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Case Notes

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Case Notes and Statute Notes

FEDERAL AVIATION ACT—AIRLINE EXIT REGULATION—The Power of the Civil Aeronautics Board under the Airline Deregulation Act Includes the Power to Order an Incumbent Airline to Provide Back-up Service for a Replacement Carrier in order to Insure Essential Air Transportation Service to the Affected City on a Continuing Basis. *Frontier Airlines, Inc. v. CAB*, 621 F.2d 369 (10th Cir. 1980).

Frontier Airlines held a certificate of public convenience and necessity authorizing air transportation to Alamogordo and Silver City, New Mexico.[1] On March 23, 1979, Frontier filed a ninety-day notice of its intent to terminate service to the two cities.[2] Pursuant to the Federal Aviation Act,[3] the Civil Aeronautics Board (CAB or Board) ordered Frontier to continue serving both Alamorgordo and Silver City for periods of thirty days each until replacement service could be found.[4] Zia Airlines, a small commuter airline,

[1] Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 370 (10th Cir. 1980). A certificate of public convenience and necessity is issued by the CAB and gives the airline permission to engage in air transportation. 49 U.S.C. § 1371(a) (Supp. II 1978).

[2] Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 370 (10th Cir. 1980). The Federal Aviation Act provides that a carrier holding a certificate of public convenience and necessity cannot terminate or suspend all air transportation that it is providing unless the carrier has first given the CAB, any community affected, and the state agency of the state in which the community is located at least 90 days notice of its intent to terminate or suspend service. 49 U.S.C. § 1371(j) (Supp. II 1978). *See also* 49 U.S.C. § 1389(a)(3)(A)(i) (Supp. II 1978).

[3] 49 U.S.C. §§ 1301-1552 (1976 and Supp. II 1978).

[4] Section 419(a)(6) of the Federal Aviation Act states:

> Notwithstanding section 401(j) of this title, if an air carrier has provided notice to the Board under paragraph (3) of such air carrier's intention to suspend, terminate, or reduce service to any eligible point below the level of essential air transportatin to such point, and if at the conclusion of the applicable period of notice the Board has not been able to find another air carrier to provide essential air transportation to such point, the Board shall require the carrier which provided such notice to continue such service to such point for an additional 30-day period, or until another air carrier has begun to provide essential air transportation to such point, whichever first occurs. If at the end of such 30-day period the Board determines that no other air carrier can be secured to

offered to provide replacement service to these cities. The CAB ordered Frontier to suspend all of its air service to Alamogordo and Silver City[5] subject to two conditions. First, Frontier was to continue its service to these cities until Zia had inaugurated service, at a minimum, at the appropriate levels of "essential air transportation."[6] Secondly, once the appropriate levels of "essential air transportation" service were begun by Zia, Frontier was to remain available for a thirty day period as a back-up carrier to insure that "essential air transportation" service would be provided.[7] The CAB issued further orders that defined Frontier's back-up obligation[8] and

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> provide essential air transportation to such eligible point on a continuing basis, either with or without compensation, then the Board shall extend such requirement for such additional 30-day periods (making the same determination at the end of each such period) as may be necessary to continue air transportation to such eligible point until an air carrier can be secured to provide essential air transportation to such eligible point on a continuing basis.

49 U.S.C. § 1389(a)(6) (Supp. II 1978).

[5] Notice of Intent of Frontier Airlines, CAB Order No. 79-6-193 (June 28, 1979).

[6] *See* § 419(f) of the Federal Aviation Act for a definition of essential air transportation, 49 U.S.C. § 1389(f) (Supp. II 1978). See notes 35 & 36 *infra*, and accompanying text.

[7] Notice of Intent of Frontier Airlines, CAB Order No. 79-6-193 (June 28, 1979). The Board's order states that "after Zia inaugurates an essential level of air transportation at Alamogordo and Silver City, we will require that Frontier be available for an additional 30-day period to insure that essential service is provided to these communities if, for any reason, Zia does not provide such service." *Id.* at 10.

[8] Notice of Intent of Frontier Airlines, CAB Order 79-8-57 (August 9, 1979). The order states:

> How Frontier determines to insure the provision of essential air service during this period is a management decision. Possible options for Frontier include a plan of financial or fuel support for Zia if needed during the transition period or a contingent arrangement with a third fit and reliable carrier to provide service through a wet-lease or other devices. If we find that problems are developing with Zia's start-up of replacement services, we will work with Zia, Frontier, and the communities to identify and resolve these problems. If we determine that Frontier must step in to insure essential service, we will again consult with the parties to determine how long is reasonable to give Frontier to fulfill its responsibilities during the back-up period. It is unlikely, however, that Frontier would, in any case, be given more than one week, and we urge Frontier to make arrangements that would make possible the insurance of essential service in a period somewhat short of a week should Zia's performance not prove satisfactory. In addition Frontier could rely on a stand-by crew and aircraft from the routine back-up capability we understand most airlines possess.

required Frontier to back-up Zia for an additional sixty days.[9] At the expiration of the additional sixty day period, the Board terminated Frontier's back-up obligation.[10] Frontier sought review in the United States Court of Appeals for the Tenth Circuit,[11] claiming

> Should Frontier not routinely maintain a system back-up capability, it is free to consider a dedicated stand-by capacity for 30 days.

Id. at 2-3. With regard to compensation the order states: "Of course, in our view of any submissions by Frontier requesting compensation for losses, it is our duty to consider whether its determinations balanced economic prudence with the need to fulfill its responsibilities." *Id.* at 3.

[9] Notice of Intent of Frontier Airlines, CAB Order No. 79-10-171 (Oct. 29, 1979). The order extends Frontier's back-up requirement for an additional thirty days. *Id.* at 2. Notice of Intent of Frontier Airlines, CAB Order No. 79-11-160 (Nov. 23, 1979). The order also extends Frontier's back-up responsibility stating:

> Although Zia has continued to meet the operational standards for its essential air service . . . , we are still concerned about several potential administrative and operational problems. For these reasons, we believe it is in the public interest to extend Frontier's reserve obligation for an additional 30 days. Notice of Intent of Frontier Airlines, CAB Order No. 79-11-160 at 2 (Nov. 23, 1979).

[10] Notice of Intent of Frontier Airlines, CAB Order No. 79-12-148 (Dec. 21, 1979). The order states:

> We have continued to hold Frontier in a backup posture at these two communities until we were confident that Zia could operate reliable service and demonstrate that its corporate structure was sound enough to be responsible for the provision of essential service without the need of a backup carrier. . . . We are now confident that Zia is in a position to operate without Frontier's reserve obligation, which was not exercised, and therefore will take no action to prevent Frontier's obligation from expiring on December 26, 1979.

Id. at 1.

[11] Frontier Airlines, Inc. v. CAB, 621 F.2d 369 (10th Cir. 1980). The court's jurisdiction to review these orders arises under 49 U.S.C. § 1486(a) (1976) (amended 1978). Venue in the United States Court of Appeals for the Tenth Circuit is provided under 49 U.S.C. § 1486(b) (1976) (amended 1978). Section 1006(e) of the Federal Aviation Act provides that no objection to any order of the Board will be considered on judicial review unless the objection was urged to the Board, "unless there was reasonable grounds for failure to do so." 49 U.S.C. § 1486(e) (1976) (amended 1978). The court in *Frontier*, however, stated that:

> The chronology of events before the Board constitutes . . . reasonable grounds for not fully exploring before the Board the issue raised by Frontier in this Court. The narrow issue here raised is the authority of the Board to issue a back-up order. . . . We are advised that similar back-up orders have been issued in numerous other instances. In such circumstances it is very doubtful that the Board would have vacated its back-up orders had a motion for reconsideration been filed. . . . The general rule requiring exhaustion of remedies before an administrative agency is subject to an exception where the question is solely one of statutory interpre-

that the CAB had no authority to issue orders requiring Frontier to provide back-up service. *Held: orders sustained:* The power of the Civil Aeronautics Board under the Airline Deregulation Act includes the power to order an incumbent airline to provide back-up service for a replacement carrier in order to insure essential air transportation service to the affected city on a continuing basis.

I. AIRLINE EXIT REGULATION

A. *Federal Aviation Act of 1958*

From 1938 to 1978 interstate air transportation was subject to regulation by the federal government under the Civil Aeronautics Act of 1938[12] and its successor, the Federal Aviation Act of 1958.[13] Under this regulatory framework, an air carrier could not lawfully engage in air transportation without a certificate of public convenience and necessity from the CAB.[14] The certificates specified the routes on which the carrier could operate.[15] An air carrier could obtain permission from the CAB to terminate its service on one of these routes only by filing an application to permanently abandon the route[16] or by filing an application to amend its certificate of public convenience and necessity.[17] In either case the Board could grant the application to terminate air service only after notice and a hearing; and even then, the Board could grant the application only if it found the action to be in the public interest.[18] As a result, the abandonment of a route was seldom permitted because, although it might be in the airline's best interest, the carrier could rarely

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tation. [W]e decline to dismiss the petition on any procedural basis, and prefer to address the merits of the controversy.

Id. at 370-71.

[12] Ch. 601, 52 Stat. 973 (1938).

[13] Pub. L. No. 85-726, 72 Stat. 737 (1958).

[14] 49 U.S.C. § 1371(a) (1976) (amended 1978).

[15] *Id.* § 1371(e)(1).

[16] *Id.* § 1371(j).

[17] *Id.* § 1371(g).

[18] *Id.* § 1371(j). The statute states:

No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless upon application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest. . . . The Board may, by regulation or otherwise, authorize such temporary suspension of service as may be in the public interest.

show the abandonment to be in the public interest.[19] The CAB reduced the burden that these routes placed upon trunk carriers by allowing a transfer of a route from a trunk carrier to local service carriers,[20] which were subsidized by the federal government when necessary.[21] Like terminations, no route authority could be transferred unless the Board found the move to be consistent with the public interest.[22] On many occasions a residual back-up obligation was ordered by the Board in the route transfers between the certificated incumbent carriers and the commuter carriers willing to provide replacement service.[23]

B. *Airline Deregulation Act of 1978*

The congressional purpose in passing the Airline Deregulation

[19] AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, AIR TRANSPORTATION REGULATORY REFORM 13 (1978) [hereinafter cited as REGULATORY REFORM]. Most carriers served markets that were marginally profitable but not as profitable as the routes that could have been chosen on solely economic considerations. *See* Cohen, *New Air Service and Deregulation: A Study in Transition*, 44 J. AIR L. & COM. 695, 696 (1979) [hereinafter cited as Cohen]. *See generally* Comment, *Route Exit Regulation Under The Airline Deregulation Act: The Impact of Fuel Cost and Availability*, 45 J. AIR L. & COM. 1029, 1032-35 (1980) [hereinafter cited as Comment].

[20] Cohen, *supra* note 19, at 696. Trunks are the major airlines, including United, American, TWA, Continental, Braniff, Delta, Eastern, and National. Local service carriers are airlines that were developed after World War II with federal government assistance to provide service to smaller and more isolated parts of the country on a regional scale. *See generally* G. EADS, THE LOCAL SERVICE AIRLINE EXPERIMENT (1972) [hereinafter cited as EADS].

[21] REGULATORY REFORM, *supra* note 19, at 13. The subsidies were granted so that the carriers could offer air service to small communities that could not be served by the certificated carriers on a profitable basis. *Id.* The subsidies were based on the airline's systemwide operating costs and revenues. *Id. See generally* EADS, *supra* note 20.

[22] 49 U.S.C. § 1371(h) (1976) (amended 1978).

[23] In Application of Hughes Air Corp., CAB Order No. 77-1-133 (Jan. 24, 1977), the CAB allowed the airline to suspend service on the condition that the incumbent carrier retain a residual obligation to reinstate service should the commuter service fall below an acceptable minimum. Similarly, in Hawaiian Airlines, Hana Suspension Case, CAB Order No. 73-8-67 (Aug. 13, 1973), the CAB stated that suspension would terminate immediately if daily scheduled air taxi service at Hana ceased to be provided on a regular basis and created an obligation on the part of the incumbent carrier to reinstate its services. The latter order was challenged in the District of Columbia Circuit Court of Appeals on grounds unrelated to the imposition of the residual obligation and was affirmed in Airlines Pilots Ass'n v. CAB, 514 F.2d 334 (D.C. Cir. 1975). *See* Application of Northeast Airlines, CAB Order No. 70-3-62 (Mar. 13, 1970) (requiring the airline to reinstate service if at any time over the three year suspension period the replacement carrier's service dropped below minimum standards).

Act[24] (ADA) was to move the air transportation industry away from governmental regulation and into a competitive free market climate.[25] The ADA was a legislative mandate to the CAB regarding the direction of aviation, aviation policy, and the limits on such policy.[26] Congress emphasized that the deregulation of the airline industry was to move in accordance with the ADA and not pursuant to the perhaps differing views of some members of the CAB.[27]

Although the thrust of the ADA is deregulation, section 419[28] allows the CAB to continue to have regulatory control over the suspension, reduction, and termination of air transportation in small communities.[29] Under section 419[30] of the ADA, "essential air transportation"[31] is guaranteed for ten years to all points deemed eligible.[32] An eligible point is statutorily defined as any point in the United States which a certificated air carrier was serving as of October 24, 1978, or to which service was authorized but had been suspended on that date.[33] Once the list of eligible points is established, the Board is then required to determine the level of "essen-

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[24] Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending 49 U.S.C. §§ 1301-1504 (1976)).

[25] H.R. REP. No. 95-1779, 95th Cong., 2d Sess. 73 (1978); 44 Fed. Reg. 52,647 (1979). The Airline Deregulation Act calls for a gradual deregulation of the airline industry over a ten year period. 49 U.S.C. § 1389(g) (Supp. II 1978).

[26] H.R. REP. No. 95-1779, 95th Cong., 2d Sess. 56 (1978).

[27] *Id.*

[28] 49 U.S.C. § 1389 (Supp. II 1978).

[29] *See* Comment, *"Deregulation"—Has it Finally Arrived? The Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 799, 815-16 (1978). *See also* 44 Fed. Reg. 52,647 (1979), which states that the "Small Community Air Service Program" addresses an area of the air transportation system where Congress recognized a need for governmental involvement at points that cannot rely on the marketplace to meet their needs. *Id.*

[30] 49 U.S.C. § 1389 (Supp II 1978).

[31] See note 35 *infra*, and accompanying text.

[32] 49 U.S.C. §§ 1389(a), (g) (Supp. II 1978).

[33] *Id.* at § 1389(a)(1). Eligible point also means certain points in Alaska and Hawaii. 49 U.S.C. § 1389(b)(1)(B) (Supp. II 1978). The Airline Deregulation Act required the CAB to establish by January 1, 1980, the criteria for determining which of the points in Alaska and Hawaii should qualify as eligible points. 49 U.S.C. § 1389(b)(2)(B) (Supp. II 1978). *See* 14 C.F.R. 270, 44 Fed. Reg. 59,244, 59,245 (1979). On or after January 1, 1982, the Board, upon application of any interested party, may designate eligible points in Alaska and Hawaii. 49 U.S.C. § 1389(b)(2)(c) (Supp. II 1978).

tial air transportation" for such points.[34] "Essential air transportation" is defined by the ADA as

> scheduled air transportation of persons to a point provided under criteria as the Board determines satisfies the needs of the community concerned for air transportation to one or more communities of interest and insures access to the nation's air transportation system, at rates, fares, and charges which are not unjust, unreasonable, unjustly discriminatory, unduly preferential, or unduly prejudicial.[35]

The level of "essential air transportation" cannot be less than two daily round trips, five days per week, or the level of service provided to the city during 1977.[36]

Certificated airlines[37] serving cities that are guaranteed "essential air transportation" are statutorily required to give ninety days notice to the Board, any community affected, and the appropriate state agency before reducing the community's service below the "essential air transportation" level.[38] Carriers that are not holding certificates but which are receiving compensation[39] must also notify the Board, the appropriate state agency, and each community affected at least ninety days prior to termination or suspension.[40] Airlines not holding certificates or receiving compensation must only provide the Board, the community, and the appropriate state agency thirty days notice prior to termination or suspension.[41]

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[34] 49 U.S.C. § 1389(a)(2)(A) (Supp. II 1978).

[35] *Id.* § 1389(f). The CAB's guidelines for the determination of essential air transportation for eligible points focus on the number and designation of hubs, specification of airports and equipment, frequency and times of flights, maximum capacity guarantees, and the number of stops permitted. 14 C.F.R. 398, 44 Fed. Reg. 52,647, 52,659-60 (1979). *See generally*, Comment, *supra* note 19, at 1032-42.

[36] 49 U.S.C. § 1389(f) (Supp. II 1978). With respect to Alaska, "essential air transportation" is to remain at a level no lower than that which existed during 1976, or two round trips per week, whichever is greater. *Id.* This is subject to other agreements between the Board and the state agency in Alaska, after consultation with the community affected.

[37] Certificated airlines are those airlines holding certificates of public convenience and necessity. 49 U.S.C. § 1371(a) (Supp. II 1978). See note 1 *supra.*

[38] 49 U.S.C. §§ 1371(j), 1389(a)(3)(A)(i) (Supp. II 1978).

[39] The CAB is empowered to subsidize service to an eligible point to insure that "essential air transportation" will be provided. 49 U.S.C. § 1389(a)(5) (Supp. II 1978).

[40] *Id.* § 1389(a)(3)(A)(ii).

[41] *Id.* § 1389(a)(3)(B).

When the Board receives notice of a change that would reduce service below the required level of "essential air transportation," it is required to make every effort to secure an air carrier to provide at least "essential air transportation" to the eligible point on a continuing basis.[42] If at the end of the notice period the Board has been unable to find another air carrier to provide "essential air transportation," the Board is authorized under section 419(a)(6)[43] of the ADA to require the incumbent air carrier to continue its service to the community.[44] This service continuation order is effective for thirty days or until a replacement carrier begins to provide "essential air transportation" service to the point.[45] If at the end of the thirty day period the CAB has not found a replacement carrier, it is empowered to extend the requirement that the air carrier continue service for such additional thirty day periods, making the same determination at the end of each thirty day period as may be necessary to preserve air service until a replacement carrier can be found to provide "essential air transportation" to the eligible point on a continuing basis.[46] Subsidized air carriers who are seeking to terminate or suspend service continue to receive subsidy payments during the period in which they are forced to continue service.[47] Unsubsidized air carriers who are forced to continue service are to be compensated for any losses that they incur as a result of the Board's order.[48]

C. *Section 419(a)(6) of the ADA and The Back-up Order*

The Board has interpreted section 419(a)(6)[49] of the ADA as authorizing the Board to issue back-up orders requiring the incumbent air carrier to remain at the eligible point until the Board determines that the replacement carrier is able to provide "essential air transportation" on a continuing basis.[50] Thus, in *Notice of*

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[42] *Id.* § 1389(a)(9).

[43] *Id.* § 1389(a)(6). See note 4 *supra.*

[44] 49 U.S.C. § 1389(a)(6) (Supp. II 1978).

[45] *Id.*

[46] *Id.*

[47] *Id.* § 1389(a)(7)(A).

[48] *Id.* § 1389(a)(7)(B) and (C).

[49] *Id.* § 1389(a)(6). See note 4 *supra.*

[50] See notes 51-58 *infra,* and accompanying text.

United Airlines[51] the incumbent carrier was held responsible for maintaining a back-up capability to resume service in case of possible interruptions in "essential air transportation" service caused by the replacement carrier's difficulties in arranging for future gate and counter space.[52] Similarly, in *Notice of U.S. Air*[53] the incumbent airline was ordered to be available in a back-up capacity for a thirty day period after termination of its service in order to insure that the replacement carrier's completion of arrangements for facilities, personnel, schedules, and subsidy rates would not have an effect on the community's "essential air transportation."[54]

The Board has also exercised its authority to require back-up service in situations where the replacement carrier has experienced problems. In *Notice of United Air Lines*,[55] Air Pacific, the prospective replacement carrier, experienced serious operating problems one day after inaugurating replacement service.[56] United Airlines, the incumbent carrier, was required by the CAB to resume operations for a few weeks until the replacement carrier was again able to establish "essential air transportation."[57] In a similar situation, Delta Airlines was required to resume operations at Presque Isle, Maine for a brief period when Bar Harbor Airways, the replacement carrier, proved unable to maintain "essential air transportation" service.[58]

There is no language in the statute expressly stating that the Board has the authority to issue a back-up order.[59] Congress does

[51] Notice of United Airlines, CAB Order No. 79-11-121 (Nov. 16, 1979).

[52] *Id.* at 4.

[53] Notice of U.S. Air, CAB Order No. 79-11-110 (Nov. 15, 1979).

[54] *Id.* at 4. Other back-up orders issued by the Board include: Notice of United Air Lines, CAB Order No. 79-12-22 (Dec. 5, 1979); Notice of Air Pacific, CAB Order No. 79-12-12 (Dec. 4, 1979); Notice of Ozark Airlines, CAB Order No. 79-10-38 (Oct. 5, 1979); Notice of Peidmont Aviation, CAB Order No. 79-9-81 (Sept. 27, 1979); Notice of Republic Airlines, CAB Order No. 79-9-101 (Sept. 20, 1979); Notice of Delta Airlines, CAB Order No. 79-7-198 (July 30, 1979); Notice of United Air Lines, CAB Order No. 79-6-36 (June 5, 1979); Notice of United Air Lines, CAB Order No. 79-6-35 (June 5, 1979); Notice of Texas International Airlines, CAB Order No. 79-3-52 (Mar. 8, 1979); Notice of Hughes Airwest, CAB Order No. 79-2-101 (Feb. 15, 1979).

[55] Notice of United Air Lines, CAB Order No. 79-7-44 (July 6, 1979); Notice of United Air Lines, CAB Order No. 79-7-74 (July 12, 1979).

[56] Notice of United Air Lines, CAB Order No. 79-7-44 (July 6, 1979).

[57] *Id.* at 2.

[58] Notice of Delta Air Lines, CAB Order No. 79-10-56 (Oct. 10, 1979).

[59] *See generally* 49 U.S.C. § 1389(a)(6) (Supp. II 1978). See note 4 *supra*.

make it clear, however, that the Board's activities are to be circumscribed by the ADA regardless of the recent activities of the Board.[60] Further, the Board in its own guidelines adopted for making "essential air transportation" determinations[61] states that unnecessary operations of the incumbent carrier should be permitted to cease so as to "enable the new carrier to develop its operations."[62]

Support for the Board's contention that it possesses the power to issue back-up orders arguably can be based in the Congressional intent to insure a continuous system of scheduled "essential air transportation" for small communities.[63] The report of the Senate Commerce Committee states that the ability of the replacement carrier to provide "essential air transportation" service must be confirmed by the Board before the incumbent carrier can withdraw from the community.[64] The report says that "[i]n no case will such an air carrier, who is operating on these 30-day periods, be allowed to discontinue such air service until the Board certifies that another air carrier is willing and able to step in and provide essential air transportation to the point concerned."[65] Representative McHugh, author of the House version of the essential air service provision,[66] stated[67] that small communities need to be assured "that there will be no interruption in their essential air transportation, that is, they will enjoy continuous air transportation during the transition period."[68] This point was also made in a conversation[69] between Senator Cannon, co-author of the deregulation legislation,[70] and Senator Durkin:

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[60] H.R. REP. No. 95-1779, 95th Cong., 2d Sess. 56 (1978).

[61] 14 C.F.R. § 398, 44 Fed. Reg. 52,646, 52,648 (1979).

[62] *Id.*

[63] 49 U.S.C. § 1302(a)(8) (Supp. II 1978). The statute states that "[t]he maintenance of a comprehensive and convenient system of continuous scheduled airline services for small communities and for isolated areas, with direct Federal assistance where appropriate" is in the public interest and in accordance with the public convenience and necessity. *Id.*

[64] S. REP. No. 95-631, 95th Cong., 2d Sess. 193 (1978).

[65] *Id.*

[66] 124 CONG. REC. H 10319 (daily ed., Sept. 21, 1978).

[67] *Id.*

[68] *Id.*

[69] 124 CONG. REC. S 5891 (daily ed., April 19, 1978).

[70] 124 CONG. REC. S 5890 (daily ed., April 19, 1978).

Mr. Durkin: Is it correct to say that under section 401 and 419 of the Federal Aviation Act as amended by the bill, each and every community now receiving certificated scheduled air transportation service shall continue to have certified scheduled air transportation without any break in service for a minimum of ten years?
Mr. Cannon: Yes it is correct.[71]

II. JUDICIAL REVIEW OF AN AGENCY'S CONSTRUCTION OF A STATUTE

Administrative agencies are entirely creatures of statute,[72] and the power of the agencies is circumscribed by the authority granted.[73] In *CAB v. Delta Airlines*[74] the Court held that the Board was not allowed to amend Delta's certificate of public convenience and necessity without a hearing that was required by statute.[75] The Court in that case stated that "the determinative question is not what the Board thinks it should do but what Congress has said it can do."[76]

The statutory grant of a power to an agency, however, implies that the agency has the power necessary for the enforcement of the statute despite the absence of specific reference in the act to the practice involved.[77] The Supreme Court in *American Trucking Associations v. United States*[78] held that the Interstate Commerce Commission had the authority to issue rules and regulations governing the use of leased equipment by authorized motor carriers, even though there was no specific reference to leasing in the

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[71] 124 CONG. REC. S 5891 (daily ed., April 19, 1978).

[72] Soriano v. United States, 494 F.2d 681, 683 (9th Cir. 1974); 3 SUTHERLAND, STATUTORY CONSTRUCTION § 65.02 (4th ed. 1974).

[73] Stark v. Wickard, 321 U.S. 288, 309-10 (1944); Soriano v. United States, 494 F.2d 681, 683 (9th Cir. 1974); 3 SUTHERLAND, STATUTORY CONSTRUCTION § 65.02 (4th ed. 1974).

[74] 367 U.S. 316 (1961). *See also* SEC v. Sloan, 436 U.S. 103 (1978). The Supreme Court found that the SEC had exceeded its statutory authority when it issued a series of orders suspending trading in the securities of a corporation for a longer period of time than its statutory authority mandated. *Id.* The court was interpreting § 12(k) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78*l*(k) (1976). *Id.*

[75] CAB v. Delta Air Lines, 367 U.S. 316, 320 (1961).

[76] *Id.* at 322.

[77] American Trucking Ass'ns v. United States, 344 U.S. 298, 312 (1953)

[78] 344 U.S. 298 (1953).

statute.[79] The Court found that the whole regulatory scheme of the act was affected by leasing, and that the absence of the Commission's power to promulgate rules concerning leasing endangered enforcement of the entire regulatory scheme.[80]

The construction of a statute by an agency charged with its administration is entitled to substantial deference by the courts.[81] In *Board of Governors v. First Lincolnwood Corp.*[82] the Supreme Court gave deference to the Federal Reserve Board's practice of denying bank stock acquisitions by holding companies on the grounds of financial and managerial deficiencies and denied a corporation's proposed bank stock acquisition on similar grounds.[83] Along these lines, in *United States v. Rutherford*[84] the Supreme Court disallowed a proposed exception to the Federal Food, Drug, and Cosmetic Act[85] for terminally ill patients since the Federal Food and Drug Administration had made no such exception in the past.[86] The rule of deference has been deemed especially appropriate in instances where the administrative practice is new and involves a construction of a statute by the agency charged with administering it.[87] In *Power Reactor Development Co. v. Electricians*[88] the Supreme Court followed the Atomic Energy Commission's interpretation of the Atomic Energy Act of 1954[89] regarding licensing of nuclear reactors because there had not been

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[79] *Id.* at 312. The statute involved was the Motor Carrier Act of 1935. 49 U.S.C. § 301-327 (1963).

[80] American Trucking Ass'ns v. United States, 344 U.S. 298, 312 (1953).

[81] United States v. Rutherford, 442 U.S. 546, 554 (1979); Board of Governors v. First Lincolnwood Corp., 439 U.S. 234, 251 (1978); Udall v. Tallman, 380 U.S. 1, 16 (1965).

[82] 439 U.S. 234 (1978).

[83] *Id.* at 251.

[84] 442 U.S. 546 (1979).

[85] 21 U.S.C. § 355 (1972) (amended).

[86] United States v. Rutherford, 442 U.S. 546, 555 (1979).

[87] Power Reactor Dev. Co. v. Electricians, 367 U.S. 396, 408 (1961); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933) (stating that the rule of deference is particularly appropriate where "the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new").

[88] 367 U.S. 396, 398 (1961).

[89] 42 U.S.C. §§ 2011-2296 (1976).

a prior case on the issue brought under the act.[90] Further, it has been held that an agency's construction of a controlling statute should be accepted by a reviewing court if such construction is sufficiently reasonable,[91] unless there are compelling indications that the agency's interpretation is wrong.[92]

Nevertheless, a line can be drawn between according administrative interpretations deference and allowing administrative agencies to violate the law.[93] In *Federal Maritime Commission v. Seatrim Lines*[94] the Supreme Court, in ruling that the commission had exceeded its statutory authority, stated:

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a reasonable basis in law. . . . But the courts are the final authorities on issues of statutory construction . . . and are not obliged to stand aside and rubber-stamp decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute.[95]

Thus it has been held that the existence of a prior administrative practice does not relieve the court of its responsibility of determining whether the practice is consistent with the agency's statutory mandate.[96]

III. FRONTIER AIRLINES, INC. v. CAB

A. *The Court's Reasoning*

In *Frontier* the Tenth Circuit Court of Appeals stated that the back-up orders challenged by Frontier[97] presented a question of pure statutory construction of section 419(a)(6)[98] of the ADA.[99]

[90] Power Reactor Dev. Co. v. Electricians, 367 U.S. 396, 398 (1961).

[91] Train v. Natural Resources Defense Counsel, Inc., 421 U.S. 60, 75 (1975).

[92] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

[93] Federal Maritime Comm. v. Seatrim Lines, 411 U.S. 726, 745 (1973); Wilderness Society v. Morton, 479 F.2d 842, 865 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

[94] 411 U.S. 726 (1973).

[95] *Id.* at 745-46.

[96] SEC v. Sloan, 436 U.S. 103, 118 (1978); Arnold v. Morton, 529 F.2d 1101, 1104 (9th Cir. 1976).

[97] See notes 7-10 *supra*, and accompanying text.

[98] 49 U.S.C. § 1389(a)(6) (Supp. II 1978). See note 4 *supra*.

[99] Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 371 (10th Cir. 1980).

Examining the statute, the court noted the changes in the law concerning air service to small communities brought about by the ADA.[100] The new ninety day notice provision under the ADA,[101] coupled with the Board's power to hold airlines for additional thirty day periods,[102] was held to evidence Congressional intent that small communities have "essential air transportation" on a continuing, uninterrupted basis.[103]

The court recognized that there was no specific language in the statute authorizing back-up orders, but stated that the statute, by necessary implication, permitted the Board to issue such orders.[104] The intent of Congress to guarantee small communities "essential air transportation" service would be thwarted, the court reasoned, if the incumbent carrier was allowed to leave and the replacement carrier upon starting service was unable to maintain service at the requisite "essential air transportation" level.[105] According to the majority, such a result would prevent small communities from having "essential air transportation" on a continuing basis[106] and would thus violate the statutory mandate.[107] In reaching its decision, the court placed emphasis on the fact that the phrase "on a continuing basis" appears twice in section 419(a)(6)[108] of the ADA.[109]

The court cited *American Trucking Associations v. United States*[110] for the proposition that the statutory grant of a greater power implies a grant of a lesser power; that is, the power of the Board to compel actual air service through its thirty day period holding power carries with it the power to order back-up service.[111]

[100] *Id.* The court discussed the changes in aviation law brought about by 49 U.S.C. § 1389 (Supp. II 1978). See notes 4 & 32-48 *supra.*

[101] 49 U.S.C. § 1371(j) (Supp. II 1978); 49 U.S.C. § 1389(a)(3)(A) (Supp. II 1978). See note 38 *supra*, and accompanying text.

[102] 49 U.S.C. § 1389(a)(6) (Supp. II 1978). See notes 44-46 *supra*, and accompanying text.

[103] Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 371 (10th Cir. 1980).

[104] *Id.*

[105] *Id.* at 372.

[106] *Id.*

[107] *Id.* at 371.

[108] 49 U.S.C. § 1389(a)(6) (Supp. II 1978). See note 4 *supra.*

[109] Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 372 (10th Cir. 1980).

[110] American Trucking Ass'ns v. United States, 344 U.S. 298 (1953).

[111] Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 372 (10th Cir. 1980). *See* American Trucking Ass'ns v. United States, 344 U.S. 298, 312 (1953).

The Board's reliance on the statute was given deference by the court because the Board is charged with administering the statute.[112] The Board's construction of the statute was ruled controlling as it was sufficiently reasonable,[113] was compatible with the language of the statute, and was consistent with Congressional intent.[114]

B. *Analysis of the Decision*

The court is correct in its determination that Congress intended small communities to have continuous "essential air transportation."[115] Section 419(a)(6)[116] of the ADA states that the Board must find a replacement carrier that can provide "essential air transportation" on a continuing basis, and the phrase "on a continuing basis" indicates that the statute is trying to emphasize the continuity element of the "essential air transportation" requirement. The court is justified in deeming the "on a continuing basis" phrase of the statute significant in its holding,[117] because arguably if Congress had intended that the incumbent carrier leave the moment that the replacement carrier first establishes the requisite level of "essential air transportation," Congress would have omitted the "on a continuing basis" phrase from the statute.

Since the ADA is a legislative mandate to the Board to conform to the limits of the ADA legislation regardless of its previous activities,[118] it is unclear whether Congress intended that the Board use back-up orders to insure air transportation. The statute says nothing about back-up orders,[119] nor does the statute require the incumbent carrier to aid the replacement carrier, to supplement

[112] Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 372 (10th Cir. 1980). *See* United States v. Rutherford, 442 U.S. 544, 553 (1979) (construction of statute by agency charged with its administration is entitled to substantial deference by courts). *See* Power Reactor Dev. Co. v. Electricians, 367 U.S. 396, 408 (1961); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

[113] Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 372 (10th Cir. 1980). *See* Train v. Natural Resources Defense Counsel, Inc., 421 U.S. 60, 75 (1975) (agency's construction of controlling statute should be accepted by reviewing court if "sufficiently reasonable").

[114] Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 372 (10th Cir. 1980).

[115] See notes 63-71 *supra*, and accompanying text.

[116] 49 U.S.C. § 1389(a)(6) (Supp. II 1978). See note 4 *supra*.

[117] Frontier Airlines, Inc. v. CAB, 621 F.2d 372 (10th Cir. 1980).

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

[119] *See* Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 371 (10th Cir. 1980). *See generally* 49 U.S.C. § 1389(a)(6) (Supp. II 1978). See note 4 *supra*.

the replacement carrier's service so as to maintain the requisite "essential air transportation" levels, to resume its own service if the replacement carrier fails, or to maintain the capability to resume service on short notice.[120] Yet the orders sustained in the decision[121] suggest possible back-up duties for Frontier, perhaps including fuel support for Zia[122] or the maintenance of a stand-by crew and aircraft,[123] that are not based upon any statutory guidelines. The burden of keeping the replacement carrier reliable, therefore, seems to be shifted from the Board to the incumbent carrier.

The statutory burden is placed upon the Board to provide a replacement carrier that can provide "essential air transportation . . . on a continuing basis";[124] the responsibility does not statutorily lie with the incumbent carrier who wishes to depart.[125] Furthermore, the Board's determination as to whether the replacement carrier can provide "essential air transportation" on a continuing basis can be interpreted as having to be made in advance of the replacement carrier's inauguration of service, not after the service has begun, as back-up orders would allow the Board to do. The report of the Senate Commerce Committee noted that the incumbent carrier cannot leave until the Board certifies that another carrier is "willing and able to step in" and provide "essential air transportation."[126] Yet the words "step in" arguably indicate a desire by Congress that the Board's determination of the capability of the replacement carrier be made before the replacement carrier initiates services, not after the replacement service has already begun.[127]

The court relies on *American Trucking Associations v. United States*[128] as authority for the Board's use of back-up orders. That decision, however, is distinguishable from the present case. In *American Trucking*, the whole regulatory scheme of the act would have been endangered if the Interstate Commerce Commission's

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[120] *Id.*

[121] See notes 7-10 *supra*, and accompanying text.

[122] See note 8 *supra.*

[123] *Id.*

[124] See text accompanying note 42 *supra.*

[125] *Id.*

[126] See text accompanying note 65 *supra.*

[127] *See generally id.*

[128] American Trucking Ass'ns v. United States, 344 U.S. 298 (1953).

power to promulgate rules had not been allowed.[129] In the present case, however, the capability of the replacement carrier to provide continuous "essential air transportation" service could be determined before the replacement carrier begins service; hence back-up orders may not be necessary for enforcement of the statute.

The Board's interpretation of the statute is given deference by the court,[130] and such deference is appropriate because the administrative practice is new and involves a construction of the ADA by the agency charged with administering it.[131] Although the statute does not mention back-up orders, the Board's interpretation does not frustrate the congressional policy underlying the statute and, arguably, does not violate the statutory mandate.[132] The Board's approach, therefore, is probably a reasonable construction.[133] Furthermore, the congressional goal of insuring continuous "essential air transportation" to small communities[134] also makes it hard for Frontier, in order to justify a reversal of the Board's statutory interpretation, to present compelling indications that the statute is wrong.[135]

IV. CONCLUSION

Frontier Airlines, Inc. v. CAB[136] will have a significant impact on airlines who wish to withdraw from small communities guaranteed "essential air transportation."[137] Airlines serving such communities are, by this decision, placed in the position of being insurers of "essential air transportation" to these cities. Incumbent airlines will have to develop plans to set aside finances or fuel to help replacement carriers[138] or will have to make standby crews and aircraft readily available to take over in case replacement

[129] *Id.* at 312.

[130] Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 372 (10th Cir. 1980).

[131] See note 87 *supra.*

[132] See text accompanying note 95 *supra.*

[133] See note 91 *supra.*

[134] See notes 63-71 *supra.*

[135] See note 92 *supra.*

[136] Frontier Airlines, Inc. v. CAB, 621 F.2d 369 (10th Cir. 1980).

[137] See notes 32 & 33 *supra,* and accompanying text.

[138] See note 8 *supra.*

carrier service is inadequate.[139]

Under the procedure approved by the court, the CAB's burden of finding a replacement carrier[140] is lightened since the Board does not have to accurately assess whether the replacement carrier can provide service in advance of its inauguration of service. The ADA is ambiguous as to the point in time at which the Board must assess the replacement carrier's ability to provide "essential air transportation" service.[141] Thus, the Board can postpone its determination of the replacement carrier's ability to provide "essential air transportation" service on a continuing basis until after the replacement carrier's service has begun. The practical effect is that the incumbent carrier becomes a safeguard upon which the CAB can rely in instances where the Board erroneously allows an unfit carrier to initiate replacement service.

The court does not decide upon the length of time an incumbent carrier can be required to be available to provide back-up service in order to insure that the replacement carrier is providing "essential air transportation" on a continuing basis. The phrase "on a continuing basis" is deemed significant by the court,[142] but is left undefined. Thus it is likely that litigation will arise concerning the length of time that an incumbent carrier has to remain in a community pursuant to back-up orders in order to insure that the "on a continuing basis" requirement is met.

The court also states that it does not reach the question of whether an incumbent carrier that is forced to remain is entitled to a government subsidy for its lost revenues caused by the forced inactivity.[143] The Board states that it will review Frontier's requests for compensation for losses, but comments that in reviewing these requests, it will weigh Frontier's economic prudence against Frontier's need to fulfill its responsibilities.[144] Thus, the Board may refuse to pay some or all of the losses incurred by an airline in carrying out its back-up responsibility if the airline's prospective decision

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[139] *Id.*

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

[141] *Id.*

[142] Frontier Airlines, Inc. v. CAB, 621 F.2d 369, 372 (10th Cir. 1980).

[143] *Id.*

[144] See note 8 *supra.*

as to which type of back-up method to use[145] later turns out to be classified as imprudent by the Board.

Viewed in light of the congressional intent of assuring that small communities have continuous "essential air transportation" service,[146] the court reaches a just result in *Frontier Airlines, Inc. v. CAB*. The capability of replacement carriers has been shown to be uncertain even after they have established the requisite levels of "essential air transportation,"[147] and back-up orders will provide a measure of insurance in terms of the continuity of air transportation in cases where the replacement carriers' service is inadequate. Back-up orders provide the Board with a practical means of insuring the continuity of "essential air transportation" as called for by the "on a continuing basis" requirement of section 419(a)(6)[148] of the ADA. Thus, the court's decision should be followed.

Mark Spencer Biskamp

PRODUCTS LIABILITY—EXEMPLARY DAMAGES—Compliance With Industry Custom Evidences "Slight Care" By the Defendant, Thereby Precluding Plaintiffs From Recovering Exemplary Damages Under Texas Law. *Maxey v. Freightliner Corp.*, 623 F.2d 395 (5th Cir. 1980).

On November 21, 1974, Billy and Mary Maxey were en route to Michigan when, outside of Comanche, Texas, their tractor/trailer rig tipped over while rounding a curve. The right fuel tank subsequently ruptured. After the truck came to a stop, the spilled fuel ignited, killing the Maxeys.[1]

Billy Maxey's parents, individually and as next friends of the decedents' surviving children, brought suit against the manufacturer/designer of the truck, Freightliner Corporation, in the United States District Court for the Northern District of Texas.[2] Plaintiffs'

[145] *Id.*

[146] See notes 63-71 *supra*, and accompanying text.

[147] See notes 55-58 *supra*, and accompanying text.

[148] 49 U.S.C. § 1389(a)(6) (Supp. II 1978). See note 4 *supra*.

[1] Maxey v. Freightliner Corp., 450 F. Supp. 955, 957 (N.D. Tex. 1978).

[2] *Id.* at 955.

claim for relief included an action for strict liability in tort based on the ground that the design of the fuel system was unreasonably dangerous.[3] The fuel system allegedly was unreasonably dangerous because (1) it was not reasonably crashworthy, (2) Freightliner had failed to warn users of the product of this danger, and (3) Freightliner's conduct regarding the design testing was inadequate. Plaintiffs further alleged that the sale of trucks with this fuel system constituted gross indifference warranting imposition of exemplary damages under Texas law.[4]

The case was tried and submitted to a jury which returned verdicts for the Maxeys on the issues of design defect[5] and gross indifference.[6] The jury, however, found for Freightliner on two issues: (1) that the fuel tank was not unreasonably dangerous due to lack of adequate warnings,[7] and (2) that Billy Maxey voluntarily assumed the risk of his injuries.[8] The jury awarded $150,000 in actual damages and $10,000,000 in exemplary damages on behalf of the Maxeys' children,[9] but declined to return a

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[3] *Id.* at 957-58. To determine whether a product is unreasonably dangerous, it is necessary to weigh the risk of harm against the utility of the product, considering whether additional safety devices would unreasonably raise the cost or diminish the utility of the product. *See* 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.). A product can be unreasonably dangerous due to a failure to warn of defects or due to a lack of safety devices. *See* Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256 (1969). Design defects are distinguished from defects in the product that result from careless production or manufacture. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 944-45 (4th ed. 1971).

[4] 450 F. Supp. at 958. *See* Bennett v. Howard, 141 Tex. 101, 170 S.W.2d 709 (1943). TEX. CONST. art. XVI, § 26, provides: "Every person, corporation, or company that may commit a homicide, through a willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide."

[5] Maxey v. Freightliner Corp., 450 F. Supp. 955, 957 (N.D. Tex. 1978).

[6] *Id.* at 959.

[7] *Id.* at 958.

[8] *Id.* at 959.

[9] *Id.* at 957-59. The Fifth Circuit Court of Appeals in Maxey v. Freightliner Corp., 623 F.2d 395 (5th Cir. 1980), found it unusual that the jury in the court below would find that plaintiff's decedent had assumed the risk of using defendant's product, while at the same time awarding the plaintiffs exemplary damages. *Id.* at 398.

verdict for compensatory damages on behalf of the parents of Billy Maxey.[10]

Upon defendant's motion, the trial court set aside the jury's verdict for the exemplary damages.[11] The court also rejected the jury's determination that Billy Maxey had assumed the risk of injury by his use of Freightliner's product.[12] The court let stand, however, the $150,000 verdict in favor of the Maxey's children for actual damages.[13]

Plaintiffs appealed to the Fifth Circuit Court of Appeals, seeking review of the district court's ruling that set aside the jury's verdict of gross indifference. Freightliner filed a cross appeal from the judgment that awarded the surviving children actual damages. *Held, affirmed*: compliance with industry custom evidences "slight care" by the defendant, thereby precluding plaintiffs from recovering exemplary damages under Texas law. *Maxey v. Freightliner Corp.*, 623 F.2d 395 (5th Cir. 1980).

PRODUCTS LIABILITY AND EXEMPLARY DAMAGES[14]

Before 1962 a plaintiff in a products liability suit could only sue a manufacturer/designer under the theories of negligence or breach of warranty.[15] Major difficulties arose with the negligence and breach of warranty theories, however, which led to the adoption of a rule of strict liability as an alternative cause of action in products liability cases. In a negligence cause of action, a manufacturer/designer may be held liable for negligence in the manu-

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[10] Maxey v. Freightliner Corp., 450 F. Supp. 955, 958 (N.D. Tex. 1978).

[11] *Id.* at 966.

[12] *Id.* at 961.

[13] *Id.* at 966.

[14] The terms "exemplary" and punitive" are used interchangeably in describing the same type of award for damages. 22 AM. JUR. 2d *Damages* § 236 (1965). *See* Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 DRAKE L. REV. 195, 199 (1977-1978). Punitive damages originated in Anglo-Saxon jurisprudence with the English common law, *see* Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763), and in the United States they became established in the Colonies. *See* T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 347 (1920).

[15] *See* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

facture[16] or design of its product.[17] A manufacturer is under a duty to use reasonable care to manufacture and design a product that is reasonably safe for its intended use[18] and for other uses that are reasonably foreseeable.[19] A major hurdle faced by a plaintiff under a negligence cause of action is proving that the defendant manufacturer/designer was unreasonable in its design or manufacture of the product.[20] Another problem that a plaintiff must overcome under a negligence theory is proving causation; that is, that the defendant's negligence caused the plaintiff's injury.[21] A frequent defense in manufacturers' liability cases, particularly where the manufacture of a component part is involved, is the assertion that despite the manufacturer's original negligence the injury was caused or aggravated by some intervening cause for which the manufacturer may not be held liable.[22]

Apart from possible liability for its negligence, a manufacturer/designer may be liable for injuries for a breach of warranty.[23] The warranty breached may be expressed or implied by law.[24] Express

[16] *See* North Am. Aviation v. Hughes, 247 F.2d 517 (9th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958); Aerodex v. American Int'l Ins. Co., 265 F.2d 290 (5th Cir. 1959); Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955), *cert. denied*, 350 U.S. 937 (1956).

[17] *See* Northwest Airlines v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955); Smith v. Piper Aircraft Corp., 18 F.R.D. 169 (M.D. Pa. 1955); Noel, *Recent Trends in Manufacturers' Negligence as to Design Instructions or Warnings*, 19 Sw. L.J. 43 (1965); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962). *See generally* RESTATEMENT OF TORTS § 398 (1934) ("A manufacturer of a chattel . . . is subject to liability to others whom he would expect to use the chattel . . . for bodily harm caused by his failure to use reasonable care in the adoption of a safe plan or design.").

[18] *See* Smith v. Hobart Mfg. Co., 194 F. Supp. 530 (E.D. Pa. 1961); Wolcho v. Arthur J. Rosenbluth & Co., 81 Conn. 358, 71 A. 566 (1908).

[19] *See* Shanklin v. Allis-Chalmers Mfg. Co., 383 F.2d 819 (4th Cir. 1967); Brown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967).

[20] *See* Gossett v. Chrysler Corp., 359 F.2d 84 (6th Cir. 1966); Brown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966); Shanklin v. Allis-Chalmers Mfg. Co., 254 F. Supp. 223 (S.D. W. Va. 1966), *aff'd*, 383 F.2d 819 (4th Cir. 1967).

[21] *See* Tibbits v. Crowell, 434 S.W.2d 919 (Tex. Civ. App.—San Antonio 1968, no writ); Schoonmaker v. Kaltenbach, 236 Wis. 138, 294 N.W. 794 (1940).

[22] RESTATEMENT (SECOND) OF TORTS § 441(1) (1965) states: "An intervening force is one which actively operates in producing harm to another, after the actor's negligent act or omission has been committed."

[23] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 650 (4th ed. 1971).

[24] *See* U.C.C. §§ 2-313, 2-315 (1952 version).

warranties rest upon express representations to a purchaser of a product.[25] Implied warranties include a general warranty of merchantability, which "simply means that the thing sold is reasonably fit for the general purpose for which it is manufactured and sold,"[26] and a warranty of fitness for a particular purpose, which means that the consumer is buying the product for a specific purpose and relying on the seller's expertise.[27]

Plaintiffs suing under a breach of warranty theory have traditionally confronted two difficulties. The Uniform Commercial Code prevents the buyer from recovering for a breach of warranty unless the buyer gives notice to the seller within a reasonable time after he knows or should know of the breach.[28] A second problem facing consumers is the seller's ability under the Code to disclaim implied warranties.[29] Disclaimers thus permit a seller to reduce substantially his liability under a warranty theory.[30]

Difficulties with the negligence and breach of warranty theories have led in some jurisdictions to a rule of "strict liability" as an alternative cause of action in products liability cases. Section 402A of the Second Restatement of Torts[31] outlines the theory of strict

[25] *See* Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932). Included are affirmations contained in an advertisement designed to induce someone to buy a product. *See* Mannsz v. MacWhyte Co., 155 F.2d 445 (3rd Cir. 1946); Topeka Mill & Elevator Co. v. Triplett, 168 Kan. 428, 213 P.2d 964 (1950); Crist v. Art Metal Works, 230 App. Div. 114, 243 N.Y.S. 496 (1930), *aff'd*, 255 N.Y. 624, 175 N.E. 341 (1931).

[26] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Annot., 75 A.L.R.2d 1 (1961).

[27] *See* 2 M. FRIEDMAN & L. FRUMER, PRODUCTS LIABILITY § 16.02 (1977). The usual warranty involved in a products liability case is a warranty of merchantability. *Id.* at § 16.04(2)(d).

[28] U.C.C. § 2-607(3) ("Where a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy. . . .")

[29] *Id.* U.C.C. § 2-316(3)(a) ("[A]ll implied warranties are excluded by . . . language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. . . .").

[30] *Id. See* James, *Products Liability*, 34 TEX. L. REV. 44 (1955); Note, *Sales-Disclaimer of Implied Warranties Held Void as Against Public Policy*, 109 U. PA. L. REV. 453 (1961). Courts, however, have often looked unfavorably upon disclaimers, finding them invalid. *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 458, 161 A.2d 69 (1960); Annot., 75 A.L.R.2d 1 (1961). Disclaimers, however, have not been completely prohibited. *See* W. R. Weaver Co. v. Burroughs Corp., 580 S.W.2d 76 (Tex. Civ. App.—El Paso, writ ref'd n.r.e.).

[31] RESTATEMENT (SECOND) OF TORTS § 402A (1965) outlines the requirements for strict tort liability:

liability in tort. Section 402A requires that for the seller of a product to be liable for strict liability in tort the seller must be in the business of selling the product and the product must reach the consumer without a substantial change in its condition.[32] This appears to be no different from requirements found in negligence or breach of warranty theories.[33] Section 402A, however, allows the consumer to recover despite the fact that the seller has exercised all possible care and the consumer has not entered into a contract with the seller.[34] Strict liability in tort in a products liability cause of action is thus the easiest of the three theories[35] to prove as the plaintiff need only show that the product was defective so as to be unreasonably dangerous. The plaintiff need not show a specific fault on the part of the defendant in the manufacture of the product, nor a breach of contract by the manufacturer.

Greenman v. Yuba Power Products, Inc.[36] was the first case to employ the concept of strict liability in tort in a products liability case. In that case, the plaintiff was injured by a defective power tool. No negligence was shown in the maunfacture of the tool, however, and therefore no negligence cause of action was possible.[37] The defendant sought to avoid liability for breach of warranty on

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 was 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 relationship with the seller.

Id. The Texas Supreme Court adopted section 402A in McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967); *See also* D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY: CASES AND MATERIALS (1976); Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185 (1976); Keeton, *Products Liability—The Nature and Extent of Strict Liability*, 1964 U. ILL. L. FORUM 693; Annot., 13 A.L.R.3d 1057 (1967).

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

[33] See notes 16-30 *supra*, and accompanying text.

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

[35] See note 31-34 *supra*, and accompanying text.

[36] 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[37] *Id.* at 58, 377 P.2d at 898, 27 Cal. Rptr. at 698.

the ground that timely notice of the breach had not been given.[38] Affirming the judgment against the manufacturer, the court ruled:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspeetion for defects, proves to have a defect that causes injury to a human being . . . . [T]he liability is not one governed by the law of contract warranties but by the law of strict liability in tort.[39]

THE TEXAS STANDARD IN ALLOWING EXEMPLARY DAMAGES

The Texas Constitution outlines the rule allowing for exemplary damages in Texas:

> Every person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceedings that may or may not be had in relation to the homicide.[40]

Texas decisions permit recovery for punitive damages in a products liability case based on strict liability.[41] The Supreme Court of Texas has stated "[i]n order that a recovery of exemplary damages may be sustained, the plaintiff must show . . . that he [defendant] acted intentionally or wilfully, or with a degree of (gross negligence) which approximates a fixed purpose to bring about the injury of which the plaintiff complains."[42] This test is still the basis for allowing exemplary damages in Texas courts today.[43]

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[38] *Id.* at 59, 377 P.2d at 899, 29 Cal. Rptr. at 699. See note 28 *supra.*

[39] 59 Cal.2d at 60-61, 377 P.2d at 900-01, 27 Cal. Rptr. at 699-700.

[40] TEX. CONST. art. XVI, § 26.

[41] Krister v. Beech Aircraft Corp., 479 F.2d 1089 (5th Cir. 1973), was a products liability case based on strict liability in which the court did not allow exemplary damages because the elements of Article 15, § 26 of the Texas Constitution were not present. *Id.* at 1091. The court indicated, however, that punitive damages are allowed under the Texas Constitution. *Id.* at 1097. *See also* Newding v. Kroger Co., 554 S.W.2d 15 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

[42] Bennett v. Howard, 141 Tex. 101, 107, 170 S.W.2d 709, 712 (1943).

[43] See note 4 *supra.* The Texas Constitution, art. 16, § 26, uses the term "gross neglect." This term has been held to satisfy the term "gross negligence" by the Texas Supreme Court. Sheffield Division, Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964); Fort Worth Elevator Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934).

Although the courts apply the same constitutional test, judicial interpretations of the Texas Constitution have not been uniform.[44] The basic issue generally has centered around the meaning of the term "gross negligence."[45] Texas Courts have struggled with this term for nearly a century.[46]

One of the earliest cases in which the Supreme Court of Texas defined "gross negligence" was *Southern Cotton Press & Manufacturing Co. v. Bradley*.[47] In that case, plaintiff's decedent (his wife) was crossing over a bridge when defendant's agents released all the steam and boiling water contained in the boilers of defendant's cotton press, scalding the decedent and causing injuries from which she later died. Plaintiff sued for wrongful death and sought exemplary damages. The court stated that for plaintiff to recover punitive damages, defendant's conduct must constitute a wilful act or omission or gross neglect.[48] The court then held that "gross negligence" meant such an "*entire want of care* which would raise a presumption of *conscious indifference* to consequences."[49] The court determined that plaintiff had not made such a case of gross negligence as to entitle him to recover exemplary damages.[50]

In 1895 the Supreme Court of Texas announced a broader definition of "gross negligence" in *International & Great Northern Railway v. Cocke*.[51] The plaintiff sued for damages caused by the killing and injury of plaintiffs' cattle by defendant's train. The court defined "gross negligence" as "an entire failure to exercise care, or by the exercise of *so slight a degree of care* as to justify the belief that the person on whom care was incumbent was *in-*

[44] See notes 47-76 *infra*, and accompanying text.

[45] *See, e.g.*, Siebenlist v. Hawille, 596 S.W.2d 113 (Tex. 1980); Annot., 98 A.L.R. 269 (1935). The Texas Supreme Court has been inconsistent in its attempts to define "gross negligence" in this context. *See* International & Great N. Ry. v. Cocke, 64 Tex. 151 (1885); Southern Cotton Press and Mfg. Co. v. Bradley, 52 Tex. 587 (1880).

[46] *See* International & Great N. Ry. v. Cocke, 64 Tex. 151 (1885); Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587 (1880).

[47] 52 Tex. 587 (1880).

[48] *Id.* at 605, *citing* the Texas Constitution, art. XVI, § 26.

[49] *Id.* (emphasis added). The Court went on to state that "such indifference is morally criminal, and if it leads to actual injury may well be regarded as criminal in law." *Id.*

[50] *Id.* at 601. The court stated that defendant had been doing this for some time and therefore was exercising some care. *Id.*

[51] 64 Tex. 151 (1885).

different to the interest and welfare of others.[52]

Texas courts have never uniformly applied either the *Bradley*[53] or *Cocke*[54] definition of gross negligence. The courts have applied the narrow definition requiring an "entire want of care"[55] in some cases and the broader test of "slight care" in others,[56] with little or no explanation for their reliance on the particular test cited. Some cases have even cited both tests with the implication that they may be interchangable.[57]

Initially, most courts applied the *Bradley* entire want of care test[58] to determine the appropriateness of a punitive damages award.[59] Thus, in *Robertson v. Magnolia Petroleum Co.*[60] plaintiffs sought exemplary damages based on the defendant employer's alleged gross negligence in failing to repair gas pipelines in the building in which the decedent was working when he was killed. The Beaumont Court of Civil Appeals stated that gross negligence was that "entire want of care" that would raise a presumption of conscious indifference to consequences.[61] Determining that there was no evidence of gross negligence on the part of the defendant-employer, the court emphasized the decedent's experience in performing such work and concluded that he could have avoided the

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[52] *Id.* at 156 (emphasis added).

[53] 52 Tex. 587 (1880).

[54] 64 Tex. 151 (1885).

[55] *See, e.g.*, Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587 (1880); Magnolia Petroleum Co. v. Ford, 14 S.W.2d 97 (Tex. Civ. App.—Eastland 1929, writ ref'd n.r.e.); Robertson v. Magnolia Petroleum Co., 255 S.W. 223 (Tex. Civ. App.—Beaumont 1923, writ ref'd n.r.e.).

[56] *See, e.g.*, International & Great N. Ry. v. Cocke, 64 Tex. 151 (1885); Bruton v. Shinault, 314 S.W.2d 143 (Tex. Civ. App.—Waco 1958, no writ); Fancher v. Caldwell, 309 S.W.2d 545 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds*, 314 S.W.2d 820 (Tex. 1958).

[57] *See* Dallas City R.R. Co. v. Beerman, 74 Tex. 291 (1889); Goff v. Lubbock Bldg. Prods., 267 S.W.2d 201, 205 (Tex. Civ. App.—Amarillo 1953, writ ref'd n.r.e.) (where the court stated that the language in the two definitions meant "practically the same thing."); Sloan v. Leger Mill Co., 161 S.W.2d 333 (Tex. Civ. App.—Amarillo 1942, ref'd w.o.m.).

[58] 52 Tex. 587 (1880).

[59] *See, e.g.*, Robertson v. Magnolia Petroleum Co., 255 S.W. 223 (Tex. Civ. App.—Beaumont 1923, writ ref'd n.r.e.).

[60] 255 S.W. 223 (Tex. Civ. App.—Beaumont 1923, writ ref'd n.r.e.).

[61] *Id.* at 225, *citing* Southern Cotton Press and Mfg. Co. v. Bradley, 52 Tex. 587 (1880).

accident.[62] The *Bradley* rule was also followed in *Magnolia Petroleum Co. v. Ford*,[63] in which plaintiffs sought exemplary damages due to the alleged gross negligence of plaintiffs' decedent's employer in failing to inspect a "shaper machine" on which decedent was working when killed. Relying on the entire want of care test for gross negligence, the court stated that the "Supreme Court recognized the necessity of affixing to the term a *definite meaning*,"[64] thereby indicating its view that the *Bradley* rule was the proper definition.

Subsequently, Texas courts continued to use the "entire want of care" test, and the Supreme Court of Texas seemed to put the issue of the definition for "gross negligence" to rest in 1943 in *Bennett v. Howard*.[65] In that case, the plaintiffs' decedent was killed by an explosion in an oil well. Plaintiffs sued for exemplary damages[66] on the ground that decedent's field superintendent was guilty of gross negligence in not preventing the explosion.[67] Citing *Bradley*, the court stated that "[g]ross negligence, to be the ground for exemplary damages, should be that *entire want of care* which would raise the belief that the act or omission complained of was the result of a *conscious indifference* to the right or welfare of the person or persons to be affected by it."[68] The court went on to state that the rule announced in the *Bradley* case had been followed by the Texas Courts of Civil Appeals in other cases.[69] The court in *Bennett* then held that any test announced by Texas courts for "gross negligence" other than the "entire want of care" test was expressly overruled.[70]

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[62] *Id.* at 230.

[63] 14 S.W.2d 97 (Tex. Civ. App.—Eastland 1929, writ ref'd n.r.e.).

[64] *Id.* at 99 (empasis added).

[65] 141 Tex. 101, 170 S.W.2d 709 (1943).

[66] The issue of compensatory damages was not involved because decedent was covered by workmen's compensation insurance. 170 S.W.2d at 712.

[67] *Id.* at 709.

[68] *Id.* at 712 (emphasis in the original).

[69] Pacific Coal & Oil Co. v. Robertson, 125 Tex. 4, 79 S.W.2d 830 (1935); Magnolia Petroleum Co. v. Ford, 14 S.W.2d 97 (Tex. Civ. App.—Eastland 1943, writ ref'd n.r.e.); Rowan v. Allen, 134 Tex. 215, 134 S.W.2d 1022 (1940).

[70] 170 S.W.2d at 713. The court stated: "We adhere to the rule announced in cases above mentioned, and any rule to the contrary announced in other cases, in conflict therewith is hereby overruled." *Id. citing* Annot., 98 A.L.R. 267, 279 (1935) (stating that the "entire want of care" test is the test in Texas for exemplary damages).

Despite its rather forceful language, the *Bennett* case did not end the debate by the Texas courts over defining gross negligence as applied to exemplary damages. In *Fancher v. Caldwell*[71] the Texas Court of Civil Appeals cited the test for "gross negligence" to be that used in *International & Great Northern Railway v. Cocke.*[72] The court in *Fancher* did not cite the Texas Supreme Court's language in *Bennett v. Howard,*[73] nor did it suggest a basis for distinguishing that case.[74] Likewise, in *Bruton v. Shinault,*[75] a case in which plaintiff sued defendant for exemplary damages based on defendant's gross negligence, the Waco Court of Civil Appeals followed the definition of "gross negligence" cited in *Cocke* and stated that "[o]ur Supreme Court has not seen fit to modify the foregoing rule."[76]

One possible explanation for the diverse approaches taken by the courts is the varying fact situations among the cases. One distinction which differentiates *Bennett*[77] from the line of cases following *Cocke*[78] is that *Bennett* involved an employer-employee situation in which the plaintiffs were alleging that the employer was grossly negligent. A similar fact situation existed in *Robertson v. Magnolia Petroleum Co.,*[79] which also employed the narrow "entire want of care" definition.[80] The court in *Bennett* expressly approved the decision in *Robertson.*[81]

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[71] 309 S.W.2d 545 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds,* 314 S.W.2d 820 (Tex. 1958).

[72] 64 Tex. 151 (1885) ("An entire want of care, or by the exercise of so slight a degree of care . . .").

[73] 14 S.W.2d 97 (Tex. Civ. App.—Eastland 1943, writ ref'd n.r.e.).

[74] The court cited both the narrow *Bradley* definition and the broad *Cocke* definition, but relied on the latter. 309 S.W.2d at 548.

[75] 314 S.W.2d 143 (Tex. Civ. App.—Waco 1958, no writ).

[76] *Id.* at 145. *See also* Fancher v. Caldwell, 309 S.W.2d 545 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds,* 314 S.W.2d 820 (1958).

[77] 141 Tex. 101, 170 S.W.2d 709 (1943).

[78] 64 Tex. 151 (1885). *See* Bruton v. Shinault, 314 S.W.2d 143 (Tex. Civ. App.—Waco 1958, no writ); Fancher v. Caldwell, 309 S.W.2d 545 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds,* 314 S.W.2d 820 (1958).

[79] 255 S.W. 223 (Tex. Civ. App.—Beaumont 1923, writ ref'd n.r.e.); see note 67 *supra.*

[80] 255 S.W. at 225.

[81] 170 S.W.2d at 713. See note 70 *supra.*

Fancher v. Caldwell[82] and *Bruton v. Shinault*,[83] however, both involved injuries resulting from automobile accidents. Neither of those cases cited the Supreme Court's language in *Bennett v. Howard*.[84] The court in *Fancher* cited both the narrow *Bradley* and the broader *Cocke* definitions, but relied on the latter.[85] The court in *Bruton* cited only the broader test for gross negligence.[86]

The employment/non-employment distinction was implicitly followed in the 1964 case of *Sheffield Division, Armco Steel Corp. v. Jones*.[87] In that case, plaintiffs were suing an employer of plaintiffs' decedent for exemplary damages. The Supreme Court of Texas stated:

> There is no question . . . as to the rule of law applicable to cases . . . where exemplary damages are sought. Gross negligence to be the ground for exemplary damages should be that *entire want of care* which would raise the belief that the act or omission complained of was a conscious indifference to the right or welfare of the persons affected by it.[88]

In 1975 the Texas Supreme Court decided *Atlas Chemical Industries, Inc. v. Anderson*.[89] There the court implicitly applied the broader *Cocke* definition for gross negligence in a non-employment factual setting. The court held that although the defendant had exercised some care, plaintiff was entitled to punitive damages.[90] The case involved a suit for compensatory and exemplary damages

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[82] 309 S.W.2d 545 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds*, 314 S.W.2d 820 (Tex. 1950).

[83] 314 S.W.2d 143 (Tex. Civ. App.—Waco 1958, no writ).

[84] 141 Tex. 101, 170 S.W.2d 709 (1943).

[85] 309 S.W.2d at 548.

[86] 314 S.W.2d at 145.

[87] 376 S.W.2d 825 (Tex. 1964).

[88] *Id.* at 828 (emphasis in original). In Woolard v. Mobil Pipeline Co., 479 F.2d 557 (5th Cir. 1973), the Fifth Circuit Court of Appeals interpreted the Texas standard to be the one set out in *Bradley*. The Fifth Circuit followed this ruling in Ballenger v. Mobil Oil Corp., 488 F.2d 707 (5th Cir. 1974), which involved an employment situation where plaintiffs sued for exemplary damages based on the employer's alleged gross negligence. The court cited Sheffield Division, Armco Steel v. Jones, 376 S.W.2d 825 (Tex. 1964), in stating that the narrow definition of gross negligence should be used. The court then stated that "[t]he exercise of even slight care defeats the presumption [of gross negligence]." 488 F.2d at 710.

[89] 524 S.W.2d 681 (Tex. 1975).

[90] *Id.* at 688-89.

resulting from water pollution caused by industrial discharges from the defendant's chemical plant. The case was reviewed by the Supreme Court of Texas on the issue of what constituted the proper standard of gross negligence.[91] The court focused on the conduct of the defendant between 1966 and 1969, a period during which the defendant had reduced the amount of pollution by ninety-five percent.[92] The Texas Supreme Court initially set aside the award of exemplary damages using the narrow *Bradley* test, noting *some effort* had been made by the defendant to reduce the pollution.[93] *Sheffeld Division, Armco Steel v. Jones*[94] was cited with approval by the court. On rehearing, however, the Texas Supreme Court departed from its prior holding and upheld the award of punitive damages in a *per curium* opinion.[95] The court stated that the efforts made by the defendant in *Atlas,* although evidencing some effort, were not enough to preclude a finding of gross negligence by the trier of fact.[96]

The employment/non-employment distinction was not followed, however, by the Fifth Circuit Court of Appeals in 1977 in *Hernandez v. Smith.*[97] In *Hernandez,* plaintiffs[98] sued an obstetrical clinic for damages relating to the care of the wife. The wife was pregnant and in labor when she arrived at the defendant hospital. Complications arose during delivery, resulting in the death of the child. Plaintiffs sued for compensatory and exemplary damages.[99] The court stated that "[u]nder Texas law, there cannot be . . . gross negligence for purposes of exemplary damages if it is shown that defendant exercised even slight care."[100]

The Fifth Circuit Court of Appeals later held in *Knabe v. National Supply Division of Armco Steel*[101] that plaintiff was entitled

[91] *Id.* at 687-88.

[92] *Id.* at 688.

[93] *Id.*

[94] 376 S.W.2d 825 (Tex. 1964).

[95] *Id.* at 688-89.

[96] *Id.*

[97] 552 F.2d 142 (5th Cir. 1977).

[98] The plaintiffs in this case were husband and wife.

[99] 552 F.2d at 144.

[100] *Id.* at 145, citing *Ballenger* with approval. The court did not cite Atlas Chemical Industries, Inc. v. Anderson, 524 S.W.2d 681 (Tex. 1975), in determining which definition of gross negligence to use.

[101] 592 F.2d 841 (5th Cir. 1979).

to recover punitive damages despite the fact that some efforts had been made by defendant to correct the problems of which plaintiff complained.[102] *Knabe* involved a situation where plaintiff dairy farmers sought to recover damages for injury to their dairy business as a result of water pollution caused by the defendant manufacturer. The district court set aside a jury award of fifty thousand dollars in exemplary damages.[103] The plaintiffs appealed, seeking reinstatement of the exemplary damages. The Fifth Circuit Court of Appeals, citing *Atlas Chemical Industries, Inc. v. Anderson*,[104] stated that although evidence showed that the defendant had made some efforts to correct the problem, those efforts were not enough to prevent the defendant from being held grossly negligent.[105]

THE EFFECT OF INDUSTRY CUSTOM

In negligence and gross negligence cases involving a defendant's standard of care, courts often look to the custom of the industry in determining liability.[106] Evidence of the usual and customary conduct of other companies in a specific industry is normally relevant and admissible as to what the community regards as proper. If the defendant complies with industry custom there is an inference that he is acting reasonably, thus providing less basis for finding him grossly negligent.[107] Evidence of industry custom is not entirely conclusive as to the existence of negligence, however, and an entire industry's conduct may be found to be improper.[108]

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[102] *Id.*

[103] *Id.* at 843.

[104] 524 S.W.2d 681 (Tex. 1975).

[105] 592 F.2d at 845, 846.

[106] Cadillac Motor Co. v. Johnson, 221 F. 801 (2nd Cir. 1915); Murphy v. American Barge Line, 76 F. Supp. 276 (W.D. Pa. 1958); Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944).

[107] Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944).

[108] In W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 167 (4th ed. 1971), it is stated:

> Even an entire industry, by adopting such careless methods to save time, effort, and money, cannot be permitted to set its own uncontrolled standard . . . . If the only test is to be what had been done before, no industry, or group will ever have any great incentive to make progress in the direction of safety.

See Marietta v. Cliff Ridge, Inc., 20 Mich. App. 449, 174 N.W.2d 164 (1970); Tite v. Omaha Colliseum Corp., 144 Neb. 22, 12 N.W.2d 90 (1943); Shafer v. H. B. Thomas Co., 53 N.J. Super. 19, 146 A.2d 483 (1958); Maize v. Atlantic Ref. Co., 352 Pa. 51, 41 A.2d 850 (1945).

One rationale advanced in holding that compliance with industry custom is not a complete defense to exemplary damages is that it would not provide an incentive for the members of the industry to improve their products.[109] The purpose of exemplary damages is to defer defendant and others similarly situated from engaging in such wrongful conduct in the future.[110] The cases that have followed this reasoning have held that such a limitation on liability would frustrate the entire concept of punishment and deterrence.[111]

Perhaps the most celebrated case on industry custom has been *The T. J. Hooper.*[112] In *The T. J. Hooper* two tugs that were towing barges were lost in a gale off the New Jersey coast. The tugs did not have radio receiving sets and hence did not have an up-to-date weather report. The court held that the general practice of an industry is not necessarily the reasonable practice, and more may be required than that generally done by the industry.[113] Specifically, the court stated:

> Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive its usages. Courts must in the end say what is required; *there are precautions so im-*

[109] *See* Ft. Worth Elevators v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934); Cole v. Tucker, 6 Tex. 265 (1881); Courtesy Pontiac, Inc. v. Ragsdale, 532 S.W.2d 118 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (purpose of exemplary damages is not to compensate plaintiff, but to punish); Credit Plan Corp. of Houston v. Gentry, 516 S.W.2d 471 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd on other grounds,* 528 S.W.2d 571 (Tex. 1974) (purpose of awarding exemplary damages is to set an example that will deter defendant and others similarly situated from engaging in such wrongful conduct in the future); J. S. Abercrombie Co. v. Scott, 267 S.W.2d 206 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.).

[110] Credit Plan Corp. of Houston v. Gentry, 516 S.W.2d 471 (Tex. Civ. App. —Houston [14th Dist.]), *rev'd on other grounds,* 528 S.W.2d 571 (Tex. 1974).

[111] *See* Ft. Worth Elevators v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934); Cole v. Tucker, 6 Tex. 265 (1881); Courtesy Pontiac, Inc. v. Ragsdale, 532 S.W.2d 118 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (purpose of exemplary damages is not to compensate plaintiff, but to punish); Credit Plan Corp. of Houston v. Gentry, 516 S.W.2d 471 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd on other grounds,* 528 S.W.2d 571 (Tex. 1974) (purpose of awarding exemplary damages is to set an example which will deter defendant and others similarly situated from engaging in such wrongful conduct in the future); J. S. Abercrombie Co. v. Scott, 267 S.W.2d 206 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.).

[112] 60 F.2d 737 (2d Cir. 1932).

[113] *Id.* at 740.

perative that even their universal disregard will not excuse their omission.[114]

In Texas, courts have similarly recognized that industry custom does not totally insulate a defendant from a finding of negligence. In *Turner v. General Motors Corp.*[115] the Houston Court of Civil Appeals held that the industry custom may be an improper one. There the plaintiff suffered injuries when the roof of his car collapsed during a rollover. The plaintiff sued the automobile manufacturer and automobile dealer under a theory of strict liability in tort.[116] An expert witness testified that the defendant, General Motors Corporation, was complying with industry custom in the design and manufacture of the roofs of its cars.[117] The court stated that although the defendant had complied with the industry custom in its structure and design of automobile roofs, the custom itself may be shown to be improper.[118]

THE MAXEY CASE

Relying on the Texas Constitution's express authorization of punitive damages in instances of wrongful death caused by gross neglect, the federal district court in *Maxey v. Freightliner Corp.*[119] held that exemplary damages are proper in a products liability cause of action based on strict liability in tort, despite Freightliner's contention that the doctrine of strict liability and the remedy of exemplary damages are incompatible. In determining the Texas standard of exemplary damages, the district court in *Maxey* relied on *Sheffield Division, Armco Steel Corp. v. Jones,*[120] which held that "gross negligence" was an *entire want of care* that would raise a presumption of conscious indifference to the consequences.[121] Discussing the issue of industry custom and its effect on the defendant's liability, the district court in *Maxey* noted that the de-

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[114] *Id.* (emphasis added).

[115] 514 S.W.2d 497 (Tex. Civ. App.—Houston 1974, writ ref'd n.r.e.).

[116] *Id.* at 499. Plaintiff alleged that the automobile was not crashworthy and that this enhanced his injuries. *Id.*

[117] *Id.* at 506.

[118] *Id.*

[119] 450 F. Supp. 955 (N.D. Tex. 1978).

[120] 376 S.W.2d 825 (Tex. 1964). See note 87 *supra*, and accompanying text.

[121] 376 S.W.2d at 828.

sign of the truck tanks was common to the trucking industry.[122] The court stated that although industry standards may not provide an absolute defense to a strict liability claim for exemplary damages, the "critical circumstance" in its determination was its concern that the court would have to hold the entire trucking industry in the United States grossly negligent.[123] This, the court stated, it was not prepared to do. It held that by adopting a design common to all manufacturers, the defendant exercised "slight care," which precluded the court from finding the defendant grossly negligent.[124] Thus the district court adopted the narrow definition of gross negligence[125] in determining whether the plaintiffs were entitled to recover exemplary damages.[126]

In a very brief analysis, the Fifth Circuit Court of Appeals in *Maxey* upheld the district court's adoption of the narrow definition of gross negligence as applied to exemplary damages.[127] The Court cited *Sheffield Division, Armco Steel Corp. v. Jones*[128] and *Hernandez v. Smith*,[129] stating: "Under Texas law, there cannot be . . . gross negligence for purpose of exemplary damages if it is shown that the defendant exercised even slight care."[130] The Fifth Circuit summarily affirmed the district court's holding that the defendant, by adopting the custom of the industry, had made such an effort as to preclude liability for exemplary damages, using the narrow definition of gross negligence.[131]

The dissenting opinion stated that the district court and the majority of the Fifth Circuit were incorrect in their determination of the Texas standard of "gross negligence" for exemplary dam-

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[122] 450 F. Supp. at 963.

[123] *Id.* at 964.

[124] *Id.*

[125] Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587 (1880).

[126] 450 F. Supp. at 964.

[127] In discussing the gross negligence definition, neither the district court nor the Fifth Circuit Court of Appeals cited any cases that applied the broader definition of gross negligence found in *Cocke* for exemplary damages.

[128] 376 S.W.2d 825 (Tex. 1964). The court also cited Woolard v. Mobil Pipeland Co., 479 F.2d 557 (5th Cir. 1973).

[129] 552 F.2d 142 (5th Cir. 1977).

[130] *Id.* at 145.

[131] Maxey v. Freightliner Corp., 623 F.2d 395, 399 (5th Cir. 1980).

ages.[132] Relying on *Atlas Chemical Industries, Inc. v. Anderson*[133] and *Knabe v. National Supply Division of Armco Steel Corp.*,[134] the dissent said that a defendant is liable for exemplary damages if it fails to exercise any care or *so slight a degree of care* that the fact finder could conclude that the defendant was consciously indifferent to the right or welfare of others.[135] Continuing, the dissent criticized the majority and *Hernandez v. Smith*[136] for ignoring *Atlas Chemical.* According to the dissent, the court in *Hernandez* relied on cases that were decided before *Atlas* and that used the narrow definition of gross negligence regarding exemplary damages.[137] The dissent further stated that allowing industry custom as a defense would result in "bad policy."[138] It was felt by the dissent that a manufacturer would not have an incentive to advance technologically in order to avoid exemplary damages so long as it was following industry custom. This would, according to the dissent, defeat the purposes of punitive damages, which are to punish and deter future activity.[139]

MAXEY AND THE FUTURE

Two basic definitions have been advanced in different cases throughout the history of the "gross negligence" issue.[140] These definitions on occasion have been applied by some courts as if

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[132] *Id.* at 400 (Johnson, J. dissenting).

[133] 524 S.W.2d 681 (Tex. 1975). The Texas Supreme Court initially held that plaintiff was not entitled to exemplary damages because defendant had made some effort. Upon rehearing, however, the court held plaintiff was entitled to exemplary damages and noted that at some point the defendants' failure to do more would warrant an award of exemplary damages. *Id.*

[134] 592 F.2d 841 (5th Cir. 1979). The court noted that the defendant, like the defendant in *Atlas Chemical,* had made some effort to correct the problem but that this did not preclude a recovery of exemplary damages by plaintiff. *Id.* at 845.

[135] 623 F.2d 395, 402 (1980) (Johnson, J. dissenting). This is basically the same test used in International & Great Northern Railway v. Cocke, 64 Tex. 151 (1885).

[136] 552 F.2d 142 (5th Cir. 1977).

[137] 623 F.2d at 402. *See* Ballinger v. Mobil Oil Corp., 488 F.2d 707 (5th Cir.), *cert. denied,* 416 U.S. 986 (1974).

[138] 623 F.2d at 405.

[139] See notes 109-11 *supra.*

[140] *See* International & Great N. Ry. v. Cocke, 64 Tex. 151 (1885); Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587 (1880).

they were synonymous and could be used interchangeably.[141] The *Bradley* definition requires a *complete absence* of care,[142] while the *Cocke* definition allows a plaintiff to recover exemplary damages even though the defendant exercises *some care.*[143]

One distinction implicit in the prior Texas decisions has been the employment/non-employment distinction.[144] In cases involving an employer-employee relationship, the courts have generally used the narrow *Bradley* definition of gross negligence in determining if a plaintiff is entitled to exemplary damages.[145] In cases that do not arise from an employer-employee relationship, on the other hand, the courts have tended to use the broader definition of gross negligence regarding the awarding of exemplary damages.[146]

The employment/non-employment distinction seems to be without logic since employees arguably are placed in as great or greater danger than individuals in non-employment situations. Thus, employees are deserving recipients of exemplary damages. Good examples of the dangerous situations that employees face are found in *Bennett v. Howard*[147] and *Sheffield Division, Armco Steel Corp. v. Jones.*[148] In *Bennett* the employee was killed by a gas pressure explosion that occurred while he was working on an oil well.[149] In *Sheffield* the employee died from burns received in a gas explosion that occurred while he was working in a gas purifying machine in the defendant-employer's steel mill.[150] These types

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[141] See note 55 *supra.*

[142] Southern Cotton Press and Mfg. Co. v. Bradley, 52 Tex. 587, 600 (1880).

[143] International & Great N. Ry. v. Cocke, 64 Tex. 151, 156 (1885).

[144] See notes 77-90 *supra,* and accompanying text.

[145] *See* Ballenger v. Mobil Oil Corp., 488 F.2d 707 (5th Cir. 1974); Woolard v. Mobil Pipe Line Co., 479 F.2d 557 (5th Cir. 1973); Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964); Bennett v. Howard, 141 Tex. 101, 170 S.W.2d 709 (1943); Robertson v. Magnolia Petroleum Co., 255 S.W.2d 223 (Tex. Civ. App.—Beaumont 1925, writ ref'd n.r.e.).

[146] *See* Knabe v. National Supply Div. of Armco Steel Corp., 592 F.2d 841 (5th Cir. 1979); Atlas Chemical Indus., Inc. v. Anderson, 524 S.W.2d 681 (Tex. 1975); Bruton v. Shinault, 314 S.W.2d 143 (Tex. Civ. App.—Waco 1958, no writ); Fancher v. Caldwell, 309 S.W.2d 545 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds,* 314 S.W.2d 820 (Tex. 1958).

[147] 141 Tex. 101, 170 S.W.2d 709 (1943).

[148] 376 S.W.2d 825 (Tex. 1964).

[149] Bennett v. Howard, 141 Tex. 101, 170 S.W.2d 709 (1943).

[150] Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825, 827 (Tex. 1964).

of cases seem to indicate that the employer owes a greater duty to care to an employee than to an individual in a non-employment situation. Such a situation arguably requires using the broader *Cocke* definition for gross negligence, which allows the trier of fact to find gross negligence even if slight care is exercised by the defendant.[151] The courts, however, continue to use the narrow *Bradley* definition for gross negligence in employer-employee situations and thereby preclude recovery of exemplary damages.

If this is the distinction the courts are trying to draw, the court in *Maxey* should have used the broader definition of gross negligence as the case did not involve an employer-employee relationship. The district court[152] and the Fifth Circuit Court of Appeals[153] in *Maxey* noted that by following industry custom, the defendant Freightliner Corporation had exercised some care. Using the broader *Cocke* test, however, the courts could have justified finding that the defendant was grossly negligent and thus liable for exemplary damages to the plaintiffs.

Another implicit distinction in the most recent cases that apply the two definitions is that where a death results the courts have applied the narrow *Bradley* definition for gross negligence,[154] while the courts, in cases that do not involve a death, have used the broader *Cocke* definition.[155] The Texas Constitution only allows for exemplary damages if a homicide results.[156] In its initial opinion in *Atlas Chemical Industries, Inc. v. Anderson*,[157] the Texas Supreme Court applied the narrow *Bradley* test,[158] relying on *Sheffield Division, Armco Steel v. Jones*.[159] *Sheffield* involved the death of an employee; *Atlas* involved water pollution. The court in *Atlas* initially found no gross negligence, but, upon rehearing, changed its position and held the defendant grossly negligent, de-

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[151] *See* International & Great N. Ry. v. Cocke, 64 Tex. 151 (1885).

[152] 450 F. Supp. 955 (N.D. Tex. 1978).

[153] 623 F.2d 395 (5th Cir. 1980).

[154] *Id.*; Hernandez v. Smith, 552 F.2d 142 (5th Cir. 1967); Sheffield Div., Armco Steel v. Jones, 376 S.W.2d 825 (Tex. 1964).

[155] Knabe v. National Supply Div. of Armco Steel, 592 F.2d 841 (5th Cir. 1979); Atlas Chemical Indus., Inc. v. Anderson, 524 S.W.2d 681 (Tex. 1975).

[156] TEX. CONST., art XVI, § 26. See note 4 *supra*.

[157] 524 S.W.2d 681 (Tex. 1975).

[158] *Id.* at 687-88.

[159] 376 S.W.2d 825 (Tex. 1964).

spite the fact that the defendant had exercised some care.[160] The court did not cite cases for its authority to do this, nor did it explain how it could award exemplary damages absent a homicide, as required by the Texas Constitution.[161] A few years later, in another non-homicide situation, the Fifth Circuit Court of Appeals in *Knabe v. National Supply Division of Armco Steel*[162] relied exclusively on *Atlas*.[163] There the court found gross negligence despite the exercise of some care by the defendant.[164] The court in *Knabe*, like the *Atlas* court, made no mention of the Texas Constitution and its requirement of a homicide in awarding exemplary damages.

If the presence or absence of a homicide is the distinction the courts are making when applying the two definitions of gross negligence, the court in *Maxey* was correct in using the narrow *Bradley* definition of gross negligence since there was a death involved. The district court[165] and the Fifth Circuit[166] recognized that the defendant had exercised "slight care." In applying the narrow *Bradley* test, the courts found this precluded an award of exemplary damages.

CONCLUSION

Strict liability in tort arose because of the difficulties plaintiffs encountered under negligence and breach of warranty theories in bringing a products liability cause of action.[167] Strict liability is the easiest of the three theories under which to bring a suit since the doctrine allows recovery in situations where recovery would be denied under a negligence or breach of warranty theory.[168] Courts in Texas allow plaintiffs to recover punitive damages in cases

[160] 524 S.W.2d at 688-89.

[161] TEX. CONST., art. XVI, § 26.

[162] 592 F.2d 841 (5th Cir. 1979). See notes 101-05 *supra*, and accompanying text.

[163] 592 F.2d at 845, 846.

[164] *Id.* at 844.

[165] 450 F. Supp. 955 (N.D. Tex. 1978).

[166] 623 F.2d 395 (5th Cir. 1980).

[167] *See* Greenman v. Yuba Power Products, Inc. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal, Rptr. 697 (1933). See notes 36-39 *supra*, and accompanying text.

[168] Recovery is allowed despite the fact that the seller has exercised all possible care and that the consumer has not entered into a contract with the seller. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). See notes 16-35 *supra*, and accompanying text.

based upon strict liability in tort,[169] provided that the plaintiff show that defendant's behavior constituted "gross neglect."[170] The narrow *Bradley* definition for gross negligence is inconsistent with the rationale behind courts allowing use of the theory of strict liability in tort, because this definition makes it more difficult for plaintiff to recover exemplary damages.

The broader *Cocke* definition for gross negligence allows recovery of exemplary damages in more cases, which goes along with the idea behind strict liability in tort. Therefore, if the courts are trying to promote a plaintiff's position by allowing a theory of strict liability in tort, they should not undercut this by allowing the defendant to exercise slight care and escape punitive damages. By abolishing the "entire want of care" test, the courts would promote safety among defendants due to the threat of punitive damages. This would, consequentially, provide an incentive for the members of an industry to improve their products.

Furthermore, assuming that the courts are justified in awarding exemplary damages in cases in which a death is not involved, it would seem that a greater degree of care should be required for the defendant to avoid exemplary damages in those cases in which a death results. The protection of a person's life should be of the utmost importance to a manufacturer/designer of a product. To accomplish this, courts should use the broader "slight care" test for gross negligence, which would allow recovery of exemplary damages by plaintiffs in a number of instances.

In applying the two definitions of gross negligence in determining if exemplary damages are warranted, Texas courts have rarely attempted to explain the bases of their holdings.[171] As long as the courts continue to state a definition without a complete explanation for doing so, the decisions will appear arbitrary and lack uniformity.[172] This will lead to further confusion in the case law

[169] Newding v. Kroger, 554 S.W.2d 15 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

[170] TEX. CONST. art. XVI, § 26.

[171] *See, e.g.*, Maxey v. Freightliner Corp., 623 F.2d 395 (5th Cir. 1980); Atlas Chemical Indus., Inc. v. Anderson, 524 S.W.2d 681 (Tex. 1975).

[172] *See, e.g.*, Maxey v. Freightliner Corp., 623 F.2d 395 (5th Cir. 1980); Knabe v. National Supply Div. of Armco Steel, 592 F.2d 841 (5th Cir. 1979); Atlas Chemical Indus., Inc. v. Anderson, 504 S.W.2d 681 (Tex. 1975); Sheffield Div., Armco Steel v. Jones, 376 S.W.2d 825 (Tex. 1964).

and uncertainty among potential defendants who seek to conform their actions to that law. Manufacturer/designers will not know whether the exercise of "slight care" will protect them from punitive damages or whether they must exercise greater care in certain situations. The courts should *articulate the policy* behind their decisions when they employ a definition for gross negligence. This will lead to more consistency and less confusion in future decisions involving this problem.

Michael L. Knapek

FEDERAL AVIATION ACT—IMPLIED PRIVATE REMEDY UNDER FEDERAL REGULATORY STATUTE—Charter Air Travelers Damaged by a Bank's Violation of the Civil Aeronautics Board Regulations Governing Charter Security Arrangements Have an Implied Private Cause of Action against the Bank under Section 401(n)(2) of the Federal Aviation Act. *Bratton v. Shiffrin*, 15 AV. L. REP. (CCH) 18,076 (7th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3526 (U.S. Jan. 26, 1981) (No. 80-146).

On October 19, 1976, Tour Travel Enterprises (TTE), a tour wholesaler, was adjudicated bankrupt.[1] As a result, nearly one thousand travelers sought refunds for their cancelled pre-paid tours. The First National Bank of Highland Park, Illinois (Bank) was to maintain tour customer deposits in an escrow account pursuant to a surety trust agreement between the Bank and TTE.[2] In accordance with Civil Aeronautics Board (CAB) regulations governing charter security arrangements,[3] the tour customers applied to the Bank for refunds.[4] Although over $740,000 was claimed by

[1] *In re* Tour Travel Enterprises, Inc., No. 76 B 8014 (N.D. Ill. 1976). TTE's Illinois retail affiliate was adjudged bankrupt the same day, *In re* Sunshine Travel Agency, Inc., No. 76 B 8015 (N.D. Ill. 1976), and its Nevada retail affiliate suffered the same fate one week later. *In re* Sunshine Travel of Nevada, Inc., No. 76 B 8075 (N.D. Ill. 1976).

[2] 14 C.F.R. § 378.16 (1980) requires that a tour operator furnish either a large surety bond or a smaller bond coupled with an escrow agreement entered into with a federally-insured bank.

[3] 14 C.F.R. § 378 (1980).

[4] 14 C.F.R. §§ 378.16(b)(2)(iv) and 378a.31(b)(2)(iv) (1980). Under

the customers, the escrow account was found to contain only $391,000.[5]

The disappointed tour participants brought suit against the Bank and its vice-president, Joel Shiffrin, alleging violation of the CAB regulations dealing with escrow accounts for tour deposits,[6] as well as breach of the escrow and surety trust agreements.[7] The district court dismissed for failure to state a claim upon which relief can be granted[8] on the grounds that the express private remedy provided in section 1007(a) of the Federal Aviation Act[9] (Act) was inapplicable[10] and that no private remedy can be implied under section 401(n)(2) of the Act.[11] The Seventh Circuit Court of

these CAB regulations, if a tour is cancelled the depository bank is to make refunds directly to the tour participants. *Id.*

[5] It is not clear what happened to the missing $349,000. All discovery was stayed pending disposition of defendants' motion to dismiss.

[6] Specifically, plaintiffs alleged improper disbursements by the Bank in violation of 14 C.F.R. §§ 378.16(b)(2)(ix) and 378a.31(b)(2)(ix) (1980). The former section provides:

> Except as provided in paragraph (b)(2)(ii), (iii), (iv), (v), and (viii) of this section, the bank shall not pay out any funds from the account prior to two banking days after completion of each tour, when the balance in the account shall be paid to the tour operator or foreign tour operator, upon certification of the completion date by the direct air carrier.

Section 378a.31(b)(2)(ix) employs essentially identical language with respect to one-stop inclusive tour charters.

[7] Bratton v. Shriffrin, 585 F.2d 223, 227 (7th Cir. 1978).

[8] 440 F. Supp. 1257, 1276 (N.D. Ill. 1977).

[9] 49 U.S.C. § 1487(a) (1976). This section of the Act was amended and reenacted in the Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705 (1978) (codified at 49 U.S.C. § 1362 (Supp. II 1978)) to enable the Board to provide security arrangements for scheduled as well as charter carriers.

[10] The Seventh Circuit subsequently upheld the district court's finding that private persons are limited under section 1487 to suits for violations of section 1371(a) which provides, in essence, that no air carrier may operate without CAB certification. Both tribunals concluded that a private cause of action is available under this section only for violation of certification requirements and that a depository bank cannot be included within the definition of "air carrier." 585 F.2d 223, 228 (7th Cir. 1978); 440 F. Supp. 1257, 1260 (N.D. Ill. 1977).

[11] 440 F. Supp. 1257, 1261-65 (N.D. Ill. 1977). Section 401(n)(2) of the Act is codified at 49 U.S.C. § 1371(n)(2) (1976):

> In order to protect travelers and shippers by aircraft operated by supplemental air carriers, the Board may require any supplemental air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such supplemental air carrier's making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such

Appeals reversed, holding that an implied cause of action exists under the latter section.[12] On writ of certiorari, the Supreme Court vacated that decision and remanded the case to the court of appeals[13] for reconsideration in light of the recent Supreme Court decision in *Touche Ross & Co. v. Redington.*[14] *Held, reaffirmed:* Charter air travelers damaged by a bank's violation of the Civil Aeronautics Board regulations governing charter security arrangements have an implied private cause of action against the bank under section 401(n)(2) of the Federal Aviation Act. *Bratton v. Shiffrin,* 15 AV. L. REP. (CCH) 18,076 (7th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3526, (U.S. Jan. 26, 1981) (No. 80-146).

I. DEVELOPMENT OF THE DOCTRINE OF IMPLICATION

A. *1916-1974*

The doctrine of implication recognizes an individual's right to a remedy when he has been damaged by the violation of a statute which does not expressly provide a private remedy. Although the doctrine has roots reaching back into English common law,[15] no federal court in the United States addressed the question of implication until 1916. In that year, the Supreme Court decided *Texas & Pacific Railway v. Rigsby,*[16] which allowed a railroad employee to recover for personal injuries sustained as a result of his employer's violation of the Federal Safety Appliance Act.[17] The Court reasoned, "[D]isregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose

carrier to perform air transportation services in accordance with agreements therefor.

This provision was amended by the Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705 (1978), to make it applicable to scheduled as well as chartered transportation and is now codified at 49 U.S.C.A. § 1371(q)(2) (West Supp. 1980).

[12] Bratton v. Shiffrin, 585 F.2d 223, 228 (7th Cir. 1978).

[13] 443 U.S. 903 (1980).

[14] 442 U.S. 560 (1979).

[15] The doctrine stems from the ancient maxim *ubi jus, ibi remedium*—"where there is a right, there is a remedy." McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment,* 80 DICK. L. REV. 167 (1976) [hereinafter cited as McMahon & Rodos].

[16] 241 U.S. 33 (1916).

[17] Act of March 2, 1893, ch. 196, § 8, 27 Stat. 531, *as amended by* Act of March 2, 1903, ch. 976, 32 Stat. 943, *as amended by* Act of April 14, 1910, ch. 160, 36 Stat. 298.

especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. . . ."[18]

Although the doctrine was seldom invoked during the ensuing forty years, it gained wide acceptance during the 1960's and early 1970's.[19] A tool of judicial activism, the implied private remedy was used by the Warren Court to provide remedies for violations of a broad range of regulatory legislation.[20] Securities regulation became the most active arena for implication, but the doctrine found application in the areas of voting rights, civil rights in housing, labor-management relations, welfare rights, and a host of other areas.[21]

Parallel developments occurred in aviation law. Although the Federal Aviation Act[22] does not authorize express private causes of action, some courts have held that aviation safety is a subject of compelling national interest which should not be left to the states.[23] In *Fitzgerald v. Pan American Airways*,[24] the Second Circuit Court of Appeals granted a private remedy for racial discrimination under section 1374(b) of the Federal Aviation Act.[25] In a

[18] 241 U.S. 33, 39 (1916). This later evolved into the especial benefit test, the concept that plaintiff must be a member of the class for whose especial benefit the statute was enacted in order to sue for its violation, and became the first of the four elements of the *Cort* test. See text accompanying note 58 *infra*.

[19] *See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962).

[20] *See* McMahon & Rodos, *supra* note 15, at 176.

[21] *See, e.g.*, Cort v. Ash, 422 U.S. 66 (1975); J. I. Case Co. v. Borak, 377 U.S. 426 (1964) (securities regulation). *See also* Rosado v. Wyman, 397 U.S. 397 (1970) (welfare rights); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (civil rights in housing); Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (voting rights); International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963) (labor relations). *See generally* Mowe, *Federal Statutes and Implied Private Actions*, 55 ORE. L. REV. 3 (1976).

[22] 49 U.S.C. §§ 1302-1542 (1976) (amended 1978).

[23] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639, 644 (1973); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 402 (7th Cir. 1974); *In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 747 (C.D. Cal. 1975). *But see* Moungey v. Brandt, 250 F. Supp. 445, 451 (W.D. Wis. 1966). *See generally* Crawford & Schneider, *The Implied Private Cause of Action and the Federal Aviation Act: A Practical Application of Cort v. Ash*, 23 VILL. L. REV. 657 (1978) (suggesting that administrative remedies should be sufficient).

[24] 229 F.2d 499 (2d Cir. 1956). *See also* United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962).

[25] 229 F.2d at 501. Section 1374(b) of the Act was codified at 49 U.S.C. § 1374(b) (1976) (amended 1978).

series of "bumping" cases,[26] overbooking was held to be a sufficient basis for the creation of an implied remedy.[27] Violations of both the safety provisions of the Act and safety regulations promulgated thereunder were also held to support implication.[28] Decisions were far from consistent in these three areas, however,[29] and attempts to sustain a cause of action under other sections of the Act were uniformly unsuccessful.[30]

During this period, three tests evolved for use in determining whether a private remedy is to be implied. The first was the especial benefit test of *Texas & Pacific Railway v. Rigsby*.[31] The second test required a finding that implication would further the purpose of the statute.[32] In this context, the courts looked to the legislative history for any indication of congressional intent to create or deny a

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[26] "Bumping" results from air carriers' practice of calculated overbooking in an attempt to compensate for booked but unoccupied seats. Under this system, an occasional passenger with a confirmed reservation cannot be accommodated. Campbell, *Airlines' Responsibilities to Passengers: Recent Theories and Extensions*, 43 J. AIR L. & COM. 289, 291 (1977).

[27] Nader v. Allegheny Airlines, Inc., 512 F.2d 527, 538 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976); Mortimer v. Delta Airlines, 302 F. Supp. 276, 278 (N.D. Ill. 1969); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 364-65 (S.D. Cal. 1961).

[28] *See, e.g., In re* Paris Air Crash of March 3, 1974, 339 F. Supp. 732, 748 (C.D. Cal. 1975); Gabel v. Hughes Air Corp., 350 F. Supp. 612, 615 (C.D. Cal. 1972); Town of East Haven v. Eastern Airlines, 282 F. Supp. 507, 513 (D. Conn. 1968).

[29] In the field of air safety, for example, *compare In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 748 (C.D. Cal. 1975) (private cause of action against manufacturer arising from deaths in allegedly unsafe plane); Gabel v. Hughes Air Corp., 350 F. Supp. 612, 615 (C.D. Cal. 1972) (private wrongful death action implied where death resulted from safety violations); *and* Town of East Haven v. Eastern Airlines, 182 F. Supp. 507, 513 (D. Conn. 1968) (implied private remedy for nuisance and trespass arising from safety violations) *with* Rosdale v. Western Aviation, Inc., 297 F. Supp. 681, 687 (D. Colo. 1969) (no federal cause of action for tort liability under § 101(26) of Act); Moungey v. Brandt, 250 F. Supp. 445, 450-53 (W.D. Wis. 1966) (no remedy implied from safety provisions) *and* Porter v. Southeastern Aviation, Inc., 191 F. Supp. 42, 43 (M.D. Tenn. 1961) (no wrongful death action implied under Act).

[30] *See, e.g.*, Danna v. Air France, 463 F.2d 407, 412 (2d Cir. 1972) (no cause of action under 49 U.S.C. § 1374(b) for alleged youth fare discrimination); Yelenik v. Worley, 284 F. Supp. 679 (E.D. Va. 1968) (no private remedy for damages due to personal injury under section 1 of Act).

[31] 241 U.S. 33, 39 (1916). See notes 16-18 *supra*, and accompanying text.

[32] *See, e.g.*, J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964); Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 89 (1962). *See generally* Note, *The Decline of the Implied Private Cause of Action, Continued: The Third Circuit Construes the Federal Aviation Act*, 33 RUTGERS L. REV. 41, 45-47 (1978).

private cause of action.[33] The third test focused on whether the express remedies contained in the statute were sufficient to accomplish the legislative purpose.[34] In applying this test, courts examined the resources and determination of the agency charged with enforcement of the statute to see if they were adequate to protect the interests of the benefited class.[35] Throughout this period, no consistent analytical framework was employed in implication cases; rather, the courts selected the test which seemed most appropriate to the particular case at bar.[36] Decisions were correspondingly inconsistent,[37] although the trend seemed to be increasingly in the direction of granting a remedy.[38]

Decisions during this era focused less on explicit indications of legislative intent to create a cause of action than on the underlying congressional policy reflected by the statute in question. Thus, the Court in *Wyandotte Transportation Co. v. United States*[39] looked to the legislative history to determine whether Congress intended to *preclude* implication rather than to find some positive intention to *create* a private remedy.[40] In the evaluation of whether the remedy sought is consistent with the legislative scheme, the use of a more lenient standard can be discerned.[41] Rather than applying a standard

[33] The Court's growing willingness to find an intent to provide a remedy can be traced by comparing T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959) (whether legislative history would support implication) with Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962) (whether implication would be consistent with congressional purposes). *See* McMahon & Rodos, *supra* note 15, at 174.

[34] *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967); Stewart v. Travelers Corp., 503 F.2d 108, 112 (9th Cir. 1974). *See generally* Note, *The Decline of the Implied Private Cause of Action, Continued: The Third Circuit Construes the Federal Aviation Act*, 31 RUTGERS L. REV. 41, 46-47 (1978).

[35] *See* J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964), in which the Court found that private enforcement of proxy rules provided a "necessary supplement" to SEC action, given time constraints on agency examination of proxy materials.

[36] Note, *The Decline of the Implied Private Cause of Action, Continued: The Third Circuit Construes the Federal Aviation Act*, 31 RUTGERS L. REV. 41, 46-47 (1978).

[37] See note 29 *supra*, and cases cited therein.

[38] *See generally* McMahon & Rodos, *supra* note 15, at 169-70.

[39] 389 U.S. 191 (1967) (cause of action implied under section 15 of Rivers and Harbors Act, 33 U.S.C. § 409 (1976), prohibiting abandonment of any vessel in navigable channel by its owner).

[40] 389 U.S. at 200. By framing its inquiry in this way, the Court significantly eased plaintiff's burden.

[41] *See* McMahon & Rodos, *supra* note 15, at 172-76.

of strict necessity, one Court granted a remedy when the plaintiff was able to show that the effectiveness of the statute would be "severely hampered" absent private enforcement.[42] Still another Court found a private cause of action on the basis that private enforcement would be a "helpful supplement" to the statutory scheme.[43] In this context, the extent of limitations on agency enforcement was deemed an important criterion in the decision to imply a cause of action.[44] The *Wyandotte* Court implied a private cause of action because it concluded that the express civil remedy provided was inadequate to ensure the statute's effectiveness.[45] Likewise, the Court in *Allen v. State Board of Elections*[46] concluded that reliance solely on enforcement by the Attorney General would prevent achievement of the goal of the Voting Rights Act.[47] Throughout this era the Court's philosophy, as expressed by the opinion in *J. I. Case Co. v. Borak*,[48] was that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[49]

B. *The Burger Court's Approach*

Signs of a change in the Court's expansive approach appeared in the 1974 decision in *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*.[50] In a suit to enjoin the termination of certain passenger rail service, the plaintiffs alleged a violation of the Rail Passenger Act of 1970.[51] The

[42] Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969) (private cause of action recognized to challenge state compliance with section 5 of Voting Rights Act, 41 U.S.C. § 1973c (1976)).

[43] J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

[44] McMahon & Rodos, *supra* note 15, at 175.

[45] 389 U.S. at 202. The 1899 statute provided for a maximum $2,500 fine and one year imprisonment. 33 U.S.C. § 409 (1976).

[46] Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (private cause of action recognized to challenge state compliance with section 5 of Voting Rights Act, 42 U.S.C. § 1973c (1976)).

[47] 393 U.S. at 556.

[48] J. I. Case Co. v. Borak, 377 U.S. 426 (1964) (private remedy implied under section 14(a) of Securities Exchange Act, 15 U.S.C. § 78n(a) (1976), based on allegedly false and misleading proxy statement).

[49] 377 U.S. at 433 (1964).

[50] 414 U.S. 453 *passim* (1974). The *Amtrak* principles were reaffirmed in Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 419-20 (1974).

[51] 45 U.S.C. §§ 501-645 (1976).

Court denied relief, however, applying the maxim *expressio unius est exclusio alterius* (*expressio unius*).[52] Maintaining that the inquiry should be whether Congress provided a remedy, the Court held that the existence of an enforcement mechanism within the statute suggests that no additional methods of enforcement were contemplated by Congress.[53] The Court modified the maxim slightly, however, averring that its application must yield to "clear contrary evidence of legislative intent."[54] This approach marked a sharp departure from the Court's previous willingness to imply private remedies and presented the lower courts with two conflicting but equally viable lines of precedent for implication cases.[55]

A year later, the Court attempted to bring some consistency to implication analysis by formulating a definitive standard. In *Cort v. Ash*,[56] a stockholder brought a derivative action against the directors of the Bethlehem Steel Corporation. The suit was based on alleged violations of section 610 of the Federal Election Campaign Act of 1971.[57] Refusing to imply a private cause of action, the Court set forth four factors relevant to the inquiry regarding implication: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally

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[52] 414 U.S. at 464-65. "The expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (5th ed. 1979). Many commentators have criticized the application of this maxim, arguing that it purports to discover legislative intent where Congress may not have considered the question. *See, e.g.*, SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943); Gamm & Eisberg, *The Implied Rights Doctrine*, 41 U. MO. KAN. CITY L. REV. 292, 300-01 (1972); Note, *Private Rights of Action for Damages Under Section 13(d)*, 32 STAN. L. REV. 581 (1980).

[53] 414 U.S. at 458.

[54] *Id.*

[55] *Compare* National R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453 (1974) *with* J. I. Case Co. v. Borak, 377 U.S. 426 (1964) *and* Wyandotte Transp. Co. v. United States, 399 U.S. 191 (1967).

[56] 422 U.S. 66 (1975).

[57] *Id.* The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 610, 86 Stat. 3, repealed in 1976 and reenacted as 2 U.S.C. § 441(B) (1976), provided criminal penalties for corporations which made contributions or expenditures in connection with certain federal elections.

relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law.[58]

The *Cort* test soon proved to be a malleable one. Lacking guidance as to the relative weight to be given to each of the four factors and having no indication as to whether all four must be satisfied in order to justify implication, the lower courts found little difficulty in emphasizing the factors which seemed appropriate to each case.[59] The apparently equal viability of the *Borak-Wyandotte* line of cases[60] and that which followed *Amtrak*[61] served only to increase the confusion.

The post-*Cort* Supreme Court holdings did not follow the strict standard of *Amtrak*. In one case, for example, the Court refused to invoke *expressio unius* and held that an ambiguous legislative history did not suggest congressional intent to preclude private actions.[62] Nevertheless, the Court began to define the third *Cort* factor, the consistency of the remedy sought with the legislative scheme, in the more narrow terms of whether it is necessary to imply a remedy to effectuate the congressional goals embodied in the statute.[63] The Court also ruled that a cause of action should be denied where it is not necessary to ensure the fulfillment of the statute's fundamental purpose, rather than a subsidiary one.[64] Furthermore, it explicitly rejected the principle that implication is proper to overcome limitations on agency enforcement,[65] ruling that a private cause of action may be granted only if the purposes

[58] 422 U.S. 66, 78. The first three factors in the test merely coordinated the standards which the Court had used in prior cases. The addition, without explanation, of the fourth consideration seemed to reflect the disinclination of the Burger Court to expand the jurisdiction of the federal courts.

The *Cort* factors apply only to statutory implication and are not relevant to determining the existence of a cause of action under the Constitution. *See* Davis v. Passman, 442 U.S. 228, 241 (1979).

[59] *Compare* Parsell v. Shell Oil Co., 421 F. Supp. 1275, 1278 (D.D.C. 1976) (emphasizing consistency with legislative scheme) *with* De Jesus Chavez v. LTV Aerospace Corp., 412 F. Supp. 4, 6 (N.D. Tex. 1976) (stressing special benefit factor).

[60] See notes 39-49 *supra*, and accompanying text.

[61] See notes 50-55 *supra*, and accompanying text.

[62] Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 39-40 (1977).

[63] *Id.* at 26. For a comparison of this with the standards used earlier, see notes 42-43 *supra*, and accompanying text.

[64] Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477-78 (1977).

[65] 430 U.S. at 41.

of the statute are likely to be "undermined" or "defeated" absent private enforcement.[66]

The trend toward a more restrictive application of the implication doctrine became evident in air law cases as well. In a series of decisions the Third Circuit Court of Appeals rejected pleas for implication under the Federal Aviation Act based on deceptive practices and violations of tariffs, as well as claims for economic damages stemming from the alleged violation of safety regulations promulgated under the statute.[67] In other post-*Cort* aviation cases, courts generally have followed the lead of the Third Circuit in their consistent denials of private remedies.[68]

II. THE INITIAL BRATTON DECISION

It was against this background of increasing judicial disfavor toward implication that the Seventh Circuit Court of Appeals first considered the *Bratton* case.[69] The court had little difficulty with the first of the *Cort* factors, the especial benefit test.[70] It found that the statute was enacted "to protect travelers"[71] against a specific wrong—the inability to obtain compensation when tour plans collapse; thus it considered plaintiffs to be clearly within the protected

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[66] *Id.* at 25.

[67] Rauch v. United Instruments, Inc., 548 F.2d 452, 458 (3d Cir. 1976) (no private remedy against manufacturer for aircraft owners required to repair defective altimeter to conform to FAA directives); Wolf v. Trans World Airlines, Inc., 544 F.2d 134, 136-37 (3d Cir. 1976), *cert. denied*, 430 U.S. 915 (1977) (no cause of action implied for passengers forced to forfeit free guest accommodations under either § 403(b) or § 411); Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 338 (3d Cir. 1975) (no private action under § 411 of Act for passengers furnished inferior ground accommodations).

[68] *See, e.g.*, Mason v. Belieu, 543 F.2d 215 (D.C. Cir.), *cert. denied*, 429 U.S. 852 (1976) (no cause of action under antidiscrimination provision for wife's derivative claim of emotional distress); Sanz v. Renton Aviation, Inc., 511 F.2d 1027 (9th Cir. 1975) (*per curiam*) (no congressional intent to create cause of action in favor of those injured through use of rental aircraft); Viking Travel, Inc. v. Air France, 462 F. Supp. 28 (E.D.N.Y. 1978) (no private remedy implied for travel agents under § 403(b)); Vandrey v. Lufthansa German Airlines, 14 AV. L. REP. (CCH) 17,788 (E.D. Pa. 1977) (passengers denied reduced ticket charges may not bring federal action under §§ 403(b), 404(a) or 411 of the Act).

[69] Bratton v. Shiffrin, 585 F.2d 223 (7th Cir. 1978).

[70] See note 18 *supra*, and accompanying text.

[71] For full text of section 401(n)(2) of the Act, 49 U.S.C. § 1371(n)(2) (1976) (amended 1978), see note 11 *supra*.

class.[72] The defendants argued that section 401(n)(2) applies only to "supplemental air carriers"[73] and that this section could not, therefore, form the basis for implication of a cause of action against the Bank or its vice-president.[74] The court, however, reasoned that the use of a depository bank is a necessary element of the regulatory scheme, and that the Bank is bound by the regulations it agreed to follow and cannot escape its obligations on the ground that it was not specifically mentioned in the statute.[75]

Turning to the second factor, the court found no indication of legislative intent to create or deny a private remedy, either in the language of the statute or in its legislative history.[76] Defendants contended,[77] relying on *Amtrak*,[78] that the express remedies of section 1007(a)[79] should preclude implication under section 401(n)(2). The court did not, however, find this argument dispositive. Noting the interrelationship of the factor of legislative intent with that of consistency with the legislative scheme, the Court reasoned that "effectuation of the congressional purpose is paramount" and that "application of *expressio unius* in this context would serve only to frustrate the goal of assuring adequate security for travelers' compensation."[80]

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[72] 585 F.2d at 228-29. This ruling was not contested by the defendants in their initial appeal to the Supreme Court. *Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit* at 6, Shiffrin v. Bratton, 443 U.S. 903 (1979) (mem.).

[73] "Supplemental air carriers" are carriers which operate only charter flights. The CAB has interpreted the Act as authorizing it to permit charters to be operated by independent tour operators as well as supplemental air carriers. Such tour operators are also bound by the regulations requiring surety bonds. 14 C.F.R. § 378.16 (1980).

[74] 585 F.2d at 229.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] 414 U.S. 453 (1974). See notes 50-55 *supra*, and accompanying text.

[79] Section 1007(a) of the Act, codified at 49 U.S.C. § 1487(a) (1976) (amended 1978), stated in pertinent part:

> If any person violates any provision of this chapter, or any rule, regulation, requirement or order thereunder, . . . the Board or Secretary of Transportation, . . . or, in the case of a violation of section 1514 of this title, the Attorney General, or, in the case of a violation of section 1371(a) of this title, any party in interest, may apply to the district court of the United States . . . for the enforcement of such provision . . . .

[80] 585 F.2d at 230. The trial court relied heavily on what it considered the

Absent any indication of congressional intent, the court maintained, the extent of agency enforcement powers must be considered before deciding whether *expressio unius* is to apply. Recognizing that practical limitations on agency capabilities do not alone justify implication,[81] the court, considering the third prong of the *Cort* test, concluded that "when practical limitations are combined with a clear possibility that agency action may never be adequate to remedy the precise wrong which Congress sought to prevent" a federal court must be willing to permit a private remedy.[82]

The court also found the federal court to be the proper forum, thus satisfying the final *Cort* test.[83] Although the plaintiffs claims could be viewed in traditional terms, such as fraud, breach of contract, conversion, and breach of fiduciary duty, the court suggested that the availability of state causes of action should not preclude a federal remedy.[84] Recognizing that the statute created the duty, and that the Bank's defenses could be altered under the regulations by which it agreed to be bound, the court reasoned that state court action might lead to an inconsistent definition of the duty in an area in which uniformity is required.[85] "If the duty of the depository bank is governed—indeed, created—by federal law, then the interpretation of the law creating the duty should surely be undertaken by the federal courts," it concluded.[86]

CAB's authority to sue to compel the Bank to make refunds to the plaintiffs, citing CAB v. Scottish-American Ass'n, Inc., 411 F. Supp. 883 (E.D.N.Y. 1976). As the Seventh Circuit pointed out, however, there is some authority to the contrary, 585 F.2d at 231. *See* Fitzgerald v. Pan American World Airways, 229 F.2d 499, 502 (2d Cir. 1956); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 364 (S.D. Cal. 1961).

The *Bratton* court pointed out that in some cases enforcement of the regulations cannot benefit the travelers. This is simply a matter of timing; once tour customers find the escrow account deficient, it is too late for enforcement of the regulations to benefit them.

[81] 585 F.2d at 230, citing Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 41 (1977). See text accompanying notes 65-66 *supra*.

[82] Bratton v. Shiffrin, 585 F.2d 223, 230 (1978).

[83] *Id.* at 232.

[84] *Id.*

[85] *Id.*

[86] *Id.* The dissent agreed that the regulations required the bank to assume certain legal obligations to the tour operator and hence to the tour participants. It argued, however, that the regulations could not be said to define the obligations and that plaintiffs' claims should be determined on the basis of principles of common law contracts and torts. 585 F.2d 223, 233-34 (Bauer, J., dissenting).

III. THE 1979 IMPLICATION DECISIONS

The first major implication decision of 1979 came in *Cannon v. University of Chicago*,[87] in which the plaintiff sought to maintain an action based on an alleged violation of section 901(a) of Title IX of the Educational Amendments of 1972.[88] The Seventh Circuit Court of Appeals held that the express remedy (administrative termination of federal funds) precluded implication of a private cause of action.[89]

On writ of certiorari, the Supreme Court reversed.[90] The Court found that Title IX explicitly confers a benefit on persons who are discriminated against on the basis of sex.[91] An examination of the legislative history convinced the Court that Congress had patterned Title IX after Title VI of the Civil Rights Act of 1964, which at the time of the enactment of Title IX had been construed as creating a private remedy.[92] The Court therefore concluded that Congress, at the time of enactment, had assumed that a private cause of action would be similarly created under Title IX.[93]

Turning to the third *Cort* factor, the Court stated:

> [A] private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.[94]

The Court found two purposes of Title IX: to avoid the use of federal funds to support discrimination and to provide individual citizens effective protection against such practices.[95] It suggested that while termination of funding is an appropriate means of

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[87] 441 U.S. 677 (1979).

[88] Title IX is codified at 20 U.S.C. § 1681 (1976) and bars discrimination on the basis of sex in any educational program receiving federal funds.

[89] Cannon v. University of Chicago, 559 F.2d 1063 (1976). This holding seemed squarely in line with the current trend of the Supreme Court.

[90] Cannon v. University of Chicago, 441 U.S. 677 (1979).

[91] 441 U.S. at 694.

[92] *Id.* at 696. *See, e.g.*, Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); Blackshear Residents Org. v. Housing Auth., 347 F. Supp. 1138, 1146 (W.D. Tex. 1972).

[93] 441 U.S. at 697-98.

[94] *Id.* at 703.

[95] *Id.* at 704.

attaining the first objective, "the award of individual relief to a private litigant . . . is fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute."[96] Finally, in considering the fourth *Cort* factor, the Court determined that a federal remedy is appropriate because of traditional federal concern with civil rights.[97]

Cannon shed little additional light on implication analysis. The Court found no need to weigh the four *Cort* factors since all of them supported the same result.[98] The language of the opinion, however, suggested a significantly more lenient interpretation of the third factor than had been evident in other post-*Cort* decisions.[99] Nevertheless, the Court explicitly warned, "When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights."[100]

Only one month later, in *Touche Ross v. Redington*,[101] the Court addressed the question whether customers of securities brokerage firms have an implied cause of action for damages under section 17(a) of the Securities Exchange Act[102] against accountants who negligently audit financial reports required by the statute.[103] Denying the remedy, the Court stressed that "our task is limited solely to determining whether Congress intended to create the private right of action."[104] Subsuming the first three *Cort* factors within

[96] *Id.* at 705-06. Despite its earlier position (in Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 41 (1977)) that limitations on agency enforcement are not a relevant factor (see note 65 *supra*, and accompanying text) the *Cannon* Court explicitly took note of "HEW's enforcement capabilities." *Id.* at 708 n.42.

[97] *Id.* at 708-09.

[98] *Id.* at 709. The Court's statement that "Title IX presents the atypical situation in which *all* of the circumstances that the Court had previously identified as supportive of an implied remedy are present," *id.* at 717, may suggest, however, that all elements of the *Cort* test must now be satisfied to justify implication.

[99] See notes 50-54 *supra*, and accompanying text.

[100] 441 U.S. 677, 717 (1979).

[101] 442 U.S. 560 (1979).

[102] 15 U.S.C. § 78q(a) (1970) was amended to the present 15 U.S.C. § 78a(a)(1) (1976) with no significant change in the relevant language.

[103] Touche Ross v. Redington, 442 U.S. 560, 562 (1979).

[104] 442 U.S. at 568. The Court emphasized that this is a question of statutory interpretation. At least one commentator questions whether historically any of the implication cases has been decided on this basis. He stresses the distinction between statutory interpretation on the one hand and looking to the statutory

the search for legislative intent, the Court concluded that section 17(a) was designed to aid SEC enforcement rather than to create private rights.[105] The Court reiterated the finding in *Cannon* that the mere fact that plaintiffs are among the class of intended beneficiaries does not require implication.[106] In past implication cases, the Court pointed out, the statute had either "prohibited certain conduct or created federal rights in private parties."[107] Finding the legislative history silent, the Court warned that "implying a private right of action on the basis of congressional silence is a hazardous enterprise at best."[108]

The Court found further justification for its refusal to imply a private cause of action in the fact that section 17(a) is flanked by provisions that expressly grant private remedies. Without referring directly to the doctrine of *expressio unius*, the Court concluded that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly."[109] The Court refused to extend its analysis to the last two *Cort* factors; having found that the statute created no private rights and that the legislative history was silent, it considered its determination complete.[110]

Touche Ross makes major revisions in the *Cort* test, stressing that the central inquiry must be whether Congress intended to create a private remedy.[111] The Court appears to have modified the first *Cort* factor into a two-prong test: the statute must either create federal rights or prohibit specified conduct.[112] *Touche Ross* suggests that if neither of these elements is present and the legislative history is silent, judicial consideration of the last two *Cort* factors is in-

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language for evidence of congressional policy on the other. *See* Comment, *Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law Power?* 51 U. COLO. L. REV. 355, 364-69 (1980).

[105] Touche Ross v. Redington, 422 U.S. 560, 569-70 (1979).

[106] *Id.* at 568.

[107] *Id.* at 569.

[108] *Id.* at 571.

[109] *Id.* at 572.

[110] *Id.* at 576.

[111] See notes 104-10 *supra*, and accompanying text.

[112] Steinberg, *Implied Private Rights of Action under Federal Law*, 55 NOTRE DAME LAW. 33, 42-43 (1980) [hereinafter cited as Steinburg]. See notes 106-07 *supra*, and accompanying text.

appropriate.[113] Without overruling *Borak*[114] or *Wyandotte*,[115] the Court makes clear that a much stricter standard exists today.[116]

The last major implication decision of 1979 came in *Transamerica Mortgage Advisors, Inc. v. Lewis* (*Transamerica*).[117] This suit involved a derivative action on behalf of a trust and a class action on behalf of the trust's shareholders, based on alleged violations of sections 206 and 215 of the Investment Advisers Act of 1940.[118] The plaintiffs sought rescission of the contract between the trust and its adviser, restitution of fees paid under the contract, injunctive relief, an accounting and damages.[119] As in *Touche Ross*, the Court emphasized that the implication question is one of statutory construction.[120] Looking to the language of the statute, the Court found a clear intent to benefit the plaintiffs and to impose enforceable fiduciary obligations on the defendant adviser.[121] It pointed out, however, that intent is not necessarily synonymous with an intent to make available a private cause of action.[122]

In the language of section 215 voiding contracts made in violation of the statute, the Court found justification for implying a cause of action for "the customary legal incidents of voidness."[123] In a five-four decision, however, the Court denied the plaintiffs' section 206 claim for damages on two grounds. First, it concluded that "section 206 simply proscribes certain conduct, and does not in terms create or alter any civil liability."[124] Second, the existence

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[113] Touche Ross v. Redington, 442 U.S. 560, 575-76 (1979).

[114] 377 U.S. 426 (1964). See notes 48-49 *supra*, and accompanying text.

[115] 389 U.S. 191 (1967). See notes 39-45 *supra*, and accompanying text.

[116] 442 U.S. 560, 578.

[117] 444 U.S. 11 (1979).

[118] 15 U.S.C. § 80b-6 and § 80b-15 (1976).

[119] 444 U.S. at 14.

[120] *Id.* at 15.

[121] *Id.* at 17.

[122] *Id.* at 18.

[123] *Id.* at 18-19. The customary legal incident of voidness include rescission, restitution, and injunctive relief.

[124] *Id.* at 19. This may suggest that at least in cases where the legislative history is silent both elements of the two-prong *Touche Ross* test (see notes 113-15 *supra*, and accompanying text) must now be satisfied in order to justify implication. Clearly, the mere proscription of specified conduct without more was insufficient to induce the court to consider the last two *Cort* factors. *See* 444 U.S. at 23.

of administrative remedies for a violation of section 206[125] and the provision of express private causes of action in earlier securities legislation[126] convinced the Court that Congress did not intend to provide for private enforcement.[127]

IV. THE SECOND BRATTON DECISION

Within three weeks of the *Touche Ross* ruling, the *Bratton* decision was vacated and remanded by the Supreme Court for reconsideration in light of that opinion.[128] On remand, the Seventh Circuit Court of Appeals reaffirmed its earlier decision, maintaining that its analysis was consistent with that of *Touche Ross* and *Cannon*.[129] The court ruled that section 401(n)(2)[130] "was designed specifically to provide an enforceable remedy to individual air charter travelers against insolvent tour operators,"[131] thereby meeting the "creation of federal rights" tests of *Touche Ross*.[132] Examining the legislative history, which it termed scarce, the court pointed to testimony before a Senate subcommittee by N. E. Halaby, then Administrator of the Federal Aviation Agency: "By requiring a supplemental air carrier to furnish a performance bond, a desirable specific review of the carrier's financial responsibility will have to be made—and, incidentally, outside of the government—and when the bond is issued, some recourse will have been supplied to those who are otherwise helpless."[133] In this intent to

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[125] Section 209, 15 U.S.C. § 80b-9 (1976), allows the SEC to sue to enjoin compliance with the statute and section 203, 15 U.S.C. § 80b-3, imposes various administrative sanctions as well.

[126] *See, e.g.*, Securities Act of 1933 §§ 11 and 12, 15 U.S.C. §§ 77k and 77l; Securities Exchange Act of 1934 §§ 9(e), 16(b) and 18, 15 U.S.C. §§ 78i(e), 78p(b), and 78r.

[127] 444 U.S. at 19-21.

[128] Shiffrin v. Bratton, 443 U.S. 903 (1979) (mem.).

[129] 15 Av. Cas. 18,078 (1980). The court of appeals did not refer to the later Supreme Court decision in *Transamerica Mortgage*. See notes 117-27 *supra*, and accompanying text.

[130] See note 11 *supra*.

[131] 15 Av. Cas. 18,076, 18,076-77 (1980).

[132] *Id.* See notes 112-13 *supra*, and accompanying text.

[133] *Id.* at 18,077. *Senate Hearings on Proposed Amendments to the House Substitute Amendment to S. 1969, Before the Av. Subcomm. of the Sen. Comm. on Commerce*, 87th Cong., 2d Sess. 103 (March 5, 1962) (statement of N. E. Halaby). This testimony was brought to the court's attention for the first time when the CAB filed a position statement as amicus curiae on remand.

provide some recourse to travelers in the plaintiffs' situation, the Seventh Circuit found the congressional intent mandated by *Touche Ross*.[134] Nevertheless, the court reiterated the principle that no affirmative intent need be shown where the remedy is needed to effectuate a stated congressional purpose.[135] It also cited *Cannon* for the proposition that "it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling."[136]

The court further decided that a careful reading of *Touche Ross* and *Cannon* "plainly indicates that more is required to infer that Congress did not intend to create a particular private right than one fact that elsewhere in the same statute Congress had explicitly granted a private cause of action."[137] Observing that one of the expressly-created remedies in *Touche Ross* specifically concerned false statements in reports and had been enacted contemporaneously with the section at issue, the court found that sections 1007 and 401(n)(2) were not created at the same time, nor did Congress refer to section 1007 when delimiting the scope of the right created in section 401(n)(2).[138]

In a vigorous dissent, Circuit Judge Bauer questioned the majority's attempt to distinguish *Touche Ross* and argued that the case is dispositive of the issue in *Bratton*.[139] Finding that no federal rights had been created, Judge Bauer determined that section 401(n)(2) "seeks to provide protection by a security agreement independent of CAB remedial measures and, in the event of insolvency, to provide recompense to charter air travelers in a state

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[134] 15 Av. Cas. 18,076, 18,077 (1980). Defendants maintained, however, that the intended "recourse" was a state cause of action on the required bond. *See Petition of Defendants-Appellees for Rehearing and Suggestion For Rehearing en Banc*, Bratton v. Shiffrin, 15 Av. Cas. 18,076 (1980).

[135] 15 Av. Cas. 18,077. While on the basis of *Touche Ross* alone it would seem doubtful that this proposition is still good law, the court of appeals found support for its position in *Cannon*. See note 94 *supra*, and accompanying text.

[136] 15 Av. Cas. 18,077, citing 99 S. Ct. at 1956 (emphasis in original).

[137] 15 Av. Cas. 18,077.

[138] *Id.* The Touche Ross Court, however, has emphasized that the statutory provision there involved is forward-looking, not retrospective; it seeks to forestall insolvency, not to provide recompense after it has occurred. Touche Ross v. Redington, 442 U.S. 560, 570-71 (1979). Much the same argument could be made regarding section 401(n)(2). See notes 9 & 11 *supra*.

[139] 15 Av. Cas. 18,078.

court action on the performance bond contract."[140] Pointing out that Mr. Halaby's testimony[141] "hardly qualifies as an expression of legislative intent,"[142] Judge Bauer suggested that the Administrator's comments are equally consistent with a congressional intent to provide recourse through a state court action on a breach of contract claim rather than a federal statutory cause of action.[143]

V. CONCLUSION

Since the *Cort* decision, the Supreme Court has been struggling with the task of formulating a clear, readily applicable standard to employ in implication cases. The second *Bratton* opinion seems to demonstrate that despite the multitude of private remedy cases addressed by the Court last term no clear conceptual framework has yet emerged to guide the lower courts. Indeed, a comparison of the majority opinion with the dissent in *Bratton* suggests that the courts may interpret the recent decisions as a return to two conflicting standards from which they are free to choose,[144] justifying an implied remedy by citing the language of *Cannon* or refusing to grant one on the basis of *Touche Ross*.[145] Further evidence of the state of confusion which exists in this area of the law can be found in the fact that during 1980 at least two other courts of appeals found implied causes of action under analyses which seem incompatible with a strict interpretation of *Touche Ross* and *Transamerica*.[146]

The Court's 1979 implication decisions cast doubt on the continuing vitality of the *Cort* test,[147] although *Cannon* deemed the

[140] *Id.* at 18,079.

[141] See note 133 *supra*, and accompanying text.

[142] 15 Av. Cas. 18,079-80.

[143] *Id.* at 18,080.

[144] See note 55 *supra*, and accompanying text.

[145] Compare the reliance of the *Bratton* majority on *Cannon*, 15 Av. Cas. 18,076-78 (1980), with the dissent's emphasis on *Touche Ross*, 15 Av. Cas. 18,078-82 (1980).

[146] Curran v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980). *See* National Sea Clammers Ass'n v. City of N.Y., 616 F.2d 1222 (3d Cir. 1980); Zeffiro v. First Pa. Banking & Trust Co., [1980] FED. SEC. L. REP. (CCH) ¶ 97,514. *But see In re* Glynn v. Capeletti Bros., Inc., No. 78-2031, slip op. (5th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980).

[147] *See* Zeffiro v. First Pa. Banking & Trust Co. (3d Cir. 1980) [1980] FED. SEC. L. REP. (CCH) ¶ 97,514 (Layton, J., dissenting).

Cort factors proper indicia of congressional intent.[148] Clearly, it is that intent which is now the central issue in any implication decision.[149] *Touche Ross* appears to create a two-part test for determining legislative intent: (1) whether the language of the statute creates federal rights in private parties or prohibits any specified conduct as unlawful[150] and (2) whether there is evidence in the legislative history of congressional intent to provide for private enforcement.[151] At a minimum, at least one of these factors now must be satisfied to justify an examination of the last two *Cort* factors; that is, whether the remedy sought is consistent with the legislative scheme and whether a federal court is the appropriate forum.[152] *Transamerica*, however, indicates that the mere prohibition of conduct, without more, is insufficient.[153] Whether the creation of federal rights alone will justify recognizing a cause of action without explicit evidence of congressional intent to provide one is not yet clear. *Bratton* may suggest that the legislative history used as evidence of that intent can be tenuous indeed.

The decision in *Cannon* could be reconciled with *Touche Ross* and *Transamerica* on the basis that a different standard is applicable in discrimination cases.[154] The Court, however, has not yet made it clear that it will proceed from that premise. The three holdings could also be reconciled by inferring that the Court will now be reluctant to imply private remedies in the field of securities regulation.[155] This seems to be an inadequate explanation, however, since the *Transamerica* Court developed its analysis through broad discussions of *Cort* and *Cannon*, neither of which was a securities regulation case.[156] Another possible explanation is that the present Court is deeply divided on the issue of implication[157]

[148] Cannon v. University of Chicago, 99 S. Ct. 1946, 1953 (1979).

[149] See notes 104-25 *supra*, and accompanying text.

[150] See notes 111-13 *supra*, and accompanying text.

[151] *Id.*

[152] *See* Steinberg, *supra* note 112, at 42-43.

[153] See note 124 *supra*, and accompanying text.

[154] Such a distinction might well be based on the absence in many cases of a state court remedy for violation of civil rights.

[155] *See* Underwood, *Transamerica Mortgage Advisors, Inc. v. Lewis: An Analysis of the Supreme Court's Definition of an Implied Right of Action*, 7 PEPPERDINE L. REV. 533, 550 (1980).

[156] *Id.*

[157] *See* Steinberg, *supra* note 112, at 38.

and that no clear standard can be formulated at this time. *Bratton*, arising as it did completely outside of the areas of securities regulation and discrimination, provided the Court an opportunity to clarify the implication test. The Court, however, chose not to use *Bratton* as a vehicle for this purpose.

Since, under the Constitution, federal courts are not common law courts of general jurisdiction and can recognize a cause of action only if it has been created by statute,[158] the Court is undeniably correct that a clear expression of congressional intent should be dispositive.[159] Implication cases by definition, however, deal with statutes which do not clearly express that intent. If the Court means to suggest that clear evidence of legislative intent must exist in the legislative history, this would seem to preclude any implication of private remedies. More often than not, the legislative history is entirely silent.[160] Moreover, given the nature of the political process, it seems unrealistic to expect Congress to speak loudly and clearly whenever it seeks to implement a policy objective.[161] Congress cannot legislate in anticipation of all possible situations[162] and political considerations often dictate bypassing controversial issues.[163] Furthermore, while Congress is now on notice that it must make its intention clear,[164] the Court's position would seem to require that Congress reevaluate all previously enacted legislation to determine whether private remedies should be provided.[165] Barring such congressional action the courts will continually be confronted with a silent or ambiguous legislative history.

Bratton, on its facts, presented a strong equitable argument for implication. Nearly a thousand individuals had been harmed because the charter security arrangements authorized by statute to

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[158] Rogers v. Frito-Lay, Inc., 611 F.2d 1974, 1978 (1980).

[159] *See* Steinberg, *supra* note 112, at 46.

[160] *Id.* at 47.

[161] *Id.* at 41.

[162] Note, *An Overview of Implied Rights of Action*, 40 LA. L. REV. 1011, 1022 (1980). *See generally* Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 COLUM. L. REV. 1085 (1979).

[163] Note, *An Overview of Implied Rights of Action*, 40 LA. L. REV. 1011, 1023 (1980).

[164] See note 100 *supra*, and accompanying text.

[165] *See* Steinberg, *supra* note 112, at 51.

protect them did not do so.[166] It may be that the Court's denial of certiorari was influenced more by the relatively unique factual situation than by conceptual concerns regarding implication analysis.

Now that certiorari has been denied.[167] the impact of *Bratton* is difficult to assess. The decision is binding precedent only in the Seventh Circuit, and it remains to be seen how it will be treated by the other courts of appeals. The case will probably have little impact outside the field of aviation since the applicable standard for implication will remain that expressed in *Cannon, Touche Ross,* and *Transamerica.* Within air law, however, it stands in sharp contrast to the Third Circuit's anti-implication decisions.[168] Given the unusual facts of *Bratton,* the decision will probably have only limited practical effects on the aviation industry. The CAB charter security regulations appear to be unaffected, but depository banks are now on notice that a violation of those regulations is actionable in federal court.

If the Court is in reality distinguishing the securities regulation cases from the ones dealing with discrimination, *Bratton* suggests that the Court is not yet ready to formulate a standard for those cases that lie in between. This may encourage litigation, especially in cases where the equities favor the plaintiff. The net result is to provide no guidance whatsoever to the lower courts in dealing with these middle-ground cases and to increase the practical problems of counsel in litigation. The confusion in this area of the law will persist until the Court promulgates a test that is applicable to a broad range of cases or distinguishes the types of cases in which different standards are appropriate.

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[166] See notes 1-5 *supra,* and accompanying text.

[167] 49 U.S.L.W. 3531 (Jan. 27, 1981).

[168] See note 67 *supra,* and accompanying text.

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