denied access to federal court. They could pursue their claims in state court, but

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[70] 437 U.S. at 377-84. Justice White authored the dissenting opinion and was joined by Justice Brennan.

[71] The facts of this hypothetical are suggested by the facts in *Corbi v. United States*, 298 F. Supp. 521 (W.D. Pa. 1969), where a plaintiff sought to sue both the federal government and an airline for negligent operation of its aircraft. The court refused to allow the nonfederal claim to be joined with the federal anchor claim. *Accord*, Kack v. United States, 570 F.2d 754 (8th Cir. 1978). *Contra*, Jacobs v. United States, 367 F. Supp. 1275 (D. Ariz. 1973); Davis v. United States, 350 F. Supp. 206 (E.D. Mich. 1972).

[72] The mid-air collision over San Diego in September, 1978, involving an aircraft of Pacific Southwest Airlines presents a dramatic example of this situation. The craft was carrying early morning business travelers and employees of the airline returning to company headquarters, most of whom were California residents. NEWSWEEK, Oct. 9, 1978, at 48-53. Any litigation which arises from the crash may involve possible claims against both the federal government and the airport and its employees, citizens of California, presenting a clear case where the holding in *Ortiz* should be extended.

the inconvenience and expense of adjudicating two separate suits might prove so burdensome that some would choose to forego this alternative. Adopting the approach of *Ortiz*, these parties would now be allowed to assert their claims by utilizing the courts' power of pendent jurisdiction over third parties. They would be provided with one convenient forum so that all their rights could be litigated and protected.

The impact of *Ortiz* will be felt in other areas of the law, as other courts seize the First Circuit's opinion as new precedent for the continued expansion of pendent jurisdiction.[73] It may be true that the decision reaffirms the reasoning and judgment of numerous prior decisions,[74] but it does so hard on the heels of the latest in the series of Supreme Court decisions which have repeatedly failed to specify how far pendent jurisdiction may extend in the federal judiciary. There still exist serious problems associated with the doctrine,[75] but perhaps now the Court will forsake its slow, case-by-case evolution of pendent jurisdiction and deal straightforwardly with those problems. The First Circuit in *Ortiz* fashioned the type

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[73] The First Circuit has since relied upon *Ortiz* in deciding a more recent question of pendent jurisdiction in *Federal Deposit Ins. Corp. v. Otero*, 598 F.2d 627 (1st Cir. 1979). The court extended the effect of *Ortiz* to allow the assertion of pendent jurisdiction over a party against whom no independent basis of federal jurisdiction existed. The effect of the decision may be limited by the peculiar facts of the case, however. Even the Ninth Circuit may seize *Ortiz* as the basis upon which to reverse its long stand against the expansion of pendent jurisdiction. In *Mattschei v. United States*, 600 F.2d 205 (9th Cir. 1979), the Ninth Circuit questioned the dismissal of a pendent claim against a third-party defendant in light of *Ortiz* although it was precluded from making any ruling on the question as the parties failed to argue the point.

Lower courts have cited *Ortiz* as support for the proposition that pendent party jurisdiction may be exercised when one of the parties is sued under an exclusive grant of federal jurisdiction. Kyriazi v. Western Elec. Co., 476 F. Supp. 335 (D.N.J. 1979). To do otherwise would constitute "a waste of judicial resources and a hardship upon the litigants." 476 F. Supp. at 337 n.3.

[74] See note 24 *supra*.

[75] Although the boost to efficient judicial administration which a broad exercise of pendent jurisdiction affords is worthwhile, commentators have warned that such a goal, if given absolute priority, would be destructive of the judicial system. Maximum efficiency could be achieved by use of a unitary court system, but that is far different from what the founding fathers intended or contemplated and should be tenaciously avoided. The present expansion of pendent jurisdiction has contributed to a deterioration of the principle of the limited jurisdiction of the federal courts and of federal-state comity. It should be checked, perhaps by legislative action. Baker, *supra* note 22, at 780-81. *See also* Comment, *The Extension of Pendent Jurisdiction to Parties Not in the Jurisdiction-Conferring Suit*, 20 LOY. L. REV. 176, 198 (1974).

of logical, forceful opinion which the Supreme Court may have been anticipating to provide it with a model for its own long-awaited pronouncement of an unequivocal acceptance of a broad view of pendent jurisdiction.

Barry R. McBee

PRODUCTS LIABILITY—JURY INSTRUCTIONS—In the Trial of Conscious Design Defect Cases Based Upon Strict Liability the Jury Henceforth May Be Instructed to Consider the Utility of the Product and the Risks Involved in its Use. Strict Liability May Be Imposed for Defective Design Which Enhances Injury After Initial Impact. *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979).

Robert Turner was traveling on a two-lane rural road in his 1969 Chevrolet Impala sedan when he intentionally swerved off the road to avoid a collision with a truck. Turner attempted to return to the road but the car slid and overturned. The automobile rolled once and the roof above Turner's head collapsed. Although Turner had his seat belt fastened, he suffered a crushed vertebra and was rendered a quadraplegic as a result of the collapse of the vehicle's roof.

The Procedural History of Turner

Turner brought suit against the manufacturer of the automobile and the automobile dealer alleging that the roof of his vehicle had been defectively designed and that such design had caused an enhancement of his injuries.[1] In November, 1976, the case was

[1] In a venue hearing the trial court held that liability will not be imposed in Texas for a defective design which is not a producing cause of the accident. The manufacturer had filed a plea of privilege to be sued in the county of its residence. To maintain a cause of action in Texas in a particular county other than the county of the defendant's residence a plaintiff must show: 1. one defendant resides in the county of suit; 2. the party challenging venue is at least a proper party; and 3. the plaintiff has a bona fide claim against the resident defendant. *See* TEX. REV. CIV. STAT. ANN. art. 1995(4) (Vernon 1964).

The manufacturer's plea of privilege was granted because the plaintiff could not prove that he had a bona fide claim against the resident defendant. *See* Turner v. General Motors Corp., 514 S.W.2d 497, 499 (Tex. Civ. App.—

tried and submitted to the jury on the basis of strict liability for failure to design a "crashworthy" automobile. A verdict was returned for the plaintiff in the amount of $1,140,000. Judgment was entered against the manufacturer and distributor, jointly and severally, and a judgment of indemnity was entered in favor of the distributor. The Beaumont Court of Civil Appeals[2] reversed on two grounds. The jury instructions defining "unreasonably dangerous" had been improper[3] and evidence of the source of a safety standard had been erroneously excluded.[4] The case was remanded for new trial.

Houston [14th Dist.] 1974, writ ref'd n.r.e.). At the time of this hearing the Texas Courts of Civil Appeals had not yet ruled on the existence of a crashworthiness cause of action. The Fourteenth Court of Civil Appeals in Houston reversed, holding that a cause of action may be maintained for defective design which enhances injuries. *Id.* at 497. The court adopted the view of *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (applying Michigan law). See note 14 *infra*. The Texas Supreme Court found no reversible error and refused to review the decision.

[2] The second appeal of this case was heard by the Beaumont Court of Civil Appeals rather than the Houston Court of Civil Appeals (Fourteenth District), which had heard the first appeal of the plea of privilege hearing, because of an equalization of the dockets. Petitioner's Application for Writ of Error to the Supreme Court of Texas at 2 (1978).

[3] The special issue defining "unreasonably dangerous" was:

> *Special Issue No. 1*: "Do you find from a preponderance of the evidence that at the time the automobile in question was manufactured by General Motors the roof structure was defectively designed?
>
> By the term 'defectively designed' as used in this issue is meant a design that is unreasonably dangerous.
>
> 'Unreasonably dangerous' means dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

General Motors Corp. v. Turner, 567 S.W.2d 812, 815 n.2 (Tex. Civ. App.—Beaumont 1978), *rev'd*, 584 S.W.2d 844 (Tex. 1979).

The definition of "defect" and "unreasonably dangerous" used by the trial court is essentially that employed by the RESTATEMENT (SECOND) OF TORTS § 402A (1965). See text accompanying notes 20 and 21 *infra*.

The Beaumont appeals court held that this definition was erroneous and that cases based on liability for design-enhanced injuries must be tried under a theory which "involves a traditional balancing of gravity and likelihood of harm against the burden of precautions to avoid the harm." 567 S.W.2d 812, 816 (citing Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974)).

[4] The trial court had required that defendants' counsel refer to a 1973 federal standard for roof strength as a "practice of the industry." The court of appeals held that the source of this standard should be identified in order to allow evaluation of its weight. General Motors Corp. v. Turner, 567 S.W.2d 812, 819 (Tex. Civ. App.—Beaumont 1978), *rev'd*, 584 S.W.2d 844 (Tex. 1979).

On March 21, 1979, the Texas Supreme Court affirmed the judgment of the court of appeals.[5] Plaintiff moved for rehearing, urging the court to withdraw its March opinion. *Held, reversed*: In the trial of conscious design defect cases based upon strict liability the jury henceforth may be instructed to consider the utility of the product and the risks involved in its use. Strict liability may be imposed for defective design which enhances injury after initial impact. *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979).

Texas Products Liability

The concept of strict liability in Texas is not new. In 1942 the Texas Supreme Court held that a manufacturer of contaminated food products could be held liable for injuries caused without proof of negligence and notwithstanding a lack of privity.[6] In *Jacob E. Decker & Sons v. Capps*,[7] the court imposed liability not on negligence or the usual implied contractual warranty but on "the broad principle of the public policy to protect human health and life."[8]

Texas did not expand the concept of strict liability beyond food products until 1967.[9] The trend in other jurisdictions, however, was toward imposition of strict tort liability for all types of products which caused injuries. The primary catalyst in this trend was the American Law Institute's Restatement (Second) of Torts, Section 402A[10] [hereinafter referred to as section 402A]. Today

[5] Turner v. General Motors Corp., 22 Tex. Sup. Ct. J. 272 (Mar. 21, 1979), *withdrawn*, 584 S.W.2d 844 (Tex. 1979).

[6] *See generally* Prosser, *Assault Upon the Citadel*, 69 YALE L.J. 1099, 1104 (1960).

[7] 139 Tex. 609, 164 S.W.2d 828 (1942). The plaintiff brought suit after one of her children had died and other members of the family had been made seriously ill by consumption of contaminated sausage manufactured by the defendant. *Id.*

[8] 164 S.W.2d at 829. *See* Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1 (1976); Sales, *An Overview of Strict Tort Liability in Texas*, 11 HOUS. L. REV. 1043 (1974).

[9] *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Shamrock Fuel Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967).

[10] RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

> Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or the consumer or his property is

section 402A, or an approach substantially similar to it, has been adopted as law, either legislatively or judicially, in the vast majority of jurisdictions.[11]

Product defects are of three general categories: manufacturing, design and marketing. A manufacturing defect occurs when, through some mistake in the manufacturing process, the product does not meet the manufacturer's standards. A design defect occurs when a product, which is marketed in the condition intended, poses an inordinate risk of danger or inadequately protects from harm because of its design. A product free from manufacturing or design defects is considered defective if the product is marketed with inadequate warnings or instructions.[12]

Liability has been imposed for two types of design defects. The first is a defect which is the cause of an accident. The second type is a defect which does not cause the accident but rather causes or enhances a person's injuries. If such a defect occurs in the design of an automobile, injuries may be caused or enhanced through the occupant's "second impact" with the interior of the vehicle. Liability may be imposed if the manufacturer has failed to design its vehicle so as to minimize these injuries. In such a case it is said that the automobile is not "crashworthy."[13] Although the

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subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.

The modern era of products liability was ushered in by Justice Traynor's landmark decision in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

[11] *See* Walkowiak, *Product Liability Litigation and the Concept of Defective Goods: "Reasonableness" Revisited?*, 44 J. AIR L. & COM. 705, 706 n.7 (1979); 44 J. AIR L. & COM. 207, 208-09 n.5 (1978).

[12] Sales & Perdue, *supra* note 8; Sales, *supra* note 8. *See generally* Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacturing and Design of Products*, 20 SYRACUSE L. REV. 559 (1969); Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

[13] *See generally* Sales & Perdue, *supra* note 8, at 16. *See also* Sales, *Automobile Design Sufficiency and Enhanced Injury: A New Concept for No-Fault Liability*, 38 INS. COUNSEL J. 388 (1971). James Sales states that the crashworthiness doctrine "transform[s] the duty of the manufacturer to design an

crashworthiness doctrine is a relatively new concept in products liability, a majority of jurisdictions have imposed liability for design-enhanced injuries.[14]

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automobile suitable for travel on the road into a duty to design a vehicle suitable as a protective container . . . ." *Id.* at 389.

The crashworthiness doctrine may also be invoked as to airplane design. *See also* Galerstein, *A Review of Crashworthiness*, 45 J. AIR L. & COM. 187 (1979); Galerstein, *Aircraft Crashworthiness: Who Sets the Standard*, 28 FED'N INS. COUNSEL Q. 258 (1978); Schaden, *Aircraft Crashworthiness*, 14 TRIAL 40 (1978); Note, *Aviation "Crashworthiness": An Extrapolation in Warranty, Strict Liability and Negligence*, 39 J. AIR L. & COM. 415 (1973).

[14] *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (applying Michigan law) was the first to hold an automobile manufacturer responsible for injuries aggravated in the occupant's second collision with the interior of the vehicle. The court reasoned that accidents on highways are so common and numerous that, while a manufacturer does not have a duty to design an accident-proof vehicle, it does have a duty to protect consumers against any foreseeable risk of harm. A majority of states have followed this reasoning, although it should be noted that many decisions are from federal courts stating what they believe the state courts would hold. *See, e.g.*, Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978) (applying Wyoming law); Knippen v. Ford Motor Co., 546 F.2d 993 (D.C. Cir. 1976); Polk v. Ford Motor Co., 529 F.2d 259 (8th Cir.), *cert. denied*, 426 U.S. 907 (1976) (applying Missouri law); Wooten v. White Trucks, 514 F.2d 634 (5th Cir. 1975) (applying Kentucky law); Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974) (applying Virginia law); Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1974) (applying Indiana law); Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974) (applying Illinois law); Perez v. Ford Motor Co., 497 F.2d 82 (5th Cir. 1974) (applying Louisiana law); Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974) (applying Rhode Island law); Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972) (applying Iowa law). *See also* Isaacson v. Toyota Motor Sales, 438 F. Supp. 1 (E.D.N.C. 1976); Anton v. Ford Motor Co., 400 F. Supp. 1270 (S.D. Ohio 1975); Huddell v. Levin, 395 F. Supp. 64 (D.N.J. 1975); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969); Horn v. General Motors Corp., 17 Cal. 2d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976); Friend v. General Motors Corp., 118 Ga. App. 763, 165 S.E.2d 734 (1968); Farmer v. International Harvester Co., 97 Idaho 742, 553 P.2d 1306 (1976); Garst v. General Motors Corp., 207 Kan. 2, 484 P.2d 47 (1971); Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974); Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513 P.2d 268 (1973); Friedrich v. Anderson, 191 Neb. 724, 217 N.W.2d 831 (1974); Bolm v. Triumph Corp., 41 A.D.2d 54, 341 N.Y.S.2d 846, *aff'd*, 33 N.Y.2d 151, 350 N.Y.S.2d 644, 305 N.E.2d 769 (1973); Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974); McMullen v. Volkswagen of America, 274 Or. 83, 545 P.2d 117 (1976); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); Engberg v. Ford Motor Co., 205 N.W.2d 104 (S.D. 1973); Ellithrope v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973); Baumgardner v. American Motors Corp., 83 Wash. 2d 751, 522 P.2d 829 (1974); Arbet v. Gussarson, 66 Wis. 2d 551, 225 N.W.2d 431 (1975).

Only a few jurisdictions follow the contrary holding espoused in *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966) (applying Indiana law) [overruled by Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977) (applying Indiana law)]. The court in *Evans* held

In the companion cases of *McKisson v. Sales Affiliates, Inc.*[15] and *Shamrock Fuel Oil Sales Co. v. Tunks*,[16] the Texas Supreme Court expressly adopted section 402A and extended strict liability to products other than food.[17] Although "the concept of defect is central to a product liability action brought in a strict tort liability theory, whether the defect be in conscious design, or in the manufacturing of the product, or in the marketing of the product,"[18] the Texas courts have not formulated a precise definition of "defect."[19] The explanatory notes to section 402A define a defect as

that while an automobile should be made reasonably safe for intended uses, liability will not be imposed for failure to make it safe for collisions, an unintended use. *See* McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D. W. Va. 1971), *aff'd*, 472 F.2d 240 (4th Cir.), *cert. denied*, 412 U.S. 940 (1973); Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1969). *See also* Brown, *Products Liability: The Genesis of "Second Collision,"* 51 N.Y.S.B.J. 21 (1979); Nader & Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645 (1967); Sales, *supra* note 13; Note, *Apportionment of Damages in the "Second Collision" Case*, 63 VA. L. REV. 475 (1977).

[15] 416 S.W.2d 787 (Tex. 1967).

[16] 416 S.W.2d 779 (Tex. 1967).

[17] The court stated "we are further of the opinion that as a logical proposition, the rule stated in *Decker* should be held applicable to defective products which cause physical harm to persons." McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967).

[18] Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979). *See* Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974).

[19] *See, e.g.*, Rourke v. Garza, 530 S.W.2d 794, 798 (Tex. 1975) (defective product "exposes its user to an unreasonable risk of harm when used for the purpose for which it was intended"); Pittsburgh Coca-Cola Bottling Works v. Ponder, 443 S.W.2d 546, 550 (Tex. 1969) (product defective if it is "not reasonably fit for the purposes for which it was intended to be used"); Ethicon, Inc. v. Parten, 520 S.W.2d 527, 533 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (defect is a "condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him") (citing RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment g at 351 (1965)).

The meaning of "defect" is flexible in Texas, *see* Sharp v. Chrysler Corp., 432 S.W.2d 131, 136 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.), and the courts have proceeded on a case-by-case basis. Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell, 511 S.W.2d 573, 578 (Tex. Civ. App. —Houston [14th Dist.] 1974, writ ref'd n.r.e.). *See also* Sales & Perdue, *supra* note 8, at 7.

Texas courts have not decided whether "unreasonably dangerous" is meant as a definition of "defect" or whether one must prove that a product is defective and that such defect rendered the product unreasonably dangerous. *See, e.g.*, General Motors Corp. v. Hopkins, 548 S.W.2d 344, 347 n.1 (Tex. 1977); Rourke v. Garza, 530 S.W.2d at 798; Ethicon, Inc. v. Parten, 520 S.W.2d at 532; Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell, 511 S.W.2d at 575. *See also* Keeton, *Product Liability, supra* note 12. "It is unfortunate perhaps that Section 402A of the Restatement (Second) of Torts provides that as a basis for recovery it must be found that the product was both 'defective' and 'unreasonably

"a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[20] "Unreasonably dangerous" is defined as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community and as to its characteristics."[21] Many jurisdictions,[22] including Texas,[23]

dangerous,' when as a matter of fact the term 'unreasonably dangerous' was only meant as a definition of defect." *Id.* at 42. "[I]t must be obvious that while different categories of defects are recognized, there has been no resolution of the ultimate question of the meaning of defect." *Id.* at 34.

[20] RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment g (1965).

[21] RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment i (1965).

[22] *See, e.g.*, McCullough v. Beech Aircraft Corp., 587 F.2d 754, 759 (5th Cir. 1979) (applying Mississippi law); Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108, 112 (7th Cir. 1976) (applying Indiana law); Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 158 (8th Cir. 1975) (applying Minnesota law); Hartman v. Miller Hydro Co., 499 F.2d 191, 194 (10th Cir. 1974) (applying Kansas law); Welch v. Outboard Marine Corp., 481 F.2d 252, 254 (5th Cir. 1973) (applying Louisiana law); Scheller v. Wilson Certified Foods, Inc., 114 Ariz. 159, 559 P.2d 1074, 1077 (1976); Slepski v. Williams Ford, Inc., 170 Conn. 18, 364 A.2d 175, 178 (1975); Aller v. Rodgers Mach. Mfg. Co., Inc., 268 N.W.2d 830, 835-36 (Iowa 1978); Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64, 69 (1970); Steinberg v. Beatrice Foods Co., 576 P.2d 725 (Mont. 1978); Brown v. Western Farmers Ass'n, 268 Or. 470, 521 P.2d 537 (1974); Lamon v. McDonnell Douglas Corp., 19 Wash. App. 515, 576 P.2d 426 (1978), *aff'd*, 91 Wash. 2d 345, 588 P.2d 1346 (1979); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 230 N.W.2d 794 (1975). *But see* Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (product defective in design if it fails to perform safely as an ordinary consumer would expect *or* if benefits of design do not outweigh risk of danger inherent therein); Cronin v. J.B.E. Olsen Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (plaintiff need not show, in addition to existence of defect, that such defect rendered the product unreasonably dangerous).

Other jurisdictions have used similar language regarding the utility and risk of products. *See, e.g.*, Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065, 1068 (1976); Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Burke v. Illinois Power Co., 57 Ill. App. 3d 498, 373 N.E.2d 1354, 1367 (1978); Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 846 (N.H. 1978); Johnson v. Clark Equip. Co., 274 Or. 403, 547 P.2d 132, 136 n.1 (1976); Pegg v. General Motors Corp., 391 A.2d 1074, 1082-83 (Pa. 1978); Lamon v. McDonnell Douglas Corp., 91 Wash. 2d 345, 588 P.2d 1346, 1350 (1979). Various authors have advocated the use of balancing considerations in determining whether a product has an unreasonably dangerous defect. *See, e.g.*, Dickerson, *Product Liability: How Good Does a Product Have To Be?*, 42 IND. L.J. 301, 330 (1967); Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303, 1306-07 (1974); Keeton, *Manufacturer's Liability*, *supra* note 12, at 565; Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

[23] *See, e.g.*, Gonzales v. Caterpillar Tractor Co., 571 S.W.2d 867 (Tex. 1978);

have adopted the expectations of the ordinary consumer as the basis for the definition of unreasonably dangerous.

The Texas courts have formulated a "bifurcated test" for application in defective design cases in determining a product's unreasonable danger. In *Henderson v. Ford Motor Co.*,[24] the Texas Supreme Court first advocated, but did not mandate, the use of such an instruction. The court asked:

> Did some feature of the form or material or operation of the [automobile air filter] housing threaten harm to persons using the automobile to the extent that any automobile so designed would not be placed in the channels of commerce by a *prudent manufacturer* aware of the risks involved in its use *or* to the extent that the automobile would not meet the *reasonable expectations of the ordinary consumer* as to its safety? (emphasis added)[25]

In *General Motors Corp. v. Hopkins*,[26] the Texas Supreme Court mandated the use of this bifurcated instruction. The instruction had been given in the conjunctive. The jury had been told that the product must threaten harm to the extent that it would not be placed in the channels of commerce by a prudent manufacturer aware of its risks *and* to the extent that the product so manufactured would not meet the reasonable expectations of the ordinary consumer as to safety.[27] The court, citing *Henderson*, however, expressly disapproved of the use of the conjunctive and stated that the proper instruction should be in the disjunctive, using "or" rather than "and." "The objective of the alternate test of unreasonable danger, i.e., from the vantage of the prudent supplier, is to avoid completely foreclosing liability because of either the visibility or the complexity of the alleged defect from the vantage of the consumer."[28] Under *Henderson* and *Hopkins*, therefore, it would appear that the jury is required to determine whether the product design meets the reasonable expectations of the ordinary consumer

General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977); Miller v. Bock Laundry Mach. Co., 568 S.W.2d 648 (Tex. 1977); Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975); Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell, 511 S.W.2d 573 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

[24] 519 S.W.2d 87 (Tex. 1974).

[25] *Id.* at 92.

[26] 548 S.W.2d 344 (Tex. 1977).

[27] *Id.* at 347 n.1.

[28] *Id.*

or whether a prudent manufacturer would have placed such a product in the stream of commerce.

Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

Subsequent to the *Henderson* decision, *General Motors Corp. v. Turner*,[29] was tried on the merits. The case was submitted to the jury with instructions defining defect solely from the perspective of the ordinary consumer.[30] The submission did not include the prudent manufacturer alternative. The Beaumont Court of Civil Appeals held that such instructions were erroneous and that in a second impact or injury enhancement case the jury should be instructed to consider four balancing factors in determining whether a design is defective. These considerations were the utility of the product versus the likelihood and gravity of risk, the availability of substitute products, the manufacturer's ability to eliminate the unsafe character of the product, and the obviousness of the danger or existence of suitable warnings and instructions.[31] Although the Texas courts had employed balancing language in their products liability opinions, the Beaumont court was the first to hold that balancing factors should be employed in the instructions to the jury.[32]

The Texas Supreme Court granted Turner's writ of error from

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[29] 567 S.W.2d 812 (Tex. Civ. App.—Beaumont 1977), *rev'd*, 584 S.W.2d 844 (Tex. 1979).

[30] See note 4 *supra*.

[31] General Motors Corp. v. Turner, 567 S.W.2d 812, 818 (Tex. Civ. App.—Beaumont 1977), *rev'd*, 584 S.W.2d 844 (Tex. 1979). The instructions advanced by the Beaumont court were a reaction to the writings of various commentators and a response to many Texas decisions. In *Metal Windows Prods. Co. v. Magnusen*, 485 S.W.2d 355 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.), suit was brought in strict liability and negligence for defective design of a sliding glass door through which the plaintiff had attempted to walk. The court noted that the purpose of such doors and the reason for their popularity was the illusion of spaciousness which they created. Even if an absence of decals on the glass was a defect, the risk of collision due to transparency did not outweigh the utility and value of the doors. Similar language was employed in *Rourke v. Garza*, 530 S.W.2d 794, 799 (Tex. 1975) and *Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell*, 511 S.W.2d 573, 577 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.). *See also* Mitchell v. Fruehauf Corp., 568 F.2d 1139 (5th Cir. 1978); Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973).

[32] General Motors Corp. v. Turner, 567 S.W.2d 812, 818 (Tex. Civ. App.—Beaumont 1977), *rev'd*, 584 S.W.2d 844 (Tex. 1979).

the Beaumont decision. The first opinion was delivered on March 21, 1979.[33] The principles of strict liability were reaffirmed as applied to all design defects, including those which merely enhance injuries.[34] The court reasoned that the purpose of strict liability is protection of the public against harm caused by defective products and that, therefore, there should be no distinction between the liability of a manufacturer whose product causes the accident and the liability of a manufacturer whose product causes damage or injury only.[35] Quoting from a Seventh Circuit opinion,[36] the court held that there is no rational basis for limiting liability to primary impact injuries.[37]

The court then held that the trial court had committed reversible error in the definition of "unreasonably dangerous" which had been submitted to the jury.[38] The correctness of the instructions given were to be determined by the Texas Supreme Court's previous writings, and "[i]t was made clear in *Henderson* and *Hopkins* that the ordinary consumer and prudent manufacturer tests were intended to be alternatives. The inclusion of one, or the other, or both, in the definition of 'unreasonably dangerous' is determined by the state of the evidence."[39] These cases contemplated, the court stated that evidence regarding these two tests would be admissible in the trial of conscious design defect cases. The court held that evidence had been introduced by the manufacturer to establish that it was acting prudently under the countervailing considerations of the risk versus the utility as to the design of the roof; therefore, exclusion of the prudent manufacturer alternative had been error.[40]

Although the court remanded *Turner* because of the trial court's failure to include the reasonable manufacturer alternative test, it held that the bifurcated instructions of *Henderson* and *Hopkins*

[33] Turner v. General Motors Corp., 22 Tex. Sup. Ct. J. 272 (Mar. 21, 1979), *withdrawn*, 584 S.W.2d 844 (Tex. 1979).

[34] 22 Tex. Sup. Ct. J. at 273.

[35] *Id.* at 274-75.

[36] Huff v. White Motor Corp., 565 F.2d 104, 109 (7th Cir. 1977).

[37] Turner v. General Motors Corp., 22 Tex. Sup. Ct. J. 272, 274-75 (Mar. 21, 1979), *withdrawn*, 584 S.W.2d 844 (Tex. 1979).

[38] 22 Tex. Sup. Ct. J. at 273. See note 4 *supra*.

[39] 22 Tex. Sup. Ct. J. at 276.

[40] *Id.* at 276-77.

would no longer rule.[41] The court noted that such a test had no place in a design strict liability submission and stated: "We are persuaded to these conclusions by the inconclusiveness of the idea that jurors would know what ordinary consumers would expect in the consumption or use of a product, or that jurors would or could apply any standard or test outside that of their own experience and expectations."[42] The court further noted that the prudent manufacturer standard is a "negligence concept" which focuses on the conduct of the manufacturer to determine if due care was exercised in the adoption of a design.[43]

While the court overruled the bifurcated instructions, it expressly disapproved of the balancing factors which the Beaumont court had held should be incorporated into "crashworthiness" instructions. It explained that just as there should be no difference between the liability for products which cause the accident and those which merely enhance injuries, so should there be no difference in the jury instructions employed. Balancing factors were held to be improper for submission to the jury in either kind of design defect case.[44] The court held that henceforth no definition of "unreasonably dangerous" should be given in the trial of conscious design defect cases based upon strict liability.[45] It recognized that many products have both utility and danger and that evidence may be presented regarding the balancing factors enumerated by the Beaumont court. It observed, however, that formulating specific balancing factors would be difficult, and therefore, precise factors should not be made a part of the definition of "unreasonably dangerous." The court explained that any definition of "unreason-

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[41] *Id.* at 277.

[42] *Id.*

[43] *Id.* The court also held that the evidence of the source of a safety standard had been properly excluded.

[44] *Id.* at 275.

[45] *Id.* at 273. The jury instructions to be given were, in pertinent part, as follows:

> SPECIAL ISSUE NO. 1
>
> Do you find from a preponderance of the evidence that at the time the [product] in question was manufactured by [the manufacturer] the [product] was defectively designed?
>
> By the term "defectively designed" as used in this issue is meant a design that is unreasonably dangerous.

Id. at n.1.

ably dangerous" contained a fictitious standard that may be meaningless to the jury.[46]

On petitions for rehearing, the court, two and one-half months later, withdrew its initial opinion and substituted another.[47] This opinion reaffirmed in all essential respects, and in virtually the same language, the principles set forth in the initial opinion. The court, however, affirmed the judgment of the trial court for the plaintiff and reversed the judgment of the court of appeals.

The court again held that strict liability should be imposed for failure to design a crashworthy automobile.[48] The turnabout was in the holding as to the jury instructions given and as to the instructions which the court mandated for future use. The "ordinary consumer" jury instructions given at the trial level were classified as "harmless error."[49] The court, using the same language, stated that the disjunctive definition never was required under *Henderson* and *Hopkins*.[50] It commented that the additional perspective of the reasonable manufacturer was to be available for the benefit of the injured plaintiff if the defect in question was apparent or if the ordinary consumer had a lack of expectations as to the details of the design in question.[51] The court did not discuss the evidence presented by the manufacturer to show that it was acting prudently. It observed that because the jury found the roof of the automobile to be defectively designed under the ordinary consumer test it was immaterial that they might have also so found under the prudent manufacturer test.[52] The court also commented that while it previously had not addressed specifically a point of error regarding use of only one-half of the bifurcated instructions, it had affirmed many cases where only the ordinary consumer definition had been given.[53]

Although the trial court's instructions were held "harmless error," the supreme court promulgated a new set of jury instruc-

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[46] *Id.* at 277.

[47] Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

[48] *Id.* at 847.

[49] *Id.* at 850-51.

[50] *Id.* at 850.

[51] *Id.*

[52] *Id.* at 850-51.

[53] *Id.* at 850.

tions to be employed henceforth. Citing with approval several Texas cases which had used balancing language,[54] the court held that juries in conscious design defect cases based on strict liability are to be instructed to consider the utility of the product and the risks involved in its use when such considerations are justified by the evidence presented. Specific balancing instructions were not to be enumerated.[55] The *Henderson* and *Hopkins* bifurcated test was overruled for the same reasons cited in the court's first opinion.[56]

The Impact of Turner on Products Liability Actions

The immediate impact of *Turner* on many members of the legal community may be one of consternation. A complete about-face within a span of two and one-half months may be interpreted as a symptom of a fickle court. Although the supreme court used basically the same reasoning to support its first and second opinions, the interpretations of the holdings of *Hopkins* and *Henderson* are diametrically opposed. In the first opinion the court held that these cases mandated the use of the prudent manufacturer alternative if evidence presented showed that the manufacturer may have been acting prudently. In the second opinion the alternative was held to be available at the instance of the plaintiff if the defect was apparent or if the ordinary consumer did not have expectations as to the design in question.[57] One is left to wonder whether the court itself ever really knew what these cases stood for regarding jury instructions. Additionally, one wonders why the court in its second opinion affirmed the trial level use of the jury instructions which in the same opinion it overruled.

Despite any possible criticisms which may be raised regarding

[54] *Id.* at 851.

[55] *Id.* The jury instructions to be given are, in pertinent part as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that at the time the [product] in question was manufactured by [manufacturer] the [product] was defectively designed?

By the term "defectively designed" as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

Id. at 847 n.1.

[56] *Id.* at 851. See text accompanying note 42 *supra.*

[57] See text accompanying notes 40 and 51 *supra.*

the *Turner* opinion, the Texas Supreme Court has dramatically changed the law regarding products liability in Texas and has changed it for the better. There no longer is any doubt that a manufacturer can be held responsible for the design of his product if it causes injuries despite the fact that it is not the producing cause of the accident. Just as the doctrine of crashworthiness may be applied to the design of an automobile, so too may it be applied to the design of aircraft. While crashes are not a normal and intended use of aircraft, the number and severity of accidents are significant enough that a cause of action will exist under *Turner* for failure to minimize adequately the injuries which might result from such accidents.[58] While there are inherent problems with judicial application of the crashworthiness doctrine,[59] the court aptly observed that a manufacturer should not escape responsibility for a defective design which causes injuries merely because the design did not produce the accident. Texas joined the majority of other jurisdictions in so holding.[60]

The *Turner* case will change the focus of the Texas jury in products cases from examination of the ordinary consumer's ex-

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[58] It is a common assumption that designing an aircraft to be "crashworthy" is a fruitless matter because aviation accidents cannot be survived. This assumption is ill-founded. Investigation has revealed that many deaths and injuries could have been avoided if the airplanes involved had been designed to avoid, for example, second impact with protruding objects or hazards created by fire. *See* Note, *Aviation "Crashworthiness": An Extrapolation in Warranty, Strict Liability and Negligence*, 39 J. AIR L. & COM. 415, 415-18 (1972).

[59] It was observed in *General Motors Corp. v. Turner*, 567 S.W.2d 812 (Tex. Civ. App.—Beaumont 1978), *rev'd*, 584 S.W.2d 844 (Tex. 1979) that "prosecution of a lawsuit is a poor way to design a motor vehicle, for the suit will almost invariably emphasize a single aspect of design to the total exclusion of all others." *Id.* at 815 (*quoting* Self v. General Motors Corp., 42 Cal. App. 3d 1, 7, 116 Cal. Rptr. 575, 579 (1974)). The court also noted that "[a]s in the case of food and drugs, the imposition of safety standards on the automobile industry can most likely be achieved better by a consistent application of regulatory standards drawn up by experts and kept current by research, rather than by *ad hoc* decisions of inexpert judges and juries." 567 S.W.2d at 815 (*quoting* O'Connell, *Taming the Automobile*, 58 N.W.U.L. REV. 299, 375 (1963)).

The problems encountered in apportioning damages due to defective design and due to the negligence of the persons involved in the accident in crashworthiness cases are discussed in Note, *Apportionment of Damages in the "Second Collision" Case*, 63 VA. L. REV. 475 (1977). *See generally* Foland, *Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy" Cases*, 16 WASHBURN L.J. 600 (1977); Hoenig & Werber, *Automobile "Crashworthiness": An Untenable Doctrine*, 20 CLEV. ST. L. REV. 578 (1971); Sales, *supra* note 13.

[60] See note 14 *supra*.

pectations and/or prudent manufacturer's conduct to examination of the product itself. The discarded bifurcated test had come under well-deserved attack. The ordinary consumer half of the test, or section 402A definition, has been labeled a "nebulous test" and "vague and imprecise."[61] Section 402A was formulated during the infancy of strict liability in tort, and there has been a growing recognition that the test has limitations, especially regarding defectively designed products. An ordinary consumer does not have expectations regarding various aspects of many complexly designed products,[62] or the consumer's expectations may be too high or too low.[63] Additionally, a problem is posed if the injury has resulted from a product the defect in which is apparent; recovery should not be limited only to those cases where the product is more dangerous than contemplated. The prudent manufacturer alternative of the bifurcated test was formulated to cure these problems, but this test, which compels examination of the manufacturer's conduct, has distinct negligence overtones.[64]

The Texas Supreme Court's choice of an alternative to the bifurcated test was a wise one. Unless we are to make a manufacturer an insurer of his product, a showing of defect must be a requisite to recovery. If a defect is to be required for recovery there is no way to avoid a risk-benefit analysis,[65] especially in design cases.[66] Many products are unavoidably unsafe and can never be made safe for use.[67] Other products pose some risk of harm but the installation of safety devices or the use of a different design may impair the usefulness of the product or make its cost pro-

[61] Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37, 39 (1973).

[62] *Id.* at 37. The ordinary consumer's expectations as to airplane design may be particularly inappropriate to examine in determining defectiveness because of the complexity of aircraft design.

[63] Fischer, *supra* note 12, at 350.

[64] *See, e.g.*, Turner v. General Motors Corp., 22 Tex. Sup. Ct. J. 272, 277 (Mar. 21, 1979), *withdrawn*, 584 S.W.2d 844 (Tex. 1979).

[65] Keeton, *supra* note 61, at 39.

[66] The utility-risk analysis is not so necessary in manufacturing defect cases because a defect may be inferred when a product leaves the hands of its manufacturer in an unintended condition. *See* Comment, *The Developing Definition of Defect in California Products Liability*, 8 GOLDEN GATE U.L. REV. 263 (1978).

[67] *See* RESTATEMENT (SECOND) OF TORTS, Explanatory Notes g-k § 402A (1965); Fischer, *supra* note 12, at 343-44.

hibitive.[68] The "unreasonably dangerous defect" question must become "whether, given the risks and benefits of and possible alternatives to the product, we as a society will live with it in its existing state or will require an altered, less dangerous form."[69]

Lynne Parkhurst

[68] Sales & Perdue, *supra* note 8, at 14-16.

[69] Donaher, Piehler, Twerski & Weinstein, *supra* note 22, at 1307. The authors suggest various balancing factors to be considered but note that reference to utility and risk should not necessarily be made part of the jury instructions. *Id.* at 1308 n.29.

Current Literature